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Satirical Legal Studies: From the Legists to the *Lizard*

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SATIRICAL LEGAL STUDIES: FROM THE LEGISTS TO THE *LIZARD*

Peter Goodrich*

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* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. LL.B. 1975, University of Sheffield; Ph.D. (Legal Discourse). 1984, University of Edinburgh. — Ed. And with full and due acknowledgment to Charles Sullivan, *The Under-Theorized Asterisk* Footnote*, GEO. L.J. (forthcoming 2005) (on file with author) [available on SSRN]. In truth what we need, what is really missing, what science requires, what art desires but the law and economics types have overlooked, is a citation index exclusive to the asterisk footnote. It is here that you get the lowdown. These are the references that need to be counted, ranked, listed, and tabulated. These are the veridical marks of community, the unexpurgated indicia of affiliations, the slips that signal the form of life, the motive and the militating purpose. Here, just to digress a little, you will find the Garlands, the Sugarmans, the Sunsteins, the Rosenfelds, and Goodriches. A preponderance of sweet names. That is just a guess actually, and there will also be instances of less sweet Hughes and Criers. Either way, here is my contribution: And many and disparate thanks to David Carlson, Neil Duxbury, Justin Hughes, Brian Leiter, Stephanie Lysyk, Jessica Marshall, Richard Posner, Monroe Price, Pierre Schlag, Jack Schlegel, Scott Shapiro, Martin Stone, for a number of invaluable suggestions, erudite references, comments, and criticisms, whether intended or otherwise. Many thanks also to Keith Aoki, Duncan Kennedy, Jack Schlegel, and to Amy Shapiro for providing me with copies of now scarce samizdat materials. Thanks also to Chuck Yablon, Christine Harrington, Anton Schütz, and Linda Mills for spirited discussion and contrary views of the value of satire. Especial thanks to Linda, *corpus meum*, for advising me on the morals of manners and the dangers of taking positions. I have listened attentively but occasionally, I admit, I have nonetheless gone my own errant way.

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The first case was called the other day before His Honour, Judge Twinfeet, who was attired in a robe of poplin green. He 'opened' that abstraction, the 'proceedings', by expressing the hope that there would not be too much jargon. 'Justice is a simple little lady', he added, 'not to be overmuch besmeared with base Latinities.'

In the first case the plaintiffs sought a plenary injunction for trespass, a declaration of fief in agro and other relief. The defense was a traverse of the field as well as the pleadings and alternatively it was contended that the plaintiffs were estopped by graund playsaunce.

Mr Juteclaw for the defendants, said that at the outset he wished to enter four caveats in feodo. His statutory declarations were registered that morning and would be available for the plaintiffs on payment of the usual stamp duty. He asked for a dismiss.

His Honour said that he observed that there was no Guard in court to prove certain maps and measurements. That was a serious matter; it showed disrespect to the court.

Mr Juteclaw said there were no maps in the case; if the plaintiffs intended to produce maps, he was entitled to 18 days' clear notice and viaticum for grossment.

Mr Faix, for the plaintiffs, said he knew of no maps; he had received no instructions as to maps.

*His Honour said he would let the matter pass, but for the future it must be understood that there must be a Guard in court to prove maps; one never knew when a map would be produced, he added.*¹

INTRODUCTION

Although it was clearly present in much of twentieth-century jurisprudence, and indeed was momentarily quite fashionable towards the *fin de siècle*, it never found its name, and it never quite came out on its own.² Satirical legal studies will be defined initially as the humorous pillorying of the pretensions of law and lawyers.³ It is more than parody, burlesque, or simple humor, in that satire implies ridicule of folly and vices that have a social significance and ill effect.⁴ In the words of one early common law reformer, the end of “satyr . . . is reformation,”⁵ and in this sense it has always been an important component in movements for abolition or change in the methods and practices of law. In the last century, satire played a varying yet visible

1. MYLES NA GOPALEEN (FLANN O'BRIEN), *THE BEST OF MYLES* 137-38 (1968) [hereinafter O'BRIEN, *BEST OF MYLES*].

2. Satirical legal studies has almost entirely shunned the adjectival and has been expressed only in the practice. However, there are the occasional asides or footnotes. The one practitioner who was also a commentator on the genre is Karl Llewellyn, who calls attention to “one fascinating facet of modern Jurisprudence: the reintroduction into that field of satirical and ironical writing.” Karl N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940) [hereinafter Llewellyn, *On Reading*], reprinted in KARL N. LLEWELLYN, *JURISPRUDENCE* 162 (1962). That, however, is about all he says, beyond referring to his own inspirations in Jonathan Swift, or the figure of Professor Tufelsdröckh and his *Heuschrecke*, or philosophy of clothes, elaborated upon to exquisite effect in THOMAS CARLYLE, *SARTOR RESARTUS* (Univ. of Cal. Press 2000) (1865). Llewellyn imitated Carlyle in the pseudonymous D.J. Swift Tufelsdröckh, *Jurisprudence, The Crown of Civilization. Being also the Principles of Writing Jurisprudence Made Clear to Neophytes*, 5 U. CHI. L. REV. 171 (1938) [hereinafter Llewellyn, *Neophytes*]. The author of the latter was, of course, Llewellyn.

3. The various genres of satire, and their legal equivalents will be discussed throughout. Initially, I will simply note three of the more important studies. C.A. VAN ROOY, *STUDIES IN CLASSICAL SATIRE AND RELATED LITERARY THEORY* (1965), provides an expansive introduction to etymological and philological issues related to the meaning and genres of the satirical. MICHAEL COFFEY, *ROMAN SATIRE* (2d ed., Bristol Classical Press 1989) (1976) provides an excellent account of the Roman satirists and their schools. JOHN DRYDEN, *A DISCOURSE CONCERNING THE ORIGINAL AND PROGRESS OF SATIRE* (1693), reprinted in 2 *ESSAYS OF JOHN DRYDEN* 5 (W.P. Ker ed., Oxford Univ. Press 1926), provides a fine overview of the conflicting traditions of poetic satire.

4. JOHNSON'S *DICTIONARY: A MODERN SELECTION* 357 (E.L. McAdam, Jr. & George Milne eds., 3d prtg. 1963) defines satire as work in which folly or vices are exposed to ridicule. For legal discussion of the distinction between satire and parody, see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994), where Justice Souter notes that “parody often shades into satire when society is lampooned through its creative artifacts.”

5. DANIEL DEFOE, *A TRUE COLLECTION OF THE WRITINGS OF THE AUTHOR OF THE TRUE BORN ENGLISHMAN*, at fol. A5 (London, Croft 1703). He adds a ditty to the same effect somewhat later: “For Penitence would all his verse disarm, / The Satyr's answer'd if the man reform.”

role in scholarly movements critical of law ranging from legal realism to law and economics, from legal anthropology to critical legal studies. The accessibility and humor of satirical legal studies afforded it unusual scope. Satire transcended the established political and doctrinal boundaries that defined legal studies. It moved between the professional, the popular and the arcane, the public and the eruditely esoteric. In varying forms, satirical studies of law allowed for the recuperation and revision of a marginal yet potent genre of classical jurisprudence, associated most obviously with Cicero's noted propensity for deflationary jokes.⁶ But most of these innovations were implicit rather than selfconscious; the movement to use satire as part of the scholarly armature of legal debate never mastered the technique's conscious deployment, thus dampening its effectiveness. With the time and distance made available by the turn of the twenty-first century, it is now possible to connect the dots and sketch the face of an understudied but important genre of legal studies. Though it dates back to the classics, to the poetry, glosses, art and emblems of the earliest Western lawyers, I will look at it here mainly in its twentieth-century manifestation. Satirical legal studies is perhaps most closely connected to leftist critiques of law, but it is far from restricted to them. Anatole France, for example, is much cited by radical legal theorists for his satirical observation that "[t]he majestic equality of the laws . . . forbid[s] rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."⁷ That ironic theme has many variants within radical legal theory but it is by no means confined to those complaining about the inequities of law. At the same time, and just to show that there are no easy political boundaries to satirical legal studies, Judge Richard Posner, the progenitor and scion of law and economics, devoted a book to satirizing the pretensions of lawyers and others.⁸ In *Public Intellectuals* he excoriates the aggrandizing claims of public-intellectual lawyers, showing, for example, that the opinions of Professor Akhil Amar, a leading constitutional law scholar, on the 2000 U.S. election debacle were of no greater relevance to reality than

6. 2 QUINTILIAN, INSTITUTIO ORATORIA 439, 441 (T.E. Page et al. eds., H.E. Butler trans., Loeb Classical Library 1933) (1921).

7. ANATOLE FRANCE, THE RED LILLY 91 (Frederic Chapman ed., Winifred Stephens trans., Dodd, Mead & Co. 1925) (1894). For elaboration of this position, see THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982); Sammy Adelman & Ken Foster, *Critical Legal Theory: The Power of Law*, in THE CRITICAL LAWYERS' HANDBOOK 39 (Ian Grigg-Spall & Paddy Ireland eds., 1992); Alan Hunt, *Marxism, Law, Legal Theory and Jurisprudence*, in DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE 102 (Peter Fitzpatrick ed., 1991).

8. RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE (2001) [hereinafter POSNER, INTELLECTUALS].

literary critic Elaine Scarry's theory that airplane crashes are caused by bad vibrations.⁹

While the critical legal studies movement and subsequent work in gender and race theory are the most visible moments in late twentieth-century satirical legal studies, the excitement and importance of the long-term movement lies precisely in its ability to transcend the boundaries of any particular sect or intersection. For every article with a title taken from a recent movie,¹⁰ or rock-oriented complaint jurisprudence that borrows a name such as Tina Turner and links it to law,¹¹ there is a prosaic equivalent of the erudite ilk of Kenneth Lasson's *Scholarship Amok*.¹² A piece such as Michael Fischl's widely read essay, *The Question that Killed Critical Legal Studies*,¹³ which satirically defends the critique of law, has its many counterparts in apparently sober¹⁴ and not-so-sober¹⁵ deliberations on the footnote or seemingly serious accounts of the relation of law to phrenology.¹⁶ There is the *reductio ad absurdum*, the blank page or the almost-blank page, that usually comes with a satirical footnote.¹⁷ There is the main

9. *Id.* at 39, 92; see also Elaine Scarry, *Swissair 111, TWA 800, and Electromagnetic Interference*, N.Y. REV. BOOKS, Sept. 21, 2000, at 92. MARJORIE GARBER, *ACADEMIC INSTINCTS* 30-31 (2001), also discusses the Elaine Scarry case in terms of academic tendencies towards boundary crossing or traveling outside their competence.

10. There are many. *E.g.*, David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908 (1999) (taking its theme from the Ridley Scott movie *The Duellists*); Peter Goodrich, *Sleeping With The Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389 (1993) [hereinafter Goodrich, *Sleeping*] (borrowing the title of the eponymous movie).

11. *E.g.*, Gary Minda, *Phenomenology, Tina Turner and the Law*, 16 N.M. L. REV. 479 (1986).

12. Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990); see also Penelope Pether, *Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories*, 10 GRIFFITH L. REV. 101 (2001); Dan Subotnik & Glen Lazar, *Deconstructing the Rejection Letter: A Look at Elitism in Article Selection*, 49 J. LEGAL EDUC. 601 (1999).

13. Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

14. J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989). More broadly, on the history and uses of footnotes, see ANTHONY GRAFTON, *THE FOOTNOTE: A CURIOUS HISTORY* (1997).

15. There is a huge humorous miscellany on the footnote and the law review, dating back at least to the acknowledgments in K.N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* (1930) [hereinafter LLEWELLYN, *BRAMBLE BUSH*]. For more recent instances, see, for example, Aside, *Don't Cry Over Filled Milk: The Neglected Footnote Three to Carolene Products*, 136 U. PA. L. REV. 1553 (1988), and its sequel, Aside, *Challenging Law Review Dominance*, 149 U. PA. L. REV. 1601 (2001). See also NEIL DUXBURY, *JURISTS AND JUDGES: AN ESSAY ON INFLUENCE* (2001) (arguing that there is an inverse relation between number of citations and degree of influence); Robert A. James, *Are Footnotes in Opinions Given Full Precedential Effect?*, 2 GREEN BAG 2D 267 (1999).

16. Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997).

17. Erik M. Jensen, *The Shortest Article in Law Review History*, 50 J. LEGAL EDUC. 156 (2000); Grant H. Morris, *The Shortest Article in Law Review History: A Brief Response to*

text which literally falls into a footnote,¹⁸ and there are texts that appear in pictures, and pictures that appear in law reviews.¹⁹ Satirical legal studies takes no one form, and its gems are often buried in the interstices of articles on the most somber of substantive doctrines.

Granted the diffusion of satirical legal studies, and accepting as we must that it can only ever be a partial construction elaborated diversely from the fragments and incidents of earlier texts, this Article is necessarily exploratory rather than definitive. If the tone of most twentieth-century criticism of law could be captured in the notion of complaint jurisprudence, and tends towards both earnestness and verbosity, the satirical legal texts that will be studied here are distinctive by virtue not only of a certain ease of access but also by dint of the eloquence of humor.²⁰ It has given us the serried wit of the legal realists, Fred Rodell's farewell to law reviews,²¹ the jurisprudence of the Supreme Court that says "NI!" or "Neeew . . . wum . . . ping,"²² Arthur Leff's imaginary anthropology of the hermaphroditic Jondo,²³ Scott Shapiro concisely incisive on the fear of theory, or the distinction between the obvious and the odious,²⁴ and Dennis Arrow's dictionary of legal "pomobabble."²⁵ It has poked fun at us with the pseudomelancholic lament of an animal law enthusiast complaining that the *Buffalo Law Review* contains no studies of buffalo law.²⁶ In a

Professor Jensen, 50 J. LEGAL EDUC. 310 (2000); Thomas H. Odom, *A Response to Professors Jensen and Morris*, 50 J. LEGAL EDUC. 311 (2000); Erik M. Jensen, *Comments in Reply*, 50 J. LEGAL EDUC. 312 (2000). On the other side of the pond, there is Angus H. MacDonald, 23 LIVERPOOL L. REV. 221 (2001), offering an entirely blank page, free even of any footnote but unable to resist attribution in the form of a name and institutional affiliation.

18. Keith Aoki & Garrett Epps, *Dead lines, Break downs & Troubling The Legal Subject Or "Anything You Can Do, I Can Do Meta,"* 73 OR. L. REV. 551 (1994).

19. As, for instance, David Carlson, *Cartoon*, 27 HASTINGS L.J. 776 (1976); 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).

20. Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 NW. U. L. REV. 360 (1989) (observing the rise of humorous critiques of law).

21. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) [hereinafter Rodell, *Goodbye*]; Fred Rodell, *Goodbye to Law Reviews — Revisited*, 48 VA. L. REV. 279 (1962).

22. Kim Lane Schepelle, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361, 1437 (2000).

23. Arthur Allen Leff, *Law and*, 87 YALE L.J. 989 (1978). Lester J. Mazor, uses a similar technique of criticism and to comparably telling effect. See Lester Mazor, *Some Recent Discoveries Concerning the Modern State*, BLACK ROSE, Summer 1979, at 15.

24. Scott Shapiro, *Fear of Theory*, 64 U. CHI. L. REV. 389 (1997).

25. Dennis W. Arrow, *Pomobabble: Postmodern Newspeak and Constitutional "Meaning" for the Uninitiated*, 96 MICH. L. REV. 461 (1997) [hereinafter Arrow, *Pomobabble*]. Reprinted, often all too literally, in Dennis W. Arrow, *Spaceball (or, Not Everything That's Left is Postmodern)*, 54 VAND. L. REV. 2381 (2001).

26. Eric M. Jensen, *A Call for a New Buffalo Law Scholarship*, 38 U. KAN. L. REV. 433 (1990).

more literary vein, critical jurisprudence has devised the “whiskoletterosmotron” method for reading texts — loosely drink some whisky and see how the textual meanings break down.²⁷ It has noted stupid lawyer tricks,²⁸ mocked the idiosyncrasies of legal dress,²⁹ excoriated the legal form,³⁰ and put Freud on the couch as a failed law professor.³¹ It has produced the *Lizard*,³² the *Reptile*,³³ and *Casual Legal Studies*,³⁴ as well as critical legal studies. It has given us Ronald Dworkin the movie,³⁵ the lost maxims of Equity,³⁶ the University of Rutland School of Law,³⁷ the fallacies of Xanadu,³⁸ and baseball and legal theory.³⁹ It has devised the figures of the bad man,⁴⁰ the

27. COSTAS DOUZINAS ET AL., *POSTMODERN JURISPRUDENCE: THE LAW OF TEXT IN THE TEXTS OF LAW* 267 (1991).

28. Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618 (1996).

29. Charles M. Yablon, *Judicial Drag: An Essay on Wigs, Robes, and Legal Change*, 1995 WIS. L. REV. 1129 (1995).

30. Charles M. Yablon, *Forms, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 258 (Drucilla Cornell et al. eds., 1992).

31. Charles Yablon, *Freud as Law Professor: An Alternative History*, 16 CARDOZO L. REV. 1439 (1995).

32. There were three issues of the *Lizard*, published from January 1984 to July 1984; and then the *Lizard Reborn* was published as an annual from 1986 to 1988. Thanks to Duncan Kennedy and Jack Schlegel for providing copies.

33. The *Reptile* was published at irregular intervals from February 1987 through February 1988. Many thanks to Amy Shapiro for copies.

34. LUKE COLE ET AL., *CASUAL LEGAL STUDIES: ART DURING LAW SCHOOL* (1989 & Supp. 1990) (collecting biting dismissive and self-critical cartoon strips).

35. Allan C. Hutchinson, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637 (1987) (book review) [hereinafter Hutchinson, *Indiana Dworkin*].

36. Eugene Volokh, *Lost Maxims of Equity*, 52 J. LEGAL EDUC. 619 (2002). The lost maxims, ironically enough, were actually coauthored by Professor Dolinko. See Eugene Volokh, *Eugene Volokh Replies*, 53 J. LEGAL EDUC. 309 (2003); see also Kenneth S. Gallant, *Letter to the Editors*, 53 J. LEGAL EDUC. 308 (2003) (responding to the original article).

37. University of Rutland School of Law, named after a county in England that was erased from the map during an administrative revision of counties in the 1970's, appears prominently in chapter four of WILLIAM TWINING, *BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL 64-90* (1994) [hereinafter TWINING, *BLACKSTONE'S*]; and again in William Twining, *Thinking About Law Schools: Rutland Reviewed*, 25 J.L. & SOC'Y 1 (1998) [hereinafter Twining, *Rutland Reviewed*].

38. Twining, *Rutland Reviewed*, *supra* note 37, at 8-13.

39. Most famously, Robert M. Cover, *Your Law-Baseball Quiz*, N.Y. TIMES, Apr. 5, 1979, at A23, reprinted in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 249 (Martha Minow et al. eds., 1992). The history is well covered in Charles Yablon, *On the Contribution of Baseball to American Legal Theory*, 104 YALE L.J. 227 (1994) [hereinafter Yablon, *Baseball*].

40. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) [hereinafter Holmes, *Path of the Law*].

normative,⁴¹ the jurismaniac,⁴² the professor embalmed in footnote 233,⁴³ the rigor mortis professor of law,⁴⁴ the antilawyer,⁴⁵ interpretative “bouillabaisse,”⁴⁶ and the trasher and the trashed.⁴⁷ It has

41. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 168 (1990) [hereinafter Schlag, *Normative*].

42. PAUL CAMPOS, *JURISMANIA: THE MADNESS OF AMERICAN LAW* (1998).

43. Pierre Schlag, *My Dinner at Langdell's*, 52 BUFF. L. REV. (forthcoming 2004).

44. This unseemly, or more properly, splenetic piece came out in the *Harvard Law Review*, an occasional and usually humorous spoof issue of the *Law Review* which is normally produced for circulation at the annual law review dinner. I looked at a copy of this issue when it came out, on the eve of the Critical Legal Conference at Harvard in 1990, but have never been able to obtain a copy. It was something of a scandal and was withdrawn from circulation by the insistence of the Faculty — at least that was my impression — almost immediately after production. This footnote, I guess, is outside of the *Bluebook* and can only be verified by the *Harvard Law Review* itself. I will make a note to write them on the issue, but I don't have high hopes of any response. In fact, final proofs, last pages, I still don't have a reply from them. Isn't that a pretty pass, a moral decline, a failure to respect professional correspondence. A sign of the times, *sic transit jurisprudentia*, and all that. Or perhaps I forgot to write them. But I will say that my research librarian hasn't been able to come up with anything. And I do correspond, on and off, more off than on in fact, with a colleague at Harvard Law School, who has answered all my questions save that one. Wouldn't even tell me over lunch. Very upsetting. And so I have only memory to rely on, the naked eye to report from, no object to proffer as proof. No use at all according to the MLR style gurus, and CCC 4 (i) (2) (3), or some other acrostic of a multi-lettered sub sub rosa rule with which they keep bombarding me says doubtless that this won't do. I could unpack that a bit, here in a footnote, will have to in fact as even I am not so oblivious as to imagine that any lengthier or more visible discussion would make it into the text because, after all, there could not be any verified, touched, personally handled, and guaranteed footnotes to the original, the missing text from the *Harvard Law Review* itself. What is a historian of satirical legal studies to do? Must one accept Harvard Law School's right to dictate the terms of its own history and to hide certain unsavory items or events from public purview? That seems very French and not American at all. In any event we have to challenge this claim that the past be erased. Here, oral history, my own memory, will have to serve. The *Revue* published a biting parody of Mary Joe Frug's piece on postmodern legal feminism which had appeared, obviously after a heated Editorial Board debate, in *Harvard Law Review*. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045 (1992). Frug's law review article came out not that long after her very untimely and unexplained death — she was stabbed by an unknown assailant in Cambridge, Massachusetts. The *Revue* piece took satirical advantage of the morbid circumstances surrounding the publication of the Frug article. The spoof's title was along the lines of “What Has a Girl Got to Do to Get Published in Harvard Law Review?”, so I recall. It was not a very sensitive title or, in my view, from what I saw, a particularly witty piece. That said, it is symptomatically of great interest, a very forceful and direct expression of conservative outrage, and a very visible representation of hostility towards feminism and postmodernism, a hostility that would more often — in publishing terms — be exercised discreetly, in a more politic manner, and to more subtle and liquid effect. The only footnote I have seen to *Harvard Law Review*, incidentally, and thus a secondary source of proof of its existence, and the dead of course can neither be disproved nor divested of their footnotes, comes along with a reference to *Yale Law Jumble*, and is in Llewellyn, *On Reading*, *supra* note 2, at 612 n.33. This refers to “the little circulated *Harvard Law Review*, and *Yale Law Jumble*,” which “spasmodically appear.” *Id.* Which reference to spasms would seem in this context to get it proleptically and uncannily right. But that is another footnote and I need to stop here.

45. DAVID SAUNDERS, *ANTI-LAWYERS: RELIGION AND THE CRITICS OF LAW AND STATE* (1997).

46. Allan C. Hutchinson, *Part of an Essay on Power and Interpretation (with Suggestions on how to Make a Bouillabaisse)*, 60 N.Y.U. L. REV. 850 (1985) (discussing Stanley Fish).

offered the stories of Hercules,⁴⁸ Geneva Crenshaw,⁴⁹ and the youthful Rodrigo.⁵⁰ At the same time it has offered up the *Diary of a Law Professor*,⁵¹ the biographical narratives of legal feminism,⁵² the oral histories and alternative rhetoric of critical race theory,⁵³ *A Lawyer's 'Alice'*,⁵⁴ a view of sales from the back of a horse,⁵⁵ the philosophy of legal naming,⁵⁶ the pseudonym Gil Grantmore,⁵⁷ a study of legislation applied to canine contraception,⁵⁸ and much, much more.

That is already quite a list, and a fairly large number of footnotes. It will give the citecheckers something to get started on, and it provides a useful conspectus of the scope and ecumenical character of the satirical legal tradition. It proves that I am very open-minded, and it allows for some preliminary observations on methodological protocol. First off, because this article will analyze a more or less inexplicit dimension of the legal tradition, satirical legal studies will be

47. See Alan David Freeman & John Henry Schlegel, *Sex, Power, and Silliness: An Essay on Ackerman's Reconstructing American Law*, 6 CARDOZO L. REV. 847 (1985) (the exemplar of trashing). As an instance of the trashers trashed, see Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984). Paul Carrington argues that Roberto Unger's manifesto for critical legal studies was unreadable and that as apostates the critical legal scholars should resign from law school. An earlier version of the same debate took place concerning the nihilism of the realists. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 121 (1995) [hereinafter DUXBURY, PATTERNS]; Charles Fried, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 331 (1988). For satirical self-trashing, see *Trashers Trashed!: Audience Rebels Against CLS Panel*, LIZARD, Jan. 7, 1984, at 1-2, and REPTILE, Mar. 18, 1987, showing an advertisement reading, "You can send Roberto to grammar school," and requesting donations toward helping Roberto learn the rudiments of stylistic accessibility.

48. Hercules appears first, and without any apparent satirical intention, in RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 115 (1978), and reappears with a vengeance in RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, EMPIRE].

49. Geneva Crenshaw appears first in Derrick Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 13 (1985).

50. Rodrigo appears first in Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (review essay).

51. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991) [hereinafter WILLIAMS, ALCHEMY].

52. My favorite example, for no good reason, is Anne Bottomley, *Theory Is a Process Not an End: A Feminist Approach to the Practice of Theory*, in FEMINIST PERSPECTIVES ON LAW THEORY 25 (Janice Richardson & Ralph Sandland eds., 2000). See also CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997).

53. For an interesting reflection on this theme, see Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 HOW. L.J. 1 (1996).

54. Glanville L. Williams, *A Lawyer's 'Alice'*, 9 CAMBRIDGE L.J. 171 (1946).

55. K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939).

56. Peter Goodrich, *The Omen in Nomen: An Exemplary Dictionary of Legal Names*, 24 CARDOZO L. REV. 1309 (2003) [hereinafter Goodrich, *Omen in Nomen*].

57. Gil Grantmore, *Lex and the City*, 91 GEO. L.J. 913 (2003).

58. Note, *Man, His Dog and Birth Control: A Study in Comparative Rights*, 70 YALE L.J. 1205 (1961).

defined as limited to the work of lawyers. There are obviously very important diatribes, parodies, parables, japes, quips, jocastic interventions, facetious digressions, ludic excursions, splenetic episodes, and polemical squibs authored by legally informed non-lawyers but, among other things, it would be quite unfair to the citecheckers to be using materials from the main library or other such arcane and distant sources. More than that, the requirements of coherence and the constraints of finitude suggest that while the great satirical works of literature often address law, their impact needs to be assessed in the form of their manifestation in the work of lawyers. Jonathan Swift's finely criminal suggestion that supernumerary babies be processed and sold as leather, food, and glue,⁵⁹ for example, arguably gains legal expression in Landes and Posner's piece on the economics of the baby shortage.⁶⁰ So, at least, one can claim. And Rabelais's dice-throwing judge in *Gargantua and Pantagruel* appears many times in legal forms.⁶¹ For example, a thoroughly Rabelasian tone is adopted by the satirical theater of the Basoche, the literary progeny of alienated fifteenth-century French law clerks.⁶² Much later, Professor Duxbury's *Random Justice* develops a similar satirical theme: Why not decide cases by lot, by a throw of the dice?⁶³ On the other hand, the immortal reports of Myles na Gopaleen from *The Cruiskeen Court of Voluntary Jurisdiction* can be highly recommended but are simply without legal peers.⁶⁴ That is how it is, and the point, I guess, is that we cannot cover everything.

59. JONATHAN SWIFT, *A Modest Proposal for Preventing the Children of Ireland from Being a Burden to Their Parents or Country*, in SATIRES AND PERSONAL WRITINGS 19 (William Alfred Eddy ed., 1932).

60. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). For commentary, see Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979), and Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986). For Posner's apologia of his position, see RICHARD A. POSNER, SEX AND REASON 410 (1992), and Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21 (1989).

61. FRANÇOIS RABELAIS, GARGANTUA AND PANTAGRUEL: THE FIVE BOOKS (Jacques LeClercq trans., Limited Editions Club 1936) (mid-1500s).

62. On the theatre of the Basoche, see JODY ENDERS, RHETORIC AND THE ORIGINS OF MEDIEVAL DRAMA (1992); HOWARD GRAHAM HARVEY, THE THEATRE OF THE BASOCHÉ: THE CONTRIBUTION OF THE LAW SOCIETIES TO FRENCH MEDIAEVAL COMEDY (1941); S. LYSYK, MAKING A FARCE OUT OF JUSTICE: THEATRICALITY & LAW LITERATURE & CRIME IN EARLY MODERN FRANCE (forthcoming 2005).

63. NEIL DUXBURY, RANDOM JUSTICE (1999).

64. O'BRIEN, BEST OF MYLES, *supra* note 1. Further reports are contained in FLANN O'BRIEN, FURTHER CUTTINGS FROM THE CRUISKEEN LAWN (1988). On the legal significance of Flann O'Brien, see Joseph Brooker, *Stopped by Grand Playsaunce: Flann O'Brien's Post-Colonial Lore*, 31 J.L. & SOC'Y 15, at 34-37 (2004).

Second, and in a similar vein to the first protocol, the merely humorous and the miscellaneous will be excluded. The humorous certainly improves legal writing and arguably provides many benefits for law.⁶⁵ The miscellaneous equally has virtues of freedom of expression and eccentricity of form, but neither genre satisfies the requirements, the *lex operis*, of satirical legal studies. I will argue that it is the primary virtue of satire to afflict the comfortable while comforting the afflicted. To be effective, hang it, to be of interest, satire must bite. If it is to be more than mere parody or, as Professor Handler, past president of the Law and Society Association, had occasion to remark, more than merely farting,⁶⁶ then the incidental humor beloved of benignly senescent legal practitioners cannot make the cut. Satirical legal studies has frequently had occasion to draw upon the merely humorous, the ridiculous imitation or parody proper, the burlesque and the farcical, but its purpose, as will be illustrated in what follows, has to exceed simple wordplay, the merely curious, and the diversely miscellaneous.⁶⁷ Thus, to subdivide, tabulate, and list in the manner of the legalist, the following categories will be excluded.

First, the incidentally humorous. Take an example at random; I happened upon it this morning. It nicely confirms the value of random encounters in the library, and it also puts one in a space where that mythical creature, the library equivalent of the bird of Psaphon, that unique *fons et origo* of law review style, the citechecker may be spotted. In a recent review, by one Dr. Ireland, of a book titled *Regulating Lives*, the following remark appears in the pre-penultimate sentences: "For the record it should be stated that the book is printed with ink on paper. I mention this because I had assumed that for the price asked it might be a work of hand calligraphy on the pelt of a member of an endangered species."⁶⁸ This splendid metaphor both attacks the profit margins of contemporary publishers and indirectly impugns the low level of law school salaries in the Principality of Wales in which jurisdiction — perhaps ironically, given his name — Dr. Ireland is a professor of law. It is a satirical enough aside but its lack of relation to the review makes it too marginal or incidental to form part of any deliberative account of the satirical as an epistemology of law or a rhetoric of legal argument.

65. This point is well-argued in J.T. Knight, Comment, *Humor and the Law*, 1993 WIS. L. REV. 897 (1993).

66. Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697, 727 (1992).

67. I will assume that parody is simply writing in which "the words of an author . . . are taken, and by a slight change adapted to some new purpose," JOHNSON'S DICTIONARY, *supra* note 4, at 283, whereas satire uses ridicule, humor, and wit to impugn "wickedness or folly," and so is distinctive by virtue of its social and political purposes or effects, *id.* at 357.

68. Richard W. Ireland, Book Review, 30 J.L. & SOC'Y 466, 470-71 (2003) (reviewing *REGULATING LIVES* (John McLaren et al. eds., 2002)).

While Dr. Ireland, a historian and critic of legal thought, uses this incidental humor to caustic ends, the second subcategory of the miscellaneous is excluded for complacency. It is not unusual for a court of law to please itself with fine phrasing, pretty parsing, or clever puns. In *Duncan v. Black*, the court delighted itself with the humorous simile that the plaintiff's sale of cotton allotments was the equivalent of selling the green cheese rights to the moon.⁶⁹ In *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, Chief Justice Traynor, to my mind rather riskily, compared his more literally minded brothers to Swedish peasants feeding their sick cattle pages of the Psalter wrapped in dough, in the hope of curing them.⁷⁰ In a similarly expansive but less purposive allegorical mode, the judges in *Textiles Unlimited, Inc. v. A..BMH & Co.* greatly entertained themselves by spinning a seamless yarn of woolen metaphors.⁷¹ In *Copeland v. Baskin Robbins U.S.A.*, the appropriately invested Acting Presiding Justice Johnson posed the plaintiffs' dilemma as follows: "Many millions of dollars' in anticipated profits had melted away like so much banana ripple ice cream on a hot summer day."⁷² These are all somewhat beside the satirical point; they amuse without informing or instructing to any social end or political consequence.⁷³ In the same vein, Justice Megarry's highly entertaining *Miscellany-at-Law: A Diversion for Lawyers and Others* must rest in the miscellaneous

69. 324 S.W.2d 483, 487 (Mo. Ct. App. 1959) ("It falls into the same category as a claim of purchase of the green cheese monopoly on the moon.").

70. 442 P.2d 641, 643 n.2 (Cal. 1968). The court wrote:

The elaborate system of taboo and verbal prohibitions in primitive groups; the ancient Egyptian myth of Khern, the apotheosis of the word, and of Thoth, the Scribe of Truth, the Giver of Words and Script, the Master of Incantations; the avoidance of the name of God in Brahmanism, Judaism and Islam; totemistic and protective names in mediaeval Turkish and Finno-Ugrian languages; the misplaced verbal scruples of the 'Précieuses'; the Swedish peasant custom of curing sick cattle smitten by witchcraft, by making them swallow a page torn from the psalter and wrapped in dough.

Id. (quoting STEPHEN ULLMAN, *THE PRINCIPLES OF SEMANTICS* 43 (1963)). For more on the metaphor, see *infra* notes 351-355 and accompanying text.

71. 240 F.3d 781, 783-86 (9th Cir. 2001). I won't cite at any length, but note that the defendants were "spinning a yarn," arbitration was "looming," facts were "warp[ed]," the affair was "tangled," the arbitration clause had not been "woven" into the contract, "threads" inevitably enough ran through the case, and so on. *Id.* at 783-84, 786. You get the drift.

72. 117 Cal. Rptr. 2d 875, 879 (Cal. Ct. App. 2002).

73. The most complete collection is found in *CORPUS JURIS HUMOROUS: A COMPILATION OF HUMOROUS, EXTRAORDINARY, OUTRAGEOUS, UNUSUAL, COLORFUL, CLEVER AND WITTY REPORTED JUDICIAL OPINIONS AND RELATED MATERIALS DATING FROM 1256 A.D. TO THE PRESENT* (John B. McClay & Wendy L. Matthews eds., 1991). *AMICUS HUMORIAE: AN ANTHOLOGY OF LEGAL HUMOR* (Robert M. Jarvis et al. eds., 2003) is also a useful source and frequently hilarious. Marc Galanter, *Lawyers in the Laboratory: or, Can They Run Through Those Little Mazes?*, 4 GREEN BAG 2D 251 (2001), is less humorous but provides an account of the sociological significance of lawyer jokes.

sphere of contexts, quips, and curiosities rather than in the more organized domain of satirical sallies in criticism of law and lawyers.⁷⁴

Third and finally, I will argue that the satirical refers to a genre, a mode of making statements, and not to the intention of the author. Thus, the seriously intended can at times be both amusing and satirically effective. By the same token, the satirically intended dart can at times be quite mundane and prosaic, let us say a simple pun or parody, a sneer or mock and nothing more. A mere joke is not satire, although of course the jocular is a part of the satirical. It probably, therefore, behooves me briefly to point out, this being the introduction, that the word satire derives from the late Latin *satura*, as in *lanx satura*, “full dish” or, more to our purposes, *lex per saturam*, meaning an “omnibus law” or a piece of legislation that was stuffed with unrelated rules.⁷⁵ In etymological terms, the word satire suggests two things. It points to a lack of distinction, something too full, something gross, stuffed, or indistinct. Secondly, it suggests a mingling of things and so a failure to respect the social hierarchy or order of places. The satirical crosses the line, it goes beyond the pale, and it challenges the norm. At its best, satirical legal scholarship enlivens argument with the political scintilla of humor; in doing so, it offers the persuasive force of a theater of reason that is willing to cross boundaries, subvert disciplines, mix genres, and break laws.

In terms of literary form, I will note that there is a satirical *lex operis*, or “law of genre.” Just for the sake of completeness, Roman satire was generally censorious and boundary maintaining. It crossed the extant boundary so as to draw it back to a prior place. It crossed the boundary backwards, as it were. The satirists derided poor morals, religious lapses, foreign borrowings, linguistic error, bad taste, and the vices and follies of their day. The Roman genre ran from Ennius to Juvenal,⁷⁶ though its most famous exponent was the poet Horace. Roman satire — let’s follow Dryden and term it “Horatian” — was marked variously by personal attacks, anger, acerbic criticism, moralism, sermonizing, and the decrying of decadence and decay. Horatian satire would usually attack the folly or vice of contemporaries in the hope of restoring a purer order or reestablishing

74. R.E. MEGARRY, *MISCELLANY-AT-LAW: A DIVERSION FOR LAWYERS AND OTHERS* (1955), is a collection of aphorisms, maxims, anecdotes and curiosities. The notion of diversion captures one common sense of what Shaftesbury calls the “miscellaneous taste.” See ANTHONY ASHLEY COOPER, *THIRD EARL OF SHAFTESBURY, CHARACTERISTICKS OF MEN, MANNERS, OPINIONS, TIMES* (Philip Ayres ed., Clarendon Press 1999) (1714).

75. VAN ROOY, *supra* note 3, at 14-16.

76. For the full gamut of sources, see the monumental GIAN BIAGIO CONTE, *LATIN LITERATURE: A HISTORY* (1994). See also VAN ROOY, *supra* note 3, at 30-44.

the prior customs, their moral boundaries, and their expressions in law.⁷⁷

The Horatian genre was poetic, polemical, and serious. It gains its juristic counterpart in legal apologetics or defensive works that seek to maintain traditional forms and established values. The Horatian literary mode will be compared to the Greek form of satire, dubbed Menippean satire after the lost work of the Cynic Menippus of Gadara.⁷⁸ The latter is a more radical and political genre that has its roots in the bacchanalian tradition of the satyr. It is associated more with the body, with myth and festival rites that sought to overturn or move beyond the extant hierarchy or modes of law. The Menippean tradition is closer to invective and has its effects through irreverent *hilaritas*, or “satirical laughter.” The Menippean genre differs from the Horatian in that it seeks to overturn so as to promote a new order or mode of life. It is political and generally written with a view, in one felicitous formulation, of making the weaker case the stronger.⁷⁹ The Menippean satire was more dangerous than the Roman and would usually make a point to invert the order of proprieties and precedents, inveighing against the hierarchy of respect and recognition in the process. It ridicules and deflates, but it does so by promoting a new order rather than shoring up the old. In this regard the Menippean is both a broader and a more radical genre than the Horatian, and in its further reaches we can find not simply works of critique, but equally utopian and dystopian works of fiction that savagely contrast the present with the future.⁸⁰

Whatever the intention of the authors — be it to amuse, instruct, hurt, or destroy — I will judge their works as belonging to one or another genre of satire not by intent so much as product and perception. Humor and satire are occasioned as much by context and juxtaposition as they are by intent. If timing is the essence of comedy, then venue, reputation, and the contemporary patterns of dialogue are the key markers of satire. It is in this sense that the utopian work is often more satirical than intended, and the dystopian work is frequently less savage than it seems. For these reasons we can include within the ambit of satire the unintentional social parody, the incidentally ridiculous, the grandiose and the absurd, irrespective of

77. For a recent translation of Horace’s works, see *THE SATIRES OF HORACE* (William Matthews trans., 2002).

78. On whom, see *THE CYNICS: THE CYNIC MOVEMENT IN ANTIQUITY AND ITS LEGACY 75-76* (R. Bracht Branham & Marie-Odile Goulet-Cazé eds., 1996).

79. PAUL FEYERABEND, *AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE* 30 (1975).

80. See, e.g., Frederic Jameson, *The Politics of Utopia*, 25 *NEW LEFT REV.* 35 (2004). For discussions of this theme, see ROBERT ELLIOTT, *THE POWER OF SATIRE: MAGIC, RITUAL, ART* (1960), and *THE WORLD OF JONATHAN SWIFT* (Brian Vickers ed., 1968).

whether the tone or intent of the author was gauged to satirical ends. What is important here is that however disparate the intention, the effect of satirical humor, to borrow from Diogenes, is that of changing the currency and so altering the current political forms.⁸¹

It remains to remark that empirical study as well as theoretical design have irrefragably pointed out a curious feature of the mirror of satire. Contrary to expectation and, indeed, as an exception to the rule of natural logic, the mirror of satire has been shown to reflect every face except that of the viewer.⁸² We don't see our own visage in the glassy reflection of the satirical and that, of course, is a very good thing. You, dear reader — citechecker, editor, colleague, friend, critic, enemy, Cnutist,⁸³ whomever — should feel affirmed. You are exempt from the strictures and punctures that follow, and coincidentally, allow you the comfort and pleasure of reading on, undaunted by the prospect of any potential mishap, free of all unpleasant feelings, and secure in the knowledge that whatever else may be learned, it will not directly affect you. Law professor, sociologist, feminist, literary critic, race theorist, analytic legal philosopher, judge, libel specialist, psychiatrist, zoologist, or whomever, please accept as the premise of what follows that, for structural reasons, even if you are named, the ensuing argument is in principle directed at anyone or everyone but you. That may seem paradoxical but that is just how it is, a final flourish to what the Augustan age was wont to call the benevolence of wit.

Finally, no introduction is complete without a map to guard against the dangers of unedited reading. The epigraph from Flann O'Brien indicates as much, and whether or not he is right in general, it is in my experience imperative in a law review, and as circumstance will have it, particularly in the *Michigan Law Review*, to announce the parts, sections, headings and subheadings, tables and lists, coda and keys, graphs and schemata that will allow the reader to know in advance and with comfort what to expect. This can also serve to spare the photocopier, reduce the costs in paper and toner, and immunize against the desire to download and exhaust precious disk space. Surely, very few will read the entirety of articles as long and as densely footnoted as the normal law review contribution, or for that matter, as

81. As reported in 2 DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS 23 (R.D. Hicks trans., 1925).

82. JONATHAN SWIFT, *Battle of the Books*, in A MODEST PROPOSAL AND OTHER SATIRICAL WORKS 2 (1986). The same principle is close to the core of MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE (Edith Grossman trans., HarperCollins Publishers 2003) (1589).

83. On the philosophy of Cnutism, derived from the rite invented by King Cnut, see Peter Goodrich, *A Fragment on Cnutism with Brief Divagations on the Philosophy of the Near Miss*, 31 J.L. & SOC'Y 131 (2004) [hereinafter Goodrich, *Cnutism*].

exhaustive and erudite as the present offering; nonetheless, the prior announcement of the contents, the divisions, subdivisions, and sub-sub-divisions acts as an invaluable guide to what it is no longer necessary to read. In that dauntlessly honest spirit of exculpation and prior provision or pre-reading, I will list and schematize the subsequent deliberations in detail and by-and-large accurately, though one is never really entirely sure what it is that gets published after the final law review edits.

Caution to the wind, in boldly assertive form, to hell with it, and assuming that I have no last-minute changes of mind, I here predict the following: In the Introduction, I will trace the earliest history and the broad forms or classical genres of satire. I will offer a lot of footnoted references and then a splendidly lucid overview of the article that will follow for the benefit of those who do not wish to follow. That is the Introduction, and just to be recursive about it, we — reader and author — are still in it. In Part I, I build upon the general introduction, the lexicon of terms, the array of references and erudite asides that seduced the reader this far. Here I expand on the distinction between the Horatian and the Menippean forms of satire and then suggest that a similarly bold division can be used to map satirical legal studies. In support of that argument, I use the example of the earliest surviving satirical legal poem within the Western tradition. My analysis of this exemplary satirical legal artifact delineates four principal modes of legal satire that will organize the ensuing discussion of more contemporary examples of the genre.

In Part II, I will address the currently popular and yet somewhat novel mode of *ad hominem* or *nominate* legal satire. I will argue that the last century was witness to a change in the prevalence and the significance of satirical legal studies and that we are only currently coming to appreciate the implications of those changes. The *ad hominem* satirical sally engages authors in a much more direct manner than is usual in academic discourse. It calls to account, it names and exposes, it removes the mask of abstracted prose from the face of tellurian legal studies. That leads very neatly into Part III where I will examine the theatrical forms of legal satire and particularly the increased use of dialogue, fiction, and drama in the critique of legal studies. Satire has generally been a force for formal innovation and the style of contemporary satirical legal studies bears this out. Whether maintaining boundaries or overturning the norm, satirical legal studies plays upon the law of genre as it governs the genre of law.

Part IV looks to the combination of the *ad hominem* and the thespian or dramatic in the genre of trashing. Trashing derives historically from religious polemics, from Reformation and counter-Reformation texts with inventive and invective titles such as

(ironically) “irenicum,”⁸⁴ “blast,”⁸⁵ “confutation,”⁸⁶ “deballacyon,”⁸⁷ “harborowe,”⁸⁸ “apologie,” or “defence.”⁸⁹ Such works were virulently dismissive of the heretic or derisive of the corruption of the orthodox and of his or her work. The stakes were real, the penalty often death, and the trashing or trashing of the trashers comparably vehement. If the wrong word or image, a false argument or unorthodox translation led fairly directly from the text to the faggots, from argument to incineration, then such vehemence was necessary and appropriate. But enough history. We live in virtual times. What is novel is for such polemics to transfer into secular law, and the obvious task of the satirical legal scholar is to trace the effects of satire when it makes that transition. My initial hypothesis, formulated over coffee with my colleague Chuck Yablon, is that from the realists to the counteroffensive against postmodernists, satirical legal trashing transformed doctrinal scholarship. The moments of satire were short-lived and little acknowledged but they offered the final expression or zenith of critique. They were the visible moment of criticism becoming the norm. The humorous and vocal dismissal of established forms on all points of the legal-political spectrum is the mark of the satirical legal moment. The trashers trashed formalism and deconstruction, along with traditionalists and radicals. The reconstruction of that history allows us to make the argument that satirical legal studies has been surprisingly effective in changing the modes of legal study or, as Emperor Julian said of the Cynics, they managed to change the political coinage.⁹⁰ Much more so, in fact, than straight-faced legal studies, complaint jurisprudence, or, to coin a phrase describing the ponderousness of most dogmatic scholarship, serio-legal criticism.

84. EDWARD STILLINGFLEETE, *IRENICUM. A WEAPON-SALVE FOR THE CHURCHES WOUNDS, OR THE DIVINE RIGHT OF PARTICULAR FORMS OF CHURCH-GOVERNMENT* (1662), which is simply the short title of the work.

85. JOHN KNOX, *THE FIRST BLAST OF THE TRUMPET AGAINST THE MONSTROUS REGIMENT OF WOMEN* (1558), *reprinted in THE POLITICAL WRITINGS OF JOHN KNOX* 37 (Marvin A. Breslow ed., 1985).

86. SIR THOMAS MORE, *THE CONFUTATION OF TYNDALE'S ANSWERE*, in 8 *THE COMPLETE WORKS OF THOMAS MORE* (Louis Schuster et al. eds., 1973) (1533) as, for example, at 6, denouncing the “pestyilent bokes” of heresies.

87. SIR THOMAS MORE, *THE DEBELLACYON OF SALEM AND BIZANCE* (1533), *reprinted in 10 THE COMPLETE WORKS OF ST. THOMAS MORE* 1 (John Guy et al. eds., Yale Univ. Press 1963).

88. BISHOP JOHN AYLMEYER, *AN HARBOROWE FOR FAITHFUL AND TREWE SUBJECTES* (n.p. 1559) (title shortened).

89. JOHN JEWEL, *AN APOLOGIE OR AUNSWER IN DEFENCE OF THE CHURCH OF ENGLAND* (photo. Reprint, Scolar Press 1969) (1564). There were countless defenses and defenses of defenses, as, for example, JOHN JEWEL, *DEFENCE OF THE APOLOGIE* (1567).

90. DONALD R. DUDLEY, *A HISTORY OF CYNICISM FROM DIOGENES TO THE 6TH CENTURY A.D.*, at ix (1937).

Part V elaborates the theme of satirical advocacy by taking up one surprising but persistent figure of critique both ancient and modern. It is that of the bad man — Moriarty, as it were, to Sherlock, I mean Oliver Wendell Holmes, the judge. In fact, it is precisely in Holmes' path-breaking work that "the bad man"⁹¹ first appears in an explicitly modern guise.⁹² The various possibilities and permutations upon the bad in contemporary legal studies are explored and dissected. The bad man or, in more contemporary work, the bad woman, or for that matter the bad hermaphrodite, is a marker of the incursion of difference, of body, voice, and diversity of experience into the cloistered domain of law. It is a dangerous and fertile theme, so in Part VI, I outline the philosophical significance of the bad man, of the body and satirical laughter, by reference to traditions of anomaly and upbeat cynicism. From the earliest satirical poems, through the gay science of the fifteenth century, through Nietzsche, Marx, and Freud — the unholy trinity — to postmodern and retro-legal studies, law and economics, and complaint jurisprudence, there is a theme of humor, playfulness, and provocation. It is a theme of being bad so as to do good, which one very successful German philosopher usefully dubs kynicism.⁹³ It is a term that develops the theoretical and jurisprudential import of Menippean satire in the domain of law.

And finally, quite breathless, and necessarily so for fear that anything shorter might end up as a Comment, or — *horribile dictu*, "more frightening still" — as an Essay or Note, the Conclusion retraces the path of the argument and intimates that conclusions are either futile or funny because all good things, even a satire, have to come to an end, whatever their author intends. Even the most sprightly law review article, the longest and best footnoted of instances of the genre, the most cited and quoted, will eventually, pretty soon in fact, end up in the Cemetery of Forgotten Books. The unread among the unreadable.

91. See Holmes, *Path of the Law*, *supra* note 40, at 459.

92. On the earlier tradition of exclusion of the bad man or woman, see Peter Goodrich, *Antirrhesis: Polemical Structures of Common Law Thought*, in *THE RHETORIC OF LAW 57* (Austin Sarat & Thomas R. Kearns eds., 1994).

93. As Peter Sloterdijk stated: "Ancient kynicism, at least in its Greek origins, is in principle cheeky. . . . In *kynismos* a kind of argumentation was discovered that, to the present day, respectable thinking does not know how to deal with." PETER SLOTERDIJK, *CRITIQUE OF CYNICAL REASON* 101 (1987). That sentiment finds its twentieth-century heirs not just in the work of Sloterdijk, but also in the avant garde radical tradition that runs from the Dadaists to the situationists. See GUY DEBORD, *PANEGYRIC* (1997) (providing illuminating insights into lifestyles and wit amongst the politically serious situationists); see also SADIE PLANT, *THE MOST RADICAL GESTURE* (1992).

I. *FRAGMENTA ANTIQUITATIS* (THE ENDURING TRADITION)⁹⁴

My principal concern is with twentieth century satirical legal studies. I will be true to my word and focus primarily on the last century. It does, however, bear saying, even if history is not popular amongst the theorists of momentary legal systems, free-floating analytic wholes, or *The Pure Theory of Law*,⁹⁵ that there is a long tradition of satirical critique of law. It is also true that it has always been a precarious genre and not much loved by those in power. Horace, to take an ambiguous instance, when he consulted a lawyer friend as to the propriety of his satires was roundly told by the doubtlessly wise *jurisconsultus* to drop his satirical maunderings altogether. With exemplary conciseness, unusual for a lawyer, he simply says “[t]ake a break.”⁹⁶

John Dryden is similarly somewhat scornful of the vast host of unsuccessful or lesser satirists, the “dull makers of lampoons,” the lamentable composers of doggerel, the malicious, the ill-informed, the splenetic, and the ill-humored.⁹⁷ All of which simply imposes a caution that the historian has to choose her examples wisely, and in doing so, recognize that there is poor satire just as often as there are ill-formulated laws to be satirized.

The satirical legal tradition is no more free of the precarious and uneven quality of satire than the genre as a disparate whole. By way of introduction, I will take only a few random examples from our discipline’s antique (and in the main European) reminiscences. This will provide, I hope, a sense of the scope and historical flow of satirical legal studies, its elective affinities, patterns and forms. It will also allow me to get the citecheckers started on some really obscure and annoying texts that have no modern editions. That will sort the literary lambs from the legal mutton, and how else are we to select who will edit the *Law Review* next year? I will be happy, incidentally, and as a

94. The title is from THOMAS BLOUNT, *FRAGMENTA ANTIQUITATIS* (1679), a rare example of early-modern legal humor defining itself as an exercise *in rem levem* or on the lighter side of things. For a wonderfully apt depiction of the importance of Latin and Greek titles and epigrams, see JOSEPH ADDISON, SIR ROGER DE COVERLEY PAPERS 201 n.76 (Mary Litchfield ed., Ginn & Co. 1899) (1711). Addison writes:

The natural love to Latin which is so prevalent in our common people, makes me think that my speculations fare never the worse among them for that little scrap which appears at the head of them; and what the more encourages me in the use of quotations in an unknown tongue is, that I hear the ladies, whose approbation I value more than that of the whole learned world, declare themselves in a more particular manner pleased with my Greek mottoes.

Id.

95. HANS KELSEN, *THE PURE THEORY OF LAW* (1967).

96. HORACE, *supra* note 77, at 53.

97. DRYDEN, *supra* note 3, at 22.

perk of publishing this article, to offer my own opinions to the outgoing Board, based in particular upon the outcome of the cite checking of the present section of this piece. I will offer absolutely no help. I won't even translate the Latin maxims. Enough said. I will leave it at that.

A. *The Civilian Tradition*

Remember prehistory? That is a trick question, but it opens the way for me to acknowledge that the classical legal tradition was not without its moments of highly discreet satirical adventure. Recollect that Caligula nailed the text of his laws on columns so high that the populace could not read them.⁹⁸ Clearly he believed that the pretensions of law greatly exceeded its practical relevance. He was, after all, himself the law, *lex loquens*, or *viva vox iuris* as the Romans were wont to put it.⁹⁹ The Greek Emperor Solon is reputed to have done more or less the same thing with his laws. There was precedent, in other words, from an earlier tyrant who also pilloried the law in a quite literal sense. The Roman tyrant borrowed from the Greek. Perhaps the root of their desire to place the text of the laws in spaces where they could not be read was simply a reminder that writing leads to forgetfulness, and that the law, as Lycurgus of Sparta enthused, should be written invisibly on the heart and made manifest in acts. It is not likely that the tyrants had such benevolently epistemological purposes but they could have, maybe in part, and who are we to say?¹⁰⁰ That raises another and related point as to the scriptural form of law, the mode of the code, or at least of Western codifications.

Prior to papyrus and long before paper, commandments and laws were inscribed on stone, upon wooden tablets, and sometimes on skins which common lawyers called "wethers."¹⁰¹ The form militated in favor of brevity and also mitigated against change. The law was as it was

98. For judicial mention of this practice, see *Cutler Corp. v. Latshaw*, 97 A.2d 234, 237 (1953).

99. On the common law notion of law as a mute magistrate (*lex est mutus magistrates*) and thus requiring the breath of life, or *lex loquens*, of the sovereign or judge, see Peter Goodrich, *Poor Illiterate Reason: History, Nationalism and Common Law*, 1 SOC. & LEGAL STUD. 7, 16-19 (1992) [hereinafter Goodrich, *Illiterate*].

100. The story of the necessity of keeping laws unwritten was a common theme in classical discussions of written law and was repeated in the Renaissance by the Elizabethan antiquary SIR HENRY SPELMAN, OF THE ORIGINAL OF THE FOUR LAW TERMS OF THE YEAR (1614), reprinted in ENGLISH WORKS (London, D. Browne 1723). I discuss that text in PETER GOODRICH, *Eating Law*, in LAW IN THE COURTS OF LOVE 87 (1996) [hereinafter GOODRICH, COURTS OF LOVE].

101. See Peter Goodrich, *Literacy and the Languages of Early Common Law*, 14 J.L. & SOC'Y 422, 429 (1987) [hereinafter Goodrich, *Literacy*]; see also M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307, at 120-25 (1993) (discussing the technologies of writing).

inscribed, and there, in sum, was the end of it. The Twelve Tables, the earliest codification of Roman law, explicitly decreed that the Tables were the law, the *ipsissima verba*, or singular and irreplaceable words of the law.¹⁰² Such law could not be meddled with or expanded by any judge, interpreter, or advocate. It was supreme and unchangeable even in the letter.¹⁰³ While that might be fine and good in abstract terms, it was hardly a practical position. Time, circumstances, and mores change, and unless the law-applying body can develop and elaborate on the rules, the law will soon fall into *desuetude* (as the Roman lawyers liked to name irrelevance occasioned by the passage of time). And so the Roman lawyers developed the protosatirical tool of the “legal fiction,” *factio iuris*, a method by which they would, essentially, preserve the law by changing the facts of the case to meet the letter of the rule.¹⁰⁴ Thus, a child might be treated as an adult or a woman as a man, if, in the view of the judge, that would lead to a proper outcome. The tyrant stripped bare, one might say, by his judiciary. And that, no doubt, is just what a committed tyrant really fears.

The Eastern Roman Emperor Justinian had a touch of a comparable tyrannical intent. When he compiled the *Corpus Iuris Civilis* in the first half of the sixth century C.E., he took the view that his lovingly compiled code of earlier Roman law was both authored by God and quite comprehensive. He promulgated that not a word of it could be changed. He even ordered the destruction of all prior sources of law and forbade any interpretative innovations.¹⁰⁵ So he too was implicitly satirizing the law, or at least that is the argument that I am making. He was so overblowing the content and importance of what was, as it happens, a rather inaccurate synthesis of earlier law that he has to be viewed as a satirist *avant la lettre*. No one, however, pays much attention to the classics anymore, and so I will leave the prehistory of satirical legal studies at that.¹⁰⁶ It is a little brief, I know, and there is a danger that it seems a touch essayistic, and not really of the depth necessary to form the stuff of a treatise or article, but I am

102. Generally, see PETER STEIN, *ROMAN LAW IN EUROPEAN HISTORY* (1999) at 3-7. The topic is also discussed in PETER GOODRICH, *READING THE LAW* at 29-30 (1986) [hereinafter GOODRICH, *READING*].

103. The common law doctrine of misprision precluded enforcement of a writ even for error in a letter. Examples are given in PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 137-39 (1990) [hereinafter GOODRICH, *LANGUAGES*].

104. For discussion of legal fictions, ancient and modern, see Peter Birks, *Fictions Ancient and Modern*, in *THE LEGAL MIND* 83 (Neil Maccormick & Peter Birks eds., 1986).

105. 1 *THE DIGEST OF THE JUSTINIAN*, at lxii (Theodor Mommsen et al. eds., 1985) (threatening the most severe penalties — *poenis gravissimis* — for any judge who cites any law other than the *Digest* or *Institutes* or other legislation promulgated by Justinian himself).

106. See Peter Goodrich, *Distrust Quotations in Latin*, 29 *CRITICAL INQUIRY* 193 (2003) (providing a more in-depth look at the exhaustion of the classical language).

going to take the risk. If the reader objects, I can always plead my European roots and a suitable and sufficient ignorance of the local norms of student-edited law reviews. Brevity is often a virtue, a mode of incisiveness that spares the prolongation of errors and expedites the accession to truth. That aside, we really know of the classical tradition through its reception during the Renaissance, and that is true too of the satirical legal scholarship that was transmitted by the legists.

The Western legal tradition as we know it in New York, on Twelfth Street in fact, circa anno Domini, now C.E., 2004, begins with the reception of Justinian's great compilation the *Corpus Iuris Civilis* along with its juristic sibling, the *Corpus Iuris Canonici*, or "Code of Canon law." So let me run through it, and of course, in much greater detail because few of us lawyers are really comparatists,¹⁰⁷ its parallels in common law. First, however, the context: The founding moment of the Renaissance, juristically speaking, was the rediscovery of a huge compilation — a sacred text comprising the fifty books of the *Digest*, the pedagogic manual of the *Institutes*, the *Novels* which were Justinian's own promulgations. This was the *Corpus Iuris* that was rediscovered in 1189 after five centuries of obscurity. It was a rediscovery of an antique resonance harbored in the Latin tongue. It was a compilation of the fragmentary remains of a long-dead law that had applied, if at all, to the inhabitants of a now-extinct world. That gives you a sense of the game being played or the ruse at work. It intimates the fiction that underlies the legal tradition, this sacral scriptural relic that was for a long time housed in a tower in Pisa.¹⁰⁸ Not the leaning tower, sad to say, but it could have been and maybe it should have been. Towers lean back everywhere, or at least all over Venice — I have never been to Pisa — and no doubt particularly if they house the scriptural skeleton of a Holy Code which proclaims at its very outset that its author is God himself — *Deo Auctore*, the juggernaut or "supreme being."¹⁰⁹ It is already a little funny, somewhat droll, a touch absurd from a secular humanist point of view and there were, as we will see, some who had the courage to make that point satirically and well.

For those who like old texts, it is not a bad read, though I would add that if God was really its author, as the preface proclaims, then God and grammar are not as closely aligned as Nietzsche for one

107. On this rather too-topical point, namely the legal resistance to comparison and so to comparative law, see Igor Stramignoni, *Francesco's Devilish Venus: Notations on Legal Space* (forthcoming 2005) (on file with the author).

108. This description is taken from FRANCOIS HOTMAN, *ANTITRIBONIAN* 121 (photo. Reprint, Publications De L'Universite De Saint-Etienne 1980) (1567), and is discussed in GOODRICH, *LANGUAGES*, *supra* note 103, at 270.

109. 1 THE DIGEST OF THE JUSTINIAN, *supra* note 105, at lv. See generally PIERRE LEGENDRE, *LE DÉSIR POLITIQUE DE DIEU* (1988).

seemed to believe.¹¹⁰ That, or there have been serious failures in transmission — endless interpolations, philological slips, cold fingers, poor copying, and the like.¹¹¹ Such, however, is a separate issue. The immediate point is rather that the legal tradition itself stems from a vast fiction, a bizarre fraud, a borrowing from what Hotman termed “a patchwork of fragments and splinters.”¹¹² All that antique Latin locked away and doing justice unchangingly and with pristine and unsullied style — *in fictione iuris semper est aequitas*, as the maxim goes, and loosely translating as “legal fictions are there to do justice.”¹¹³ In any event, the Roman tradition comes as a package, so Professor Alan Watson says, and I am inclined to believe him — I once had sherry with him in Edinburgh and he seemed both energetic and full of knowledge, among other things. He calls it “the block effect”¹¹⁴ of civil law, and although I think he means it as a noun, I would read it as a verb: there is a lot of blocking and a lot blocked by the inaptly named *Digest*. Put it like this, whatever else may be its enduring virtues or juristic qualities, the *Digest* is palpably undigested and overall it is self-evidently indigestible. One could spend a lifetime studying it. The humanist Baldus did exactly that and became according to Hotman one of the most remarkable of law teachers and yet, after 47 years of being the mediaeval equivalent of a law professor, one of the most famous there was, he admitted that he was still an apprentice in his knowledge of the *Digest*.¹¹⁵

B. *The Sermon on the Laws*

Obviously enough, the first work of satirical legal studies is a critique of Justinian’s *Corpus*. In a beautiful juxtaposition of names, Placentinus, a twelfth-century lawyer and one of the most important of glossators, derided the dead Justinian and the old corpse of the *Corpus*. Placentinus, of course, is cognate with placenta and with giving birth.¹¹⁶ That which is associated with birth is unlikely to resonate much with old age, let alone with a corpse; that indeed is the

110. FRIEDRICH NIETZSCHE, *THE TWILIGHT OF THE IDOLS* (1889), *reprinted in* 16 *THE COMPLETE WORKS OF FRIEDRICH NIETZSCHE* 22 (Oscar Levy ed. & Anthony M. Ludovick trans., 1964) (1909) [hereinafter NIETZSCHE, *TWILIGHT*] (“I fear we shall never be rid of God, so long as we still believe in grammar.”).

111. SEBASTIANO TIMPANARO, *THE FREUDIAN SLIP* (Kate Soper trans., NLB 1976) (1974) (discussing the philological sources and significances of slips).

112. HOTMAN, *supra* note 108, at 134.

113. Cited, for example, in *Wilkes v. The Earl of Halifax*, 95 Eng. Rep. 797 (K.B. 1769).

114. WATSON, *supra* note 102, at 14-22.

115. HOTMAN, *supra* note 108, at 109; PIERRE LEGENDRE, *L’AMOUR DU CENSEUR* 63 (reprint 1995) (1974) [hereinafter LEGENDRE, *L’AMOUR*].

116. On names and naming, see Goodrich, *Omen in Nomen*, *supra* note 56, at 1311-16.

theme of Placentinus's *Sermo de Legibus* or satirical sermon on the laws. The *Sermo* takes the form of a poem and seems to have been delivered as an introductory lecture to beginning law students as an entertainment and as a spur to critical thought.¹¹⁷ His poem was curiously similar in status to the poems that still occasionally appear in the casebook — lauding the bovine fate of Rose the Second of Aberlone,¹¹⁸ for example, or explaining the absurdity of a recent decision.¹¹⁹

Placentinus was a jurist, a poet, and a satirist. He taught law for a while in Bologna but, according to Roffredus of Benevento, he “ridiculed a certain doctrine held by another Bolognese doctor, Henricus de Bayla, and this man, who was at the same time a powerful knight, made a nocturnal assault on Placentinus, who fled in terror.”¹²⁰ According to one contemporary account, he fled but he took many of his students with him and returned to his native Piacenza in fine satirical¹²¹ fashion “dancing with triumph and joy.”¹²² And it was in his later years in Piacenza that Placentinus wrote the *Sermo*, or critique of *pseudolegistas* — namely, phony lawyers.

Looking back, now quite old, five years or so before his death, Placentinus uses the form of the poem to instruct his students in the venerable art of satirical critique. Let's look at this classic text in some detail. The poem is a *satura*, in what I have termed its Menippean form, but here applied to law. In attacking law, the author acts in defiance of custom and of the usual forms. His concern is to invert the traditional order and values. He wishes, implicitly at least, to suggest the possibility of future and less strangulated forms. That is the starting point, and it is compounded by an introduction that places the narrative of the poem in the context of a classical figure, that of *topothesia*, or “imaginary place.”¹²³ Where law is to be subjected to the

117. The *Sermo* is printed in Hermann Kantorowicz, *The Poetical Sermon of a Mediaeval Jurist: Placentinus and his 'Sermo de Legibus'*, 2 J. WARBURG INST. 22, 36 (1943) [hereinafter *Sermo*].

118. EDWARD J. MURPHY ET AL., STUDIES IN CONTRACT LAW 490-92 (6th ed. 2003).

119. Robert E. Rains, *To Rhyme or Not to Rhyme: An Appraisal*, 16 LAW & LITERATURE 1 (2004); Robert Rains, *When You Wish to Be an R*, 4 GREEN BAG 2D 333, 333-34 (2001) [hereinafter Rains, *R*].

120. *Sermo*, *supra* note 117, at 25.

121. The term “satirical” is derived from “Satyri” — the word for the mythological Greek Satyrs. “Satirical” may be a false etymology, VAN ROOY, *supra* note 3, at 1, 20, but it is an interesting one and resonates with the more Dionysian versions of satirical practice that will be discussed in the conclusion.

122. *Sermo*, *supra* note 117, at 25.

123. On *topothesia*, the figure of imaginary place, see HENRY PEACHAM, THE GARDEN OF ELOQUENCE [1593] (facsimile reproduction 1954) at 141-42 (“a fained description of a place”). On *topographia*, the figure of description of an actual place, see also GEORGE PUTTENHAM, THE ARTE OF ENGLISH POESIE (photo. reprint, Kent State Univ. Press 1970)

criticisms of desire, to the court of conscience or of love, then the proper mode of announcing this critique is a bucolic setting, a garden, an arbor, or a wood.¹²⁴ In the manner of such poems and in the genre of the courts of love, the *Sermo* begins by describing the author taking a walk in the woods and arriving unexpectedly in an undiscovered and idyllic, indeed voluptuous, spot.¹²⁵ There he sees an *ager vetus*, or “ancient field,” surrounded by vineyards, meadows, woods, and with a river running through it.

Critical genre established, satire begins. Where better than in the woods and among the satyrs, invoking the Greeks and a tradition that favored not simply exposing folly but also arraiging vices?¹²⁶ *Satura in sylvae*. And the protagonists are then introduced. A young and dancing girl, scantily clad, alive, lithe, and fleshy. A figure of love, a *prosopopeia* of desire called *Domina Ignorantia*.¹²⁷ In contrast to her, comes a figure much less lovely: that of law. *Legalis Scientia* is depicted as an elderly, disfigured, and ugly woman.¹²⁸ She is deformed, bent, desiccated, and she lives in the old field. To paraphrase Nietzsche, one must distrust any law that cannot dance, and Placentinus proceeds in exactly that manner, by favoring the dancer over the tuneless and sedimented.¹²⁹ In the debate that follows, the youthful *Ignorantia* ridicules the figure of legal studies in uncompromising tones. Remote from the world, studied in secret, neither competent in philosophy nor even articulate in its own languages, legal studies, as we would call them, are depicted as immoral, incomprehensible, dishonest, confused, terrible in aspect, and deformed in outcome.¹³⁰ To this, the protagonist *Domina Ignorantia* adds that legal science is a stultifying pursuit. It offers no better than a living death. It is a form of suicide, a fatal sin.¹³¹ Law itself, just to round the critique out, is a murderer of passion and of youth, a progenitor of misery rather than of knowledge. The corpse of the *Corpus Iuris* makes a zombie of the lawyer. Well, Placentinus

(Edwin Arber ed., A. Constable & Co. 1906) (1589).

124. See ANDREAS CAPELLANUS ON LOVE (P.G. Walsh ed. & trans., Gerald Duckworth & Co. 1982) (n.d.); see also GOODRICH, COURTS OF LOVE, *supra* note 100, at 29-71 (discussing Capellanus); Peter Goodrich, *Gay Science and Law*, in RHETORIC AND LAW IN EARLY MODERN EUROPE 95 (Victoria Kahn & Lorna Hutson eds., 2001) [hereinafter Goodrich, *Gay Science*] (discussing Capellanus and toposhesia).

125. *Sermo*, *supra* note 117, at 38 ll. 70-75.

126. DRYDEN, *supra* note 3, at 19.

127. *Sermo*, *supra* note 117, at 38 l. 81.

128. *Id.* (ll. 77-78).

129. FRIEDRICH NIETZSCHE, THUS SPAKE ZARATHUSTRA 45 (1910).

130. *Sermo*, *supra* note 117, at 38 ll. 93-98.

131. *Id.* at 38 ll. 99-107.

doesn't use those exact words, but that is the gist of the satire. Law flees the living and despises the world. See a lawyer, see a miserly and melancholic misanthrope.

The modern editor, Hermann Kantorowicz, himself a lawyer, does not approve of the poem. No surprise there. He calls it mediocre and alien.¹³² In the sense that satire is a rather underused and little recognized genre of legal studies, I guess he is in some measure correct. More correct than interesting, in fact. It is hard to conceive it as mediocre or middling in any significant sense. It is either good or bad, and I would opt for bad, meaning, as we will see later,¹³³ radical, or to paraphrase the song, "it is the bomb that brought us together." Whether or not it is a "good" or "bad" poem in any conventional sense seems to me quite beside the point. Satire makes an argument; it deflates the pompous, ridicules the self-loving, and encourages the over-serious to get real. I loved the poem and how often am I tempted to read a Latin verse? Not often, though it does have a strangely calming effect. Soporific even. In any event, we can both have our opinions; the more important function of recollecting Placentinus and the birth of satirical legal studies is to isolate the original elements of the genre. I will do this synoptically by reference to how the constituent elements of the genre are developed in later Renaissance and modern satirical legal tracts. There are four key ingredients, and I will briefly discuss each before moving to their more contemporary expressions: personification, novelty, ridicule, and criticism.

C. *Satirical Themes*

1. *Personification*

Satirical legal studies is a popularizing genre, an attempt to link law to life, and legal language to what is said, to the spoken word, and latterly to the vernacular.¹³⁴ To achieve such populist ends, the satire must attach itself to a figure or a person. Satire cannot be generic or dry. Thus it needs a narrative and specifically it requires dramatization, actors, and action. Unusually for a legal text, the *Sermo* introduces the author, the ambulant observer of the action, and it depicts the minutiae of scene and players. Thus we witness a young girl

132. *Id.* at 32.

133. See *infra* Part V.

134. This, of course, was not and is not always the case. Fortescue praised the pristine and unadulterated character of law French and law Latin. The later tradition would often repeat that position and defend the archaic and ungrammatical character of legal language, Coke's *vocabula artis* of a profession that was proudly full of words unknown to the grammarians. For Maitland this made it the language of science, comparable to that of geometers and algebraists. For full references, see Goodrich, *Literacy*, *supra* note 101, at 434-35.

and an old woman, two personifications, two faces going head to head. The satirical needs to satirize someone, and while the medieval texts would use rhetorical figures, the condensations represented by *Ignorantia* and *Scientia*, the later tradition moved more usually to ridicule of specific people, to ad hominem and, as I like to call them, *ad nomen* arguments. We can follow a certain trajectory in this regard. Where the *Sermo* uses personification through classical figures, later satirists used named deities, as, for example, Stephanus Forcatulus used Cupid in his constitutional treatise, *Cupido Iurisperitus*, or the “Jurisprudence of Love.”¹³⁵ Later tradition, the trajectory of advance being always from abstract to the evermore concrete, preferred named antagonists. Thus the polemicist lawyer, the appropriately named Hotman, wrote his critical treatise on legal education as an attack on the compiler of the *Digest* and titled his book *Antiiribonian*.¹³⁶ Which makes the point pretty clearly, I think. No room for doubt when the critique comes bearing your name, together with the suffix “against,” as its title.

The politics of satire have always revolved around the dangers and rewards of daring to ridicule and arraign the vices of the living. For satire to be effective it has to hurt, it must of necessity cut, and that cut will be deepest where its subject is named. The various modes of kindly satire, of polite Augustan circumlocutions, may have transitory temporal effects but generally it is personalized attack, the nominate invective that both takes the risks and causes scandal, ruin, reform, or all three. Placentinus, remember, was a critic who had suffered adverse physical consequences as a result of his temerity, and if he chose to personify rather than to name, there were reasons for that which can be well understood. Where the maxim of the legists was “expose the folly but don’t arraign the vice,” the contemporary tradition has moved rather to naming and arraigning. At the end of history, time is short. It always was, in fact, but now is no exception; it simply takes a different form of urgency or political need.

2. Novelty

Satirical criticism is variously motivated by dissatisfaction and desire for something new: either restoration of the old order or its overturning. Placentinus, as his name suggests, gave birth to a novel legal form. He adopted the poetic usage of an imaginary *topos* in which to play out both his scorn for the extant and his lust for something new. There is necessarily an element of something new,

135. STEPHANO FORCATULO BLITERENSI, CUPIDO IUSPERITUS (1553).

136. For Hotman’s swingeing critique of Tribonian and his “precious reliquary,” see HOTMAN, *supra* note 108, at 85-93, 99.

what Ernst Bloch called *plus ultra*, a novelty or *novum*, that directs and motivates the Menippean form of satirical work.¹³⁷ The desire to ridicule, in short, derives from a sense that things have gone too far as they are, that they are too much — in contemporary parlance they are gross — and a thought experiment or utopian scheme is needed to correct the blandishments of the present. The utopian, the beyond or elsewhere, is always a dimension of satirical critique. It imagines how persons and things could be otherwise and that exercise in thought bears with it the risk and the reward of experiment and chance, *fortuna* in the future.

The appeal to novelty, the insistence that there could be a better space of law, other times and topics, is the rhetorical device — the *topothesia* — that the *Sermo* uses and that we find taken up extensively in later works. Thus the courts of love and the gay science use a variety of imaginary places, courts of flowers, courts of moods,¹³⁸ as well as the *High Court of Love* in Paris as their literary, and sometimes also, temporal sites of existence.¹³⁹ From Boccaccio's *Il Filocolo*¹⁴⁰ to Mahieu le Poirier's *Court of Love*,¹⁴¹ imagination rules in legal satire and its location is variously the garden, the saturnalia, the carnival, the various *dies nec fasti*, or “nonlaw days,” in which the author can encounter the utopian projection, the alternative space through the looking glass or on the other side of the mirror. To take a common law example, though authored by an antiquary, there is John Selden's tract, *Jani Anglorum Facies Altera*, or “the other face,” of English law.¹⁴² This work traces the feminine history of common law to a time immemorial and then to a time imagined when female goddesses roamed Britannia, and the laws of the second Venus ruled.

137. On the spirit of utopia and the persistence of the desire for the new, for renewal and reform, see ERNST BLOCH, *THE PRINCIPLE OF HOPE* (Neville Plaice et al. trans., Basil Blackwell 1986) (1959).

138. MARTIAL D'AUVERGNE, *LES ARRÊTS D'AMOUR* (Jean Rychner ed., A. & J. Picard 1951) (1460), provides the fullest set of examples. For others, see GUILLAUME DE MACHAUT, *LE JUGEMENT DU ROY DE BEHAIGNE AND REMEDE DE FORTUNE* (James I. Wimsatt & William W. Kibler eds., Univ. of Ga. Press 1988) or the recently published late twelfth-century Occitan manuscript *LA CORT D'AMOR* (Matthew Bardell ed., *Legenda* 2002).

139. *LA COUR AMOUREUSE DITE DE CHARLES VI* (Carla Bozzolo & Hélène Loyau eds., *Le Léopard d'Or* 1982) (circa 1400), discussed in GOODRICH, *COURTS OF LOVE*, *supra* note 100, at 1-2.

140. GIOVANNI BOCCACCIO, *IL FILOCOLO* (Donald Cheney & Thomas G. Bergin trans., Garland Publishing, Inc. 1985) (n.d).

141. MAHIEU LE POIRIER, *LE COURT D'AMOURS* (Terence Scully ed., Wilfrid Laurier Univ. Press 1976).

142. JOHN SELDEN, *Jani Anglorum Facies Altera*, in JOHN SELDEN, *TRACTS* (London 1683), discussed in PETER GOODRICH, *OEDIPUS LEX 152-59* (1995) [hereinafter GOODRICH, *OEDIPUS*].

There indeed was a thought, a long-term history of what law could have been and might become.

3. *Ridicule*

The spice of satire and the virtue of its critique lie in ridicule — the use of humor to deflate, pillory, abase, demote, deride, impugn, and overturn. The function of Menippean satire is to make the weaker argument the stronger, to distrust seriousness, to think the impossible on the grounds that it is precisely the conditions of possibility that need to be changed. Put it like this, deep thought tends to be immobile, stuck in the depths and burrowing down. Light thought, by comparison, trips easily on.¹⁴³ It works to invert common sense and shock or at least entertain the reader into a new way of seeing old events, patterns, or things. The *Sermo* is full of ridicule, of course, but my favorite example of legal levity is from a sixteenth-century edition of the *Arrêts*, or “judgments,” from the courts of love reported by Martial d’Auvergne. This edition has its own legal and highly legalistic commentary by a jurist and *eruditae*, as they used to say back then, bearing the nom de plume of Benoit de Court. His commentary is published under the title *Commentaires Juridique et Joyeux* and consists of the most excellent and humorous legal glosses on the case law that d’Auvergne had reported.¹⁴⁴ He says, for instance, to use an example of which I am most fond, that juristically, which is to say according to the case law on love, kisses can be taken freely but it is *furtus*, or “theft” — his commentary is in the Latin and of the Latin — the moment that the kiss becomes too passionate. The line is drawn at the biting of the lip. Once osculation turns to consumption then flirtation has degenerated into theft.¹⁴⁵ That is a fine, appropriate, and good-humored judgment of a case that in current circumstances would likely be dealt with wholly inappropriately and quite otherwise.¹⁴⁶ There is force in ridicule, and provided that it is not used to excess, to mock gratuitously, or to revel in the pain of another, then it is often a direct and accessible avenue to truth.¹⁴⁷

143. A point well made in OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM & SELECTED CRITICAL PROSE* (Linda Dowling ed., Penguin Books 2001) (1891).

144. Benoit de Court, *Commentaires Juridique et Joyeux, accompanying MARTIAL D’AUVERGNE, LES ARRÊTS D’AMOURS* (François Changuion 1731).

145. *Id.* at 259.

146. The most striking example of a kiss leading to an absurd legal proceeding is in *Beckelman v. Gallop*, discussed at length in JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997), and commented upon in terms of the relevant amatory theology and law of kissing in Peter Goodrich, *The Laws of Love: Literature, History and the Governance of Kissing*, 24 N.Y.U. REV. L. & SOC. CHANGE 183, 185-98 (1998).

147. M.A. SCREECH, *LAUGHTER AT THE FOOT OF THE CROSS* (1997), usefully discusses the various uses of laughter, of mockery and derision, in the Christian tradition. SIMON

Ridicule, from *ridere*, involves laughing at some thing or someone. Ridicule is the style, the spur or *punctum* that lances the blemish or that cuts to the quick. It is necessarily harsh, and it inflames both in the sense of excitation and of demolition. The *ridiculum acri* was in essence purposeless harshness or malicious demeaning; while it might succeed in diminishing or ruining a specific subject, it had no greater moral or political purpose and hence its bad name. *Cave canem*, or “beware the dogs,” was historically a warning against vicious spirits and unkind minds whose mere wordplay was inconsequential but emotionally harmful to those indicted. At its best, however, ridicule calls the subject or the practice to account. It requires responsibility and is appropriate to its topic. Consider the following anecdote from Laertius: “When some one was discoursing on celestial phenomena, ‘How many days,’ asked Diogenes, ‘were you in coming from the sky?’”¹⁴⁸ Ridiculous, or at least ridiculous back then, you get the point, to make claims as preposterous as those of the astrologer or metaphysician who talks of the heavens without ever leaving the ground. To be Nietzschean about it, to encounter God you have to, at the very least, learn how to dance.

4. Criticism

The final category raises the frequently charged question of the purpose of ridicule or of humorous criticism most directly. Could not the same arguments be performed in somber and accepted forms? The answer is no, for the simple reason that satire introduces a novelty that is external to law. Let’s go right back. Aristophanes satirizes the lawmakers by having women take over the assembly and withhold sex until they get the legislative changes they want.¹⁴⁹ Placentinus follows in that tradition and introduces poetry into the prose of law, as well as bringing youth, femininity, the body, and dance into the supine and serried array of desiccated legal texts. In the later tradition, the use of humor to juxtapose the inside of law to an outside that threatened or sought entry into it is very common. There is the probably apocryphal yet repeated story of Accursius, one of the first and greatest of the glossators, author of the *Glossa Ordinaria*, whose daughter is reputed to have taught law. She was beautiful and so, in the cause of not distracting the students from their studies, she lectured while wearing a

CRITCHLEY, ON HUMOUR 109-11 (2002), also helpfully analyzes the *risus acri* as opposed to the *risus purus* or (here) appropriately political laughter.

148. 2 LAERTIUS, *supra* note 81, at 41.

149. ARISTOPHANES, ASSEMBLYWOMEN, in ARISTOPHANES IV: FROG, ASSEMBLYWOMEN, WEALTH 237-411 (Jeffrey Henderson ed. & trans., 2002).

veil or, in some versions of the story, from behind a screen.¹⁵⁰ Satire here marks an alien presence within the law, and intimates thereby the need for change. The norm must be suspended if the foreign figure, the alien or “aegyptian,” and here the feminine, is to be recognized and incorporated.

We can also note a common theme to the satirical as it applies to law. Placentinus shares with Aristophanes, Benoit de Court, Selden, and the anecdote about the daughter of Accursius a concern with the exclusion of difference, and specifically of the feminine from the law. It seems in substantive terms to be an exemplary exclusion, a founding myth of modern as opposed to mythic laws. That could in part be because justice is traditionally depicted in a feminine form, as *Iustitia*, or *Ignorantia*, but it has a wider resonance. The notion of satirical criticism making the weaker case stronger can be aligned with the argument that it also brings the exterior and the excluded into law. Satire rectifies, redistributes, and reorients. That is its merit and its novelty. It introduces what lawyers have ignored, repressed, obscured, or demolished in the construction of their science. It resurrects the failures and imagines the future. If the exclusion of women or the plight of the daughter was the exemplar it strongly suggests that there is a creativity or force to the exterior of law, an eros or sex that is as attractive as it is threatening. In this context, satire espouses some version of the Socratic dictum, “lawyer know yourself,” meaning know where you are and who you are in relation to where you are, to an outside both proximate and distant, near and far.

At an epistemological level, satire proffers access to what Foucault called the “positive unconscious” of the science of medicine in his case, and here, that of law.¹⁵¹ Legal science from Placentinus on constructed its disciplinary domain, its borders and methods, its jurisdiction and writs through a process of selection and exclusion. What did not fit the cause of legal science was necessarily jettisoned or otherwise demolished, thrown out, or hidden away. The positive unconscious of law is a reference to everything that failed to find a place in the novel science, the exegesis of a remarkably ambitious but ultimately very limited text. What I hope to recoup is thus potentially everything that was sacrificed or excluded in establishing the pure science or dictate of

150. JOHN LESLIE, A DEFENCE OF THE HONOUR OF THE RIGHT HIGHE, MIGHTYE AND NOBLE PRINCESSE MARIE QUEENE OF SCOTLANDE, at fol. 139a (London 1569), available at <http://eebo.chadwyck.com>, discussed in GOODRICH, OEDIPUS, *supra* note 142, at 116.

151. As Foucault explains:

[T]he unconscious of science . . . is always the negative side of science — that which resists it, deflects it, or disturbs it. What I would like to do, however, is to reveal a *positive unconscious* of knowledge: a level that eludes the consciousness of the scientist and yet is part of scientific discourse . . .

MICHEL FOUCAULT, THE ORDER OF THINGS, at xi (Vintage Books 1973) (1970).

law.¹⁵² In brief, what are the others of law? Who does law exclude or kill on sight, a trajectory from the barbarian to the foreign to the *homo sacer*, the Jew or Muselmann¹⁵³ of the twentieth-century camps. The failures or losses that referred to an internal exile in the Renaissance era, come back in the contemporary era as defining themes in legal feminism and in those parallel or subsequent movements in legal thought that address race, ethnicity, sexual orientation, age, or species as comparable structures of exclusion or denial of voice. Confronting lawyers with the experience, narratives, oral histories, and contrary norms of excluded groups is precisely the function of Menippean satire within the contemporary domain of law.

Returning to the founding era of modern legal forms, a philosopher turned lawyer, Abraham Fraunce, introduces poetry and logic into the study of law, this at least is what he claims, so as to improve the common law method of the late Renaissance. Along the way, and without compunction, he ridicules the “grand little mootmen” and other ignoramuses — in that case non-Ramists as well as dunces — of the Inns of Court, and to good effect.¹⁵⁴ The lawyer William Fulbecke, writing around the same time as Fraunce, derides what would now be termed the obsessive compulsion of the common law lawyers: “so full of Law-points, that when they sweat, it is nothing but Law; . . . when they sneeze it is perfect law; when they dream it is profound law. The book of *Littleton’s Tenures* is their breakfast, their boier, their supper and their rare banquet.”¹⁵⁵ That about sums up OCCLD (pronounced occlude) or obsessive-compulsive common law disorder. Read it as you will, it is a satirical moment in a polemical work, and its form is not entirely accidental. It is the body of lawyers that is derided, their juristic obesity that is caricatured. Again, in other words, an outside has been drawn in, a boundary crossed, and a persuasive point made in a juristically unusual form.

Finally, satire brings with it a certain charge, potential animus, and occasionally an erotic attraction. It is a very specific mode of sparring or polemics. It tends, as I have suggested, to accompany radically novel arguments, changes in position or formalities. In such a spirit it is personal, precisely because it seeks to oust an old order, a tired incompetence, or entrenched establishment, real or imagined. The

152. *Id.*, discussed in GOODRICH, LANGUAGES, *supra* note 103, at 15-20.

153. GIORGIO AGAMBen, REMNANTS OF AUSCHWITZ. THE WITNESS AND THE ARCHIVE 41 (1999); see also Thanos Zartaloudis, The Idea of Humanity or a Letter to the Benefactors of Mankind (2003) (unpublished manuscript, on file with the author).

154. ABRAHAM FRAUNCE, THE LAWIERS LOGIKE 89-90 (1588), available at <http://eebo.chadwyck.com>. For discussion, see GOODRICH, LANGUAGES, *supra* note 103, at 20-32.

155. WILLIAM FULBECKE, THE SECOND PART OF THE PARALLELE OR CONFERENCE OF THE CIVIL LAW, THE CANON LAW, AND THE COMMON LAW OF THIS REALME OF ENGLAND, at fol. B2 (1602) (spelling modernized), available at <http://eebo.chadwyck.com>.

twentieth century is no exception. Satire most obviously accompanied the realist movement, it reemerged with critical legal studies, and in less explicit forms with feminism, law and economics, critical race, and LatCrit legal studies. Novelties all. Even if variable in genre and content, all were forms of entry into a complacent legalism, and they share that element of exteriority, of being the excluded seeking to come in, to return, to overturn, or to reform. It is to these moments and movements, to the long twentieth century and its admirably diverse legal efflorations, that I now turn. In doing so, I will use the fourfold root, the categorization that emerges from the *Sermon on the Laws* written all that time ago at the origin of the tradition.

II. SATURA RESARTUS (THE REVIVAL OF SATIRE)

The classical satirical tradition favored the innominate mode of personification. For Placentinus, it was a *prosopopoeia* that faced off and debated another personification: *Domina Ignorantia* against *Legalis Scientia*. After his early experience of physical attack, Placentinus the satirist was perhaps concerned to shield himself from those who might take offense. There was less chance of being attacked by a *prosopopoeia* than by an irate person, though in my experience it is still a risk. It is hard to predict who is out there. A similar principle of self-protection doubtless underpinned the Basoche theatrical farces of the fifteenth-century Parisian law clerks. These were heavily allegorical satires in which rhetorical figures such as the Old Digest and the New Digest would debate and detract from each other and from the law.¹⁵⁶ Many other classical figures from *Justitia* herself to *Phronesis* and law clerks identified by number — *Primus*, *Secundus*, and so on — made their appearance and played their allegorical roles.¹⁵⁷ The later tradition of satirical revels at the Inns of Court in London, which theater will gain brief mention again later, also adopted a wholly figurative critique of common law.¹⁵⁸

A. Allegory and Theater

The allegorical satire, in the tradition of the Roman saturnalia, was generally predicated upon a festive or farcical reversal of the order of things. The clerks of the Basoche would complain about pragmatic obstacles to success: lack of money, difficulty of entry into the profession, domineering behavior of established lawyers and judges; it

156. FARCE NOUVELLE, *reprinted in* RECUEIL DE FARCES FRANÇAISES INÉDITES DU XV SIÈCLE 333 (Gustave Cohen ed., 1949).

157. FARCE NOUVELLE, *supra* note 156, at 333 ll. 1-10.

158. PAUL RAFFIELD, IMAGES AND CULTURES OF LAW IN EARLY MODERN ENGLAND 89-123 (2004).

was not to the name or person but to the position that the satire was directed. That remained true for the bulk of the subsequent tradition. Hotman, whom I mentioned earlier, attacked Tribonian by name, but Tribonian was by then long dead.¹⁵⁹ Similarly, Gilbert Abbott à Beckett's splendid satirical treatise, *The Comic Blackstone*, originally published in 1846, obviously lampooned a titanic but safely dead figure of common law. The author was a barrister of Gray's Inn, and the treatise commences with the immortal sentiment: "Every gentleman ought to know a little of law, says Coke, and perhaps, say we, the less the better."¹⁶⁰

Later again, and to evidence the continuity of this displacement of criticism into the allegorical, there is Professor Rodell's curious occasional essay, published on the eve of World War II, and given the Biblical and somewhat apocalyptic title *Woe Unto You, Lawyers!*.¹⁶¹ The book includes, to give you a flavor, a wonderful allegory of the Lady who cannot decide, by legal reason, whether or not to get out of bed in the morning.¹⁶² Here is how the argument progresses. In the tradition of reversals, the Lady is the Law, and her Law has two primary principles: "The first [is] that anything that seems presently desirable is right. The second [is] that anything which seems presently desirable is likely, in the long run, to be wrong."¹⁶³ The first decision of the day is whether to get up or lie in bed a little longer. Applying abstract principles and counter-principles, rules and subrules, she eventually follows precedent — she got up yesterday — and arises. Then she needs a judicial determination on whether to brush her teeth, have a hot or cold shower, which dress to wear, and so on, until late in the afternoon, spoiled for choice, like Buridan's ass, she stays at home rather than going out. That is all you can hope for, Rodell opines, from transcendental legal abstraction, that worryingly brooding omnipresence in the sky or more accurately the cloud hovering over the bed.¹⁶⁴

The tradition of satirizing the named dead, the innominate, or the personified living is what Lord Birkett, in his introduction to an

159. HOTMAN, *supra* note 108, at 85. Hotman came up with a term for Tribonianisms, the classical legal equivalent of "snafu." He termed textual errors *emblemata Triboniani*, or "emblems of Tribonian," and thereby gave him a second life in philological notoriety. See the immensely erudite Valerie Hayaert, *La Critique Humaniste du Corpus Iuris Civilis et les Emblemata Triboniani* (2003) (unpublished manuscript, on file with the author).

160. GILBERT ABBOTT A'BECKETT, *THE COMIC BLACKSTONE* 1 (London, Bradbury, Agrew & Co. 1887) (1846).

161. FRED RODELL, *Woe Unto You, Lawyers!* (1939). Rodell's title refers to Luke 11: 52.

162. *Id.* at 135-54.

163. *Id.* at 138.

164. *Id.* at 139-42.

anonymous collection of cautionary legal tales, calls the “kindly” tradition.¹⁶⁵ Such was a very English genre of humorous critique that was in the Augustan era dubbed polite satire and associated most closely with Addison and Steele, the twin pillars of the *Spectator*.¹⁶⁶ It disturbs the dead and instructs the living but keeps all known or extant faces out of the mirror of satire.¹⁶⁷ Even where the dead are not simply satirized but actively and even maliciously denigrated, their absence from the interchange renders the use of their name generic and close to a personification. Justice Oliver Wendell Holmes was long dead when the Minneapolis lawyer Ben Palmer published “Hobbes, Holmes and Hitler,” and it was left to the energy of Professor Fred Rodell to respond and correct said Ben who so bent the truth.¹⁶⁸ When my colleague Richard Weisberg, to my dismay, wrote that postmodernism, and specifically deconstruction, were versions of Vichy — which is to say, fascist — hermeneutics, he specifically gave no names.¹⁶⁹ Since then he has come clean, but it took a little pressure.¹⁷⁰ Polemic has to become quite passionate and not a little heated before the personal names start to fly and reputations are placed on the line.¹⁷¹

The tradition of satirizing figures such as the lawyer is age-old; whether kindly or not, it plays safe by choosing the mask over the face, *ad personam* over *ad hominem*, the dead over the living. The

165. Lord Birkett, P.C., *Foreword* to FORENSIC FABLES BY O, at v (complete ed. 1961).

166. The bulk of the issues of the SPECTATOR and all of Addison’s essays are reprinted in Volumes 5-12 of THE BRITISH ESSAYISTS (Alexander Chalmers ed., 1855-56). For discussion and some synoptic examples, see FRANK MUIR, THE OXFORD BOOK OF HUMOUROUS PROSE 30-38 (1990).

167. See Joseph Addison, *False and True Humour*, SPECTATOR No. 35 (Apr. 10, 1711), reprinted in SELECTIONS FROM THE TATLER AND THE SPECTATOR OF STEELE AND ADDISON 334 (Angus Ross ed., 1982).

168. Fred Rodell, *Justice Holmes and His Hecklers*, 60 YALE L.J. 620, 621 (1951) (discussing Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569 (1945)).

169. RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 127-75 (1992). *But cf.* Peter Goodrich, Essay, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2041 (2001). For a more general version of the view contrary to Weisberg’s, namely the assertion that it is precisely grand narratives, totalizing truth claims, clangorous assertions of certitude, that led to the terrors and carnage of the twentieth century, see JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Univ. of Minn. 1984) (1979). The twenty-first century hasn’t made that great a start on this front either.

170. Richard Weisberg, *Nietzsche’s Hermeneutics: Good and Bad Interpreters of Texts* in NIETZSCHE AND LEGAL THEORY (Peter Goodrich and Mariana Valverde eds., forthcoming Routledge 2005).

171. Shaftesbury illustrates as much with an anecdote:

A Clown once took a fancy to hear the *Latin* Disputes of Doctors at a University. He was ask’d what pleasure he could take in viewing such Combatants, when he could never know so much as which of the Partys had the better. “For that matter,” reply’d the Clown, “I a’n’t such a Fool neither, but I can see who’s the first that puts t’other into a Passion.”

SHAFTESBURY, *supra* note 74, at 107-08.

wheedler, the wrangler, the bloated abstraction, the dead hand, the *non placet* — the one who “prefers not to”¹⁷² — the cross-dressing judge, and so too the more modern satirical legal figure of the liar, all impugn without attaching to any particular being or actual act.¹⁷³ It takes a twentieth-century transition, an interruption of the tradition, a radical break from figure to face, from epitaph to name, for the ad hominem argument to emerge as a satirical form. I start with this form because it is the most disruptive, the most threatening to the established norm, the most diverse and indicative, as well as the most recent. It has the merit of being more political than kindly. I also have a personal interest in it, having devoted some considerable energy to ad hominem and indeed *ad nominem* criticisms of legal colleagues, some of whom, it must be admitted, are not now that well-disposed towards me. And what can I do about that? “Quam turpiter enim agunt homines, tam turpiter hec reprehendit” as it was put by William of Conches in his immortal Glosses on Juvenal and I cannot be improving on that.¹⁷⁴

B. *Ad Hominem Arguments*

The ad hominem argument, just to give a brief history, was traditionally viewed as a logical fallacy. In Aristotle’s diction, it was an elench or sophistical argument.¹⁷⁵ A personal attack does not substantiate an objective argument. Nor does it disprove it. Outside of an alternate universe, mathematical formulae are likely to stand irrespective of the character of the mathematician proposing, for example, the table of multiplication.¹⁷⁶ Few legal arguments, however,

172. The *non placets* are to be found in the wonderful F.M. CORNFORD, *MICROCOSMOGRAPHIA ACADEMICA* (1908). Those that “prefer not to” derive from Bartleby, the protagonist of the eponymous novel by Herman Melville, *Bartelby, The Scrivener*, in *MELVILLE’S SHORT NOVELS* 3, 10 (Dan McCall ed., W.W. Norton & Co. 2002) (1853).

173. My favorite examples are JOHN DAY, *LAW TRICKES* (London, More 1608); RICHARD HEAD, *PROTEUS REDIVIVUS OR THE ART OF WHEEDLING OR INSINUATION* (1675), available at <http://eebo.chadwyck.com>; THOMAS POWELL, *THE ATTORNEYS ACADEMY* (Theatrum Orbis Terrarum, Ltd. 1974) (1623). For more on that tradition, see C.W. BROOKS, *PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH* (1986), though it should be noted that the authors have generally not been lawyers but rather, like Shakespeare, people adversely affected by litigation.

174. GUILLAUME DE CONCHES, *GLOSÆ IN JUVENALEM* (Bradford Wilson ed., 1980) [circa 1135] at 90, and translates: “as foully as men act, so foully this reproves.”

175. On sophistical elenches, see Aristotle, *The Sophistical Elenchi*, in 2 *THE ORGANON OR LOGICAL TREATISES OF ARISTOTLE* 540-610 (Octavius Freire Owen ed., 1853).

176. Steve Martin, *Hissy Fit*, in *PURE DRIVEL* 80, 80 (1998).

Let us assume there is a place in the universe that is so remote, so driven by inconceivable forces, where space and time are so warped and turned back upon themselves, that two plus two no longer equals four. If a mathematician were suddenly transported and dropped into this unthinkable place, it is very likely that he would throw a hissy fit.

are as definitive or immobile as the times table. “For everything else there’s Mastercard,” as the advertisement goes;¹⁷⁷ more properly, all political and legal arguments are merely probable and as such are highly dependent upon assumptions and susceptible to aspersions of character.¹⁷⁸ Thus Leff in his law dictionary concludes his definition of the *argumentum ad hominem* by remarking, “[i]f, of course, the ‘ad hominem’ attack is an allegation of stupidity and ignorance, then it is at least relevant to the matter at hand.”¹⁷⁹ Although traditionally closer to rhetorical ethos than to forensic proof, the ad hominem argument does assign a probative responsibility, it calls to account, and so interrupts the essentially reclusive if not outrightly evasive mode of academic argument. The ad hominem is persuasive, often highly entertaining, engaging, and telling. More than that, the ad hominem argument is central to the satirical genre and so it is precisely with this modern rupture in the legal form that an account of more contemporary satirical legal studies should begin.

The satirical ad hominem argument comes in two related forms. It either defends or overthrows. In classical terms, it belongs to the Horatian or the Menippean mode, and sometimes to both.¹⁸⁰ Depending upon the institutional hierarchy that divides satirical author and satirized subject, the form either puts down — abases and maybe deflates — or it overturns and interrupts the extant hierarchy. The defensive mode is not distinct from what I will term the genre of “revolt,” but there is a difference of position and project that is sometimes significant to the tone and the actualization of the satirical persuasion. Granted the plurality of competing hierarchies, it is also the case that superiority in one domain, say intellectual precedence, may accompany a lesser status within another hierarchy, say that of judicial appointment compared to academic standing. Thus Judge Posner, to take an example that will occupy a few of the following pages, may be judicially superior but also be of lower scholarly ranking than his satirized subjects.¹⁸¹ Satirical superiority in one context may

Id.

177. MasterCard International Inc., *Registered Trademarks*, available at <http://global.mastercard.com/hr/general/copyright.html> (last visited Oct. 11, 2004).

178. ARISTOTLE, *THE “ART” OF RHETORIC*, 163-343 (John Henry Freese trans., Harvard Univ. Press 1994) (1925); POSNER, *INTELLECTUALS*, *supra* note 8, at 49.

179. Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2056 (1985) [hereinafter Leff, *Dictionary*].

180. See *supra* notes 78-80 and accompanying text (contrasting the two forms of satire).

181. Posner’s tables of scholarly citations try, of course, to prove that the latter is not the case and that he is cited more often than Dworkin, Nussbaum, or any other of his scholarly peers. See POSNER, *INTELLECTUALS*, *supra* note 8, at 194-220 tbls. 5.1-.10. I have commented upon this at greater length in Peter Goodrich, *The Perspective Law of the Ego: Public Intellectuals and the Economy of Diffuse Returns*, 66 MOD. L. REV. 294 (2003) (reviewing POSNER, *INTELLECTUALS*, *supra* note 8). It has to be observed, of course, that Posner was

indeed compensate for a sense of inferiority in another domain. An analytic legal philosopher may feel that his cult is the acme of wisdom and virtue, and dismiss with heavy satire scholars of differing persuasions or philosophical inclination.¹⁸² At the same time, the need to augment the school to which one belongs by diminishing those who are outside it must cast some doubt on the security, the ranking and the position, of the satirist. The compulsion to rank is arguably a rank obsession.

The Horatian satirical abasement tends to express the superiority, real or imagined, of the writer over the subject of the put down. The prime contemporary exponent of the deflationary ad hominem satire is undoubtedly Judge Richard Posner. Dick to friend and enemy alike, Posner has spearheaded satirical polemics and caustic dismissals of opponents. His treatise on the topic is humorously and symptomatically subtitled *A Study in Decline* with the reader being left to wonder if the decline is in his capacity to study or in the subject studied, internal or external to the work. In either event, he is very witty. The argument of the book, however, tends to suggest that it is not Posner, but rather the public intellectuals, who are losing their grasp, if they ever had one, on real trends in the real world. If that interpretation is correct, then Posner's derisive account of the follies of law professors offering real-time commentaries on unfolding events is classic Horatian invective and boundary maintenance. It is censorious, moralizing, and seemingly serious, scientific in intent if not in any obvious methodological sense.

The deflationary mode is predominantly concerned with aggrandizing a preferred position, and on occasion, a preferred person or self. Posner deflates his opponents primarily by drawing up a list of the top 100 public intellectuals judged by scholarly citations.¹⁸³ That is

responsible for the rankings and thus may have some insecurity as to their validity. He evinces as much in his book. POSNER, *INTELLECTUALS*, *supra* note 8, at 169.

182. The most egregious example, at least in print, is a law professor at Cambridge University in England, Matthew H. Kramer, who in a series of book reviews has made some remarkable and unsubstantiated dismissals of divergent scholarly traditions. These are excoriated, detailed and discussed in Peter Goodrich & Linda Mills, *The Law of White Spaces: Race, Culture, and Legal Education*, 51 J. LEGAL EDUC. 15, 22-26 (2001). Brian Leiter provides some further brief examples. See 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, 187 n.4 (1993) [hereinafter Leiter, *Objectivity*]; Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, RUTGERS L.J. (forthcoming 2005). To display again my extraordinary even-handedness, my legendary equity, contrast the above with Peter Rush, *Semiotics in the Trial of Jurisprudence*, 53 MOD. L. REV. 121 (1990) (reviewing BERNARD S. JACKSON, *LAW, FACT, AND NARRATIVE* (1988)), or W.T. Murphy, *The Style of the Critic*, 4 LAW & CRITIQUE 125 (1993) (reviewing MATTHEW H. KRAMER, *LEGAL THEORY, POLITICAL THEORY, AND DECONSTRUCTION* (1990)), or Ronald Dworkin, *Thirty Years On*, 115 HARVARD L. REV. 1655 (reviewing JULES COLEMAN, *THIS PRACTICE OF PRINCIPLE* (2001)) [hereinafter Dworkin, *Thirty Years On*].

183. POSNER, *INTELLECTUALS*, *supra* note 8, at 212-14 tbl. 5.4.

his proof. His name appears as number ten on the list. He is in the top ten public intellectuals ever, or actually between 1995 and 2000. Even so, that is pretty good. He is the highest-ranked legal intellectual. He beats all of his contemporaries and peers, including Cass Sunstein (12), Ronald Dworkin (way lower, ranked at a risible 29), Richard Epstein (41), William Eskridge (46), Akhil Amar (50), Martha Nussbaum (59), Stanley Fish (67), all the way down to Duncan Kennedy, the token critical legal scholar on the list (ranked at 88 but nonetheless above Sir Isaiah Berlin (90), E.P. Thomson (93), and Alfred Kinsey, of Kinsey Report fame, at 100).¹⁸⁴

The argument attached to the list is often humorous, almost always barbed, and in essence uses the putative science of citation and media mention to show that public intellectual lawyers, among others, trade in credence goods of little or no value. Akhil Amar couldn't have been more wrong on *Bush v. Gore*.¹⁸⁵ Bruce Ackerman and Ronald Dworkin, ideological opponents of Posner's, are derided for the inaccuracy and irrelevance of an open letter entitled *The Election Crisis* that they signed and published in the *New York Times*.¹⁸⁶ They are law professors, but they got the law seriously wrong. Dworkin's essay on the Clinton impeachment and his review of Posner's *An Affair of State* are lampooned for liberal-left partisanship, for relentless "spin," for inaccuracy, and for exaggeration.¹⁸⁷ Alan Dershowitz, a professor of Criminal Law, also took issue with the impeachment, and so too incurred the elective wrath of Posner the expost pundit of juridical correctness. Posner goes to great trouble to show how Dershowitz, who has, after all, been annoyingly successful in terms of media presence, has failed to understand a most rudimentary aspect of criminal procedure.¹⁸⁸ A flaw in the man is a flaw in his argument.

Judge Posner is pretty clear on the significance of irony and satire in public intellectual work. He sees his own intellectual role quite directly as that of unseating the "false prophets,"¹⁸⁹ and as reinventing and promulgating a satirical critique of shabby scholarship and lame predictions. In the service of these admirable aims, Posner explicitly argues the legitimacy of ad hominem polemic: "When the debater's arguments must be taken, to a degree anyway, on faith, it is as rational to consider his general trustworthiness as it is to consider the general trustworthiness of any seller of credence

184. *Id.*

185. POSNER, INTELLECTUALS, *supra* note 8, at 39.

186. *Id.* at 113-19.

187. *Id.* at 372-74.

188. *Id.* at 125-26.

189. POSNER, INTELLECTUALS, *supra* note 8, at 130.

goods.”¹⁹⁰ Law, and particularly the conundrums of constitutional law that so animate Dick Posner, belong within the domain of what Aristotle terms probable argument,¹⁹¹ and hence they rely upon character, persuasion, and the myriad other attributes of uncertain human interventions.¹⁹² That is a beginning. It allows for a realistic recognition of the posturing and posing that accompanies the politics of law, but that is not all.

The deflationary genre of ad hominem satirical legal studies has to be understood in the context of its ethical and political goals. In structural terms, the deflationary satirical critique has a dual function. It elevates the group, cult, school, or self that is utilizing the genre, and in aggrandizing the position spoken from, it shores up the hierarchy that recognizes the primacy of that sect. Part of that initial function gains additional expression in a secondary or incidental feature of reasserting the lexical order of an established hierarchy. The satirist seeks to maintain a boundary between the sect that satirizes and the subjects satirized. In Posner’s case, satire is a tool for evidencing the priority of law and economics over other schools and subdisciplines within the legal academy. It is a story that is well-enough known and certainly does not need me to repeat it.

It is possible that Posner could be interpreted as overthrowing a hierarchy or upending an order of precedence. He certainly devotes his satirical energies to deflating the grander kind of legal public intellectual. Dworkin, Dershowitz, Nussbaum, Ackerman, Amar, and their ilk are no small figures. They are publicly recognized and a fairly constant presence in the demisphere of elite press and media outlets. Deflating them is not a coward’s game, but as a judge, with the real-world weight of bench and bar behind him, and as a leader of the most successful of legal intellectual movements of the last half of the 20th century, Posner is more plausibly viewed as reasserting and maintaining the primacy of his school over its competitors. A significant part of his message, after all, is that his competitors are in the end merely academics, merely theorists, whereas his work spans several worlds, including one supposes, and unusually, the real world, at least from time to time. He makes the point most strongly in a recent essay that attacks the law and literature movement whose history parallels that of law and economics.¹⁹³ It is almost an axiom of satire that we are most critical of what is closest to us. It is the most

190. *Id.* at 49-50.

191. ARISTOTLE, *supra* note 178, at 27 ll. 14-15.

192. *Id.* at 169, *discussed in* GOODRICH, READING, *supra* note 102, at 179-81.

193. Richard A. Posner, *What Has Literary Theory to Offer Law?*, 53 STAN. L. REV. 195 (2000) [hereinafter Posner, *Literary Theory*] (reviewing GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* (2000)).

threatening or intrusive, and so, having dealt with his intellectual peer group, those closest to his heels, Posner turns next to an impudent subdisciplinary threat that should have been long quieted by his earlier works. In his scathing review of a recent treatise by Binder and Weisberg titled *Literary Criticisms of Law*,¹⁹⁴ Posner seeks, as vigorously and clearly as in any of his writings, to impose the lexical priority of law and economics to law and literature.¹⁹⁵

Here is a taste of his finely attuned satirical deflation of Binder and Weisberg. The authors are two professors of law who endeavor, in 500 pages of “tightly packed print dense with learning,”¹⁹⁶ to answer the question: “What has literary theory to offer law?” Posner, however, pre-empts them and answers the question in the first sentences of a review that might well have ended after the first six lines and with the answer that he proffers: “Nothing.” But because the satire is always in the detail, he goes on to indicate that “this book represents decadent” legal scholarship.¹⁹⁷ It is a book that does not discuss law at all but rather indulges in “theory-mongering” and invites the question “so what?”¹⁹⁸ The answer to that question is that theory-mongering is going to make legal studies a laughing stock, just like it reduced English departments to the butt of satirical humor. Semiotics — semi-idiotics in newspaper parlance — might take hold in the bastions of law. That is not all. Professor Dworkin once used an analogy between law and literature so surely it can be included in the fold of the “ostentatiously marginal” and profoundly irrelevant.¹⁹⁹ Dworkin, like Binder and Weisberg, or indeed Dershowitz, has nothing to offer the serious study of law. He too is demeaned, scorned, cast aside, or winnowed away as chaff to the seed of law and economics.

The least that could be said is that law and literature is put in its place. The order of subdisciplines is maintained, and Posner the satirist has performed a dual feat of considerable dexterity. He has located himself in a position of considerable importance and prominence, as a judge and as a judicial arbiter of the degrees of seriousness — of merit — that is to be accorded to the genres of legal studies. He has located himself not only within the academy but also in the public-intellectual sphere of cultural events. He has placed his interest and discipline at

194. It should be pointed out that in the work reviewed, Binder and Weisberg do refer to Posner's contribution to law and literature as “a polemic,” BINDER & WEISBERG, *supra* note 193, at 20, and then later briefly, but only very briefly, discuss his work and opine that it drains literature of interest. *Id.* at 287.

195. See generally RICHARD A. POSNER, LAW AND LITERATURE (1998).

196. Posner, *Literary Theory*, *supra* note 193, at 195.

197. *Id.*

198. *Id.* at 197-98.

199. See *id.* at 207.

the pinnacle of the order of legal disciplines. In dismissing others, he has signaled the assurance and asserted the priority of himself. That is key to the deflationary mode. It puts the race in Horace, as it were, and the ratio in the Horatian.

One can also note that this genre is extreme. It gives little or no credit to the other position. It objects, excludes, and ridicules. That is the style. The deflationary satirical genre is not a modality of moderation. It has to be read with humor, lightly, and it is logically necessary that the ad hominem quality of the criticisms be matched by analysis of the person proposing the satire.

If Posner's wish is in the end to protect his way of life and bolster the position that best maintains it, other instances of the genre can be shown to perform comparable functions. Professor Nussbaum, in a 1999 piece in *The New Republic*, provides a brilliant example of the deflationary mode in the most personal of keys. The article is on the use of philosophy in changing law to feminist ends. The subject satirized is a philosopher by training, a feminist, and Professor of Rhetoric at Berkeley. The title of the piece is quite direct — "The Professor of Parody" — and if that was not clear enough, the subtitle reads: "The hip defeatism of Judith Butler."²⁰⁰

Observing a structure of argument that is very close to Posner's, Nussbaum deflates Butler by eviscerating the parodic professor's "fancy words on paper."²⁰¹ Butler's prolixity is contrasted with concrete projects and actual social change.²⁰² Where Posner thought that the theory-mongering duo of Binder and Weisberg were instances of decadence, Nussbaum sees Butler as plain occult. Butler is a practitioner of a politics that is merely "verbal and symbolic."²⁰³ If that seems a surprising reprimand from a philosopher, Nussbaum immediately specifies that Butler is merely an academic and writes with "lofty obscurity and disdainful abstraction."²⁰⁴ That is not good, we must suppose, and soon enough we learn this style is the bearer of the stigmata of "quietism and retreat."²⁰⁵ The hipster Butler is smart but ponderous. She is casually allusive and aloof. She uses hierarchy and mystification as her tools. She wants to be a star and wraps herself in "an aura of importance,"²⁰⁶ but there is nothing there. Just verbosity, name-dropping, sophistry, and rhetoric. And the ultimate put-down or

200. Martha C. Nussbaum, *The Professor of Parody*, NEW REPUBLIC, Feb. 22, 1999, at 37.

201. *Id.*

202. *Id.* at 37, 42.

203. *Id.* at 38.

204. *Id.* at 42.

205. *Id.* at 48.

206. *Id.* at 39.

meiosis: “One afternoon, fatigued by Butler on a long plane trip, I turned to a draft of a student’s dissertation on Hume’s views of personal identity. I quickly felt my spirits reviving. Doesn’t she write clearly, I thought with pleasure, and a tiny bit of pride.”²⁰⁷ Butler doesn’t even make it to the level of student prose.

Poor, errant Butler. She wouldn’t even get into the graduate program at University of Chicago. That is because, in case you weren’t clear on this, she cannot write and those who cannot write cannot think. Butler is a pessimist, a nihilist, a masochist in love with her own bondage.²⁰⁸ She is just another self-indulgent academic lamenting the insufficiency of signs from the safety of the campus. It remains to add that Butler has written on law, but is not located in a law school. But should you doubt that Nussbaum’s boundary demarcations apply within the law school then just compare her criticisms of Butler’s hapless prose to Professor Brian Leiter’s defense of analytic legal philosophy²⁰⁹ or David Saunders on the virtue of the rule of law.²¹⁰ Leiter singles out two suitably successful legal theorists, Pierre Schlag and James Boyle.²¹¹ Schlag and Boyle are not analytically inclined but rather propose continental philosophy as their inspiration. And in the humorous law journal the *Green Bag*, they are ponderously informed by Leiter that their writings would not even qualify them for a graduate program in philosophy.²¹² To this Leiter adds a list of those select few, his network, his *philoï*, or “friends,” who do good philo-sophical work in law. It is charmingly nominate, disarmingly direct, entirely assertive, and distinctly bizarre. Well worth a chuckle in fact. David Saunders makes a similar if more reasoned point at a political level, and accuses Schlag and his ilk of basking in the freedom that the rule of law has garnered for academics, while denouncing the hand that freed them.²¹³

By way of recapitulation, the contemporary Horatian genre of *ad hominem* or indeed *ad nominem* deflationary satire serves to maintain boundaries, to deflate and protect an extant order of academic merit.

207. Nussbaum, *supra* note 200, at 40.

208. *Id.* at 44.

209. Leiter, *Objectivity*, *supra* note 182, and Leiter, *The End*, *supra* note 182.

210. Saunders argues that the critics of law are the inheritors of religion, offering the appalling spectacle “of critical intellectuals offering up their own moral interior to endless publication.” Which sounds pretty horrible. SAUNDERS, *supra* note 45, at 10.

211. Leiter, *The Law School Observer*, 5 GREEN BAG 2D 101, 101 (2001). On Schlag and Jack Balkin, see Leiter, *Objectivity*, *supra* note 182, at 187 n.4.

212. Brian Leiter, *The Law School Observer*, 5 GREEN BAG 2D 101, 101 (2001) [hereinafter Leiter, *Law School*].

213. SAUNDERS, *supra* note 45, at 31, *discussed in* Goodrich, *Law-Induced Anxiety: Legists, Anti-Lawyers, and the Boredom of Legality*, 9 SOC. & LEGAL STUD. 143, 155 (2000) [hereinafter Goodrich, *Anxiety*].

Posner protects law and economics, Nussbaum is busy saving liberal-feminist political philosophy, and Leiter is idiosyncratically keen to shore up an analytic legal philosophy that remains — local squabbles aside — the dominant school in contemporary jurisprudence. For Saunders, too, the purpose of the satirical mode is to show that fact and norm, how things are (or more precisely how he says they are) is how they ought to be. Nostalgia greets “retrolution,” the return of the archaic in a modernized form.²¹⁴ “Is” and “ought” are pretty much one and the same in the realm of philosophical self-analysis. Anyone who thinks differently is a free target of censorship, humorous or otherwise. And along the way, the rhetorical structure of deflationary self-aggrandizement exhibits a number of constants. Order is opposed to chaos, clarity to obscurity, the real world to the merely academic. In whatever manner it is couched, the conclusions are also somewhat uniform: the subject punctured is worthless. For all their smartness, their cleverness, their long words, they are in the end what Placentinus termed pseudologists, the sadly agnostic proponents of impracticalities far removed from the tellurian concerns of any extant *lex terrae*, or “mundane law.”

C. *Revolting Positions*

If the establishment and status quo motivate the deflationary genre, its radical counterpart, the genre of inversion, is propelled by the desire for change, and the will to overturn the order of things. The irreverent mode of radical satire may well deflate along the way, but its primary objective is not directly abasement or aggrandizement but rather an overturning of the extant power and a reversal of positions in the hierarchy. There is no question, of course, that there has always been a satirical strain in the critique of the power of lawyers and the endlessness of law. That is a tradition that flourished in the twentieth century as well as any other. The nominate or ad hominem expression of satirical critique in the overturning of the works of contemporary greats, however, was something of a novelty. Such, of course, is particularly the case if the Titan — say, Ronald (Hercules) Dworkin — is still alive. It, at the very least, involves a risk and is most usually undertaken in the Menippean mode of confrontation.

To get a little philosophical, the genre of overturning involves what Alain Badiou terms a “logical revolt,”²¹⁵ meaning that it expresses

214. For the origin and use of the term “retrolution,” see ANDREW BLAKE, *THE IRRESISTIBLE RISE OF HARRY POTTER 16-17* (2002). I develop the theme in relation to law in Peter Goodrich, *Retrolution*, 3 *RECHTSGESCHICHTE* 23 (2003).

215. ALAIN BADIOU, *INFINITE THOUGHT: TRUTH AND THE RETURN OF PHILOSOPHY* 39 (2003) [hereinafter BADIOU, *INFINITE THOUGHT*] (adopted from Rimbaud’s “les révoltes logiques”).

insubordination, a decline in reverence, a certain disrespect for the order and sanctity of law.²¹⁶ Such modes of disaffection, even when highly personal, have tended to remain innominate. When Lani Guinier opens her discussion of “Models and Mentors” in *Becoming Gentleman* with an anecdote of how her professor of Corporations at Yale Law School opened every class by announcing “Good morning, gentlemen,”²¹⁷ she politely or otherwise does not name him. That is kind of old-school leftism on her part, or at least deference to an accountability that is greater than any singular individual. Of course we could discover the name, but the point is that she chose to gloss it over with anonymity. The move towards accountability for text and name, begins though somewhat slowly with the textualist turn and its reversal of the traditional priority of speech over writing, and of author over text.

We can take a classic instance of overturning from a jointly authored study, *Postmodern Jurisprudence*.²¹⁸ The essay was originally published in a symposium volume on critical legal studies in Britain in 1987, back in the early days of the Critical Legal Conference.²¹⁹ There was a spirit if not, in general, a practice of a situationist kind.²²⁰ There is, in other words, an element of play and of performance in the overturning of the superior in the hierarchy. This essay is a deconstructive reading of a work on the philosophy of natural law authored by one John Finnis, a law professor at the University of Oxford.²²¹ We learn in the preface to *Natural Law and Natural Rights* that Finnis was actually in Africa, at Chancellor College of the University of Malawi, “in an environment at once congenial and conducive to contemplation of the problems of justice, law, authority, and rights,”²²² while doing most of the writing. His permanent position, however, as the back cover announces, was as a Fellow and (fully Latinate) ‘Praelector’ in Jurisprudence at the time of the book being put to bed with the Clarendon Press, the more prestigious branch of Oxford University Press. Just to fill the story in a little, Finnis was also the external examiner of the doctoral dissertation of the first-named

216. See DOMINIQUE LECOURT, *THE MEOCRACY: FRENCH PHILOSOPHY SINCE THE MID-1970S*, at 128-29 (2001).

217. LANI GUINIER ET AL., *BECOMING GENTLEMEN* 85 (1997).

218. DOUZINAS ET AL., *supra* note 27, at 74.

219. Costas Douzinas & Ronnie Warrington, *On the Deconstruction of Jurisprudence: Fin(n)is Philosophiae*, 14 J.L. & SOC'Y 33 (1987).

220. Nathaniel Berman, *Against the Wrong and the Dead: A Genealogy of 'Left/mpm'*, 22 CARDOZO L. REV. 1005 (2001). More broadly, see PLANT, *supra* note 93. To this, one should add DEBORD, *supra* note 93, for a brilliant sense of the situationist philosophy of life.

221. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

222. *Id.* at vii.

author of the deconstruction of his work that is published under the personal and punning title, *Fin(n)is Philosophiae*.²²³

The deconstruction of Finnis's text has a trinitarian thematic. At the level of legal-philosophical polemic, it seeks to evidence that although Finnis argues for the vitality of natural law, his text, style, and tone is encased in positivism, a position quite antithetical to the natural law conflation of law and morals. At the level of method, the critics argue that while Finnis claims the self-evidence of natural law values, their truth or independence of the persuasions of their proponent, his text is in fact rhetorically laden and suffused with floral metaphors. Finally, at the level of satire, the logic of revolt leads to the inexorable conclusion that Finnis's text mirrors his name, is about the end of life and obsessed throughout with death: "Human flourishing becomes a black joke, an ultimate deferral. Our Fin(nis) becomes our aim."²²⁴ It is no more than a death-bound subjectivity.

The satirical dimension of the overturning lies in the linking of the name Fin(n)is to the project (or end) of the paper. Finnis argues for self-evident values by using a string of metaphors. He claims to be for life, but promotes death. He promises truth, but he proffers lies. To that, we are offered the additional satirical image of the philosopher as seducer and pedagogue. Finnis's self-perception, his textual position, is that of taking the side of the philosopher against the skeptic, and of seduction against destruction.²²⁵ Here is how he is portrayed:

Seduction: the gentle(man) pedagogue, the father of light. The text knows truth and can seduce the willing (though as yet ignorant) reader into the garden of knowledge, provided foolish objections are abandoned. . . . And there before the unknowing reader stands the father figure or pedagogue: "The clear-headed and wise man." By promising fragments of "his" wisdom the writer/text can woo the reader/sceptic towards the tree of knowledge.²²⁶

So who wouldn't follow a Praelector into the garden of knowledge as published by the Clarendon Press? It is a tough question, high status stakes, but the postmodern authors are concerned to undermine this seemingly omniscient textual progress by pointing out how coercive it is: "Ultimately, the text does to objectors what Caesar's henchman do to Marullus and Flavius; they 'are put to silence.'"²²⁷ It is that extreme textual violence — the expulsion of the critic, the deriding of the literary at the same moment as it is being manipulated for the ends of truth and so as to administer the *finis*, or "execution" of the skeptic in

223. See Douzinas & Warrington, *supra* note 219.

224. DOUZINAS ET AL., *supra* note 27, at 88.

225. FINNIS, *supra* note 221, at 84.

226. DOUZINAS ET AL., *supra* note 27, at 84 (citation omitted).

227. *Id.* at 84-85.

the text — that brings on the satirical critique. It is an exemplary piece. It is both poetry and payback, a fine dramatization of a prosaic philosophical essay, an engaging satirical foray into an elite jurisprudential preserve. Mainly it is irreverent, not quite as in awe of the philosopher and his garden as should be the case according to the norms of the prior doctrinal tradition.

D. Tones

The radicalism and novelty of the analysis of Finnis's ends lies in the play upon the name and specifically the use of the persona as a personification of the import of the text. It is irreverent, ludic yet political. It is Menippean, both satirical and personal, and therein lies the rub. The Praelector is demoted, from *prae* to *post*, as it were, although the pun upon the etymology of the name and the nomination of the positive and positivistic argument is not a necessary feature of ad hominem criticisms. In a piece that is critical of the critics, to take an antithetically inclined example, Matthew Kramer takes Alan Norrie to task for incoherence and error in his analysis of the subjectivist approach to recklessness in criminal law.²²⁸ In footnote one, *praenotitia* one might say, Kramer praises Norrie for avoiding the “silliness and bluster” of British critical legal scholarship but then decries the fact that such a “refreshingly mature tone . . . has not resulted in a cogent analysis.”²²⁹ Footnote two refers incidentally to “a fine recent discussion”²³⁰ of the generality of concepts authored by N. Simmonds, Kramer's doctoral supervisor at Cambridge University — and note, if you please, how important these insignia of status are to the maintenance of boundaries or, alternatively, to the deflation of egos strung out on a fog of long words. That is the very stuff of satire, nothing more and nothing less. With the range of personal reference now clarified or at least footnoted, the *philein* cited, Kramer embarks upon proving sloppiness, stumbles in reasoning, and failures of understanding. He finally opines that “[f]ar from having achieved a breakthrough, [Norrie] is in fact trumpeting to the world what everyone knows already.”²³¹ Norrie, the false trumpeter, the pied piper of normative error, has “misused” reason and drawn insupportable conclusions on four occasions in his article: “In each case, a largely

228. Matthew H. Kramer, *False Conclusions from True Premises: Warnings to Legal Theorists*, 14 OXFORD J. LEGAL STUD. 111 (1994) (discussing Alan Norrie, *Subjectivism, Objectivism and the Limits of Criminal Recklessness*, 12 OXFORD J. LEGAL STUD. 45 (1992)).

229. *Id.* at 111 n.1.

230. *Id.* at 111 n.2. Nigel Simmonds is acknowledged as Kramer's supervisor in MATHEW H. KRAMER, *LEGAL THEORY, POLITICAL THEORY, AND DECONSTRUCTION: AGAINST RHADAMANTHUS*, at xii (1991).

231. Kramer, *supra* note 228, at 119.

credible thesis has become inflated into a hyperbolic caricature of itself,” to which we can add that there have been “unsupportable leap[s],” “invalid” arguments, and “distortive[.]” affinities to “much more solid pathways of reasoning.”²³²

Kramer’s lavish criticisms arguably perform precisely the “silliness and bluster” he denounces in those he criticizes. Or perhaps it is simply zest for his project, his beloved self-presence of reason. In either event, the tone of these warnings is somewhat apocryphal and whether intended or not as satire, there is a strong dimension of ad hominem dismissal and derisive overstatement placed ironically alongside the path of pure reason. Norrie was and is an established figure within the critical legal tradition. He is daringly overturned by a younger competitor who is far from afraid to name names and cite satirically inflated errors. Interestingly, Kramer was himself a lapsing leftist. His thesis had been on deconstruction and legal theory, and some of the charge in his “Warnings” comes with the scent of burning rubber and a vehemence that befits the exorcism of a former self.

It is my suspicion, to take one final example, that the relation of teacher to student, and now of editor to subject, plays a significant role in the highly amusing ad hominem attack upon the work of Gunther Teubner to be found in a debate on globalization and contracts. Professor David Campbell was asked to comment on an article on relational contracting published by Professor Teubner, an internationally acclaimed social theorist and philosopher of law. Leaving aside the various arguments as to relational contracts, the ad hominem satirical theme begins with the first sentence of the article in which Campbell ironically expresses the fear of being unfashionable, behind the trends, and unhip.²³³ The very name of Teubner invokes in him what might be termed the anxiety of the lack of influence. He is worried that he is not up-to-date, that he will seem inadequately knowledgeable in the latest social theory, but then he immediately points out “the utter worthlessness” of most if not all of sociological theory. He goes on to legitimate his view somewhat ironically by stating that “sociological literature confirms my opinion.”²³⁴ Having proffered this meaty paradox, Campbell moves then to a humorous put down of Teubner’s trendiness:

Reading [Teubner’s paper] gave rise to a feeling akin to one I remember from my days as a putatively upwardly mobile teenager going to a party in flares long after wealthier adolescents had discarded theirs. This feeling was made worse when, not content with being, as it were, at the

232. *Id.* at 120.

233. David Campbell, *The Limits of Concept Formation in Legal Science*, 9 SOC. & LEGAL STUD. 439, 439 (2000).

234. *Id.*

party himself, which was bad enough, Teubner introduced another guest, Jacques Derrida, who is even more hip, being, as Teubner tells us, “arguably the greatest expert in the reconstruction of private law,” which was something I didn’t know.²³⁵

After this ironically flattering dismissal, Campbell in essence goes on to make the point that when it comes to the law of contract, and specifically the relational theory of contracts, Teubner has no idea what he is talking about, and quite possibly has not read the work of Ian Macneil, the author that he is criticizing.²³⁶

The latter satirical overturning is subtle and worthy of citation. Campbell has lavished Teubner with praise. He has set him up as an academic star, as a master of theory, and as a leader of academic fashions. Teubner is definitely someone in the know. Campbell then slips in a seemingly incidental anecdote. Discussing his decision, all those years ago, to abandon social theory and study law, he has the following to say: “In studying law as it were internally, in the sense of being able to reason as a lawyer, and especially to handle the sources of the law, one immediately gains the advantage so often lost in general social theory, of tending to know what one is talking about.”²³⁷ That certainly makes the point, though if any doubt remained, Campbell adds that insofar as Teubner relies upon Derrida as his guide to private law, this “amounts to a joke.”²³⁸

Campbell plays David to Teubner’s Goliath. He overturns the greater figure and in doing so he expressly decides “to give voice to my disdain”²³⁹ That is powerful, novel, and unusually direct. It is satire with a very specific purpose, namely, that of unmasking false theory and the unnecessary multiplication of terminologies. Campbell goes after Teubner as a pseudologist. It is in the finest of traditions and is as much an expression of realism as it is of any ulterior satirical intent. To borrow a phrase that Posner hates, Campbell is determined “to speak truth to power”: Teubner may be a fancy theorist; he may be hip and well connected; he may even have been, for a while, a colleague of Campbell’s coauthor Hugh Collins of the passingly trendy London School of Economics,²⁴⁰ but Campbell will neither flatter nor spare him from the excoriation of the error of his ways.

235. *Id.* at 440.

236. Campbell, *supra* note 233, at 441, 446 n.4 (opining on whether Teubner had read anything more than IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* (1980)).

237. *Id.* at 441.

238. *Id.* at 445.

239. *Id.* at 446.

240. See, e.g., David Campbell & Hugh Collins, *Discovering the Implicit Dimensions of Contracts*, in *IMPLICIT DIMENSIONS OF CONTRACT 25* (David Campbell, Hugh Collins & John Wightman, eds., 2003).

E. Conclusions

Before leaving the genre of ad hominem satire, in both its deflationary and rebellious, Horatian and Menippean genres, a few interim conclusions are in order. The two genres share much, including the dangerous novelty of their unflinching willingness to name and account. The ad hominem gets personal. It names names, and it calls individuals to responsibility for what they actually have said and done. In getting personal, it is interesting that the genre also expresses and exposes the person. There is an element of nominal embedding in that it is impossible to expose the person of the subject satirized without also exposing oneself. The beauty of the satirical enterprise is precisely its honesty in the exposure of motive and character, the latter simply being motive extended over time. In each of our examples, in other words, there have been clear indicators of personal investment.

In *Fin(n)is Philosophiae*, the authors overturn what is obviously a personally invested hierarchy. Finnis was the doctoral examiner of the first named author. Finnis was at Oxford University, and a Praelector to boot, whereas the authors of the satire were at a left-leaning Polytechnic law school or third-tier institution in London. They used literature to topple law and, in doing so, enacted the revenge of the marginal. Professor Kramer praises his doctoral supervisor and acts as the aggressively satirical guard of a legal reason that he had only recently come to espouse. David Campbell's satire is also located in the days of his PhD and in the protection of his mentor. He tells the story of abandoning a first love, social theory, for the rigors and possibilities of law. When Leiter, to use an example that will crop up again, rails against Dworkin, it is his teachers of philosophy at Michigan — and fine school it is too — that are in part and curiously defended.²⁴¹ Why Dworkin attacks Coleman nobody knows. He doesn't even disagree with him: "his account is stunningly like my own."²⁴² So what is the beef? I can't be having a theory of everyone but it could be to do with Coleman being his successor at Yale Law School, it could be a question of respect, a matter of competition and status, or maybe just a matter of mood. A case of green eggs and ham. But at the same time, the Empire must be defended, and the local hierarchy maintained. For Posner and for Nussbaum, it is also a question of boundary maintenance. They (and Dworkin) are older, however, and so it is their school, law and economics and liberal feminism, respectively, that gains the protection of satire.

In each of the instances cited, the manifestation of motive and the display of personal investment, however momentary, signal a desire to

241. Leiter, *The End*, *supra* note 182, at 21 and 13.

242. Dworkin, *Thirty Years On*, *supra* note 182, at 1656.

engage, to move, and to persuade. When a text gets satirical it is a sure sign that the subject is one that matters to the author. They inveigh and convey. They are taking sides, they are seeking to seduce so as to confirm a boundary or to topple a superior. And their engagement is in many senses compelling. That is at one level because names and reputations are the very stuff of the academic public sphere or symbolic economy of legal scholarship.²⁴³ It is worth fighting over one's name not only because the ego requires it but also because the currency and value of the professional persona in large measure depends upon it. Most everything else can be ignored or reduced to abstractions. Only satire calls directly to the name, incites the face of the author, and makes a demand for responsibility. It is hard to resist getting down and dirty when your name is impugned, and few ever do. When the dogs bark, the game begins.

III. TRAGEDY AND FARCE

A. *Theater and Norm*

Satire is by its nature intrusive, affective, and radical. It dramatizes the realm of ideas and pushes serious proposals in a humorous and often-biting form. It shocks the reader to pay attention. It does so in the generic mode of allegory or by telling a story in an extreme manner. Satire stages the realm of ideas, and it is that dimension of enactment, the performance of the normative that deserves closer scrutiny. A display of the structural workings of social relations, of the laws that determine how laws get applied, is never likely to be too popular with those for whom the mystery and obscurity of law, the classical *arcanum iuris*, is a professional axiom, or *modus vivendi*. The law is the law, and there, quite honestly, all explanations run out. It is pure, the jurists say, and we all know that to engage with purity is to stain or adulterate or defile. Law is neither to be translated nor practiced by the *imperite*, those unlearned in legal science, Sir Edward Coke opined in the early years of the modern tradition.²⁴⁴ When it is a question of passing over from the professional to the popular, the normative to the factual, from juristic abstraction to life, then leave the law alone, respect the *vocabula artis*, or "foreign tongue," of its esoteric custody, implausibly termed the language of geometers, or a sign system unadulterated by use and of an algebraic precision. Such is the principal refrain of the professionals all the way from Alciatus to

243. PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* (1993).

244. EDWARD COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: A COMMENTARY UPON LITTLETON* (London, J. & W.T. Clarke 1832) (1608) [hereinafter COKE, *INSTITUTES*].

Zuluetta. If “all the world’s a stage,” then law is in the main a player behind closed curtains.

That law has always existed in a complex and competitive relation to theater has only recently begun to gain the attention it deserves.²⁴⁵ The satirical text is always dramatic, and historically this means that it has threatened law. For instance, a fragment in the *Digest* of Roman law records that any citizen who “appeared on the stage to act or recite” was subject to the penalty of *infamia*, meaning “loss of citizenship” or civil death.²⁴⁶ They would become what common law termed an outlaw. Historical reconstruction suggests that this ban upon theater, a censorship that lasted for nearly two centuries, was a reflection of the proximity of theater to law rather than of their separation. Roman authorities originally directed the ban against Athenian tragedy, a foreign influence representing the drama of social life in a manner that Roman authorities believed best restricted to the forums of law.²⁴⁷ Law did not need competition from a foreign comparison, it sought a singularity or status of truth that secular variations upon its providential themes might impede — *res judicata pro veritate accipitur*, meaning that legal judgment emanates from the space of truth.²⁴⁸

Law sought to be the singular drama of justice and truth, the sole *theatrum veritatis et iustitiae*, as it was later coined.²⁴⁹ In its classical form law was indeed an expressly theatrical enterprise, and lawyers were known as actors (*actores*). To this day, lawyers in some jurisdictions still wear costume, usually gowns and sometimes also wigs, occasionally breeches, and buckled shoes.²⁵⁰ Legal actors served to promote specific types of social performance, to enact, but also to dramatize and display the discourse of the fates and the unraveling of

245. RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000); Cornelia Vismann, *Tele-Tribunals: Anatomy of a Medium*, 10 GREY ROOM 5 (2003). Both address the impact of new media upon law. See FLORENCE DUPONT, L'ORATEUR SANS VISAGE: ESSAI SUR L'ACTEUR ROMAIN ET SON MASQUE 66-73 (2000) (on the relationship of law to theater and the competition between the two); LAW IN LITERATURE: LEGAL THEMES IN DRAMA (Elizabeth Villiers Gemmette ed., 1995) (for a selection of texts); Florence Dupont, *La scène juridique*, 26 COMMUNICATIONS 62 (1977).

246. 1 THE DIGEST OF THE JUSTINIAN, *supra* note 105, at 82, *discussed in* Peter Goodrich, *Law*, in THE ENCYCLOPEDIA OF RHETORIC 417 (Thomas O. Sloane ed., 2001).

247. Dupont, *supra* note 245, at 64-66.

248. COKE, INSTITUTES, *supra* note 244, at 103a.

249. “Theater of justice and truth.” The phrase dates back to a treatise of the same name by Jean-Baptiste de Luca (1614-83) Discussion of the source and the maxim can be found in PIERRE LEGENDRE, L'INESTIMABLE OBJET DE LA TRANSMISSION 42 (1985).

250. See, for example, COURT DRESS (1992), a Consultation Paper issued on behalf of the Lord Chancellor and the Lord Chief Justice, replete with some fine or at least surprising images of various levels of the English legal profession in their full regalia, from wigs and gowns, to breeches, and buckled shoes.

life in terms of good and evil as experienced during the slow march of the body towards death.²⁵¹ These were dramatic themes, and they did not take competing representations particularly well. When in the era of the reception the cleric Andreas Capellanus authored a dramatic text, a dialogue with a number of set-piece trials in courts of love, the Church banned the work fairly rapidly as being heretical.²⁵² The alternative trials of women's courts were too close to law to be left unscathed or uncensored. Law could not be put in such a popular form nor exposed to the common eye in a language free of argot in a space not yet solemnized. The theater of the Basoche was the work of disaffected law clerks and satirized law and lawyers by holding mock trials, or *causes grasses*, as well as staging theatrical farces. It was also banned and revived at various points in the fifteenth century.²⁵³

To the above elliptically critical satires, and for the sake of completeness, we can add more literary satires of legal method and form. There is the later tradition of judgments handed down by courts of love. It includes a statute establishing a High Court of Love in Paris in 1400,²⁵⁴ and encompasses *The Judgments of Love*, fifty-one decisions reported by the jurist and poet Martial d'Auvergne in 1462.²⁵⁵ That tradition later produced a number of further reports of legislation from the Parliament of Love²⁵⁶ and other decisions of literary courts of love.²⁵⁷ England too had a vigorous tradition of juristic dramatics, and the Elizabethan era witnessed numerous farces performed as part of

251. COURTING DEATH: THE LAW OF MORTALITY (Desmond Manderson ed., 1999) (usefully collecting a disparate array of perspectives upon law and death).

252. See ALEXANDER J. DENOMY, *THE HERESY OF COURTLY LOVE* (1947); see also Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633, 641-44 (1996) (reviewing the sources).

253. 1 E. PARFAICT & C. PARFAICT, *HISTOIRE DU THÉÂTRE FRANÇOIS* (Burt Franklin 1968) (1745). The authors explain:

En 1422 les Clercs de la Bazoche ayant représenté leurs Jeux, malgré la deffense qui leur en avoit été faite, le Parlement, pour punir cette désobéissance, rendit un Arrêt le 14 août de la même année, qui condamna les Acteurs à quelques jours de prison, au pain & à l'eau. Le 12 may 1473 le Parlement en prononca un autre dont le motif étoit tout contraire; puisqu'il ordonnoit à la Bazoche l'exécution de ses Jeux, & à ne se départir de cet usage, que par une permission expresse de la Court.

Cited in LYSYK, *supra* note 62 as being at Vol. I, 101; see also HARVEY, *supra* note 62.

254. LA COUR AMOUREUSE DITE DE CHARLES VI, *supra* note 139.

255. D'Auvergne, *supra* note 138.

256. HONORÉ D'URFÉ, *LES EPISTRES MORALES ET AMOUREUSES* (photo. reprint, Slatkine Reprints 1973) (1619). For discussion of these sources and their legal implications, see Peter Goodrich, *Amatory Jurisprudence and the Querelle des Lois*, 76 CHI.-KENT L. REV. 751 (2000).

257. As, for example, MADELEINE DE SCUDERY, *CLELIE* (London, Mosley & Dring 1656). The final expressions of the tradition are to be found not in the work of the *precieuses*, but in FRANÇOIS CALLIERES, *NOUVELLES AMOUREUSES, ET GALANTES* (1678); JEAN DONNEAU DE VISE, *LES NOUVELLES GALANTES, COMIQUES ET TRAGIQUES* (photo. reprint, Slatkine Reprints 1979) (1680).

the revels at the Inns of Court in London. Lawyers authored many such melodramas by inverting or mocking established legal forms while offering little by way of sustained satirical critique of law.²⁵⁸ While legal authors of farces tended to devote their dramatic skills to burlesque forms of amusement, some more polemical plays addressed topics of contemporary political concern such as the status of women²⁵⁹ and the corruption of judges.²⁶⁰

B. *Genres of Dialogue*

The other face of the ban on theater is the use of dialogue and dramatization in legal treatises and works of doctrine. Quite aside from the theater of trial itself, scholarly and doctrinal writers have also resorted to dialogic forms. Authors frequently defended the law by using the dramatic mode of dialogues between, for example, a Doctor of Civil Law and a common lawyer, an attorney and a student, or a defender of the law and a critic. In rhetorical terms, it had long been axiomatic that what could be made present through dialogue, through the *enargeia*, or “visually orientated figures of conversation,” was much the most likely to persuade. Same thing today, with Presidential debates, on-the-air interviews, talking heads, and the like. Historically, when the stakes were high, then dialogue was the most likely mode in which to seduce the citizenry back to the path of true law. The most famous examples in the common law tradition are probably Sir John Fortescue’s *In Praise of the Laws of England* and Saint German’s *Doctor and Student*.²⁶¹ These two works were what would now be termed dramatic dialogues in which a pedagogue instructed a student in the virtues, the uniqueness, and antiquity of common law. The drama and the instruction were necessary because of the threats that Roman law and foreign intervention posed to the nascent native tradition. On the other side of the divide, Thomas Starkey’s dialogue on the common laws actively proposed codification and Roman law as

258. For an excellent recent account of the revels, see RAFFIELD, *supra* note 158.

259. Famously, the anonymous SWETNAM THE WOMAN-HATER ARRAIGNED BY WOMEN (Meighen 1620) puts the author of a misogynist tract on trial before a “Ladie Chiefe Justice.” He is sentenced to be muzzled for his barking humor. See also ESTHER SOWERNAM, ESTER HATH HANG’D HAMAN: OR AN ANSWERE TO A LEWED PAMPHLET (photo reprint, n.d.) (1617).

260. RICHARD BRATHWAIT, MERCURIUS BRITANNICUS (n.p., circa 1640) puts the judges in Hamden’s Case on trial before the court of literature. See Peter Goodrich, *Amici Curiae: Friendship and Other Juristic Performances in Renaissance England*, in LORNA HUTSON & ERICA SHEEN, *LITERATURE, POLITICS AND LAW IN THE RENAISSANCE ENGLAND* 23, 31-34 (2004).

261. SIR JOHN FORTESCUE, *In Praise of the Laws of England*, reprinted in *ON THE LAWS AND GOVERNANCE OF ENGLAND* 1 (Shelley Lockwood ed., Cambridge Univ. Press 1997) (1468); CHRISTOPHER SAINT GERMAN, *DOCTOR AND STUDENT* (T.F.T. Plucknett & J.L. Barton eds., Seldon Society 1974) (1528).

remedies for the abuses and irrationality of the *leges terrae*, or “local and common laws.”²⁶² In a formally similar vein, Sir Thomas More’s *Utopia* was comparably in the genre of dialogue and was famously quite dismissive of law and lawyers.²⁶³

In each of the instances cited so cursorily, the threat or the urgency of the need for change impelled recourse to the dramatic form. It is a genre that still gains expression, great and small, in twentieth-century legal thought. There are some instances of minor drama, as for example Glanville Williams’s comic dialogue, ‘*A Lawyer’s Alice*’, which deals with the issue of meaning in the hands of lawyers.²⁶⁴ There were critical dramas, correspondences,²⁶⁵ the dialogue of the trashers,²⁶⁶ the theatre of the threshold,²⁶⁷ and the extended conversational narrative of the *Rodrigo Chronicles* and their sequelae.²⁶⁸ The origin of the form, however, was principally apologetic; the defense of the faith is the more normal role for lawyers. Most pertinent to our theme, therefore, is the grandiose drama enacted apologetically by Ronald Dworkin in *Law’s Empire*.²⁶⁹ It may not take the form of an explicit dialogue but it is clearly both fictive and theatrical in tone.

Whatever other functions it may seek to fulfill, *Law’s Empire* is both radically dramatic and extremely apologetic. Its project is the delineation and defense of a law that only philosophy can properly uncover and propound: “The courts are the capitals of law’s empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law’s ambitions for itself, the purer form of law within and beyond the law we have.”²⁷⁰ That is

262. THOMAS STARKEY, A DIALOGUE BETWEEN REGINALD POLE AND THOMAS LUPSET (Kathleen M. Burton ed., Chatto & Windus 1948) (1535), *discussed in* GOODRICH, LANGUAGES, *supra* note 103, at 71-82.

263. SIR THOMAS MORE, *UTOPIA* (Clarence H. Miller trans., Yale Univ. Press 2001) (1516).

264. Williams, *supra* note 54.

265. *E.g.*, Peter Rush, *Killing Me Softly with His Words: Hunting the Law Student*, 1 LAW & CRITIQUE 21 (1990); Christopher Stanley, *Killing Them Softly with My Words?: Responding to Peter Rush*, 1 LAW & CRITIQUE 39 (1990).

266. *E.g.*, Freeman & Schlegel, *supra* note 47; Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

267. ALLAN C. HUTCHINSON, *DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT* 1-22 (1988).

268. RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* (1996); RICHARD DELGADO, *JUSTICE AT WAR: CIVIL LIBERTIES AND CIVIL RIGHTS DURING TIMES OF CRISIS* (2003); RICHARD DELGADO, *THE RODRIGO CHRONICLE: CONVERSATIONS ABOUT AMERICA AND RACE* (1995); Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo’s Bittersweet Epiphany*, 101 MICH. L. REV. 1201 (2003).

269. DWORKIN, *EMPIRE*, *supra* note 48.

270. DWORKIN, *EMPIRE*, *supra* note 48, at 407.

the project, and it is neither devoid of ambition nor hesitant in its claims to truth. Dworkin, from the Hebrew *dvorin*, or “prophet,”²⁷¹ takes on the role of the seer and spells out the true form of law. It is not an intentionally satirical work but it does perform most of the moves of the morality play, the defensive genre of satirical drama. In defending the integrity of law, Dworkin calls into being the personification of the philosopher judge, a figuration of the social, the mask of legal truth, a Titan, a God, of whom Dworkin simply says: “Call him Hercules.”²⁷²

C. *The Figure of Hercules*

Much has been made of the figure of Hercules and of the hyperbole and other indiscretions of *Law's Empire*, the work in which Hercules gains his most extended depiction.²⁷³ The metaphor of precedent as the equivalent of a chain novel was satirized early and very effectively by Stanley Fish who uses the first verse of a Crosby, Stills, and Nash song to explain how Dworkin “Don't Know Much About History,” and in fact, he points out a little further on, Dworkin, like the protagonist in the song, actually doesn't know much of anything at all.²⁷⁴ Which is a pretty serious and perhaps risky put down of a man who clearly likes to fantasize that he is at the very least on nodding terms with Hercules. In any event, the criticism only encouraged him, maybe he liked the attention, but whatever the reason, whether his heart was open or his shoes too big, it didn't stop Dworkin or even give him pause. Put it like this, the theatrical grandeur of *Law's Empire* and the allegorical extremity of its heroically Herculean protagonist seemed, indeed, to encourage further criticism. Certainly, whether intended or not — and who doesn't feel flattered by a little controversy? — the later work elicited some radically satirical responses in experimental forms that matched the thespian quality of the book, the tome, the scriptural *imperium* itself.

Law's Empire is nothing if not a boundary-defining work. If you are calling on Hercules, then it is a fair guess that the author views the stakes as high and that foundational questions of the legitimacy of law are on display. Such scholarly drama may well seem melodramatic to the world of legal practice but the point is that there is evident charge. It is manifest most obviously in the liberal use of rhetorical figures that

271. See Goodrich, *Omen in Nomen*, *supra* note 56, at 1330 (entry for Dworkin).

272. DWORKIN, *EMPIRE*, *supra* note 48, at 239.

273. See, e.g., DOUZINAS ET AL., *supra* note 27, at 55-73.

274. Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, 9 CRITICAL INQUIRY 201 (1982) reprinted in *THE POLITICS OF INTERPRETATION* (W.J.T. Mitchell ed., 1983).

are usually less prominent in texts that engage with or speak as law. There is a dimension of experiment and novelty of form in Dworkin's literary reconstructions. It inspired a classic of satirical legal studies, a review by Allan Hutchinson of the spurious movie of the book, entitled *Indiana Dworkin and Law's Empire*.²⁷⁵

Hutchinson's review is a satire in the manner of Swift. It endeavors to make a series of serious and politically engaged points by means of an absurdist and highly entertaining review. Borrowing perhaps from Sony Pictures, though this would be an instance of reverse causality, he starts by citing invented prerelease praise for the movie. Socrates is quoted as giving a resoundingly favorable preview: "A new look at ancient problems of judicial romance, philosophical mystery, and academic adventure."²⁷⁶ John Locke calls it "[a]n enchanting performance — it will leave you breathless."²⁷⁷ The plain grandiosity of the book is the first butt of satire but it is Dworkin, the Indiana Jones or comic-book hero of *Law's Empire*, and his sidekick, the "superhuman" Hercules, who are most remorselessly lampooned. After outlining the narrative sequence of the movie and detailing certain of the set pieces, Hutchinson moves to present a series of spoof reviews purportedly culled from a cross-section of journals — *The Journal of Film Optics* to the *Lizard*.²⁷⁸

The reviews get down and personal. The first one cites no less a figure or figures than Shakespeare to make the claim that Dworkin is a "lunatic" and the author of "airy nothing."²⁷⁹ Written as a review in *The Journal of Film Optics*, probably coda for the actual (and appropriately titled) journal *Camera Obscura*, the rest of the review plays with the figure of vision and the gender of the gaze. Dworkin is "uniocular" in his approach and *Law's Empire* "is a land of the blind in which the one-eyed lawyer has become king."²⁸⁰ The Empire is also a male bastion in which women are invisible, defective, or just occasionally, by accident or indecision, "as important as men."²⁸¹ In other reviews, we are treated to excoriations of Dworkin's megalomania, his imperialistic designs, his sexism, and his racism. In a review purporting to be from the *Lizard*, a short-lived journal to which

275. Hutchinson, *Indiana Dworkin*, *supra* note 35.

276. *Id.* at 637.

277. *Id.*

278. *Id.* at 650-60.

279. *Id.* at 650 (quoting WILLIAM SHAKESPEARE, *A MIDSUMMER NIGHT'S DREAM*, act V, sc. I, ll. 7-8, 14-18).

280. *See id.* at 652.

281. *Id.*

I will return,²⁸² Dworkin is shown to be self-serving, incoherent, lazy, and a coward.²⁸³

Let us conclude with the simple overall observation that the satire seeks to expose and politicize a contradiction. For all his talk of justice and principle, Dworkin perpetrates numerous injustices of textual interpretation. That is not a hopeful sign in a work that seeks to become “the . . . silent prologue to any decision at law.”²⁸⁴ And when it comes to the social reality of inequality, Dworkin is simply fraudulent in his refusal to even acknowledge let alone address the plight of “many women, gays, blacks, or Indians,” to which Hutchinson adds those who live below the poverty line, who have no medical insurance, who are unemployed, homeless, incarcerated, put to death, and much, much more.²⁸⁵ They are simply not part of the Herculean world or domain of philosophical presupposition that *Law's Empire* promotes. The heroic dream that the figure of Hercules serves to promulgate is unconsciously elitist — racist, sexist, and overwhelming committed to the status quo. That at least is what the *Lizard* critic thought. The view from the radical center.

D. *Literary Criticisms of the Law*

Hutchinson derides and overturns in a manifestly unusual literary form, at least unusual for the law review. His satirical send-up borrows from earlier traditions of dialogue but offers an immediacy and experimentalism that was and remains highly unusual. The textualist turn had pitched literature against law, interpretation against truth. All of the earlier ad hominem satires cited were engaged not simply with demarcating the boundary between law and literature but also with questions of style, and related issues of the avoidance or espousal of supposedly nonrhetorical rhetorical figures. *Law's Empire* adopted a literary motif and was challenged satirically by critics who believed that his annexation of interpretation to a singular philosophical position was self-contradictory and disingenuous. For all such praise of the literary, it has been rare to see experimentation in the drama or style of critical works. It is too hard to get such essays published in law reviews claimed an author in the short-lived satirical broadsheet the *Lizard*.²⁸⁶ To which the answer, presumably, should be: Why try?

Hutchinson published, and republished, as is the modern way, several dialogues, a play, an invented judicial opinion, and a fairy tale

282. See *infra* Part III.F.

283. Hutchinson, *Indiana Dworkin*, *supra* note 35, at 657-58.

284. *Id.* at 640 (quoting DWORKIN, *EMPIRE*, *supra* note 48, at 90).

285. *Id.* at 660.

286. *Notes from the Margin*, *LIZARD*, Jan. 6, 1984, at 6.

in a collection bearing a title from a Van Morrison song and with a quip at the end of the preface: "Finally, for the convenience of reviewers, if I am so blessed, I have left in a number of glaring inconsistencies and blatant contradictions."²⁸⁷ The book was published in Canada, and in truth it did not get that many reviewers, but those who did take it on all found cause to mention and disapprove of that final prefatory remark.²⁸⁸ God forbid, as it were, that a satirical work should make fun of itself. There was an element of self-criticism in Hutchinson's humor, a dimension of satirical self-mockery, that can also be detected in the other signal works of stylistically experimental legal satire. A few further examples follow.

There is, for instance, the drama that unfolds in the final chapter of *Postmodern Jurisprudence*. It starts with a trio of lecturers — law professors in U.S. parlance — stealing a postgraduate student's essay and seeking to publish it as their own. A case of plagiarism. One which raises some issues of copyright law, authorship, and authenticity. To complicate matters and make things more interesting, the article is rejected by the journal to which it is sent. It forms the object of analysis of a nontriumphal concluding essay in which the collision of literature and law is finely staged. It ends with the narrator deciding to abandon law for a career in literature. He will devote himself to criticism, or that at least is the plan, because there are already too many "failed English profs pretending to be writers. Now the lawyers are getting into it."²⁸⁹

So the lawyer protagonist of the law review style of article moves into the domain of the literary, and as is common among neophyte novelists, starts out with criticism. A book arrives in the mail. No choice but to review it:

I have heard that some unscrupulous reviewers read only one chapter of the book, chosen randomly, and then write reviews twice the length of the original. Not me, sir. Not Peter. I have morals, a system. I read the first and the last sentence. Entry and exit. You see the actor get in and you know the rest. Spend a couple of hours looking at the audience. More interesting. The play's the thing; the more they get into the play, the more you can see of them. And then when the actor leaves, you know who's got style. Entry for interest. Exit for style.²⁹⁰

287. HUTCHINSON, *supra* note 267, at ix.

288. *E.g.*, Alison Young, *Dwelling on the Threshold*, 9 INT'L J. SEMIOTICS L. 315, 318 (1990) (finding the ludic and parodic features of the essays both annoying and insightful).

289. DOUZINAS ET AL., *supra* note 27, at 270.

290. *Id.* at 271. I cannot help myself from mentioning the allusion to "Not me, Sir. Not Peter." *Id.* It is a subtextual issue but the eruption of names and other attributions in academic texts is not without significance, and that significance is all too easily lost or rapidly deflated by the passage of time and changes in geography or circumstance. So the Peter in question is as likely as not the Peter on the back cover of the book who extols its virtues of radicalism and erudition. (The blurb reads, in part: "*Postmodern Jurisprudence* is a work of

It is a scene that certainly challenges most conceptions of legal theory as a prosaic discipline descriptive, if not of doctrine, at least of rules. It is a scene that led one reviewer to observe quizzically that what he had in his hand appeared to be a book.²⁹¹ But he clearly wasn't too sure.

The review of *Law's Empire* the movie, and the novelistic ending in the form of a disputed essay and an imaginary copyright case are both fairly explicitly satirical interruptions of the usual form of legal discourse. They function to expose the rhetoric or implicit drama of the text being studied, they offer an alternative dramatization and the opportunity of thinking about the law differently, of changing the political currency, of calling attention to how it is that law gets thought. To be effective, such alternative dramatization needs to compete effectively with the dominant prosaic form.²⁹² That is a difficult task according to Bierce's *Unabridged Devil's Dictionary*, because it requires a sense of humor, and that is rare among lawyers (or at least reserved for the off hours).²⁹³ Its appeal, such as it may be, granted that it is published in law reviews and monographs, in book-length articles or, more precisely, reprints of door-stopping stature, is

remarkable scholarship and of a Renaissance erudition of disciplines." — Peter Goodrich, *Faculty of Law, Birkbeck College, University of London*.) Had he really, and would it be moral for him simply to scan the first and last lines? The first line, Chapter 1: "There is an old and beautiful story; once, in some long distant past, people lived in a state of peace, plenty (or at least sufficiency), truth and beauty." *Id.* at 3. And last line, same theme, circle rounded, too long to quote in full. After referencing the fact that "[a]ny reference to real persons in this novel essay is purely fictitious and coincidental," it goes on to say that "[t]he authors have exercised every possible care to avoid misrepresenting the views of any characters . . ." and intend no libel. *Id.* at 271. The beautiful fiction of the beginning has become an inoffensive coincidence by the end. A strange deflation or loss of nerve perhaps. A defense of the unreal by unreal means, and a quiet subversion notwithstanding. And it also gives a clear frame, a good marker of the status of the work, its interdisciplinary ambition, its elision of antique and ultramodern, law and fiction. Indeed, why read more than one would remember? Why not admit to a system? The attribution is pretty good, in other words, but the method is wrong. Not first and last lines, "enter" and "exeunt," but rather a reading of *law's petrae*, and so of the textual structure. Here that means scanning of names, looking for Peter or for the foundations, the tables of law, the law of text in the texts of law. Not what was said, but where it was said and to whom it was sent. Not the fiction but the actors and their play.

291. B.S. JACKSON, *The Wisdom of the Inessential*, 12 LEGAL STUD. 103 (1992) (reviewing DOUZINAS ET AL., *supra* note 27) (starting, "[t]he object in my hand has all the appearances of a book, indeed an academic book from a reputable publisher . . ." and ending the opening paragraph, "[i]n short, the book is a glorious contradiction in terms").

292. THOMAS MATHIESON, *THE POLITICS OF ABOLITION* 1-19 (1974) (describing competing contradictions and the politics of the unfinished).

293. AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* 308-09 (Albert & Charles Boni, Inc. 1925) (1911). Bierce defines "satire":

An obsolete kind of literary composition in which the vices and follies of the author's enemies were expounded with imperfect tenderness. In this country satire never had more than a sickly and uncertain existence, for the soul of it is wit, wherein we are dolefully deficient, the humor that we mistake for it, like all humor, being tolerant and sympathetic.

Id.

clearly to an audience based in the academy, students and professors, pedagogues and future lawyers, thinkers skilled in the art of photocopying more often than reading, in citing more copiously than they or their assistants have had time to peruse.

E. *Critical Legal Studies and Beyond*

Dramatizations seek to lure law out of its lair. Their aim is to show law for what it is, either the theological ground of the social or the yoke under which the oppressed are forced to march. In either case, the use of the theatrical or novelistic itself threatens the boundaries of legal scholarly discourse; it is precisely such use of the literary and theatrical form that invokes the defensive satire or simple dismissal, the Horatian scorn, of scholars such as Posner, Nussbaum, Finnis, and Dworkin.²⁹⁴ One might say that satire incites satire in response. When the comfortable are afflicted, they tend to inflict discomfort upon those whose temerity has led them to challenge the order of things, the truth, the proper forms. A defense ensues in which invective is met in kind. The legitimacy of the legitimate has to be verified and reaffirmed even if in affirming the purity of the orthodoxy it is tarnished a little with the venom of the *ad nominem* and the impurities of passion. The hegemonies have to be watered. It is necessary sometimes, as Paul was wont for a while to do, to kick against the pricks. If it is a question of legitimacy then, to coin a phrase, you need to start talking. No accident it turns out that one of the inaugural critical legal texts, the accessible one,²⁹⁵ was a dialogue, replete with kitchen scenes, the roll call of friends, a kettle boiling, and an element of self-parody in the use of arcane terms and other legalisms.²⁹⁶ Wittingly or unwittingly, the dialogic form opens up legal education, and to a lesser extent legal doctrine, to the lives of those who profess it and to the experience of those who study it. Dialogue brings the law professor together with the law that is professed, it forces the somnolent archive into the diurnal space of the living. All of which means that the rhetorical effect of dialogue is broadly to attach legal doctrine and rules to persons and places, and that in and of itself renders the beginnings of an accounting.

The dialogue that founds critical legal studies as a movement with a satirical wing borrows more or less selfconsciously from Situationist

294. See *supra* Part II.B-C, III.C.

295. Gabel & Kennedy, *supra* note 266, at 9-11. The inaccessible one was Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). See Carrington, *supra* note 47; Peter Goodrich, *Law and Modernity*, 49 MOD. L. REV. 545 (1986) (rebuttal).

296. Gabel & Kennedy, *supra* note 266, at 5-9.

and related theories of staging the politics of law.²⁹⁷ The use of the theatrical, of scene and dialogue, is a mode of attempting to compete with the drama of law, indeed to seize its dramatic qualities for radical or, in other eras, apologetic goals. One of the earliest critical legal texts in Europe, Bankowski and Mungham's *Images of Law*, expressly presents the theory of satirical re-enactment of law's dramas. Under the rubric of "seizing the law," it argues precisely for a method of parodic dramatization. Bankowski and Mungham's emblematic parody is taken from the Chicago Conspiracy Trial and, specifically, Abbie Hoffman's attempt to turn the trial into a farce — a genre of popular legal theater that dates back, as we have seen, to the Basoche. Most famously, in cross-examination as to whether he had pissed in the direction of the Pentagon, the dialogue went as follows.

Q.: Did you ever on a prior occasion state that a sense of integration possesses you and comes from pissing on the Pentagon?

A.: I said from combining political attitudes with biological necessity, there is a sense of integration, yes. I think I said it that way, not the way you said it, but —

Q.: You had a good time at the Pentagon, didn't you, Mr. Hoffman?

A.: Yes I did, I am having a good time now. Could I — I feel that biological necessity now. Could I be excused for a slight recess?²⁹⁸

Far-fetched or irresponsible though the theory of the trial as farce may seem to contemporary eyes,²⁹⁹ the project of challenging the established theatre of law and exposing its dramatic qualities, its routine staging or choreography of the scene of reason, is a key dimension of satirical critique.

There is an element of stylistic hedonism to dialogue and theater. It draws an audience in, it helps a reader to identify with the theme being expounded, and it takes the law outside of its normal doctrinal or more properly dogmatic modes of exposition. There is nothing directly satirical about Patricia Williams's *The Alchemy of Race and Rights*, to use the example of the most stylistically controversial of critical texts, but its use of biography, conversation, and anecdote capture a world

297. See Berman, *supra* note 220, at 1005-07.

298. ZENON BANKOWSKI & GEOFF MUNGHAM, *IMAGES OF LAW* 132 (1976) (quoting *THE TALES OF HOFFMAN* 149-50 (Mark L. Levine et al. eds., 1971)). For further discussion of the trial as farce, see Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 381 (1983), discussing the use of ridicule and resistance in the courtroom. See also Peter Goodrich, *Zenotypes: On the Modes of Reproduction of Critical Lawyers*, 11 SOC. & LEGAL STUD. 425 (2002) [hereinafter Goodrich, *Zenotypes*].

299. For a contemporary accounting of the trauma of trials, see SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY* (2002).

that dogma strives to exclude.³⁰⁰ It was in that sense a gentle satire, and all the more powerful for the apparently mundane and descriptive quality of its narratives. Richard Delgado's dialogues, *The Rodrigo Chronicles*, filled the law reviews in the 1980s and 1990s and perform a similar formal function: they force the question of style and aesthetic to consciousness and open up the generally repressed question of the subjective experiences of law students as well as of professors and lawyers. The radicalism of the latter function lies also in the historically marginal quality of the experiences being expressed. To read an essay on property that bases its argument upon biographical reminiscences of forebears who were slaves was shocking to the genteel and secluded preconceptions of the legal academy.³⁰¹ There hadn't been many such authors in the academy before. And in the same vein, Rodrigo was able to capture a diversity and spirit that had previously not simply been excluded but unimagined in law school.³⁰² Rodrigo was a student who, both literally and metaphorically, called Socratically on his professor. He would walk in to his office, phone him at home, quiz him on the literature, challenge his politics, run into him at the market, and more. The professor, like Prufrock, was allowed to have 'doubts', frustrations, a biography indeed, and even prior and subsisting failings. He even had tone — skin tone. Radical stuff for a profession that has historically claimed that the lawyer, the *jurisperitus*, or "the legally wise," carry all the texts of the law in their breast.³⁰³

Every new relationship, according to the psychoanalyst Julia Kristeva, leads to a new correspondence.³⁰⁴ Every new correspondence is expressive of a new love. So too with style. A new style expresses novel experiences, a different relationship to both world and law. That is particularly true of the dramatic style, which was historically foreign

300. WILLIAMS, ALCHEMY, *supra* note 51; PATRICIA WILLIAMS, THE ROOSTER'S EGG (1995) [hereinafter WILLIAMS, ROOSTER'S EGG]; PATRICIA WILLIAMS, SEEING A COLOR BLIND FUTURE (2000) [hereinafter WILLIAMS, COLOR BLIND]. On reactions to Williams's work, see Goodrich & Mills, *supra* note 182, at 26-29.

301. WILLIAMS, ALCHEMY, *supra* note 51, at 17-19, 216.

302. See especially, Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992).

303. The Latin maxim is *omnia scrinia habet in pectore sua* — "the emperor carries all of the texts in his breast." Or heart, or head. Doesn't really matter. The point is that what is inscribed internally, the word of the heart (*verbum cordis* as it used to be called) can hardly be challenged. Or at least to admit you were wrong would be to question your innards which is not a trait in which lawyers excel. On all of which, see Peter Goodrich, *A Theory of the Nomogram*, in LAW, TEXT, TERROR (Lior Barshack et al. eds., forthcoming 2005).

304. JULIA KRISTEVA, TALES OF LOVE 15 (Leon S. Roudiez trans., 1987), *discussed in* Peter Goodrich, *Epistolary Justice: The Love Letter as Law*, 9 YALE J.L. & HUMAN. 345 (1997).

to dogma and law except in the moments of its greatest crisis, of juridical reformation and counter-reformation. It is a style, we should recollect, that for long periods of time was censored by law as being too competitive and too seductive, two things that lawyers particularly fear, namely, the judges being judged or their erotic attraction to law being exposed.³⁰⁵ With the diaries and the chronicles, with dialogue and drama, came radical new visions, new colors, and new bodies. Borrowing from Arthur Leff's fine though only partially completed dictionary of law, it was as if B, "another frequent participant in legal hypotheticals, with a tendency toward victimization, as in 'A hits B,'" had turned the tables on A.³⁰⁶

Feminism and critical race theory ineradicably changed the style of legal scholarship, but they were not often explicitly satirical enterprises.³⁰⁷ Their contributions to the dramaturgy of legal writing come as substantive contributions, as criticism, as the expression of historical exclusion, and hence will be addressed more fully in looking at criticism as the content of satire. For the moment, in relation to drama as a genre of legal satire, the manner of politicizing law through calling attention to the mode of its scholarly or professional staging, its language and literary forms of life, plays upon the most fragile of boundaries between rule and expression, as also between self and other in both disciplinary and existential senses. It is, in sum, a destabilizing intervention, and the fact that it is necessarily so is nowhere better evidenced than in the little-remembered, generally unloved, short-lived, yet satirically exquisite pages of the *Lizard*.

F. *The Lizard*

The *Lizard* was the unofficial, indeed disclaimed, organ of the Critical Legal Conference for a brief interlude in the 1980s. Right at the beginning of the movement, not that the movement lasted very

305. That law operates according to a strange scene of love, and that it is as a discipline an obscure object of desire, is an argument interestingly elaborated upon in JUDITH BUTLER, *THE PSYCHIC LIFE OF POWER* (1998). She is not easy to read — I am not above admitting that Nussbaum is on to something, *see supra* notes 200-207 — but the point is a good one. Fuller elaborations of the connections and occlusions around desire and law can be found most usefully in LEGENDRE, *L'AMOUR*, *supra* note 115; PIERRE LEGENDRE, *JOUIR DU POUVOIR* (1976).

306. Leff, *Dictionary*, *supra* note 179, at 2113. Contrast B with A: "In legal hypotheticals 'a', usually capitalized, is ordinarily one of the important parties, with a composite personality more aggressive than that of any other letter, e.g., 'A hits B' . . . and so on." *Id.* at 1855.

307. WILLIAMS, *ALCHEMY*, *supra* note 51, at 8, posits that literary devices such as parody, parable, and poetry were the textual hallmarks of feminism and critical race theory. DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1994) [hereinafter BELL, *CONFRONTING*] addresses the issues of confrontation and allegory.

long,³⁰⁸ it spawned a satirical newsletter that lampooned the composition and leadership of the Conference as well as mocking the established dogma of the academy. Juxtaposed with a scathing parody of the boredom of AALS sessions on doctrine are a series of self-mocking debates about the role of theory in critical legal studies, the exclusion of feminists, and a nicely realistic Ann Slanders's advice column giving homilies to your averagely timid, moderately radical, tenure-track crit.³⁰⁹ In later issues, after the inaugural Conference in Wisconsin, the divisions of age, race, and gender that were later — in fact quite rapidly — to fragment critical legal studies, are proleptically sent up in parodic pieces on the hierarchy of the movement, on the exclusivity of the network, on the status obsessions of the members, the sexism of their practice, and even an essay by Mark Tushnet on being a bad teacher.³¹⁰ There is a remarkable exchange of letters generated by a confession of erotic desire for female students made by a male professor to the Ann Slanders column.³¹¹ Ann Slanders immediately admits that she is a man. There is a piece on the “trashers trashed,”³¹² and a thoughtful note on “the diagonal focus syndrome”³¹³ that affects lower-status law professors and unemployed teachers at AALS conferences.

My sense is that the *Lizard*, the *Lizard Reborn*, the *Reptile*, and *Casual Legal Studies* were unpopular — against the grain of professional self-enhancement or contrary to the antagonistic seriousness of sixties politics — and short-lived publications that people rapidly placed in the back burners of their memories. Telling Roberto to learn how to write, confessing to failing as teachers, pointing out that the critical legal studies movement was in practice a job-seeking network for estranged middle-class white men, or exposing the fact that these antilawyers were professionally committed and taking good money for teaching law, wasn't helping. The spirit of the

308. It was always an endangered species according to DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997); Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013 (1985) [hereinafter Kennedy, *Psycho-Social CLS*]. For commentary, see Peter Goodrich, *Duncan Kennedy as I Imagine Him: The Man, the Work, His Scholarship, and the Polity*, 22 CARDOZO L. REV. 971 (2001) [hereinafter Goodrich, *Duncan Kennedy*]. For the alternative view, see Fischl, *supra* note 13.

309. Ann Slanders, *Advice to the Forlorn*, LIZARD, Jan. 5, 1984, at 3; *Debates About Theory Within Critical Legal Studies*, LIZARD, Jan. 5, 1984, at 3; *Feminism and Critical Legal Studies*, LIZARD, Jan. 5, 1984, at 3. The *Reptile* also had an advice column written by Ms. Demeanor. See REPTILE, Feb. 5, 1987, at 3.

310. E.g., Mark Tushnet, *On Being a Bad Law Teacher*, LIZARD REBORN (Conference on Critical Legal Studies, Buffalo, N.Y.), May, 1987, at 22.

311. Ann Slanders, *Forbidden Love: Towards an Erotics of Law Teaching*, LIZARD, Jan. 7, 1984, at 3, 5.

312. *Trashers Trashed!*, *supra* note 47, at 1-2.

313. *The Diagonal Focus Syndrome*, LIZARD, Jan. 7, 1984, at 7.

times was revolutionary, and proletarian sympathizers wanted seriousness, praxis, or activism, a road map to the here and now of fundamental contradictions and structural change, not jokes, student rebellion, or self-analysis in the mode of ridicule. The traditional left was never big on communication skills, social competence, humor, or self-analysis, and they certainly didn't like having those failings exposed. Satirical legal studies, to use the jargon, fast became an infantile disorder.³¹⁴ That, or in a more sympathetic and directed vein, the humorists came too close to the bone, they were too prone to telling the truth, and just to lick the wound a little, the satirists were right. Mark Tushnet is now (or rather was until recently) President of AALS, the bastion of law school normal science, leader of the establishment forces, and there were not a few other career gear shifts that I won't detail here. I have gotten into enough trouble before.³¹⁵ Leave it at that.

Look back over the short run of the *Lizard* — I know it is hard to get ahold of so I can happily send you copies or provide you with a reference for the librarian — and conduct a structural analysis of the contents. First off, the *Lizard* fairly uniformly takes the critical legal left to task for the conservatism of its positions, institutional origins, and positions of power. It is all about Harvard Law School, and, as the *Casual Legal Studies* cartoons in particular show, that means it is about everything and about nothing. Harvard Law School is exemplary of corporate buyout, of aggrandizing status credentials, and of a symbolic economy that the legal left participated in and benefited from while purportedly trying to bring it down.³¹⁶ It is that paradox, that unavoidable irony, that inevitable uncertainty that the *Lizard* in essence plays upon and dances around. The themes that the *Lizard* so deftly and brazenly addressed are precisely those that spelled out the internal contradiction, the bad faith of the legal left on an existential plane. The *Lizard* early on predicted what would happen in practice — the very site that the traditional crits were claiming in moralizing

314. VLADIMIR IL'ICH LENIN, "LEFT-WING" COMMUNISM, AN INFANTILE DISORDER (1920). For those too young to be disordered, the phrase referred to the immature or merely rebellious spirit of those bourgeois radicals who could not bring themselves to comprehend the importance of structural change: dictatorship of the proletariat, destruction of the state, in particular, as the only feasible or scientific path to communist idyll. For a comprehensive study of the new left in these terms, see NIGEL YOUNG, AN INFANTILE DISORDER? THE CRISIS AND DECLINE OF THE NEW LEFT (1977).

315. Peter Goodrich, *The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction*, 10 LAW & CRITIQUE 343 (1999) [hereinafter Goodrich, *Critic's Love*].

316. Though that is not one hundred percent true. One consequence of critical legal studies was undoubtedly that it brought the political troubles and tenure wars at Harvard to national attention. It was bad press — or good press, depending on where you stood — but whichever it was, one effect was that it lowered the currency of Harvard Law School and loosened its grip upon the academic job market in law. Not a great deal, but some. And that is something.

fashion to be their own. Thus the *Lizard* focuses on the interior of practical questions. Why are law students depressed? Why is law school so intellectually unadventurous, so dull? What are law professors afraid of? Why are law professors so often moonlighting, teaching on the side, or writing briefs for corporations or novels for the market? If that is what they are doing, why not teach the novels, admit the fictions as well? Why set blind exams? Why not have relationships with students? Or at least, when half the faculty has married students or former students, why not recognize that teaching does involve a relationship and that there will be erotic charge or antagonism in them if the teaching is good? And then again, with great proleptic insight: Why hasn't Harvard Law School appointed any women of color? What is the relationship between whiteness and knowledge? And in cartoon form, here is how the tenure wars, the Dean search, and the everyday classroom, look.

Politics is the art of the possible. The crits didn't win but they did change the coinage. The *Lizard*, the organ of the satirical wing, is much the most entertaining and accessible record of what the movement wanted, what it was, and what it bequeathed in the end. The satirists dramatized the all too human failings of the movement. They marked what was great and what was small, what would survive, and what would fall apart. It was satire that most directly tabulated the change in the symbolic economy, the alteration in the currency, the shifting form of legal knowledge. Satire wasn't everything but it was the satirical, the outrageous, the humorous, and the boundary crossing that was picked up in the media, made it to the magazine section, and gave the movement a political edge in the domain of politics and in the international forum of the reproduction of lawyering. In a very positive but — until I spelled this out — unrecognized form, it was a return or a renewal of the tradition of the Basoche and of the revel, carnival encountering law, theater facing off against prose, the *jocoserium*, or “humorously serious.”

Given a history that began with the banning of theater, it is unsurprising that lawyers should not pay overmuch or willing attention to the dramatic either inside or outside law. It is their fond belief, their necessary fiction, that law is staged as argument and advocacy rather than as selfconscious forensic theater. Lawyers study the rhetoric of trial for instrumental reasons, not as a symbolic form intrinsic to the social meaning and political purposes of the legal order. No, that would be much too political; only social anthropologists or ethnographers acknowledge the theatrical bent of lawyers, the choreographical skills of judges, or the baroque intricacies of legislative performances. To study the costumes, stages, and players, the roles and performances, good or bad, is not law but only para-law, marginal legal studies, work that cannot make it into the solemnized space of the discipline performing its rites of reproduction. The object

of study seemingly permeates the method and the reception of the study itself.

A personal anecdote, though I am sure it will get removed somewhere along the line by one of the Homerically talented fact-checking teams. I fondly recollect the Arthurian-styled Round Table of the Semiotics of Law, which used to meet annually in Reading, Pennsylvania. It had its purity as well as its invisibility but the cause was a good one: Why not study law as a system of signs? What about the communicative and symbolic dimensions of legality? The aesthetics of trial? The literal visibility of justice being done? These weren't questions that interested the normal law professor — if that is not too much of a misnomer, I have yet to meet one — but the interesting point is that it was a site of humor and curiously informative performances. There was the tax barrister from Sydney, Australia, who showed a slide of himself in his underwear and then superimposed his formal legal dress upon a map of those parts of the city where he was legally entitled to wear them. The sartorial in Sydney. From classroom to courtroom but nowhere else in the metropolis could he wear his formal legal attire. A matter of traditions and manners and so of the very essence of law. But it would take a stretch (a limo at least) to get the Faculty to leave the metropolis for a comparative thesis on court dress.³¹⁷

To all of which it simply has to be said: Don't let them grind you down — *nil carborundum*. Where critics of the law have pointed out the dramatics and the melodrama of law, its tragic-comic self-importance, its burlesque mystery, its labyrinthine obscurity, they may well have been dismissed and their own texts, dialogues, and other disquisitions have been treated as theatrical, as merely comedic or satirical. What did you expect? Short-term victories or immediate profit? No. This is a question of the long term, the backgame. Let's see who wins in the end. For the meantime, it is no big surprise that satire and semiotics alike are deemed to be outside of legal studies proper or, as Leiter likes it, *simpliciter*. To put it in aphoristic form, scratch a lawyer and find a Latinist. Distrust both.

317. The English press labeled semiotics "semi-idiotics" way back in the early 1980s when it made its first Anglophone appearances in literary criticism. That kind of scholar was consigned to a satellite campus of a State University squarely in the midst of the death of the East Coast. The record and monument of the Round Table, its Camelot as it were, can be found in the ten or so volumes of annual proceedings. 1-3 LAW AND SEMIOTICS (Roberta Kevelson ed., 1987-89) (first through third Round Tables); 2, 3, 6-8, 10 SEMIOTICS AND THE HUMAN SCIENCES (Roberta Kevelson ed., 1991-95) (fourth through ninth Round Tables); 11 SEMIOTICS AND THE HUMAN SCIENCES (John Brigham & Roberta Kevelson eds., 1996).

IV. THE SUBLIME AND THE RIDICULOUS

There can be no doubt that a significant dimension of satirical legal studies resides in the deflation of the pretensions of authority. As the *Lizard* exemplified, the pretensions of authority are not confined to the established legal academy or AALS, but they rear their head within the hierarchy that any process of institutionalization requires.³¹⁸ The Critical Legal Conference did not lack for efforts at the sublime, and it stood to reason that these should be deflated. The sublime is made for satire and exists so as to become ridiculous. That is the ethos and justification at least of satirical legal studies. The dogmatic and the doctrinal are there to be trashed. It was the legal realists who made this an art and a practice. They brought the dogma down to earth for a while. Law, in Holmes's aphorism, is not a brooding omnipresence in the sky. Failure to recognize that fact lends itself to the production of a legal science that is in the main a theological pursuit,³¹⁹ and to the proliferation of legal abstractions that are best described as transcendental nonsense.³²⁰ It was not, however, the judicious Holmes who made the latter and trashing statement but rather Felix Cohen.³²¹

A. *The Legal Realists*

The scions of substantive satire in the twentieth century were the legal realists. Their historians have tended to miss this point or in the usual manner of legists they have simply regarded it as incidental and frankly irrelevant to the serious doctrinal and methodological points that the realists, their mentors,³²² or forebears had to offer. Yet it was humor, satire in fact, that brought the edifice of legal science crashing down in the first half of the twentieth century. Judicial formalism and academic legal positivism were reduced to rubble by satire, not by seriousness or the subtleties of critical dogmatics. Indeed, when it came to teaching law or writing casebooks, Karl Llewellyn's self-criticisms could easily have appeared in the *Lizard*. Discussing, in a footnote, the slavish traditionalism of the course books produced by

318. Kennedy, *Psycho-Social CLS*, *supra* note 308, at 1013-16.

319. Holmes, *Review*, 14 AM. L. REV. 233 (1880).

320. On Holmes's metaphysics, see DUXBURY, PATTERNS, *supra* note 47, at 33-65.

321. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

322. WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT, at viii (1985). Though Twining himself did go in for some bizarre if not particularly funny modes of self-expression. He has been wont to discuss the University of Rutland School of Law, see TWINING, BLACKSTONE'S, *supra* note 37, at 66-67, attending juristic bazaars, and the jurisprudence of Xanadu. William Twining, *The Great Juristic Bazaar*, 14 J. SOC'Y PUB. TCHRS. L. 185 (1978).

even the most “freakish” of realists, himself included, Llewellyn had this to say:

The Man from Mars would find trouble finding significant differences between these books, or between any of them and a case-book of Langdell or Beale, or Costigan. It is not merely that all butterflies have wings, but that within one species of butterfly, color and spots are much alike; and all lay eggs that hatch out after their own kind. You need a micrometer to measure the freak-component. *Yet that is the component which gives the books such value as they have.*³²³

The text accompanying the self-deprecatory footnote is a classic of trashing. It trashes “so-called legal education,” for its normality and its “deadly sanity.”³²⁴ It pleads for “freak persons and freak policies” and deplores their absence from Columbia, Harvard, and Yale: “But I wish to make it clear that I am not attacking these three schools, as such, or any of them. *Shabby and silly as they are, I know of no schools less shabby or less silly.*”³²⁵ It is a classic piece of trashing: funny, inventive, and iconoclastic. It ends by saying that so-called legal education, even in the so-called best schools, is “inadequate, wasteful, blind and foul” and the parting words are: “Altogether it makes one think of Pilgrim’s Progress. But whether the stage be Slough of Despond or Vanity Fair is hard to tell.”³²⁶ That, as one might say, is way harsh, and that is the point. Satire should be.

Llewellyn’s complaint was that legal science was an otherworldly venture. In common with the other legal realists, Scandinavian and American, he wanted to turn the attention of legal educators away from the nether world, the heaven of concepts, the afterlife of rules, to the present tense practicum: “‘My brother Gray,’ runs one garbled version of a story, ‘has taught you what the law Used to be; my brother Ames has taught you what the law Ought to be; I intend, with your indulgence, to give some attention to what the law Is.’”³²⁷ In the rest of the piece, Llewellyn goes after what Pierre Schlag, a contemporary legal satirist, has called “the jurisprudence of the holding pattern,”³²⁸ by way of analogy to the flight path of planes rerouted while coming into O’Hare Airport in Chicago. Legal concepts were just never making it to the ground. They were staying *in nubibus* as we Latinists are fond of putting it.

323. K.N. Llewellyn, *On What Is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 652 n.1 (1935).

324. *Id.* at 651.

325. *Id.* at 651-52.

326. *Id.* at 678.

327. *Id.* at 672.

328. PIERRE SCHLAG, *LAYING DOWN THE LAW* 21 (1996) [hereinafter SCHLAG, *LAYING DOWN*]. For an analysis in terms of the failure of reason, see PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998) [hereinafter SCHLAG, *ENCHANTMENT*].

The major point made by the first trashers was one that had earlier and coincident expressions in Scandinavian legal realists' belief that legal words were magical, and in truth no more real than any other chimera or fantasm.³²⁹ Legal science was predicated upon an unwarranted metaphysics, a holdover from earlier theological systems of belief, the equivalent of astrology or magic. Lawyers, according to Jerome Frank, were playing wizard long before Kennedy was publishing the *Lizard*.³³⁰ In truth the legal realist critique of the make-believe worlds of legal concepts are well documented and much discussed, both back then and now. There was quite a debate and much of it was satirical but the medium got lost for the message. Let's return for that reason to the question of critical humor and the trashing form.

The most direct and fluent statement of the trashing mode comes under the auspices of no less an authority than the "Shade of Von Jhering," a turn-of-the-century German historical jurisprude.³³¹ In a rightly celebrated article debunking the "transcendental nonsense" of legal theory, the felicitous Cohen begins with "a curious dream."³³² A German jurist dreamed he had died and was taken to a special heaven reserved for legal theorists. "In this heaven one met, face to face, the many concepts of jurisprudence in their absolute purity."³³³ The spirits of good faith and bad faith, property, possession, laches, and right in rem were all there and hanging out together with the logical instruments needed to transform these legal concepts and "to solve the most beautiful of legal problems."³³⁴ Among the machines was a "dialectic-hydraulic-interpretation press, which could press an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts."³³⁵ The punch line — wait for it — was that this heaven was "open to all properly qualified jurists," with only one entry

329. On which school, see M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 731-781 (6th ed. 1994) (1959). Specifically on legal concepts as magical thinking, see KARL OLIVECRONA, *LAW AS FACT* 112-122 (1939), arguing the close link between "imaginary notions in the law and in magic."

330. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 62-79 (3d ed. 1973) [hereinafter FRANK, *COURTS*] (on "wizards and lawyers"); see also RODELL, *supra* note 161, at 1-20 (on "modern medicine-men").

331. Cohen, *supra* note 321, at 809; see also JEROME FRANK, *LAW AND THE MODERN MIND* 217-221 (2d ed. 1931) [hereinafter FRANK, *MODERN MIND*].

332. Cohen, *supra* note 321, at 809.

333. *Id.*

334. *Id.*

335. *Id.*

requirement: they had to drink the Lethean draught (an early version, I suspect, of interstellar Romulan ale) “which induced forgetfulness” of all human affairs. “But for the most accomplished jurists the Lethean draught was entirely superfluous. They had nothing to forget.”³³⁶

The debunking of transcendental nonsense that follows upon the noble dream of a heaven reserved entirely for jurists is a paean of parody. The courts and other dogmatists regularly, even and especially the brightest, “hypostasize” and “thingify” concepts such as corporation, or property, or right, to such a degree as to make them supernatural entities, metaphysical beings, angels, nonsense.³³⁷ The question of the status of these imaginary legal beings approximates closely the question fondly and frequently asked by theologians: “How many angels can stand on the point of a needle?”³³⁸ Put a few such concepts together and you have modern legal reasoning and, Felix continues, “[s]trange as this manner of argument will seem to laymen, lawyers trained by long practice in believing what is impossible, will accept this reasoning as relevant, material, and competent.”³³⁹ It would be improper to abandon Cohen’s argument without observing at least that the satire keeps flying throughout the article. The metaphysical circularity of legal abstractions, indeed all of the “magic ‘solving words’ of traditional jurisprudence” add precisely as much to our knowledge of legal practice “as Moliere’s physician’s discovery that opium puts men to sleep because it contains a dormitive principle.”³⁴⁰ To this are added footnotes to Lewis Carroll’s *The Hunting of the Snark* and from that old favorite of legal and other satirists, *Through the Looking Glass*.³⁴¹

It is philosophically too dismissive to regard trashing as the expression of a mood, as does Duxbury,³⁴² but it is proper to attempt to

336. *Id.*

337. Cohen, *supra* note 321, at 811.

338. *Id.* at 810. An incisive and entertaining modern version of this argument can be found in W.T. Murphy, *Reference Without Reality: A Comment on a Commentary on Codifications of Practice*, 1 LAW & CRITIQUE 61 (1990).

339. Cohen, *supra* note 321, at 811 (citation omitted).

340. *Id.* at 820.

341. *See id.* at 820 nn.7 & 31; *see also* GILLES DELEUZE, *ESSAYS: CRITICAL AND CLINICAL* 21-22 (Daniel W. Smith & Michael Greco trans., 1997) (discussing *Through the Looking Glass*).

342. *Et tu Duce*. Duxbury explains: “Yet even ‘movement’ seems too strong a word in this context. Realism was more a mood than a movement. That mood was one of dissatisfaction with legal formalism . . .” DUXBURY, *PATTERNS*, *supra* note 47, at 69. Which, you have to admit, is pretty damning. The realists, he appears to be saying, were law professors in a bad mood. They were, horrible to say, dissatisfied. Not quite themselves, perhaps. In need of Zolof? Maybe so, because for Duxbury it is clear as day, plain as a pikestaff, that law is necessary, good, and will continue in its age-old form.

capture the tone of critique that the realists developed. Their polemic was based upon a juristic version of the *Twilight of the Idols*.³⁴³ The legal world, to paraphrase Nietzsche, had become a myth, and the realists were dancing in the freedom that such a realization produced. Trashing was their way of showing that law was human, indeed all too human. The excoriation of transcendental nonsense was obviously enough a critique of religion, of the belief in pure forms, of faith in the legal absolute *tout court*.³⁴⁴ Trashing, in other words, represents a sudden bout of freedom, release from the pilgrim's burden, a liberating moment of renewal, of pluralism in legal thought. If the talismanic concepts of legal rectitude were simply some of many archaic beliefs, if the word magic of doctrine was really no more than the expression of a neurosis, if the ceremonies of law were just medieval rites aimed at inducing dread, then freedom was fun, and imagination could take hold of doctrine and scholarly texts alike.

The most polished of the polemicists, aside from Felix Cohen, were Frank and Llewellyn. Frank was wonderfully scathing on key realist topics such as the infantile docility of the legal profession,³⁴⁵ and on lawyers' tendency toward father worship of judges,³⁴⁶ on "word-magic,"³⁴⁷ and other evasions. Here is what he has to say about legal-magic addicts: "a magic-addict betrays schizophrenic attributes. The legal-magic mongers might then be described by a wag as mildly schizoid, since they insist on portraying as existent a legal system which plainly does not exist."³⁴⁸ The schizophrenic, he remorselessly continues, "lives in a world of words, which he so completely identifies with — or mistakes for — reality, that reality as others know it, hardly exists for him."³⁴⁹ And he concludes wonderfully with the

343. On how the real world became a myth, see NIETZSCHE, *TWILIGHT*, *supra* note 110, and for commentary on how the real world became a myth, see JEAN BAUDRILLARD, *SIMULATIONS* (Paul Foss et al. trans., 1983).

344. On this theme, there is the somewhat labored Thurman W. Arnold, *Apologia for Jurisprudence*, 44 *YALE L.J.* 729 (1935); and more expansively, THURMAN W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935), on the mystery of jurisprudence, and on spiritualism in law. The roots of this position go back, though not without some irony, to Holmes's dictum that Langdell was "the greatest living theologian." Holmes, *Review*, *supra* note 319, at 313. See also the explicit argument of Oliver Wendell Holmes, *Path of the Law*, *supra* note 40; OLIVER WENDELL HOLMES, *THE COMMON LAW* (Mark DeWolfe Howe ed., 1963) (1881).

345. FRANK, *MODERN MIND*, *supra* note 331, at 69-75.

346. *Id.* at 243-52.

347. *Id.* at 57-68; FRANK, *COURTS*, *supra* note 330, at 292-309.

348. FRANK, *COURTS*, *supra* note 330, at 65. Frank again foreshadows much that was to come later. On the schizoid, see GILLES DELEUZE & FELIX GUATTARI, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* (Robert Hurley et al. trans., 1983) (1977); JEAN-JACQUES LECERCLE, *PHILOSOPHY THROUGH THE LOOKING-GLASS* (1985); and, for brief commentary on the theme, Peter Goodrich, *Tristes Juristes*, 12 *SOC. & LEGAL STUD.* 109 (2003).

349. FRANK, *COURTS*, *supra* note 330, at 65 (citation omitted).

view that “the modern magical legal thinkers resemble — remotely to be sure — the case, reported by a psychiatrist, of a man who wrote the word ‘beefsteak’ on a piece of paper and then ate the paper.”³⁵⁰

Eating psalters, books of the law, or legal texts, is an antique image captured in the Latin maxim, *omnia scrinia habet in pectore sua*, meaning loosely that the legal subject ingests, or better injects the texts of law, a practice captured in a number of medieval images of kneeling legal subjects receiving the book of the law in their mouth.³⁵¹ One can note further, though largely incidentally, that the image gained judicial recognition many years later from Justice Traynor, who in a footnote already alluded to,³⁵² observed that the legal formalist’s belief in the talismanic fixity of legal words is a taboo equivalent to the Swedish peasant belief that a page torn from the Psalter and fed to sick cattle would cure them.³⁵³ Traynor and Frank both take the view that democracy requires a conversation about laws that is not consistently obstructed by the compensatory metaphysics of “verbomania.”³⁵⁴ Legal technique, Jerome reports frankly, “needs liberation from the mental outlook of the Dark Ages.”³⁵⁵

A similar Reformist zeal is found in Frank’s ridiculing of legal robes. The judicial robe, and in other legal cultures less modern than that in the United States, the wig and gown, indeed breeches and buckled shoes, “are historically connected with the desire to thwart democracy.”³⁵⁶ He goes on to point out that the belief that donning a gown will give you access to a higher law, that it will provide a brush with divinity, or an essentially costume-based access to the inaugural and oracular just doesn’t hold up to the harsh corrections of experience:

Of course, no such change occurs in a man with the mere donning of a robe. At least in my case it didn’t. When I woke up one morning a federal judge, I found myself just about the same person who had gone to bed the night before an SEC Chairman.³⁵⁷

350. *Id.*

351. See PIERRE LEGENDRE, DIEU AU MIRROIR: ETUDE SUR L’INSTITUTION DES IMAGES 41-66 (1994), *partially translated in* LAW AND THE UNCONSCIOUS: A LEGENDRE READER 211-54 (Peter Goodrich ed., 1996) [hereinafter LEGENDRE READER].

352. See *supra* note 70 and accompanying text.

353. *Pac. Gas and Elec. Co. v. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 643 n.2 (Cal. 1968).

354. FRANK, MODERN MIND, *supra* note 331, at 63.

355. *Id.*

356. FRANK, COURTS, *supra* note 330, at 255; see also Peter Goodrich, *Oedipus Lex: Slips in Interpretation and Law*, 13 LEGAL STUD. 381, 394-95 (1993).

357. FRANK, COURTS, *supra* note 330, at 255-56. Thurman Arnold is said to have taken a different view. When asked how he could hold the scholarly opinions that he did and still sit

Costume, make-believe, wousining (word magic), hallucinations, the great illusion of legal science, and the idols of the theater all needed deflating. Thurman Arnold dryly satirized the inordinate reverence that was paid to the Supreme Court as being no more than an emotional prop and a transposition of English monarchism. The Great Illusions, the Delphic Oracles, the myths and the madness of lawyers were all fair targets of the realist's philosophical hammer or satirical polemic. The realist, to paraphrase Llewellyn, paraphrasing Holmes, abhors the vacuous. Thus the law teacher's disillusion, occasioned by "long and sad" experience:

We have discovered in our teaching of the law that general propositions are empty. We have discovered that students who come eager to learn the rules and who do learn them, *and who learn nothing more*, will take away the shell and not the substance. We have discovered that rules alone, mere forms of words, are worthless.³⁵⁸

All that nothingness, in other words, just waiting for exposure and deflation.

The last word, however, on the realist's penchant for satirical polemic of the trashing kind has to go to Fred Rodell. Frank had curiously remarked in *Courts on Trial* that Rodell's critique of lawyers had gone too far — it was "sometimes excessive."³⁵⁹ It is true that *Woe Unto You, Lawyers!* was at times parodic, but its purpose was on all fours with Frank's own, slightly more modulated satire. The argument of Rodell's that perhaps holds the greatest satirical charge was his wonderful farewell to law reviews.³⁶⁰ Llewellyn had already commented upon the common legal disease of "Citis": "Victims of this mental disorder hold the delusion that nothing is, except in print; and that even what is in print is tabu to use unless some print is cited. I have been fighting Citis, especially in law reviews, for many years."³⁶¹ Llewellyn had also invented the Principle of Anonymous Non-Citation and its subcategory, the Principle of Mutual Anonymous Non-Citation to cure the evils of Citis.³⁶² The principles of anonymity were key to Llewellyn's ridiculing of what he coined "Pseudea" and

on the bench, he is said to have replied that when he put on the judicial robe, everything changed.

358. LLEWELLYN, BRAMBLE BUSH, *supra* note 15, at 2.

359. FRANK, COURTS, *supra* note 330, at 321 n.8.

360. Rodell, *Goodbye*, *supra* note 21. It generated, among other things, the second series of the *Green Bag*, an occasional journal of legal humor specifically intended in its second series to act as an antidote to the prolixities and "citis" of law reviews. See David P. Currie, *Green Bags*, 1 GREEN BAG 2D 1 (1997). The second series has featured some extraordinarily funny pieces, some with considerable — generally Horatian — bite.

361. LLEWELLYN, BRAMBLE BUSH, *supra* note 15, (foreword) at 8. "Citis" is a close phonetic and linguistic relation of Cystitis, or urinary tract infection.

362. Llewellyn, *Neophytes*, *supra* note 2, at 176.

“Pseudiscussion.” The cure that his satire offered had the dual advantages of ensuring that the vulgar could be kept at bay through the avoidance of any chance of checking the references, and that both sides in generalized and largely imaginary controversy could equally claim victory.

The crown for humor and directness has to go, however, to Rodell. In a brief and unfootnoted contribution to the *Virginia Law Review*, Rodell observes with a stringent and properly unmodulated humor: “There are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.”³⁶³ In five-and-a-half full pages, Rodell then goes on with unshirking vigor to excoriate the use of footnotes, the “dumpy dignity and fake learnedness,”³⁶⁴ the “strait-jacket of law review style,”³⁶⁵ the “follow-the-leader mentality,”³⁶⁶ the mountains created “out of tiresome technical molehills,”³⁶⁷ and the general “diddling while Rome burned.”³⁶⁸ It is heartfelt stuff propounded with humorous flair and a very precise rhetorical appreciation of the general levels of stylistic conformity, pedantry, indirectness, self-effacement, bombastic pomposity, and utter unreadability of the usual product which, in his view, should be tried “for wilful murder of [its] reader’s (all three of them) eyesight and patience.”³⁶⁹ In all, it is a classic of satirical humor and of rigorous trashing, largely unequalled in the subsequent seventy-odd years of the tradition.

B. *Trashing*

The trashing strategies of the realists are characterized by rhetorical inventiveness and literary imagination. They brought a humor and wit to polemics that have seldom since been anything more than deadly serious. There are some instances in the second half of the century of neorealist revivals. The work of William Twining had many of the allegorical attributes of his mentor and hero, Karl Llewellyn — some of the humor but little of the trashing. As depicted above, he gives us the juristic bazaar, *Pericles and the Plumber*,³⁷⁰ as well as *Blackstone’s Tower*, the University of Rutland, and the jurisdiction of

363. Rodell, *Goodbye*, *supra* note 21, at 38.

364. *Id.* at 41.

365. *Id.*

366. *Id.* at 44.

367. *Id.* at 43.

368. *Id.*

369. Rodell, *Goodbye*, *supra* note 21, at 41.

370. William Twining, *Pericles and the Plumber*, 83 LAW Q. REV. 396 (1967).

Xanadu.³⁷¹ Similarly, Arthur Leff revived some of the wit and grace of the realist tradition with a certain bite,³⁷² but it was the Critical Legal Conference that really inherited and honed the technique of trashing, and specifically the *risus acri*, the ridicule of conservative or more broadly establishment traditions. It has to be said, however, that the critical legal studies movement was broadly Marxist in theoretical derivation and its roots were mired less in humor than worthy dialectical materialist constructions. The early works of the movement trumpeted world-saving clarions such as the “fundamental contradiction,”³⁷³ “false consciousness” along with “counter-hegemonic consciousness,” “ideological state apparatuses” alongside “deviationist doctrine,”³⁷⁴ with little room behind or between the long words for very much in the way of satirical or amorous asides.

Kelman’s article on trashing, on the “technique that we in Critical Legal Studies often use,” defines it in the baroque form of an equation replete with italicized key terms, perilunar parentheses, and bracketed instructions: “Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragic]-*comic*); and then look for some (external observer’s) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we’ve exposed.”³⁷⁵ That is his opening paragraph and things can only improve, humorwise, from that. It is fair, I think, to say that Kelman doesn’t really appreciate the satirical force of trashing or of the textual dismissals proffered by the antitrashers, but he does have some good lines. His best idea is to treat the antitrashers’ work “as yet another text to be trashed.”³⁷⁶ As to the rest, let’s just summarize the few glimpses of trashing as satire that do emerge between the graphs, the figures, the footnotes, the status insignia, the capitalized and talismanic words.

First off, there is an element of irony: Kelman regrets being a trasher, but it is the best-available position. He wishes it wasn’t, but it is (or so he claims here). Next, and importantly, he acknowledges that trashing questions the vacuous norm of politeness that U.S. legal academics have imbibed, seemingly from birth:

371. See sources cited *supra* note 322.

372. See, e.g., Arthur Allen Leff, *Unspeakeable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1240-49 (1979).

373. Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 211-13 (1979). For commentary on the fundamental contradiction, see Alan Hunt, *The Theory of Critical Legal Studies*, 6 OXFORD J. LEGAL STUD. 1 (1986) [hereinafter Hunt, *Theory*].

374. Unger, *supra* note 295, at 576-83.

375. Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 293 (1984).

376. *Id.* at 296.

[They] were told (repeatedly) by their moms and dads, “If you don’t have anything nice or constructive to say, say nothing at all.” In the eyes of these academics, to violate this wholesome norm is an unquestionable disgrace, and they generally take for granted that we in CLS would bow our heads in deep shame if “all we’d done” was to make it impossible to wallow happily in the familiar ooze of traditional legal discourse, humming the same old tunes without embarrassment.³⁷⁷

It is not Diogenes, but it does make the point that trashing is precisely about being bad, having fun, and looking at the inside of law from the outside.

Trashing really made its reappearance with the second wave of critical legal studies, influenced by European theory — specifically by deconstruction, or a dubious interpretation of it, and the postmodern turn. Even then, trashing never really made it back to the level of the realist moment. It never quite had the confidence or the status of the realists, there aren’t any critical legal scholars on the bench for example, and the tenure wars kept most of them out of the top law schools. What trashing there was tended to a certain Oedipal rebelliousness; it was stylistically a little puerile, a touch overstated, and a tad insecure. That would be my reading of the rather academically orientated trend in what were usually, though not always, trashing book reviews. Trashing became very internal to the academy, and as a consequence, more narcissistic than usual; and I can modestly claim a certain personal expertise. The trashers in general fell within the rueful sway of Kelman’s own observation that, “[l]aw professors are, in fact, a kiss away from panic at every serious, self-conscious moment in which they don’t have a bunch of overawed students to kick around.”³⁷⁸ Status rather than satire, *satura lacunae* rather than *satura lanx*, seemed to be their driving force.³⁷⁹ There is little fun in insecurity, and there is seldom humor let alone any satirical selfconsciousness in status seeking. It makes sense then that the main works of generic trashing came from those few crits who hung on to jobs in high-status institutions, or who, for political reasons, resigned themselves to, and reveled in their lack of status.

The themes of realist trashing reemerged in the early 1980s. Roberto Unger’s book-length address on the critical legal studies movement can hardly be accused of satirical intent.³⁸⁰ I wasn’t there but I have heard the accounts of this “after-dinner talk” that lasted

377. *Id.* at 297.

378. Kelman, *supra* note 375, at 322.

379. Similar points are well and humorously made in LIZARD, *supra* note 32, especially volume 3. See also Goodrich, *Sleeping*, *supra* note 10; Goodrich, *Critic’s Love*, *supra* note 315.

380. See Unger, *supra* note 295.

three hours or more. A while afterwards, I was staying with a colleague in Amherst, and occasion had it that I was relegated from the guest room to the T.V. room on account of a more important visitor (perhaps simply someone they had actually invited to come to stay). Chance landed me in a room full of cassette recordings of lectures that my host had attended. He had Unger's critical legal studies movement lecture, and so I listened to the tape of Roberto delivering the big speech. Not the whole thing, I hasten to add. I am not a masochist, and I am slow but not that slow on the uptake. In any event, personal reminiscences aside, the incantatory intonation, the mellifluous chanting manner, the almost oneiric rhythm in which he poetically pronounced this distended lecture as an after-dinner talk has an element of the deliciously self-parodying. It is an otherworldly intervention, priestly in style, and takes on in legal studies what was pronounced in the last line of *Knowledge and Politics*, namely, the valedictory diktat: "Speak, God."³⁸¹ That final incantation now seems to have meant that God should speak through me, his servant, his prophet, I, Roberto.³⁸² The lecture on the critical legal studies movement does trash formalism (and objectivism), and it ends by talking famously of how law professors are like priests before "cold altars."³⁸³ Which itself was a captivating and much-discussed image, although in theological terms I would have thought that altars were always cold. It was the idolaters who danced around the fire. But that is a much longer discussion and probably not to be had with Roberto who tends not to answer my letters. There is certainly satire in Unger's treatise, but it is hardly a defining feature of that work or of his later elaborations. The more satirically inclined Harvard law professor, my sometime correspondent, is Duncan Kennedy, the charismatic team leader of the legal left.

Legal Education as Training for Hierarchy was a subversive's manual for surviving law school and overthrowing the legal institution. It politicizes Felix Cohen's more theological critique of transcendental nonsense, and replaces the vacuity of "solving words" with the vacuity of policy words. Interestingly, it uses the term nonsense in describing the subtext of the first-year law curriculum: "The whole body of

381. ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 295 (1975).

382. Unger's tendency in recent years to send out preprinted postcards with aphorisms such as "Every man should be his own prophet" as their message seems to me to confirm this interpretation.

383. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 119 (1986). The crits, he says, form "a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars." The theological metaphor is both antique and attractive. It was taken up by Carrington, *supra* note 47, at 227, amongst others, arguing that the crits, the lapsed priests of law, should leave law schools. See also Neil McCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 OXFORD J. LEGAL STUD. 539 (1990).

implicit messages is nonsense."³⁸⁴ The law is too full of drek to take that seriously.³⁸⁵ As to law teaching, it is "silly" and "irrelevant."³⁸⁶ Then, with immortal satirical wit, Kennedy ends with a series of utopian proposals such as assignment of law students to law schools by means of a lottery. Kennedy concludes with the following recommendation: "Equalize all salaries in the school (including secretaries and janitors), regardless of educational qualifications, 'difficulty' of job, or 'social contribution.'"³⁸⁷ Which is a pretty complex thought, a subtle and inspired modern version of William Morris's *News from Nowhere*, in which the honest usages of the artisan's practice, an equality of art and empathy, ruled the day in the aftermath of law.³⁸⁸

Kennedy's oppositional — samizdat — tome was unusual both for its humor and for its positive proposals. Most of the trashers, left and right alike, avoided any positive outcome to trashing. It was fun, said Freeman,³⁸⁹ and that is true and sufficient. The rest was the future, and that, as Leonard Cohen puts it, we ought to leave open. Arthur Leff made the same point, indulging in a little retro-trashing of the neotrashers:

Whereas the Marxists place their "community" in the foggy sea of the future, and Nozick and Unger place theirs like dots of butter in a buttermilk of potential strife, Posner leaves his version of sanctified human interaction to moments of firefly-like flash. When the flashes go out, or fail to go on, then there is nothing at all but the dark.³⁹⁰

And in the darkness, to conclude the metaphor, there are "Godlet[s]," Leff's term for petty sovereigns and other phantoms.³⁹¹

C. Book Reviews

The last refuge of trashing, of negative satirical critique, was the book review. This, as Rodell wearily pointed out, was the poor

384. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 20 (1st ed., 4th prtg. 1984) (portions first printed in *THE POLITICS OF LAW*, *supra* note 7, at 40).

385. *Id.* at 24.

386. *Id.* at 27.

387. *Id.* at 123.

388. WILLIAM MORRIS, *NEWS FROM NOWHERE* (Boston, Roberts Bros. 1890). It is an underused tradition, full of gems, satirical and otherwise, including SAMUEL BUTLER, *EREWON OR OVER THE RANGE* (Hans Peter Breuer & Daniel F. Howard eds., 1981) (1870), a work that should be mandatory reading for law professors, critical or traditional.

389. Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 *YALE L.J.* 1229, 1230 (1981).

390. Leff, *Unspeakable Ethics*, *supra* note 372, at 1245.

391. *Id.*

relation, the marginal genre usually put at the end of each issue of the law review.³⁹² Historically and for the most part, the Article, the Comment, and the Note precede the Review in lexical order of priority. The Note, written by students — even the Note! — often gets ahead of the Review. It is a ranking that renders the Review peripheral, a feature that was expressed historically in the use of a smaller font for the review than for the big ideas and big type of important Articles like this one. Which suggests, of course, that satirical legal scholars should treasure the book reviews, and for that matter the other precious marginalia, the glossatorial comments, the scribblings, and even the rejections that litter the files or all too often the office floors of the lower echelons of the academic hierarchy.³⁹³ But enough about my problems, I will take one example of trashing as systematic and witty ridiculing of the book being reviewed.

Alan Freeman and Jack Schlegel's review of Bruce Ackerman's *Reconstructing American Law* begins with a dialogue in defense of trashing.³⁹⁴ "What we trash," they declare, "is simply not serious and we refuse to act as if it were!"³⁹⁵ It is a nicely formulated paradox. If the book being reviewed is not taken seriously then the Review, to borrow from John McEnroe, cannot be serious.³⁹⁶ But, of course, it is serious about being satirical. It is direct, it is entertaining, and it proceeds "to offer a Bronx cheer," a zero grade, to Ackerman's "intellectual aerial acrobatics."³⁹⁷ These, we are told, amount to little more than falling off a building and crashing, flailing, to the ground. This is trashing at its purest. It is ad hominem, raunchy, and brave. No kow-towing here. They take the trash can of a book and they upend it, to marvel at the plenitude of silliness that it contains.

There are six axiomatic sillinesses in the book, an aggregate of foolishness so supreme that "one wonders why this book was written in the first place."³⁹⁸ You get the picture. They don't think much of the book, and they are refreshingly candid in their view of the author. The book is "pompous, arrogant, condescending, self-involved, and self-aggrandizing."³⁹⁹ So, not much good. And then, shortly on, the authors of this tour de force of trashing resort to the scientific terminology of

392. Rodell, *Goodbye*, *supra* note 21, at 44.

393. I offer an accounting of this genre of the marginal in Goodrich, *Cnuism*, *supra* note 83.

394. Freeman & Schlegel, *supra* note 47, at 847-48.

395. *Id.* at 848.

396. No reference without a cite, and so here goes: JOHN MCENROE, *YOU CANNOT BE SERIOUS* (2002).

397. Freeman & Schlegel, *supra* note 47, at 849.

398. *Id.* at 856.

399. *Id.*

behavioral psychology. Ackerman's conceited tone is defensive. It is generated "by his desperate need to protect his empty liberal center," and they conclude that "the book may best be described as an instance of 'male-chimp display behavior.'"⁴⁰⁰ A footnote explains this in terms of "charging displays," that are often accompanied by loud "pant-hoots," "pant-grunts," or "*waa* barks."⁴⁰¹ In short, it is in the end to be understood as an exercise in "aggressive male competition."⁴⁰² Or, to borrow a metaphor from William Twining, it is rutting behavior at the University of Rutland.

Trashing got personal. It referenced sex and the body. It was bad and that was one of its virtues. Ackerman could never have been quite the same after reading a Review like that. Although few others attained the grace or nerve of Freeman and Schlegel, there were many similar trashing reviews. There was Tushnet's *Dia-Tribe*,⁴⁰³ Robin West's comparison of Posner to Kafka,⁴⁰⁴ Richard Weisberg lampooned as Billy Budd,⁴⁰⁵ *Twining's Tower*,⁴⁰⁶ and many further minor instances. Whether realist, neo-conservative, or critical, trashing produces responses. It is a mode of vehemence or stylistic force; it changes things, engages people, produces responses. Certainly I imagine, and word has it, that Ackerman was far from pleased. And in the end, what more can scholars who wish to politicize law ask for?

The discourse of the academy and the pronouncements of dogmatics from the bench tend to take the form of a conversation with the dead. That is an aspect of the fraternal and backward-looking character of the humanist tradition.⁴⁰⁷ As Derrida put it, the brothers cannot fight in public, and no cursing or maligning is allowed in the

400. *Id.* at 857.

401. *Id.* at 857 n.43.

402. *Id.* at 857.

403. Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 710 (1980) (reviewing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978) and asking "how could so morally obtuse a work be taken so seriously?").

404. Robin West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985), reprinted in ROBIN WEST, *NARRATIVE, AUTHORITY, AND LAW* 27 (1993).

405. John Ayer, *Weisberg: The Very Idea of "Law and Literature"*, 85 MICH. L. REV. 895 (1987) (reviewing RICHARD WEISBERG, *THE FAILURE OF THE WORD* (1984)).

406. Peter Goodrich, *Twining's Tower: Metaphors of Distance and Histories of the English Law School*, 49 U. MIAMI L. REV. 901 (1995) (book review).

407. This point is made well in PETER SLOTERDIJK, *RÈGLES POUR LE PARC HUMAIN: UNE LETTRE EN RÉPONSE À LA LETTRE SUR L'HUMANISME DE HEIDEGGER* (2000), although the source of this observation is JACQUES DERRIDA, *THE POSTCARD: FROM SOCRATES TO FREUD AND BEYOND* (Alan Bass trans., 1987). This and related texts are discussed in Peter Goodrich, *The Immense Rumor*, 16 YALE J.L. & HUMAN. 199 (2004) [hereinafter Goodrich, *Rumor*].

history of thought.⁴⁰⁸ For his generation, it would be too unsettling, too real, and too hurtful to the fragile egos of those criticized.⁴⁰⁹ Trashing had the purpose and the glory of actually refusing that norm of unnecessary self-satisfaction. The reason that satire names names and offers unmediated judgments is because the norms of vagueness and innominate abstraction precisely hide the influences and effects of scholarly texts and the institutional acts that they express. Theory is in this sense a banner that relieves the author of any need to account for her place in the text. Trashing reverses that tendency and trend to anonymity, and it does so in profoundly ethical terms. Reversing the norm always looks exaggerated or extreme to those in the establishment who rely upon its continuance. The satirical exaggeration, the trashers' hyperbolic humor, is no worse than the inflated abstraction of the theory that they criticized. It was just that in a sense, from conventional perspectives, they were being bad. But what is bad is good, and what is good is bad. And it is precisely to that figure of the bad, and specifically of the "bad man" that I will now turn.

V. ON BEING BAD AND GETTING CRITICAL

A. *The Bad Man*

I have ignored Oliver Wendell Holmes in a rather studied way. That is partly because he is very next-but-last century, and partly because he was generally much more serious than satirical. Holmes, however, did have one supremely important satirical moment. More an aperçu than a theory, but along the path of the law he stumbled upon the figure of the "bad man."⁴¹⁰ The famous statement took the form of an observation which Holmes offers early on in his celebrated address: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict."⁴¹¹ Slightly later in the lecture, the bad man has become "our friend the bad man."⁴¹² For our friend, we learn that all that matters is "what the courts will do in fact."⁴¹³ From this Holmes deduces, and even though he has just noted that his friend the bad man "does not care two straws for the axioms or

408. JACQUES DERRIDA, *POLITICS OF FRIENDSHIP* 305 (George Collins trans. 1997).

409. *See id.*; *see also* JACQUES DERRIDA, *NEGOTIATIONS* 153 (Elizabeth Rottenberg ed. & trans., 2001); Goodrich, *Rumor*, *supra* note 407, at 200-04, 221-26.

410. Holmes, *Path of the Law*, *supra* note 40.

411. *Id.* at 459.

412. *Id.* at 460.

413. *Id.* at 461.

deductions,"⁴¹⁴ that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁴¹⁵

The concept of the bad man, the general theory that law is a prediction of the quantum of force, deprivation, or pain that will be inflicted on the bad man, the law breaker, had a very considerable impact upon twentieth-century jurisprudence. It has been revisited many times.⁴¹⁶ There are many sources of its appeal, but one of them surely has to be that it was a risky and humorous satirical send up of the formalists and their putative science of law. The emblem of common law was historically the "reasonable man," a *vir constans*,⁴¹⁷ a fellow of common sense and prudence, an experienced citizen of ordinary phlegm. One could argue, as it was put in *Fardell v. Potts*, that "this legendary individual occupies the place which in another science is held by the Economic Man, and in social and political discussions by the Average or Plain Man. He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen."⁴¹⁸ Holmes indeed, in a slightly later piece, himself referred to "our old friend the prudent man."⁴¹⁹ His first love, as it were, his fall back, his fate.

The bad man arrived upon the last-but-one turn-of-the-century jurisprudential scene as something of a ludic scourge upon the vacuity of legal science and the transcendental nonsense of legal abstractions long before they were actually termed "transcendental nonsense" by the felicitous Cohen.⁴²⁰ The study of law is the study of social pathology and its juristic resolutions. A science of law that refuses to study the bad man, the viewpoint of the lawbreaker, was in Holmes' view the equivalent of a science of medicine that refused to study the internal dynamics of disease because it harmed the body. So the bad man was the lawyer's friend. He not only paid the bills, but he was the epistemic endpoint of the legal rule. And he was also the opposite of the reasonable man. Not good but bad. Not logical but practical. Concerned not with reason but experience, and specifically with avoiding any unnecessary encounter with public force. Which was a whole new way of thinking about law.

414. *Id.* at 460.

415. *Id.* at 461.

416. *See, e.g.*, William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973).

417. *Dulieu v. White & Sons*, 2 K.B. 669, 684 (1901). For discussion of that decision, see *Owens v. Liverpool Corporation*, 1 K.B. 394, 400 (1939).

418. A.P. HERBERT, M.P., UNCOMMON LAW 1-2 (1945).

419. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 (1899) [hereinafter Holmes, *Interpretation*].

420. *See* Cohen, *supra* note 321.

The bad man symbolizes a secularizing turn in legal thought. He represents a move away from the vagaries of conscience and the dogma of divine or at least sovereign dictates of pristine legal rules. There is a sense, of course, in which the common law had always taken the practical path. The judges, who discovered and relayed customary law, had generally believed in a rose-tinted proposition most often attributed to Plowden: *semblable reason, semblable ley* — “if it seems reasonable it seems that it is law.”⁴²¹ The ultimate source of reason, however, was custom and practice so immemorial as to be part of the law of nature, and so in the end even custom was attributed to a divine rather than human inspiration.⁴²² Holmes’s friend the bad man was a radical departure and a satirical step towards addressing the law as a mode of life, as experience in an all too human form. As satire, however, it was only a first step. Holmes cannot be accused of following through with the bad man. He didn’t himself get down and bad, he immediately backtracked.

Holmes wanted to escape the theological reveries of abstract legal thought and its broodingly aloof doctrines. He wanted to escape God in law, but he ended up outlining a jurisprudence defined as the study of nothing but prophecies.⁴²³ Which sounds a bit religious to me. Rodell ridiculed lawyers as “medicine men,”⁴²⁴ and Frank was harsh on magicians and wizards.⁴²⁵ Prophets fall pretty much into that category as well, only that Holmes seemed to think that rather than being reducible to divine, natural, or simply scholastic reason, rules could be derived from history and empirical research. Not content with that, he went on to suggest that such a history was “the history of the moral development of the race.”⁴²⁶ So here, to follow through, Holmes is trying to move away from religion, but he does so by resorting to prophets. He wants to separate law from morals, and the way that he does so is by recourse to the figure of the “bad” man, which sounds pretty much like a moral judgment to me. His language betrays his purpose. He intended one thing but said another.

Finally, just in case the rest of Holmes’s piece tricked you into thinking that prophecy was actually a secular endeavor in which the

421. See FRAUNCE, *supra* note 154, at 73 (citing Plowden’s definition); GOODRICH, LANGUAGES, *supra* note 103, at 36 (discussing same). For a recent and interesting though limited discussion of this theme, see Gerald J. Postema, *Classical Common Law Jurisprudence (Pt. 1)*, 2 OXFORD U. COMMONWEALTH L.J. 155 (2002).

422. See FORTESCUE, *supra* note 261, at 33-35 (making the strongest version of this claim), discussed in Goodrich, *Illiterate*, *supra* note 99, at 11-14.

423. Holmes, *Path of the Law*, *supra* note 40, at 458, 461.

424. RODELL, *supra* note 161, at 3-6.

425. FRANK, COURTS, *supra* note 330, at 62-70; FRANK, MODERN MIND, *supra* note 331, at 196-200.

426. Holmes, *Path of the Law*, *supra* note 40, at 459.

bad man had some kind of say or stake, read to the conclusion, make the stroll through to the end of the path of the law. Enter the garden. Happiness, we are told, comes in the final accounting from the “remoter and more general aspects of law It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of universal law.”⁴²⁷ Holmes and his friend the bad man had, I suspect, by this point in time long parted company. Echoes of the infinite would have had the bad man running for the street. He was a rhetorical figure all along, and now he is zapped by the good guy, the reasonable man, the successful lawyer whose ear turns out in the end to be tuned to nothing more solid than glimpses of the unfathomable and hints of the universal law. Just so much snake oil to the bad man, or at least that is one point of view.

B. *The Unreasonable*

The issue that the figure of the bad man raises here is that of satire. Being bad is precisely the function of satire. It lampoons the pretensions and the conceits of the self-important, the overconfident, and the serenely vacuous. That is the role of the bad man; he is there to upend the assumptions of lawyers, to empty the trash can, and to deflate the complacency of unworldly legal claims to science. You have to take account of the bad man in whatever guise he appears. He may become an unreasonable woman, as in *Fardell v. Potts*.⁴²⁸ Or, in a less distant version, he may be a bad woman, a lesbian-feminist legal scholar riding a bicycle on the footpath when the Road Traffic Act forbids it.⁴²⁹ That is kind of an academic’s example, not hugely bad but bad enough. It is a version of pissing in the direction of the Pentagon, it is going beyond the rules, putting life ahead of law, and pleasure in front of the norm. It is a way of playing with the rules, and it has a less obvious significance that transcends the specific examples, and of which Holmes was only dimly aware.

The bad man was an emblem of difference in law. His introduction, brief and seemingly incidental though it was, marked a significant departure and was a radical gesture. It was not so much that prior to the bad man, law had been obsessed with the good, though that was part of it. More to the point, the good, the reasonable, the prudent, the cool, the phlegmatic, and all the other similar-sounding figures of law were precisely similar, familiar, and the same. They had different names but as Holmes put it elsewhere, *idem sonans*, they sound the

427. *Id.* at 478.

428. HERBERT, *supra* note 418, at 1.

429. MARGARET DAVIES, ASKING THE LAW QUESTION 122-23 (1994).

same and can only be differentiated by recourse to external circumstances. Holmes is discussing *Raffles v. Wichelhaus*, where the same name, *Peerless*, referred famously to two different vessels.⁴³⁰ He then goes on to mention not the bad man, but now his purer form, his transcendental self or soul, the bad itself: "In the use of common names and words a plea of different meaning from that adopted by the court would be bad"⁴³¹ Well, let's take the cue: the bad man is attracted to bad interpretations, uncommon meanings, difference plain and simple. And having let the bad man out, Holmes could hardly deny him a few bad interpretations. The century that followed was full of them. In fact, I think one could say that the bad man proliferated in law and in legal studies, and when critical legal studies emerged in the 1980s it just picked up and revived a much-lengthier tradition of the bad man and his bad interpretations. I will take a few examples. That should be enough. A few more footnotes to keep the good guys happy, sort out next year's editorial board, that kind of thing.

The bad, I am suggesting, represents the emergence of difference, and to be brutally direct about it, the experiences, the languages, and histories of those whom historically law had excluded. I doubt that Holmes intended such, but that is what he opened the door to, and for a moment at least, acted as the theoretician for. The old harmony of common law, the notion that there was one community, one language, one set of experiences that we could all agree upon as reasonable, as good, just turned out to be bad. At the least it was inaccurate. There were the poor, the working class, women, ethnic minorities, those with disabilities, gays, lesbians, transsexuals, who as the century progressed all had to be bad so as to do good and make themselves heard. The importance of the bad man lies not in his existence, after all, because religion, canon law, and common law have all been predicated upon dealing with the bad man, chucking him out, as it were, for being the devil that he is. That said, what is novel is the presence of the bad man, the visibility of bad interpretations, the bad man as norm or voice. That visibility and voice constituted the wittiest element in Holmes's introduction of his friend. The bad man, Moriarty as it were, soon turned out to be the indispensable sidekick of Holmes and the law. You couldn't have one without the other, and realistically speaking it was time to admit it. There is bad in the good and there is good in the bad, and no amount of law can get around it.

Bad is a moral category, and used as an adjective it constitutes a judgment. The bad man, as friend or as ex-friend, is a *prosopopeia*,

430. Holmes, *Interpretation*, *supra* note 419, at 418; see also A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 135 (1995) (discussing *Raffles v. Wichelhaus*, 2 H & C 906 (Ex. 1864)).

431. Holmes, *Interpretation*, *supra* note 419, at 418.

the rhetorical figure of personification. It is the linguistic means of creating a presence, and of giving an abstract idea a face, the iconic body part, and oftentimes a voice as well. The bad referred directly to the uncommon meaning, to the different, to the immoral and excluded. It refers to the opposite of law: not to the ethical but to the pragmatic, not to the spirit but to the body. Each aspect forms an important attribute of the Menippean branch of satirical legal studies. The *Corpus Iuris* became the literal body before the law. Satire is indeed often scatological, usually organic, and most emblematically concerned with the body. Diogenes, the first and greatest of the classical satirists precisely imposed his body into the discourse of philosophy. The stories are well-known and need not be noted in detail here: he masturbated in public saying "he wished it were as easy to relieve hunger by rubbing an empty stomach."⁴³² He stayed in temples, he lived in a wine jar, he walked barefoot in snow, he ate raw meat and vegetables, slept in the sun, pissed in the market place, farted at philosophers, and so on.⁴³³ Diogenes, according to his critics, lived like a dog, would bark and belch, laugh and cry in the cause of physically embodying his philosophical beliefs and satirizing the abstractions of the philosophers. If we turn to satirical legal studies in its more explicit manifestations in the critical legal scholarship of the second half of the twentieth century, there is a significant element of classical cynicism, of bodily intrusion, of embodiment and incorporation of the physical.

There is a short piece on reductionism in an early issue of the *Lizard*. It starts with the words: "There was in the beginning a dense fog:" and what follows the colon is a blank square frame. It continues:

People began to study this fog, for all the reasons people tend to study things like fog. . . . Some studied the fog hoping thereby to improve the conditions of their class, or race, or sex; others hoped to advance someone else's class, or race, or sex. Still others hoped to advance humanity, or the universe; and, finally, some people studied it from habit.⁴³⁴

The history referred to runs as follows. The sociology of law had a strong historical-materialist wing, and from the 1960s onward radical sociological accounts of law would attack the idealism of legal doctrine and counterpose the bodies, the actual life processes, or the materiality

432. 2 LAERTIUS, *supra* note 81, at 47.

433. See generally Andrew Long, *The Socratic Tradition: Diogenes, Crates, and Hellenistic Ethics*, in THE CYNICS, *supra* note 78, at 33.

434. *Reductionism*, LIZARD, Jan. 7, 1984, at 1, 10. For a divagation on that same theme in an historical context, see Peter Goodrich, *The Iconography of Nothing*, in LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW 89 (Costas Douzinas & Lynda Nead eds., 1999).

upon which law was inscribed.⁴³⁵ Class was the generic term for the aggregate body of laborers, the workers tied ineluctably to the means of production. For historical-materialist accounts of law, it was not consciousness — ideas — that determined social reality but rather socio-economic reality that determined consciousness.

Critical legal studies inherited much of the ethos of historical materialism, and it offered, initially at least, a class-based analysis of law.⁴³⁶ One aspect, though only one of many, in critical legal scholarship was the epistemic manipulation of the body. Bankowski and Mungham⁴³⁷ make numerous and often satirical use of the body in criticizing the law. They advocate for disruption of the trial, for theatrical protests, for the momentary staging of an alternative to law.⁴³⁸ Carlen's study of courtroom interactions in the lower courts borrowed its motif from Artaud's theater of the absurd. It is pretty funny. The dialogues she reports are droll or mad to a lay reader, but they are also politically frightening and poignant in a deflationary kind of a way.⁴³⁹ They do what all critical legal accounts of law ought to do: shock the complacency of the reader by addressing, noticing, and giving representation to the "bad man" — the people and bodies who were excluded, voiceless, and routinely processed by a system that was deaf to their pleas.⁴⁴⁰ They mine the satirical potential of the real and resort to the shock value of the historical record.⁴⁴¹

435. BANKOWSKI & MUNGHAM, *supra* note 298; *see also* PETER GOODRICH, *LEGAL DISCOURSE* (1987); PAUL HIRST, *ON LAW AND IDEOLOGY* (1979); ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* (1978); COLIN SUMNER, *READING IDEOLOGIES* (1979).

436. DUXBURY, *PATTERNS*, *supra* note 47, at 422-50; Goodrich, *Critic's Love*, *supra* note 315, at 345-49; Hunt, *Theory*, *supra* note 373, at 3-7; Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199 (1984).

437. *See supra* note 298 and accompanying text.

438. BANKOWSKI & MUNGHAM, *supra* note 298, at 132; *see also* Goodrich, *Zenotypes*, *supra* note 298, at 431-32.

439. PAT CARLEN, *MAGISTRATES' JUSTICE* (1976).

440. GOODRICH, *LANGUAGES*, *supra* note 103, at 179-201; IN *LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD?* (Herbert M. Kritzer & Susan S. Silbey eds., 2003); Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974).

441. *See, e.g.*, FRANK BURTON & PAT CARLEN, *OFFICIAL DISCOURSE* (1979); JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE* (1997). On the uses of history, and ignoring the current classifications, *see* Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 465 (Kimberlé Crenshaw et al. eds., 1995).

C. *Exiles*

Part of the breakup of critical legal studies as any kind of coherent conference or movement lay in the emergence of a second generation of critical legal scholars who were tired of the pieties of Marxism and the transcendental nonsense of class struggle. That is how it seemed and the resolution was in part to turn to satire of the texts of law. The old order of the real was collapsing. Baudrillard announced the reality of simulacra,⁴⁴² Umberto Eco embarked upon travels in hyperreality,⁴⁴³ and in law, Pierre Schlag and a team of other disconsolate law professors started changing how law review articles were going to be written. Suddenly, it was not legal doctrine as worthily reported from the lips of the judiciary that was taking pride of place. The conversations in the law school faculty lounge were appearing in scholarship;⁴⁴⁴ cocktail-party indictments of legal radicalism became the theme of self-critical reflections;⁴⁴⁵ a law school bulletin photo portrait of the Carter Professor of General Jurisprudence at Harvard Law School was the visual text used in one review as the starting point for the analysis of the work.⁴⁴⁶ And there was much more. Critical fictions multiplied. There was the law professor as a failed cab driver,⁴⁴⁷ an imaginary dinner party organized at Stanford Law School,⁴⁴⁸ a book-length study of the “enchantment” of reason,⁴⁴⁹ and an account of law as an addiction for which some twelve-step program is probably the cure.⁴⁵⁰ Experience, conversation, things seen and noted as absurd or different, as boring or amusing, started to litter the margins of the law review. It was a new generation offering a little more realism: the body in front of the text. It was not library lawyering in the sense of the legal realists, but it was library bound, a rather

442. JEAN BAUDRILLARD, *SIMULACRES ET SIMULATION* (1981).

443. UMBERTO ECO, *TRAVELS IN HYPERREALITY: ESSAYS* (William Weaver trans., Harcourt Brace Jovanovich 1986) (1967).

444. *See, e.g.*, Paul F. Campos, *The Chaotic Pseudotext*, 94 MICH. L. REV. 2178, 2178-83 (1996); Duncan Kennedy, *Pierre Schlag's The Enchantment of Reason*, 57 U. MIAMI L. REV. 513 (2003) (commentary).

445. Fischl, *supra* note 13, at 780.

446. Goodrich, *Duncan Kennedy*, *supra* note 308, at 971-73.

447. Schlag, *Normative*, *supra* note 41, at 167.

448. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1099-1100 n.193 (2002).

449. SCHLAG, *ENCHANTMENT*, *supra* note 328; *see also* Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

450. CAMPOS, *supra* note 42, at 188-89, *discussed in* Goodrich, *Anxiety*, *supra* note 213, at 147.

literary questioning, as Derrida put it, of “Scribble” and the relations between writing and power.⁴⁵¹

The critical legal scholars were not the only ones to have fun. They too had their satirists. There was the very amusing and quite unreadable diatribe of Arrow on pomobabble.⁴⁵² There was a finely ridiculous application of deconstruction to commercial law that bemoaned the “trail of anguish” that postmodern legal scholarship has left in the legal academy.⁴⁵³ The author, Professor DeLong, goes on to ask: “Does it have to be this way? Can there be hope for people who think a ‘dangerous supplement’ is an outdated pocket part? Who when they hear the word *norm* think first of the fat guy on *Cheers*?”⁴⁵⁴ And the answer was no, but your average commercial lawyer could play the role of soi-disant literary theorist and highbrow hermeneut if he (or just possibly she) read through the two short steps that DeLong had to offer on postmodern theory made simple.⁴⁵⁵ And just to add a footnote or two, there were a few parodic pieces on the “paranoid” style in legal scholarship,⁴⁵⁶ the interdisciplinary law professor as a schizophrenic,⁴⁵⁷ the capture of the academy by leftist legal academics,⁴⁵⁸ the relationship of law and the river, or the nihilism of the long-worded and hard-to-understand critics of law, the apostates of the legal academy,⁴⁵⁹ and even Brian Leiter regularly dissing the sophomoric practices and nonexistent philosophical credentials of critical legal theorists⁴⁶⁰ and other competitors near and far.

Take the example of Leiter’s most recent invective, the latest instance of analytic boys gone wild, and here the object is Dworkin *ad deridicula*, or Ronald ridiculed. You don’t believe me? You can’t

451. Jacques Derrida, *Scribble (Writing-Power)*, 58 YALE FRENCH STUD. 117 (1979).

452. Arrow, *Pomobabble*, *supra* note 25.

453. Sidney W. DeLong, *Jacques of All Trades: Derrida, Lacan, and the Commercial Lawyer*, 45 J. LEGAL EDUC. 131, 131 (1995).

454. *Id.* (quoting JACQUES DERRIDA, OF GRAMMATOLOGY 141 (Gayatri Chakravorty Spivak trans., 1976) (1967)).

455. *Id.* at 132-37.

456. Carlson, *supra* note 10, at 1946-48; Francis J. Mootz III, *The Paranoid Style in Contemporary Legal Scholarship*, 31 HOUS. L. REV. 873 (1994).

457. Suzanna Sherry, *The Law Professor as Schizophrenic*, 3 GREEN BAG 2D 273 (2000).

458. For this highly implausible thesis, see Dennis W. Arrow, “Rich,” “Textured,” and “Nuanced”: Constitutional “Scholarship” and Constitutional Messianism at the Millennium, 78 TEX. L. REV. 149 [hereinafter Arrow, *Rich*]. This is loosely on par with the left-wing takeover of the media, on which see AL FRANKEN, LIES (AND THE LYING LIARS WHO TELL THEM) (2003).

459. Carrington, *supra* note 47, at 223-25; MacCormick, *supra* note 383.

460. Brian Leiter, *The End of the Empire: Dworkin and Jurisprudence in the 21st Century*, RUTGERS L.J. (forthcoming 2005). Generally, see Peter Goodrich, *Pierre the Anomalist: An Epistemology of the Legal Closet*, 57 U. MIAMI L. REV. 791, 799-801 (2003).

make this stuff up, and I speak as one who has no mandate for the subject of this lampoon. Leiter begins in exemplary scientific fashion with an empirical claim “it is increasingly the *sotto voce* . . . consensus” within legal philosophy that Dworkin has made no contribution and has had no influence.⁴⁶¹ This important assertion of fact, this unmuddled yet slightly rococo claim, is then given the benefit of further fulsome proof: it is what “those who work in legal philosophy say privately.”⁴⁶² A later footnote adds well-researched additional evidence: there are “widespread perceptions about the argumentative feebleness of his . . . views.” Glad we nailed that down. Can’t argue with the facts. And if that isn’t clear enough, follow it up with: “Dworkin tried to lead [the] field down a deeply wrong-headed path.” No lack of precision there. Could go to court on the strength of that. Put money on it. But let’s see it through. Dworkin’s work has been “largely irrelevant . . . implausible, badly argued for, and largely without philosophical merit.”⁴⁶³ He is “the quintessential ‘sophist’ of legal theory,”⁴⁶⁴ and his arguments are “so baroque and muddled that they have been completely ignored.”⁴⁶⁵

Overall Dworkin’s oeuvre is impugned as implausible, “spectacularly wrong-headed.”⁴⁶⁶ And we are told somewhat disingenuously that it is a puzzle that his jurisprudential contribution “turns out, sadly, to amount to so little.”⁴⁶⁷ If the puzzle seems paradoxical and self-defeating as an argument, thankfully help is on the way. *Mirabile dictu* the puzzle is solved. We learn that Dworkin and his rhetoric “borders, I’m afraid, on the ‘unhinged.’”⁴⁶⁸ So that’s it.⁴⁶⁹ Good that it got clarified. And so it goes on but at the risk of infuriating Brian I have to say it would become tedious. Yet maybe just a word or two more. According to Leiter, Dworkin circulates “falsehood,”⁴⁷⁰ he is committed to “anti-intellectualism”⁴⁷¹ and where

461. Leiter, *The End*, *supra* note 182, at 1-2.

462. *Id.* at 20.

463. *Id.* at 2.

464. *Id.* at 16.

465. *Id.* at 13.

466. *Id.* at 15.

467. *Id.* at 15.

468. *Id.* at 19.

469. Close semantic scrutiny suggests that Leiter’s source for this argument in DR. SEUSS, *HOW THE GRINCH STOLE CHRISTMAS* [1957] (1985) no pages numbers — what on earth will Blue Book BBB (iii)(2)(3)(a) have to say about that? — arguing of the Grinch: “It *could* be his head wasn’t screwed on quite right. / It *could* be, perhaps that his shoes were too tight. / But I think the most likely reason of all / May have been that his heart was two sizes too small.”

470. Leiter, *supra* note at 460.

471. *Id.* at 19.

he has had an impact⁴⁷², he didn't have an impact. He was very influential but he had no influence at all. Or, to get a little personal, he just doesn't measure up to the "seminal Neil MacCormick."⁴⁷³ So he doesn't get to play with the boys, can't hold a candle to the *theatrum lucidum* of Larry Alexander, Jules Coleman, George Fletcher, Matthew Kramer, Michael Moore, Stephen Morse, Stephen Munzer, and all the other present day greats, the "unparalleled theoretical and philosophical prober[s],"⁴⁷⁴ the "most prominent ones,"⁴⁷⁵ the household names, and presumably the band of murmurers with whose *sotto voce* mutterings Leiter began his polemic. That is the flavor. A few lemony snickets, a series of unfortunate events, but as a defense, *apologia pro amici mea*, it is an exemplar of the satirical, a perfectly honed invective that puts the name back in *nomos*, and draws up a positively Posnerian list of the top ten legal philosophers.

Brian is being bad. But note also that his piece is brilliantly open, unabashedly polemical, and not afraid to display an endearing emotional honesty in the mode of the ad hominem. Nor is he afraid to exemplify what he criticizes. He is too busy putting the Horatio back in the Horatian genre. He has returned to Thermopolae, or its juridical equivalent, and he is telling it as it is, or at least how he sees it by his own Leiters. The city must be defended. And of course there are various subtexts. I won't discuss them here, I only want to say that the text illustrates well the culture wars in legal scholarship, the battle over turf, and the pervasive belief that we are all exiles at some level. And hence the play between structure and name, between the serious and satirical, and the charting of a path in between invective and the defense of friends. It is also, by this very token, a staging of loyalty, a positioning of friends, a demarcation of enemies. All that stolen enjoyment. Dworkin is "an *extremely good writer*," "his rhetoric is compelling," he comments on "*pressing legal issues*,"⁴⁷⁶ he gains attention, and we might add that he gets on Posner's A list, that he held the most prestigious of jobs in legal philosophy — Yale, Oxford, NYU, UCL: he has the status and he is not afraid to use it. Or be specific — why don't I? — there was the "drama" of "Dworkin's hatchet job . . . on Jules Coleman's book."⁴⁷⁷ There was the dismissive reference "to *Legal Theory*, which I edit with Larry Alexander and Jules Coleman,"⁴⁷⁸ and then there was Dworkin's claim that Leiter's

472. *Id.* at 3.

473. *Id.* at 10.

474. *Id.* at 3.

475. *Id.* at 5.

476. All at *id.* at 16.

477. *Id.* at 18.

478. *Id.* at 18.

teacher Peter Railton — “the standard of excellence in philosophy”⁴⁷⁹ — isn’t “relevant.”⁴⁸⁰ And finally the plain outrageous statement that legal positivists are scholastic, hermetic, and worst of all, “not interesting.”⁴⁸¹ The very idea. Most rumbunctious.

D. *Critical Race Theories*

So there are exiles all over. You cannot ignore that Leiter thinks he and his friends have been pushed to the side, implausible exiles or at least on the margins despite their top-notch work and mutual admiration. It is a salutary story with its own vivid self-expressions but I must needs move back now to the historical trajectory of the sense of exile and the actual dispersion of the radicals. What followed or represented the flowering, take your pick, of the short-lived critical legal studies movement was a much more diverse assertion of the body.⁴⁸² The crits had divided as much as anything else upon generational lines. The young wanted to be noticed, needed to be different, and sought a post-Marxist or postmodernist voice. Class just didn’t capture the complexity of material differences. Neither classroom nor class struggle were heuristically adequate to the pleasures of the I-Pod, the multitasking of the wireless environment, or the sound bytes of the first Internet generation. To this one has to add the retro concerns that class analysis excluded women, and later that it excluded race, ethnicity, and sexual orientation. If critical legal studies generally tended first to earnestness and latterly to flippancy, the subsequent generation was much more satirical, even if that satire was caused as much by the juxtaposition of contraries as it was by any more explicit satirical intention. I will start with a characteristic image.

The story comes in the course of an argument about the need for a multiplicity of voices, of multiple life experiences, that are currently missing, circa 1991 that is, from legal scholarly dialogue. The anecdote is titled *The Elevator* and reads as follows:

One Saturday afternoon I entered an elevator in a luxury condominium in downtown Philadelphia with four other Black women law professors. We were leaving the apartment of another Black woman law professor. The elevator was large and spacious. A few floors later, the door opened and a White woman in her late fifties peered in, let out a muffled cry of surprise, stepped back and let the door close without getting on. Several

479. *Id.* at 21.

480. *Id.* at 13.

481. *Id.* at 17.

482. On the flowering and diversification of CLS, see Kennedy, *Psycho-Social CLS*, *supra* note 308, at 1016-23, or GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END* (1995).

floors later the elevator stopped again, and the doors opened to reveal yet another White middle-aged woman, who also decided not to get on.⁴⁸³

The first incident, Banks reports, puzzled the women, and the second one made them laugh. Once was idiosyncrasy, twice was farce. In fact positively absurd.

That gives you a vivid image of the shock value of the body adorned with colors and clothes but without words. What you don't know, the unfamiliar, the strange, the outside, are all so many synonyms for one meaning of bad. The shock value of the body is precisely the basic premise of satire. It is the oldest tradition. Read Placentinus, Rabelais, or Freeman and Schlegel on Ackerman the chimp, Hutchinson on the one-eyed Dworkin, on the principles of Cyclops, Douzinas's drunken narrator, or the jurisprudence of Buffy the Vampire Slayer,⁴⁸⁴ and it is awash with body parts, bodily functions, organs, faces, mouths, and more. It is embodied, hedonistic, shocking to the norm, and somewhat exterior to the preceding style of legal scholarship. The function of legal satire is to introduce what law excludes. More than that, satire gives a competing voice to the experience, the languages and forms of life, that law excluded along with the bodies that were bad or simply too different to gain entry into the Pantheon of recognized legalisms, or Holmes's community of the shared meanings of words.

Why this concern with genre, with the aesthetic or style of critiques of law?⁴⁸⁵ The answer is layered, both historically and theoretically. I am going to have to apologize to Professor DeLong (who you will remember really doesn't like theoretical terms) but exclusion is both conscious and unconscious. In Taunya Banks's anecdote about the elevator, the middle-aged white woman reacted without thought — she let out a muffled cry, she stepped back, a physical response to sensory data that got under her skin. Her response was ingrained, habitual, prior to thought, which means it was prejudiced, decided in advance. And you will also have noticed that the law professors in the elevator didn't say anything, didn't reassure, or persuade, criticize, or comfort. And that is probably because it all happened too quickly, and it wasn't really a context conducive to speech. If the lady jumped at the sight of four Black women, I don't think she would have been calmed

483. Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46, 49 (1990-91).

484. See William P. MacNeil, "You Slay Me!": *Buffy as Jurisprude of Desire*, 24 CARDOZO L. REV. 2421 (2003); Anthony Bradney, *Choosing Laws, Choosing Families: Images of Law, Love and Authority in "Buffy the Vampire Slayer."* 2 WEB J. CURRENT LEGAL ISSUES (2003), at <http://webjcli.ncl.ac.uk/2003/issue2/bradney2.html>.

485. A theme pursued well in ADAM GEAREY, *LAW AND AESTHETICS* (John Gardner ed., 2001).

down by the fact that they could talk. It would probably just have made them seem a whole lot more dangerous.

It is hard to say it, but Taunya and her colleagues just had to be there to break the norm, to shock the order of things.⁴⁸⁶ Their difference was in their appearance, but that difference was somehow structural. It fed into deeply ingrained fears, perceptions way below the level of immediate articulation. There are plenty of similar stories. Patricia Williams being locked out of Benetton's,⁴⁸⁷ or Regina Austin being turned down by Harvard Law School,⁴⁸⁸ or Lani Guinier being flamed in the popular media as the "Quota Queen."⁴⁸⁹ All that negative affect is expressive of something, at the very least of deeply felt emotion, animation and excitement, desire and fear. Those are visceral responses, bodily states, and we refer to them in that way in part by dint of recognition that inclusion and exclusion, similarity and difference, recognition and rejection are both conscious and unconscious. When Charles Lawrence starts a law review article by reporting a dream in which he confronts a racist white law professor, one question to ask is "who is the dreamer?"⁴⁹⁰ In Freudian terms it is the unconscious, the sleeping body. That, in fact, was the argument that he made: Racism is unconscious and so too are many of our responses to it.⁴⁹¹ That is the level at which the discourse takes place, in the theater of self and other, in the mime of visceral gestures, in the shock of the satirical as well as through the relative calm of legal prose.

Legal feminism in its various forms introduced the body into the discourse of law. Sexual difference,⁴⁹² the masculine gender of the legal use of pronouns, the maleness of the reasonable man, the assumption that the disembodied reason of legal abstraction — the transcendental nonsense — was universal, common to all bodies, to both sexes, to all cultures.⁴⁹³ Feminism and most specifically "difference feminism"

486. For a powerful discussion of appearance and identity, on "seeming" to belong to a stereotype or class or image, see Maria Grahn-Farley, *Not for Sale: Race & Gender Identity in Post-Colonial Europe*, 17 N.Y.L. SCH. J. HUM. RTS. 271 (2000).

487. WILLIAMS, ALCHEMY, *supra* note 51, at 44-51.

488. See BELL, CONFRONTING, *supra* note 307, at 104-09, 114-15.

489. GUINIER ET AL., *supra* note 217, at 99.

490. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992) [hereinafter Lawrence, *River*].

491. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

492. LUCE IRIGARAY, I LOVE TO YOU: SKETCH FOR A FELICITY WITHIN HISTORY (Alison Martin trans., 1996) [hereinafter IRIGARAY, I LOVE]; LUCE IRIGARAY, THINKING THE DIFFERENCE (Karin Montin trans., 1994) (1989) [hereinafter IRIGARAY, DIFFERENCE]; see also DRUCILLA CORNELL, TRANSFORMATIONS (1993).

493. IRIGARAY, DIFFERENCE, *supra* note 492, at 37-67; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

impugned the disembodiment of law by placing the female body and the female voice,⁴⁹⁴ biography and embodiment, onto the agenda of legal studies. That meant seizing a space and finding representation in the dialogue of universals which was in fact no more than the male-gendered monologue of scholarship and doctrine. In Irigaray's elaboration, women needed their half of the public space of representation. They needed access to the sites of social enunciation. They needed legal definition and recognition. Women had to become legal subjects, which meant for her that they needed to grasp an objectivity of their own.⁴⁹⁵

The emergence of the female body in the discourse of law required new forms of representation. Irigaray argued for a baseline civic identity and recognition for women, a status that would allow women to develop their own modes of representation, their own aesthetic, politics, science, religion, and mythology.⁴⁹⁶ It was an argument that Drucilla Cornell developed in wonderfully Joycean terms by arguing for a "mamafesta," a carnivalesque language of feminine self-definition.⁴⁹⁷ It was precisely taking the body seriously, addressing the unspeakable,⁴⁹⁸ that expanded the ambit of legal studies to include attention to the multiple differences of the subjects upon whom the law was inscribed. Sex was a primary difference, for sure, but then so were race, ethnicity, and sexual orientation.⁴⁹⁹ What has the law got to say for me, as a woman, a person of color, a foreigner, a stranger, a gay man, a lesbian, a transsexual, or a "horsexe"?⁵⁰⁰

The body sprung onto the legal stage, with all its colors, tones, modulations, and rhythms. It was an expanding world of race theory, sansei legal feminism,⁵⁰¹ LatCrit legal studies, and sexual-orientation

494. The most influential work was CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). See also CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

495. IRIGARAY, *I LOVE*, *supra* note 492, at 18. For comment, see Peter Goodrich, *Writing Legal Difference: Helena Kennedy's Eve Was Framed and British Justice and Luce Irigaray's J'aime à toi: esquisse d'une félicité dans l'histoire*, 4 WOMEN: A CULTURAL REV. 173 (1993). See also GOODRICH, *OEDIPUS*, *supra* note 142, at 144.

496. IRIGARAY, *DIFFERENCE*, *supra* note 492, at 20-23.

497. DRUCILLA CORNELL, *BEYOND ACCOMMODATION 1* (1991); Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 688 n.108 (1990).

498. NICOLA LACEY, *UNSPEAKABLE SUBJECTS* (1998).

499. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGALF. 139 (1989).

500. CATHERINE MILLOT, *HORSEXE: ESSAY ON TRANSEXUALITY* (1990).

501. MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER AND THE LAW* 182-83 (1996) [hereinafter MATSUDA, *WHERE?*]. The term sansei refers to third generation Japanese-Americans. *Id.* at 181.

law.⁵⁰² Introducing the body — asking, as did Matsuda, *Where is Your Body?* — proposed a radically different connotation for the old legal writ of habeas corpus, meaning where is the body, and who will account for its being there? The body took to the stage, and that of course means that it became the object of legal discourse and the subject of legal texts. If the body was the expression of difference then that was because it appeared to be different. It needed different forms of expression, and that meant different modes of representation would reflect the differences of lived experience. Dreams, anecdotes, fictional characters and allegories, reminiscences, biographical diaries, poetry, emotion, fire music, jazz, and law were the new and corporeally embedded directions in the study of law. That was the radical critical style.

For Derrick Bell, writing differently, elaborating fictional characters in imagined worlds, talking about the experiences of outsiders and of the forgotten, was simply and directly a question of confronting authority.⁵⁰³ The subtle and persistent shock produced by a *Harvard Law Review* Supreme Court Term Foreword written in the form of a fictive chronicle recounting imaginary events was a selfconsciously satirical intervention.⁵⁰⁴ It was confrontational but in a stylish and understated form. It confronted and it shocked by challenging the forum and the scholarly jurisdiction of the law review. Bell's *Chronicles* begin on precisely that question of jurisdiction or right to speak. The author, the lone minority member of a committee planning bicentennial constitutional celebrations, tells a friend of a fantasy in which he returns to report back to the Framers on the progress made in the two centuries since they signed. The friend is "kind," and she tells him that he will have "to explain to the framers how you, a black, had gotten free of your chains and gained the audacity to teach white men anything."⁵⁰⁵ Adopting a common literary device, Bell later addresses the question again by indicating that the *Chronicles* are not his, but told to him "by Geneva Crenshaw, a civil rights lawyer who experienced them while recovering from an injury she suffered in Mississippi during the Freedom Summer campaign of 1964."⁵⁰⁶ Bell does not state that she is a fiction until later. Instead, he

502. CRITICAL RACE THEORY, *supra* note 441, collects some of the most important writings. Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087 (1997), is an important early guide to LatCrit theory. See also MATSUDA, WHERE?, *supra* note 501.

503. BELL, CONFRONTING, *supra* note 307, at ix-xiv.

504. Bell, *supra* note 49.

505. *Id.* at 4.

506. *Id.* at 13.

proceeds in “a tone of dead seriousness”⁵⁰⁷ to record the narrative of the Celestial Curia, and the dialogue that followed its recounting.

Bell’s *Chronicles* article was followed by a whole series of comparably confrontational literary interventions. Geneva Crenshaw returned fulsomely in Bell’s book *And We Are Not Saved*,⁵⁰⁸ again in *Faces at the Bottom of the Well*,⁵⁰⁹ and in *Afrolantica Legacies*.⁵¹⁰ She was Bell’s vehicle and, as is well known, she was also his political cause. He resigned from Harvard Law School precisely because no African-American woman had been appointed to the faculty.⁵¹¹ It is work that helped found the critical race theory movement, and it helped define the style of the work. It demanded a change of voice and of forum that was picked up on or played with by many other authors. If legal discourse and scholarship expressed a white-male norm, a different form of scholarship and different sites and modes of enunciation were necessary to the inclusion of novel experiences, cultures, and their anomalous norms.

Bell’s *Chronicles* adopted the literary and often utopian device of the found manuscript and the report from an inaccessible place. Geneva Crenshaw arrived at the Celestial Curia after “what seemed a long journey.”⁵¹² When we encounter Geneva again, it is by means of the same literary device, rhetorically *topothesia*, or the figure of an imagined geography,⁵¹³ through a daydream during the plenary session of an unsatisfactory conference. *Afrolantica*, to take a further example, was an explicitly utopian space which “rose slowly, fully formed from watery depths in about the location of the mythical, lost continent of Atlantis.”⁵¹⁴ The form signaled the novelty of the content and of the cause: if law was here and now, critical race theory wanted to take it elsewhere and into a future that was as of yet genuinely unknown. Critical race theory was abolitionist in the sense that it did not want substitutes of this for that, or simple inclusion and repetition of a prior norm. In its radical early modes it wanted recognition and enunciation for modes of life, of culture, experience, speech, and

507. MATSUDA, WHERE?, *supra* note 501, at 49.

508. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

509. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

510. DERRICK BELL, *AFROLANTICA LEGACIES* (1998) [hereinafter BELL, *AFROLANTICA*].

511. BELL, *CONFRONTING*, *supra* note 307, at 50-65, tells the story from Bell’s perspective.

512. Bell, *supra* note 49, at 17 (emphasis omitted).

513. Peter Goodrich, *La Nouvelle Vague: Epiphanies, Encounters, Events*, 10 FEMINIST LEGAL STUD. 159 (2002). The figure is defined by PEACHAM, *supra* note 123, at 141-42.

514. BELL, *AFROLANTICA*, *supra* note 510, at ix.

writing that were distinctive in genre and outside of prior law if not expressly unlawful.

Charles Lawrence began his critique of the white norm with a highly confrontational dream in which he elaborated upon the significance of fear and the differences in the experience of fear as between that of “the oppressor, or master, and that of the oppressed, or slave.”⁵¹⁵ The force of the criticism is both smoothed and extended by its location in a dream. Its shock value is augmented by its accessibility, its resonance with experience. Here is how Matsuda relates it: “The conceptualization of fear as a motivational force in life and in law — intertwined with a critique of meritocratic legal lies, all in a short account of one man’s dream — was stunning to readers who identified with Lawrence’s experience.”⁵¹⁶ It was a dream of a voice, and of the social change that speaking our dreams could bring.

Patricia Williams begins her most famous work with a fable of the Celestial City, and then moves immediately to the state of waking:

Since subject position is everything in my analysis of the law, you deserve to know that it’s a bad morning. I am very depressed. It always takes a while to sort out what’s wrong, but it usually starts with some kind of perfectly irrational thought such as: I *hate* being a lawyer.⁵¹⁷

So Williams begins with the bad, and being bad, appropriately enough, means feeling unlike a lawyer, and unlike Holmes’s other and probably better friend, the prudent man who listens for the echoes of the universal. A later set of radio lectures that Williams delivered on the BBC in London, which both threatened and infuriated the English tabloid and middlebrow media,⁵¹⁸ started with an anecdote about the experiences of her child in the schoolyard playing “good guys.” The teacher had told her students that there was no color line between good and bad. Good could be black and bad could be white (or pink or gray). She had said color didn’t matter, best to ignore it in fact. Williams pointed out that this was bad advice, so bad that her child had to be taken to the eye doctor when he kept saying that he didn’t know the color of things because, in essence, his teachers had taught him that color didn’t matter.⁵¹⁹

John Calmore, to take one final example, begins with jazz. His argument for jazz jurisprudence was that it was a musical form that

515. Lawrence, *River*, *supra* note 490, at 2233.

516. MATSUDA, *WHERE?*, *supra* note 501, at 49.

517. WILLIAMS, *ALCHEMY*, *supra* note 51, at 3.

518. WILLIAMS, *COLOR BLIND*, *supra* note 300. On the press reaction in England, see Goodrich & Mills, *supra* note 182, at 27-29.

519. WILLIAMS, *COLOR BLIND*, *supra* note 300, at 3-4.

expressed dissent from traditional forms.⁵²⁰ It is a form that allows improvisation; it is generally unrehearsed and democratic, a countercultural practice in fact. Jazz is fundamentally critical and multicultural, and it is its oppositional, border-crossing character, its appeal across racial divides, its heterogeneity that appeals to Calmore. That, and the fact that it is based in performance, in doing something, in lived experience and its expression. Calmore does not think that mixing jazz and law, black and white, “is necessarily a bad thing.”⁵²¹ Well of course it isn’t a bad thing, but in Holmes’s terms, Calmore, and Cornel West,⁵²² and Archie Shepp, Derrick, Patricia, Charles, and Mari, Kim, and Kendall, they are all versions of his friend the bad man, bringing bad interpretations — the music of difference — into the law. Play on.

VI. KYNICS, SATIRISTS, AND CRITICS OF LAW

In his essay on the path of the law, Holmes, in backtracking rapidly from the radicalism of introducing his friend the bad man says the following: “I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism.”⁵²³ Well, one implication of that is surely that while the hearer may not, the reader most certainly will. Holmes wasn’t much of a philosopher, but his reference and anxiety are highly telling. Of course it was cynical, or more accurately, to borrow the German term that Peter Sloterdijk coins for subversive or antiestablishment Menippean cynicism, it was “kynical.”⁵²⁴ That means that it was classically cynical, in turn playful, irreverent, critical, harsh, at times shocking, and throughout fiercely realistic. The kynic was political through and through, classically an activist and one who would hound authority and privilege in search of authenticity and in search of something new. The kynic belonged to a political tradition that was insolent, audacious, and hedonistic: “[T]he tradition of kynicism, embodied in Diogenes ... privileged satirical

520. John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2135 (1992).

521. *Id.* As a side note, Kellis Parker, cousin of Charlie Parker, was a professor at Columbia Law School and kept a trombone in his office. See Kendall Thomas, *Remarks at Memorial Service for Professor Kellis E. Parker*, 101 COLUM. L. REV. 699 (2001).

522. CORNEL WEST, *PROPHETIC FRAGMENTS* (1988). West later went on to produce a rap CD, to the distress of Lawrence Summers, the new President of Harvard University. West subsequently moved to Princeton University for that very reason.

523. Holmes, *Path of the Law*, *supra* note 40, at 459. BIERCE, *supra* note 293, at 61, defines “cynic” as follows: “A blackguard whose faulty vision sees things as they are, not as they ought to be,” which ably captures Holmes’s friend and gives us a lucid entry into a world turned upside down.

524. SLOTERDIJK, *supra* note 93, at 101. For useful discussion, see THE KYNICS, *supra* note 78.

laughter, sensuality, the politics of the body, and a pleasure-oriented life as forms of resistance to the master narratives of Platonic idealism, the values of the polis, and the imperial claims of Alexander the Great.⁵²⁵ Times have moved on, Alexander is no longer Great, we've moved from Plato to NATO, but the satirical technique, the irreverence, the cheekiness, the laughter and lampooning, are arguably still significant attributes of contemporary kynicism and of satirical legal studies in its twentieth-century forms. Who was Diogenes, after all, if not the first bad man?

It is kynicism, I will suggest, that is the common link, the theme that draws together legal realism, the diverse forms of critical legal theory, the social parodies of public intellectuals, the critics of postmodernism, and the practitioners of the lighter side of law.⁵²⁶ The thread that I have traced under the aegis of satirical legal studies, from the legists to the *Lizard*, from Renaissance legal farces to the *Green Bag*, from *amici curiae* to *amici humoriae*, is that of a satirical tradition that is properly the heir to classical kynicism. Looking back may enable us to move forward. There are key elements, consistencies even, that the tradition of kynicism exhibits. They can be drawn together to aid in developing the project and prospects of satirical legal studies, not, I hasten to add, as a movement but rather as an idea, a sentiment, a critical mood, and an as-yet-neglected genre of legal writing. It may be that there are costs to making this subculture visible. The squibs and jibes, the jokes and barbs are secretly what jurists enjoy reading but they fear to take them seriously, they rather ironically have trouble thinking them through. We all have our blind spots, lawyers perhaps more than most, it being a sedentary life, but let's take a look. There are, at the very least, certain key themes that can be drawn from the earlier tradition, various impulses and commitments, a tone and a style, and addressing these directly can help define the philosophy of satirical legal studies as we inherit it and may yet build upon it.

525. Andreas Huyssen, *Foreword* to SLOTERDIJK, *supra* note 93, at xv.

526. I refer here, and admittedly or intentionally only in a footnote, to the healthy levity of some of the contributions to the *Journal of Legal Education*, which has long had a periodic section titled "On the Lighter Side," that includes some fine if local satire of law review footnoting, scholarly prolixity, law school hierarchy, and other academic vices. Every so often an almost-blank page will appear. The first series of *Green Bag*, a journal that announced itself, in its first issue in 1889, as intentionally useless, and defended that position in the second issue, had a longstanding section called "Facitiae" and varied sections of humorous antiquities or bizarre anecdotes. Other period pieces of juristic entertainment from that era include BALLADS OF THE BENCH AND BAR OR IDLE LAYS OF THE PARLIAMENT HOUSE (1882); LYRICS OF THE LAW (J. Greenbag Croke ed., 1884); and POEMS OF THE LAW (J. Greenbag Croke ed., 1885). My favorite of contemporary legal poets is Robert Rains. See, for a good illustration, Rains, *R*, *supra* note 119.

A. *Philosophy as a Way of Life*

When Plato put forward the definition of the human as a featherless biped and was praised for it, Diogenes grabbed a rooster and plucked the feathers from it. He then brought it into Plato's school and said: "Here is Plato's man"; as a result of which, the phrase "having broad nails" was added.⁵²⁷ For Diogenes and the Kynics, it was the materialization of thought that mattered. What was significant was not the philosopher's teaching, but rather it was the philosopher's practice that determined their importance: "It was their very life that bore meaning within itself and implied an entire doctrine."⁵²⁸ In this aspect, Diogenes has much in common with Socrates in imagining that the function of philosophy is to dispel reliance upon easy abstractions or the vacuities of established practice. Knowledge of oneself and care of oneself were the primary sources of philosophical thought and entailed a decision that grounded a life.

Honesty, vitality, and humor went together in establishing a lifestyle as "an ethical practice that others could imitate."⁵²⁹ In this dimension, life was a stage upon which thought was acted out. That was its freedom and its authenticity, its project and its power. Anything else would be dishonest, lazy, and in the end unhappy. What has not been experienced, directly or vicariously, can hardly be thought, or if thought is liable to stultification. Thus the story of the rooster being plucked, a story that is echoed in the title of one postmodern law book of anecdotes authored by Patricia Williams⁵³⁰ and numerous other enactments of the failure of enlightenment. Diogenes, according to Tertullian, carried a lamp in broad daylight as an ironic gesture against the metaphor of light, and later of enlightenment, as an externally given illumination.⁵³¹ The kynic is honest, Gnostic, and realistic: light has its source in the sun, and those who value nature will see their way by that.

The kynic's *universitas vitae*, or "schoolroom of life," referred to a philosophy taught in other places, in the lifestyle of the actor, the artist, the player.⁵³² It was teaching that took place on the stage of public life and through the drama of public events. It was inculcated through what was done rather than through the more usual retrospective reflections that synthesize what should have happened or

527. 2 LAERTIUS, *supra* note 81, at 43.

528. PIERRE HADOT, WHAT IS ANCIENT PHILOSOPHY? 102 (2002).

529. Long, *supra* note 433, at 41.

530. WILLIAMS, ROOSTER'S EGG, *supra* note 300.

531. 2 LAERTIUS, *supra* note 81, at 43. The reference to Tertullian is given in THE CYNICS, *supra* note 78, at 361.

532. SLOTERDIJK, *supra* note 93, at 120.

represent what the judge or philosopher rationalized as the reasons for what was not done. It is that thematic of enactment, of honestly looking at what occurred, particularly in legal judgment, that motivated legal realism from the beginning. Holmes was from the outset in search of phenomenology, an account of law that responded not to logic but to experience. Satirical legal studies took up that theme and derided the many forms of juristic abstraction and specifically the disassociation of norm and judgment, fact and determination. Its concern was with what happened, what got lived, and not with what was represented.

Legal realism was in large measure a satire of the pretensions, the follies and intellectual foibles, of jurisprudence. In their varying forms, Llewellyn and Frank, the rule skeptics and the fact skeptics, sought to express what happened in the name of law. From the *Cheyenne Way*⁵³³ to the study of parking regulations,⁵³⁴ the goal was to account for what got done and to juxtapose that with the rules in the books or the fantasms in the judgments. The sociology of law continued that pattern of satirical or simply negative confrontation between practice and judgment, between application of the norm and normative self-justification.⁵³⁵ It is in the tradition of the realists, that critical legal scholars satirized the grandiose claims of legal reason, of rule and policy, in favor of an account of how law affects life. Pierre Schlag's *Enchantment of Reason*, referred to the dream of pure forms, the fantasy of a logical order that mapped the anomalous domain of events.⁵³⁶ The "jurismaniac" was precisely an addict of legal resolutions to all conceivable social ills and was derided as such:⁵³⁷ "Hello, my name is Peter, and I am a jurismaniac" is a salutary starting point, is it not? The heirs of critique, feminism, critical race theory, sensei jurisprudence, Latcrit legal studies, and so on, all share a connection to experience, to what is lived, as the primary datum against which to measure the follies of legal doctrine and the various other authorized accounts of law. Rodrigo continues, at least in one sense, in the tradition of Placentinus, and chronicles the experience of the student as the outsider, and the demand of the excluded to a place in the social contract, the law that underpins law.

Legal philosophy as a way of life is obviously something of a lost art, a distant memory, a tradition now marked by desuetude rather

533. K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941).

534. Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 *YALE L.J.* 1 (1943).

535. For a striking example, see DOREEN J. MCBARNET, *CONVICTION: LAW, THE STATE AND THE CONSTRUCTION OF JUSTICE* (1981).

536. SCHLAG, *ENCHANTMENT*, *supra* note 328, at 3-7.

537. CAMPOS, *supra* note 42, at 3-15.

than use. It is not obvious what it means, though nor is it necessarily particularly difficult. Law as a way of life refers to the relationships that law engenders and the practices it supports. The question of what law is as an experience, in its time and space, its here and now, is really very challenging. As I have shown, irreproachably I believe, law is ironically everywhere enclosed, bounded, locked away. It is in law schools, in books, in courts and texts and the scarcely comprehended argots of statute and decision, codes and their complications. We satirists, however, cannot start from these external manifestations of law, these passing distractions, but rather look to experience, to the interiority of practices, to the affects and comparisons, the proximities and distances, that support the rule. As Nietzsche puts it, and he was an exemplary kynic, a gay scientist in the extreme, what has to be addressed is the color of law, its history as a practice, its affective life, the day-to-day of the face-to-face.

B. *Humor as a Rhetorical Form*

I have left discussion of humor until rather late. Purposefully so, or at least I shouldn't really be admitting otherwise, because satire embraces humor but does so to particular effect. Humor, however, underpins and in part defines satire, and it is worth elaborating upon one further feature. Humor engages the body, it causes a physical eruption, "broken sounds," trembling or convulsion. Here is a sixteenth-century definition of laughter:

Laughter is a movement caused by the jubilant mind and the unequal agitation of the heart, which draws back the mouth and the lips, and shakes the diaphragm and the pectoral parts with impetuosity and broken-up sound, through all of which is expressed a feeling over an ugly thing unworthy of pity.⁵³⁸

Note that laughter ineluctably joins thought to the body, and along with blushes and tears, reticence and passion, it is the most real that thought can be. Note further that what most helps us in defining laughter as the expression of humor is this boundary-crossing character which is also expressive of the most direct and honest of beliefs. The dread potentate is an ill-working digestive apparatus;⁵³⁹ the judge, to use an English example — and why not? — is dressed as a woman or, if female, as a man; the professor is a bore, or drunk, or ill-prepared, or passing on someone else's thoughts as his own; the Associate Dean is rent seeking.⁵⁴⁰ Whatever. Call them on it.

538. LAURENT JOUBERT, *TREATISE ON LAUGHTER* 73 (Gregory David De Rocher trans., Univ. of Ala. Press 1980) (1560).

539. CARLYLE, *supra* note 2, at 51.

540. See Stewart E. Sterk, *Information Production and Rent-Seeking in Law School Administration: Rules and Discretion*, 83 B.U. L. REV. 1141 (2003). Just for the hell of it:

Humor is perhaps too light a word. Diogenes was often referred to as Socrates gone mad,⁵⁴¹ a characterization attributed to Plato and frequently taken up by subsequent, less-affectionate historians. His madness was most immediately his opposition to cultural norms as arbitrary rules, his aversion to proper manners as modes of concealment, and to the general prescription of the tragic as against the comedic or simply hedonistic. Humor in the service of satire causes laughter, but it also generates shock and outrage because of the deflationary cause within which it plays its role. Role reversal, the inversion of accepted norms, the parodying of social positions, are key elements in all comedy and of particular importance in satirical interventions. Diogenes the dog and kynicism as dog philosophy together represent an emblematic expression of the limitation of philosophy and a surprising inversion of the usually disembodied nature of philosophical thought.

The later tradition constantly returned to the humorous as the intrinsic mode of destabilizing or at least desanctifying law. The legal equivalent of kynicism is literally “dog jurisprudence” — a barking critique of established norms. It is a long-lived tradition that starts for us with Placentinus’s humorous poem and its juxtaposition of nature and law, as vitality waged against the desiccated figure of legal science. The figure of *Domina Ignorantia* was that of a young girl, not that of a dog to be sure, but the import was similar, the trigger the same, and the humor was equally that of nature — bare life — in insurrection against law. This was the theme most evidently of the *gai savoir*, or “gay science,” that Nietzsche recalled in his eponymous treatise.⁵⁴² The humor of the kynics gained its major modern elaboration in Nietzsche, whose philosophy of gay science opened with the opposition of tragedy and parody, and the declaration that satirical science, the scientist as satyr, was the face of the future.⁵⁴³

Sterk, whose office is only one floor away from mine, and who seems pretty physically active, sporty even, was an interim Associate Dean. He would not make this argument — I will ask him next time I see him — but the very fact of writing the article, of “vent[ing] my personal frustrations” as he puts it at 1170, amusingly acts as a partial rebuttal of his thesis. It, at the least, exemplifies that we are all part rent-seekers, extracting a personal interest, pushing a subgroup cause in the course of running things as they are. It cannot be helped. It is how things are. A little pain in your profit; a little prophet in your pain.

541. 2 LAERTIUS, *supra* note 81, at 43.

542. FRIEDRICH NIETZSCHE, *THE JOYFUL WISDOM (LA GAYA SCIENZA)* (Thomas Common trans., Frederick Ungar Publ'g 1960) (1882) [hereinafter NIETZSCHE, *JOYFUL WISDOM*]. For discussion of the jurisprudential significance and possibilities of that text, see Goodrich, *Gay Science*, *supra* note 124, at 95, and GEAREY, *supra* note 485, at 64-73.

543. NIETZSCHE, *JOYFUL WISDOM*, *supra* note 542, at 3.

The buffoon, the kynic, the jester, Diderot's Rameau,⁵⁴⁴ and Foucault's fool⁵⁴⁵ played a hugely important role in the early history of the politics of thought. For Nietzsche, the figure of the satiric scientist, the kynic or gay thinker, was one of innocence and ambition, of honesty and the satisfactions of a loose tongue: "[W]hen any one speaks 'badly' — and not even 'ill' — of man, then ought the lover of knowledge to hearken attentively and diligently; he ought, in general, to have an open ear wherever there is talk without indignation."⁵⁴⁶ The reason for going with the bad and not with the moralistic or indignant, is specified as follows:

For the indignant man, and he who perpetually tears and lacerates himself with his own teeth (or, in place of himself, the world, God, or society), may indeed, morally speaking, stand higher than the laughing and self-satisfied satyr, but in every other sense he is the more ordinary, more indifferent, and less instructive case. And no one is such a *liar* as the indignant man.⁵⁴⁷

Nietzsche's kynic was an oppositionist and a rebel. He was above all honest, and his honesty pitched him against the moral code of required points of view. The satirical scientist was cheerful because the Christian God was dead⁵⁴⁸ — no longer worthy of our belief — and along with that cheerful cheekiness, the gay scientist opposed humor, and the various ruses of parody and jesting, to the weariness, the sobriety and humorlessness of the tradition of Christian moral values. It was indeed the humorlessness of a norm that was nihilist or life-defying, in a bland or weak and dreary way.⁵⁴⁹ Humor existed to remove the mask of seriousness behind which the moralizing philosopher hid. It was the rhetorical mode of the destruction of tragedy: "Great things require that one be silent about them or talk about them on a grand scale: on a grand scale means cynically and with innocence."⁵⁵⁰

Humor was the genre of resistance and dissent. It accumulated many further figures in the literary tradition from the Rabelesian

544. Actually Rameau's nephew. See DENIS DIDEROT, *Rameau's Nephew*, in RAMEAU'S NEPHEW AND D'ALEMBERT'S DREAM 13 (Leopard Tancock trans., Penguin Books 1966) (n.d).

545. MICHEL FOUCAULT, MADNESS AND CIVILIZATION (1965).

546. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 40 (Helen Zimmern trans., George Allen & Unwin Ltd. 1976) (1887).

547. *Id.*

548. NIETZSCHE, JOYFUL WISDOM, *supra* note 542, at 275.

549. A suggestion frequently made in SCHLAG, LAYING DOWN, *supra* note 328.

550. FRIEDRICH NIETZSCHE, THE WILL TO POWER I, at 1 (1909). Translation is taken from THE CYNICS, *supra* note 78, at 354.

Doctor of gay science⁵⁵¹ who philosophized *sans culottes* — bare assed — to the yippies or the *Lizard*. Issue one of the *Lizard* begins with a defense of the “incivility” of critical legal scholars against an attack by the *Times*. The opening response reads: “Kiss my ass, cigar-breath. You guys sound more and more like an organ (you know which) of the Pinochet regime.”⁵⁵² Which is a classically bad, and specifically bad-mouthed response. It neatly enacts the position being defended. And then, to add paradox, the respondent later denies the accusation: “We are not uncivil, unless as you say it’s uncivil ever to argue with people in authority.”⁵⁵³

The use of humor, Nietzsche’s *incipit parodia* of gay science, develops as much out of a literary and rhetorical tradition as it does out of rebellion against the received wisdoms of philosophy. Satirical legal humor revised the theatrical genre of comedy for the purposes of criticizing law. The poem was the earliest form of such critique outside of theater, and it was a form much used by Nietzsche himself, but as we have seen, the genre also included dialogues,⁵⁵⁴ humorous briefs,⁵⁵⁵ ludic digressions,⁵⁵⁶ revs and plays,⁵⁵⁷ as well as fictional sallies.⁵⁵⁸ As satire, these divergent examples of the genre share the rhetorical use of humor to make a broadly political point. The recourse to rhetorical forms gives the further clue that these uses of humor are aimed to engage, or in Saint Augustine’s classical formulation, to move, persuade, and bend the audience to the purposes of the orator.⁵⁵⁹

551. RABELAIS, *supra* note 61, at 67-72. See also, interestingly MICHÈLE LE DOEUFF, LE SEXE DU SAVOIR 371 (1998).

552. *The Civility Issue in Critical Legal Studies: A Dialogue Between The Times and Lizard*, LIZARD, Jan. 5, 1984, at 1.

553. *Id.* at 2.

554. *E.g.*, C.W. Maris van Sandelingenambacht, *Nietzsche, Niezky Nijinsky*, 24 CARDOZO L. REV. 1261 (2003) (providing a highly staged example); Tung Yin, *Really, Who is Uncle Zeb?*, 3 GREEN BAG 2D 115 (1999) (criticizing law school).

555. *E.g.*, Charles Yablon, *Suing the Devil: A Guide for Practitioners*, 86 VA. L. REV. 103 (2000).

556. *See, e.g.*, DAVID FRASER, CRICKET AND THE LAW: THE MAN IN WHITE IS ALWAYS RIGHT (1993) (analyzing cricket-based theories of law); Yablon, *Baseball*, *supra* note 39 (reviewing the baseball metaphor in jurisprudence). Leff, *Law and*, *supra* note 23, offers a preliminary analysis of the appeal of the ludic metaphor. SIMON ROBERTS, ORDER AND DISPUTE (1979), offers a broad anthropological account of a number of ludic modes of dispute resolution in non-Western cultures.

557. For a recent example, see the two brief scenes in Robert E. Scott, *Twenty-Five Years Through the Virginia Law Review (with Gun and Camera)*, 87 VA. L. REV. 577, 580-82 (2001).

558. DOUZINAS ET AL., *supra* note 27, at 199-271 (analyzing the relationship of law to literature through a fictional copyright case).

559. SAINT AUGUSTINE, ON CHRISTIAN DOCTRINE (D.W. Roberts, Jr. trans., 1958).

Granted that change is usually not immediately desirable to those who are being called upon to change — often named the establishment, the status quo, or vested interest⁵⁶⁰ — and granted further that law has always been unusually slow to change, humor is often a necessary dimension of arguing for reform. It has to be said that it is also usually lacking, but rhetorically it is helpful. The modern lawyer studies rhetoric too little and so is not best-equipped to evaluate the place of humor. It is a radical dimension to argument, a central tenet of kynicism, and an intrinsic aspect of the art of satirical legal studies. That said, it can be added that it has philosophical significance as well. Satire treats philosophy as also being rhetorical, and it deems rhetoric to have a philosophical significance. Humor is the best traveled axis of such a radical elision. Humor persuades in large part because it attracts attention, it is engaging and engaged, it is in brief both thoughtful and accessible. That is its strength as a rhetorical form; it allows for the possibility of persuasion, even if it does not on the given occasion persuade, or at least not immediately.

Humor, which of course has close links with the unconscious,⁵⁶¹ with the drives, plays upon the ambiguity of words and things. Here is not the place to embark upon an account of the genres or manners of the different types of humor but it is worth saying that it is a leveler of differences and, in principle, contrary in spirit to the pretensions of those who deem themselves above the muck of the world, of bodily functions, the emotions, the groans and guffaws, the blushes and smirks that mark all arguments as also being *ex hominem* and *ad nominem*. The appeal of humour is what we dull leftists used to call *praxis*, the art of conscious, quotidian political action, of taking things on thoughtfully in the everyday. Humor has appeal, a joke can get through, a satire can stick. It might even be fun to be a kynic in the philosophy of law.

C. *Anomalism as a Theory of Law*

Kynicism is predicated upon a theory of the event. Kynic philosophy was a choice of life rather than a discourse or treatise upon

560. The argument for reform may most often be vested in liberal and left-wing critics of law, but it is equally true of right-wing satirists that they view liberal and left positions as controlling the relevant public sphere. Thus Dennis Arrow, *Rich*, *supra* note 458, takes the position that left-wing scholars have taken control of law schools; POSNER, *INTELLECTUALS*, *supra* note 8, views liberal and left-leaning intellectuals as dominating the media of public-intellectual presence or, more disparagingly, as a left-wing market.

561. I have resisted returning to SIGMUND FREUD, *JOKES AND THEIR RELATION TO THE UNCONSCIOUS* (James Stratchey trans., 1960). I have crossed too many lines already but he does make the useful observation that humor is necessarily in conflict with the superego. He sees the superego as a censor, a wrathful lawyer, as it were, whereas the delightfully light Critchley turns the other way and coins the more accurate epithet, “the super-ego is your amigo.” CRITCHLEY, *supra* note 147, at 93.

modes of living. As a philosophy of embodied thought, a theory of the significance of acts, it was responsive, spontaneous, and spoken rather than written. Thus the anecdotes of Diogenes are full of paradoxical challenges to the received order of thought. When Diogenes saw a child drinking with his hands, he threw away his cup and drank with his hands as well.⁵⁶² When someone declared that movement did not exist, Diogenes simply got up and walked away.⁵⁶³ Among the many significances of such symbolic acts is a strong sense of the uniqueness of the act as an expression that is authentic to the uniqueness of the event. It was anomalous, novel, beyond prior calculation or prediction, and so for the kynic, authenticity meant both apprehension of and response to the anomalous character or difference of the individual event.

The classical legal tradition traveled under the sign of order. According to the ancient jurists, *nihil pulchrius ordine*, "nothing is more beautiful than order."⁵⁶⁴ For the kynic, the opposite was true — beauty lay in the particular, in anomaly and dissent. The roots of this division between the early schools of law,⁵⁶⁵ derived from the writings of one of Diogenes's followers, Crates of Pergamum. It was not law but the rule-bound theorems of the grammarians that Crates attacked and in doing so established a tradition of anomalism first in linguistics and later in law.⁵⁶⁶ In schematic terms, the dispute looked as follows. For the analogists, language was inherently orderly and governed by regularity. The analogist grammarian undertook to submit language to principles or rules that were predicated upon likeness or analogy. Nouns and verbs could be grouped and classified into declensions and conjugations on the basis of similarity of form. The verbal similarities that the analogists sought to find were not only grammatical, they were congruent also with the semantic reference of the word, the context or *denotata* of the sign.⁵⁶⁷

The anomalists were more radical and stressed difference rather than similarity of form. Their argument was that language was far from

562. 2 LAERTIUS, *supra* note 81, at 39.

563. *Id.* at 39.

564. On the maxim *nihil pulchrius ordine*, see PIERRE LEGENDRE, *LES ENFANTS DU TEXTE* 55 (1992); LEGENDRE READER, *supra* note 351, 17-20.

565. See Peter Stein, *The Two Schools of Jurists in the Early Roman Principate*, 31 *CAMBRIDGE L.J.* 8 (1972); see also PETER STEIN, *REGULAE IURIS* 49-67 (1966).

566. The standard account is that of R.H. ROBINS, *A SHORT HISTORY OF LINGUISTICS* 45-47 (2d ed. 1970). A more technical account can be found in F.H. Colson, *The Analogist and Anomalist Controversy*, 13 *CLASSICAL Q.* 24, 33 (1919). The most important surviving source on this debate is 1-2 MARCUS TERENCE VARRO, *DE LINGUA LATINA*, at bks. V, VIII, X. (Roland G. Kent trans., 1951).

567. See R.H. Robins, *Dionysius Thrax and the Western Grammatical Tradition*, 1957 *TRANSACTIONS OF THE PHILOLOGICAL SOC'Y* 67, 72 (1958).

orderly and that likeness of form, the rules and regularities that the grammarians sought to impose were shot through with exceptions. The irregularities, disharmonies, and anomalies that could be found throughout language use, were as essential and originary to the nature of language as were the regularities and rules of analogy that the analogists imposed. In Varro's description of the debate, the anomalist was focused upon usage, upon the situation and its modes of expression, its difference rather than its conformity to a rule: "[I]t is our practice to seek utility and not to seek resemblance; thus in the matter of clothing, although a man's *toga* is very unlike his tunic, and a woman's *stola* is very unlike a *pallium*, we make no objection to the difference."⁵⁶⁸ The rooms of a house, he goes on to explain, are again unlike each other but that lack of resemblance is not an obstacle, it is rather a virtue, and he concludes: "Therefore, since difference prevails not only in clothing and in buildings, but also in furniture, in food, and in all the other things which have been taken into our daily life for use, the principle of difference should not be rejected in human speech either."⁵⁶⁹

Grammar is presupposed in law. The position of the analogist was taken up by the Proculian school of law, while that of the antigrammarians became the Sabinian position. Where Crates and later Aristarchus accused the grammarians of arbitrarily imposing general rules upon disparate practices, the Sabinian jurists attacked the abstraction and rigidity of the analogist school, and derided the attempts of Labeo to introduce analogy into law. In the view of the Sabinians, the truth of law lay not in grammar but in the specific contexts of its use. The analogist, in other words, imposed regularity, order, rules upon the chaos of law's actual use, its failing historical practices. The project of the legal grammarian was that of integrating difference and legislating *Latinitas*, or "abstract proper forms." The juristic anomalist argued that this obsessive desire to impose regularity upon the life of law was a misrecognition of the uniqueness and the difference of the interpretative practices of legal decision makers: the analogist's impulse to find or to impose consistency threatened to erase the difference of the actual case, the uniqueness or exception that is law for us.

The details of the antique schools are not so relevant today, but the general position that there is more than reason, an excess of reason, both humor and sorrow in the jurist's compulsive reduction of events to rules finds strong expression in satirical legal studies. Reason arrives after the event, and it rationalizes a pathology or occurrence that escaped all prior prediction. The singular, the subject, and the case are

568. 2 VARRO, *supra* note 566, at 393.

569. *Id.* at 395.

outside of calculation. They exceed and escape the rule, and so being true to the event is, as Badiou puts it, similar to being in love: you have to change, you have to think something new and outside of the calculus of prior rules.⁵⁷⁰ The event, as one feminist theorist of law has recently phrased it, is a “shock to thought”⁵⁷¹ and truth is in these terms fidelity to the event, change, and it requires recognition of difference and of anomaly.

Much of the charge of the debates surrounding legal postmodernism and critical legal studies, the endless disputes about indeterminacy, the demise of truth, the evil of grand narratives, lay in the threat to law’s concept of order that anomalism brings. Living with uncertainty is an art that few lawyers have internalized. They tend rather to live according to lists, memoranda, and other tabulated and lexically ordered notations. Uncertainty, attention to difference, departure from the paradigm has never been received that fondly by lawyers. The same is true of the twentieth century. The realists were dubbed nihilists, dark specters of nothingness, harbingers of apocalypse.⁵⁷² Pierre the anomalist was more or less directly accused of being mad,⁵⁷³ Boyle was derided as sophomoric and unqualified to gain entry to graduate school,⁵⁷⁴ Unger and his ilk were warned to leave the law school,⁵⁷⁵ and even I was roundly reprimanded in print — weeks before going up for tenure — for failing properly to honor the order of law.⁵⁷⁶ The analogists, the believers in the order and rectitude of the momentary system of law, the followers of rules, have little time for anomaly, for difference, and the “intersubjective zap”⁵⁷⁷ of events. They would rather be hung than have an anomalous thought, so they tend to say, and it perhaps explains why analogists often have rather long necks. That or they don’t look into your eyes when they speak.

570. ALAIN BADIOU, *ETHICS: AN ESSAY ON THE UNDERSTANDING OF EVIL* 43 (Peter Hallward trans., 2001); Oliver Feltham & Justin Clemens, *Introduction to BADIOU, INFINITE THOUGHT*, *supra* note 215, at 31-35.

571. Anne Bottomley, *Shock to Thought: An Encounter (of a third kind) with Legal Feminism*, 12 *FEMINIST LEGAL STUD.* 29, 59 (2004).

572. GOODRICH, *READING*, *supra* note 102, at 210-17.

573. The debate is reviewed in David S. Caudill, *On the Naming of Paranoia in Legal Scholarship*, 33 *HOUS. L. REV.* 215, 218 (1996).

574. Leiter, *Law School*, *supra* note 212, at 101.

575. Carrington, *supra* note 47, at 225; *see also* Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism’s Response to Critical Legal Studies*, 65 *TUL. L. REV.* 15 (1990); Peter W. Martin & Robert W. Gordon, “*Of Law and the River*,” and of *Nihilism and Academic Freedom*, 35 *J. LEGAL EDUC.* 1 (1985); John Stick, *Can Nihilism Be Pragmatic?*, 100 *HARV. L. REV.* 332 (1986).

576. P.S. Atiyah, *Correspondence*, 50 *MOD. L. REV.* 267-68 (1987).

577. Gabel & Kennedy, *supra* note 266, at 4.

The history of modern legal anomalies begins, of course, with “my friend the bad man” and the realist desire to attend to the pathology or event of judgment. The bad man asked in essence what is going to happen, what forces, what pleasure and pain, is going to occur to me? It was the question of occurrence that intrigued the realists and incited the ire of the analogically inclined. No one knows in advance what is going to happen. As law indicates time and again, what happens does so in spite of the law, beyond the reach of the norm. That is the beauty of the event and the pleasure of living. We can try to exclude surprises, or we can be open to events and change in light of them. That seems to be the choice, the two poles or extremes, and the satirists, for the purposes of satire, choose the latter potentiality rather than the prior probability.

D. *Hedonism as a Source of Law*

The satirical tends to accentuate the humorous and the absurd. It drags the personal into the public domain so as to shock and to entertain. It indulges in the ad hominem dismissal and the punning play upon words so as to give vitality and presence to discourses that tend otherwise to float off into the ether of dormant abstraction. Humor is pleasing because, like Aristotle’s accomplished metaphor, it offers a novel or boundary-crossing comparison. We laugh at the inversion of roles, the doubleness of meaning, or the rapid trajectory from one order to another. The comedian seeks to engage that desire for risk taking and for slippage. The rhetorical root of humor lies in a concern with persuasion or indeed seduction, with the pleasure of confrontation and the charge of conflict, with the viscera of dialogue that were manifest from early on in the theoretical tradition of kynicism.

There is no question but that Diogenes was an extremist. He scorned and abused and acted badly. As Nietzsche puts it, for the cynic, “his anger was his comfort, his recreation, his *remedium* against repulsion, his happiness.”⁵⁷⁸ It is the last term that requires attention here. Happiness, a non-utilitarian, spontaneous, and physical pleasure was the goal of kynicism. A society that could not allow for such pleasure was at fault. Kynicism stood for hope, for the celebration of humor and the disorientation of the senses. Hedonism stood opposed to moralism, as pleasure confronted fear. Kynicism was a way of life, a philosophy of practice that treated what was done, the event of the act, as the true expression of thought. What could not be embodied was of only secondary importance. And if it was contradicted by what was

578. THE CYNICS, *supra* note 78, at 358 (quoting FRIEDRICH NIETZSCHE, *Zur Genealogie der Moral*, in NIETZSCHE’S WERKE (1905)).

done, then it was nonsense. As Walter Benjamin put it, “[t]o be happy means to be able to look into oneself without being frightened.”⁵⁷⁹ Or, to borrow from the English satirist Addison: “A man’s first care should be to avoid the reproaches of his own heart; his next to escape the censures of the world. If the last interferes with the former, it ought to be entirely neglected.”⁵⁸⁰ Strong words, a happy principle, a principle of happiness.

Self-reliance, self-expression, and self-knowledge are the marks of anomalism. An initial, if by no means total, resistance to prior rules resulted in impassioned challenges to the intimidations of Christian moralism. The exception to the rule was the prime theme of kynicist hedonism, as also of gay science and of the later expressions of philosophical hedonism. In sedimented cultures, and particularly in legal institutions, kynicism engenders crisis — it unsettles — and relieves by drawing attention back to first principles and to the earliest of childhood questions: What should I do? What will make me happy? In Sloterdijk’s paradoxical formulation:

Periods of chronic crisis demand of the human will to live that it accept permanent uncertainty as the unchangeable background of its striving for happiness. Then the hour of kynicism arrives; it is the life philosophy of crisis. Only under its sign is happiness in uncertainty possible. It teaches moderation of expectations, adaptability, presence of mind, attention to what the moment offers.⁵⁸¹

All of which, even if one dislikes the irreverent style, seems plausible enough, even desirable.

Again turning to the legal manifestations of kynicist hedonism, we can summarize the tradition of satirical legal studies by pointing to the distinctively modest theme of its twentieth-century manifestations. What the satirical legists have consistently fought against has been the prejudices or prior judgments of the legal institution. In the name of uncertainty and with a view to the singularity of the event, they have dragged the personal into the public, the literary into the legal, poetry into law, jazz into jurisprudence. They have confronted the norm with the facts, they have elided the “is” with the “ought,” the *grundnorm* with its forebears, its advocates and detractors. There have been tirades against postmodernists, against liberals, against legal academic pundits, against theory, boredom, and long words as such. As if that were not bad enough, latter-day satirists have exposed the messy

579. SLOTERDIJK, *supra* note 93, at 126 (quoting WALTER BENJAMIN, EINBAHNSTRASSE 59 (1969)).

580. JOSEPH ADDISON, *Sir Roger at the Assizes*, in THE SIR ROGER DE COVERLEY PAPERS FROM THE SPECTATOR 97 (Laura Johnson Wylie ed., 1990).

581. SLOTERDIJK, *supra* note 93, at 124.

generative process of theory,⁵⁸² the immediacy of the body and of the emotions, as elements of law and specifically of legal judgment. Worse than that even, they have attended to difference and to color, to race and sexual orientation, to music and context as well as rule and law. The satirical legal scholars have at their best been highly inventive. They have played with uncertainty; they have mocked dogma; they have elaborated upon the underside of rules. The noble dream of freedom is counterposed to the nightmare of what often gets done in the name of the law.

A final word on kynical jurisprudence as a satirical enterprise. It is the function of satire to be irreverent towards the norm and critical of the law. Whether ridiculing the pompous vacuity of public intellectual legal scholars, parodying the incoherence of postmodernist lawyers, dethroning the higher-status practitioners of transcendental nonsense, or simply exposing the imaginary thought processes of judges,⁵⁸³ the satirical branch of legal scholarship offers the engagement of humor, the accessibility of experience, and the freedom of new forms. The incursion of youth, of difference, of novel forms, is what keeps legal studies alive. That was what Placentinus thought and what the utopian fictions of critical race theory resolve. No law without poetry, no truth without varying degrees of uncertainty, no norm of seriousness without its satirical counterpart and temporary nemesis. How else can we hold the future open?

As an envoi, an anecdote from the golden age of satire, the Augustan Era, the early eighteenth century. The author is Addison, not a lawyer but a lawmaker, and his protagonist is Sir Roger de Coverley. Sir Roger is on his way to the Assizes and is joined by two further characters. Will Wimble is in essence the reasonable man, a yeoman, a jury foreman, a sensible person, and “he would be a good neighbor if he did not destroy so many partridges.”⁵⁸⁴ The other is our friend the bad man, one Tom Touchy, who is famous for being extravagantly litigious. Tom Touchy has sued everyone, and “[h]is head is full of costs, damages, and ejectments.”⁵⁸⁵ When the pair of characters fall into Sir Roger’s company they place a dispute before him:

Will, it seems, had been giving his fellow-traveller an account of his angling one day in such a hole; when Tom Touchy, instead of hearing out his story, told him that Mr. Such-an-one, if he pleased, might take the law of him [sue him] for fishing in that part of the river. My friend Sir Roger

582. Bottomley, *supra* note 52.

583. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

584. ADDISON, *supra* note 580, at 98.

585. *Id.* at 98.

heard them both, upon a round trot; and, after having paused some time, told them, with the air of a man who would not give his judgment rashly, that much might be said on both sides. They were neither of them dissatisfied with the Knight's determination, because neither of them found himself in the wrong by it. Upon which we made the best of our way to the assizes.⁵⁸⁶

No need to decide now. Judgment is for Jupiter. Absolute determination belongs to God. Down here, among terrestrials and under the rule of tellurian laws, justice is a way of talking. Human laws should have a human face. They should be spoken in the local tongue. Best, the satirist seems to say, to let the conversation continue. Which is an optimistic message. In this instance, the beauty of legal satire lies in the very ordinariness of its resolutions. *Res severa, verum gaudium*: "things are complex, the truth is simple," as I believe Horace once said, though I cannot at present find the source.

VII. CONCLUSION: ON LIES

The conclusion to any moderately thorough study of satirical legal studies is probably best formulated as the absence of a conclusion. The vice of lawyers is precisely the will to determine, end, or conclude prematurely. It is a morbid vice as well as a dangerous assumption. It plays with the absolute and presumes that lawyers can stand in the position of judgment or take up the place and role of Jupiter.⁵⁸⁷ That, of course, is the nature of law and the exigency of the judge: They are under a duty to determine, but they are also under a duty to listen, to remain open, and to deliberate before judging. Satire addresses that moment prior to judgment in the hope of preventing prior judgments.

The philosophical theme of satirical legal studies is thus a modest one. It proposes an effort to give up on the judgment of God while knowing full well that there is a time at which such determination is inevitable. The satirist in that sense behaves badly or at least irreverently, and endeavors to hold open the site of judgment, the transitivity of deciding, and to suggest that certainty is not necessarily the most valuable of values. The satirist is uncertain about certainty in precisely the same vein that "our friend the bad man" is interested in assessing and taking risks. And if uncertainty is painful, particularly to lawyers, then the humor of satire can at times placate the injury or act as a salve to the wound.

To be cautious of taking up the position of judgment, to accept the uncertainty of reasoning and the incalculability of events, to write

586. *Id.* at 98-99.

587. See ANTONIN ARTAUD, *To Have done with the Judgment of God*, in *SELECTED WRITINGS* 555 (Susan Sontag ed., Helen Weaker trans., 1976). It is usefully commented on and elaborated in GILLES DELEUZE, *ESSAYS CLINICAL AND CRITICAL* 126-35 (1997).

humorously and in a literate way are all potentially avenues to legal irrelevance and scholarly lack of influence. To say that satirical legal studies is a modest genre, to observe that it is lighthearted and embodied, could easily be taken to mean that it is marginal and ineffective. Worse than that, the association of the satirical with the playful, the humorous, the youthful and different, could assign the legal satirist to the domain of the merely fictive, to the heterotopia of poetry, or the extrajudicial domain of theater. Those are certainly risks but by the very same token they are also signs of juristic health. Put it like this, the absolute is out of human reach, the serious is not always trustworthy, certainty is often a form of complacency, and what is, is open to question.

Satire is certainly alive and well in the political sphere, and it has to be added that the Supreme Court is not above some distinctly ironic interventions and some biting, satirical dissenting judgments. It just goes to show that law is only politics by other and historically slower means.⁵⁸⁸ By that token of venue, satirical legal studies will soon be powerful again. In the meantime, a synopsis of its formal features can aid in the preparations. First, there is the question of legal language. Much of twentieth-century satirical legal studies had as its object the divorce of the language of lawyers from the reality of legal practice. What was said was a mismeasure of what was done. That was the argument of the realists, the critical legal scholars, and the critical race theorists. It was also the argument of the diverse critics of liberal legalism and left lawyering. The vices of formalism were linguistic sins, just as much as the incoherence of “pomobabble” was a form of aphasia. That, and much more, is captured in the epigraph from Flann O’Brien depicting the interchange between Justice Twinfeet and the counsel for the parties, Mr Juteclaw and Mr Faix. It can provide the avenue into a preliminary concluding observation.

The epigraph comes from the first case reported before the Cruiskeen Court. It is emblematic by virtue of position and should be read as such, as the initiation of the theme upon which all the other cases collected are variations. The substance of the dispute before the Court is never made apparent. There are simply pleadings, technical words, exchanges between the counsel and the bench, and then an adjournment. The defendant’s lawyer at one point considers himself to have been insulted and promptly abandons the case. He does not, of

588. The current satirical best-sellers are FRANKEN, *supra* note 458, and MICHAEL MOORE, *DUDE WHERE’S MY COUNTRY?* (2003). It is interesting that Franken and Moore tend to get shelved under humor, rather than politics, but the success of the works means that they are also under current best-sellers. By way of contrast, ANNE COULTER, *TREASON* (2003), is shelved under politics. This curiosity of classification also perhaps surprisingly seems to accord both with independent booksellers, such as Shakespeare and Company in New York, and with conglomerates such as Barnes and Noble.

course, abandon in any old manner but rather, we are told, he leaves and then reappears saying that he wishes to apologize for a solecism he has unwittingly committed:

When he felt compelled by the dictates of honour to quit the court, he had merely lifted his papers and left. As a lawyer of long standing, he knew that the correct and accepted thing was to *gather up* his papers and withdraw. He then renewed his apologies, gathered up his papers, and withdrew.⁵⁸⁹

Just as the subject matter of the dispute is far from obvious, the debate between counsel appears rapidly to become internal to their choice of terms. In the hands of lawyers, the dispute, whatever it was in the substantive complaint, devolves into a self-perpetuating wrangle over foreign words of art. That is a common enough complaint about law, but its form is peculiarly paradoxical. The judge enjoins no Latin, but does so in a Latinate form and is immediately confronted with numerous Latinities, as well as obscure items of law in French and Middle English. It was stipulated that the debate was to be simple, but it could hardly have been made more recondite or obscure.⁵⁹⁰ It is in the context of this fog of verbiage that the judge hallucinates or at least imagines the need for a map. For want of a map, one could say, the case gets abandoned.

The map is obviously enough a metonymy, a thinly veiled request for some approximation to what it is that is being talked about. None being forthcoming, the case folds. Wouldn't that reduce the docket? A happy reverie. It also should be noted that this strange request, this humorous divagation into the tellurian whereabouts of the *fief in agro*, or the space occupied by the *caveat in feodo*, the traverse and viaticum, could as easily be interpreted as a request for a text, and for a guard for the text, or for a lexicon or interpreter. That it was a map, however, has its pertinence. Whatever its details, and they are never given, the case concerns trespass and easement. Without an easement or invitation, entry onto property is arguably trespass and that seems to be the issue. Historically, the writ of trespass required a pleading that the intrusion occurred *vi et armis*, or "with force and arms."⁵⁹¹ Assertion of an easement was similarly direct and physical, it required proof of use of the property, or right-of-way, over substantial periods of time. Both legal concepts, in other words, are in origin corporeal or at least grounded in rites that took place through the body in relation to the land. Hence the antique term for common law was *lex terrae*, or "law of the land," and the judge, himself named after the pertinent

589. O'BRIEN, *supra* note 1, at 138.

590. See Brooker, *supra* note 64, at 24-26.

591. ANTHONY FITZHERBERT, *NATURA BREVIVM* 194 (photo. reprint 2003) (Watts 1793) (1514).

body parts, the feet, flailingly calls for a map and perhaps also invokes Coke's sesquipedalian or pedestrian measure of law.⁵⁹²

The lawyers in O'Brien's inventive court case have the best of instructions and the exchanges appear to be with the best of intentions but lawyers will rapidly revert to linguistic type. The social object of O'Brien's wit is a law that cannot help itself, and which, in consequence, soon disengages reality and propels itself along the lexical pathways of a parallel universe. You know the sort of thing. And if you have ever been a law student you have experienced the drift, the linguistic tipping point beyond which borrowed words become your own.⁵⁹³ Satirical legal studies challenges that parallel linguistic universe, that fog or fantasy, what the Renaissance critics called the "tinctures of Normanism" or the baroque imperialism of Rome. They would occasionally deplore the hotchpot and inkhorn terms, and then of course they would return to them and with an alacrity made all the sweeter by their earlier denunciation.⁵⁹⁴ Common law is linguistically a reliquary, a bizarre remainder, a leftover from times when law was neither common nor what we generally now mean by law. Far from being the *lex terrae* in any obvious sense, common law, the expression of the commons and of common customs, is the imprint of foreign invention and the residue of occupation of the common law's territory. In a sense these laws are bad; they are marks of difference, signs of borrowing and importation that have through time become incorporated into the legal community but long forgotten by the territory and community from which the law comes. That at least is the norm.

The map is a metonymy for the apprehension of the unknown and the satirical call for a map is precisely an attempt to attach the foreign words to a known geography and so to locate the bodies present, pending, or to be suspended. Trespass and easement imply, respectively, body and place. They are the ideal objects of mapping and the embodied cause of the case. The parallel world of legal abstractions has at some point to encounter the real world of events. Law meets the case or cause or instance of judgment. That is the

592. One has to note that Justice Twinfeet is perhaps getting one over on Sir Edward who is only a foot and a half or sesquipedalian. The reference to 2 SIR EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, at xxiii (1777). It is further worth noting that this is, as far as I know, Coke's only reference to satire and specifically to Horace (*proicit ampullas et sesquipedalia verba*).

593. A point well made in BENJAMIN SELLS, THE SOUL OF THE LAW (1994). Duncan Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW, *supra* note 7, at 40, makes a similar point, namely that over time the mask becomes the person.

594. Important as it is to have footnotes for each and every term of art, 594 and counting, these were commonplace terms for their era, and I will simply refer here to sources available in GOODRICH, LANGUAGES, *supra* note 103, where such themes are dealt with at greater length.

moment — the suspension, hiatus, punctum, or transposition — that satire engages. That is the moment of mapping, the instance that was classically termed chorographic, by which was meant the occasion when the law would dance and so deal with the living. At its best, which is not necessarily at its most juridical, satirical legal studies mimic, parody, or otherwise reenact the moment when an arcane language shatters on the rock of real.

Thus Posner is much his most amusing in excoriating the erroneous predictions of public intellectuals. Frank was hilarious on encounters with facts, and Cohen aptly elaborated the dream of transcendentals that never left the domain of Morpheus long enough to touch down on diurnal ground. The same theme of transition to particularities characterizes the best of critical legal scholarship, of race theory and feminist jurisprudence. Just for the hell of it, Franken is funniest on his encounters with conservatives and on the lies that individuals actually spouted.⁵⁹⁵ The point is that whatever the satirical intent, Horatian or Menippean, juvenile or bitter, reactive or progressive, the humor lies in the legal event, the crossing of boundaries meaning the actual cause or encounter between laity and judiciary, vernacular and legalese. That is what is funny, because the satirical reenactment of the event shocks, surprises, inverts, or makes a farce out of what is usually and unthinkingly glossed over with terms of legal art of such abstraction that they bear only an indeterminate relation to any imaginable extralegal world.

Flann O'Brien again, and because one is supposed to end where one started, provides the best account of this collision of legal language with life. In the last case reported from the log of the District Court, "[t]he Sergeant said that defendant, having been ejected from gaol premises, was again found in his cell the following morning."⁵⁹⁶ It is on this occasion the defendant who spouts Latin and who uses Latinate terms to explain why he could not conceivably have absconded:

If I had failed to appear in this court at the time appointed, too well I knew that my bail would not be *confiscated*. Neither would it be *impounded*. (Here defendant became moved.) Neither would it be *declared forfeit* — or even *forfeited*. It would not be *attached*. It would be. . . (Here defendant broke down and began to weep.) . . . Defendant (sitting in dock, burying face in hands and weeping loudly): My bail would be . . . ESTREATED. I . . . I . . . could not . . . face that. Estreated! (Here defendant blubbered uncontrolledly.)⁵⁹⁷

595. FRANKEN, *supra* note 458, at 5, 218 (discussing Anne Coulter and Dick Cheney, respectively).

596. O'BRIEN, *supra* note 1, at 152.

597. *Id.* at 153.

The choice of legal terms is wonderfully apposite. *Estreat* is both a noun and a verb, and it has a comparably profound effect on the defendant. Strange though that degree of affective impact may seem, it is simply a graphic depiction of everyday legal process. The words get out of hand. A word like *estreat* can intrude into the real in diverse ways. It, in fact, originates in a procedure that was intended to prevent harm, indeed to provide a modicum of mercy,⁵⁹⁸ according to the relevant writ; but time is the enemy of equity.⁵⁹⁹ The *estreats* were maybe common in the sixteenth century but only a Latinist or historian (*more agni inter lupos*) would know the import of the word now.⁶⁰⁰ Its meaning was originally to check the record by sending for a copy and seeing whether the relevant party had paid what was due — the penalty or amercement — into court. The *estreat* was the moment of truth, appropriately enough in the form of the arrival of the copy, and thence the application of the law. The word is perfectly chosen and brilliantly exemplified. Logically the defendant had broken into the prison so as to prove his good character; he had committed the crime so as to prove his innocence.

We lawyers don't deal in *estreats* anymore. And frankly, after reading O'Brien, it would be hard to use the term in anything other than a wickedly humorous way. The meaning would be changed, and that is the point. If asked to define the role of satire, of this eminently literary genre, in the study of law the answer has to be that the satirical has effects. It changes meanings, it punctures complacency, and offers one of the most powerful and effective of challenges to the self-aggrandizement of lawyers and the related pretensions of legal scholarship. Satire *estreats* the law. As this history of satirical legal studies has lengthily evidenced, it has time and again been satire that has deflated the inflated, concretized the abstracted, put a face to the mask, and called the wayward — the prophets and pundits, the pompous and prolix — to account. It is satire that has made the weaker the stronger and, at least since Holmes found his Moriarty, the bad the good.

598. FITZHERBERT, *supra* note 591, at 173, lists the *estreat* under the general heading of the writ of *moderata misericordia*, or “of moderate mercy.”

599. *Id.* at 174-75. JOHN RASTELL, *LES TERMES DE LA LEY*, s.v. *Estreat*. The *estreat* is listed here as well in relation to the writ of *moderata misericordia*.

600. The Latin phrase is used by the *estreat*-fearing defendant in reference to his own circumstances, and loosely translates as “the way of the lamb amongst wolves.”