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In his book of essays, *Laying Down the Law*, Pierre Schlag answers a variant of the somewhat facetious question that is my title by saying: "Maybe nothing. Maybe what comes next is that we stop treating 'law' as something to celebrate, expand, and worship. Maybe, we learn to lay down the law."[1] Ignoring the double entendre in the last sentence, I take this passage to mean that we in the legal academy should give up on the practice of creating normative justifications for bureaucratically defined and elaborated rules, the rules of law.

In *The Enchantment of Reason*, Pierre builds on his earlier argument by offering an extended critique of the practice of normative justification that he calls normative legal thought. He asserts that, for a variety of reasons, normative legal thought *by its terms* cannot provide a sufficient justification of legal norms and is, therefore, a pointless enterprise. The failure of normative legal thought to provide normative justification derives from the inability of reason to do the work that it is asked to do given the conditions that law places on reason's exercise. These conditions are commonly identified with the Rule of Law—that there is and must be a single right answer to a question of law so as to differentiate law, the domain of reason, from related social practices, especially its radically conceived "Other," politics, the domain of interest and passion, of greed and misdeed. So Pierre's conclusion is much the same as before: We, as citizens and academics, should give up the practice of normative justification and do something else with our lives.

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* Professor of Law, State University of New York at Buffalo. This piece is dedicated to all those individuals who would have joined Critical Legal Studies in attempting at least to invigorate, though better to transform, legal teaching and scholarship had we, the old people, better understood how to keep an intellectual movement alive. It is offered with thanks to Neil, Laura, Pierre, and Bert who, from time to time, have urged me to be more forthcoming on topics outside of my narrow compass in legal history. Each has separately and distinctively contributed to what I have written here. It is doubtful, however, that any of them really meant to encourage me to talk about some of the matters that I have chosen to speak of, however. In addition, as always Avi offered his singular assistance. Diane and Tom helped, each in their own way. A faculty seminar here at Buffalo surely reinforced my colleagues' belief that I am loopy, if not dangerous, and simultaneously convinced me that I am not speaking about phantasms of my own creation. Such was a fair trade for which I thank them.

1. PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 166 (1996).

Pierre does not appear to be saying that normative argument is impossible. At least as long as normative argument does not depend on the premise that there is one and only one correct conclusion to a moral or ethical dilemma, such argument seems to be acceptable to him. Rather, his critique is directed at law professors, in both their teaching and scholarship, because those two activities depend on "normative legal thought *by its terms*" for such meaningfulness as they may have.

I believe that Pierre has demonstrated the proposition about law that he set out to establish, at least as instantiated in legal scholarship and teaching.[2] Thus, a significant question arises: "Assuming that legal academics do not simply fold up their tents and steal into the night, 'What is to be done?' What might legal academics do in their role as teachers and scholars?" This question is particularly important, and so the classic formulation appropriate, because I suspect that many of my friends in the Party of the Left are, or ought to be, troubled by Pierre's argument.

Those of the Left have no trouble believing that the targets of Pierre's critique, the liberal legalists, are properly chastised for the flabbiness and duplicity of their thought. But there remains a residuum of unease on the Left, and rightly so, because Pierre has tied this critique so very closely to a particular view of the Rule of Law, that of the Rule of Laws. Unfortunately, it is just this view of the Rule of Law that the Party of the Left uses regularly in its criticism of liberal legalism. Our recurrent tactic is to hold a mirror to a legal practice, notice the inequality that undermines the claim of law to be doing justice, shout "Politics!," and follow that shout with a plea to vindicate the ideals of law. As the Party of the Left is not as stupid as the liberal legalists assume, it is reasonably obvious to us that if this form of argument can work in our favor, then it can be used against us. Indeed, the Party of the Right regularly adopts this form of argument in matters such as abortion, affirmative action, and gun control. Thus follows our fear, if not belief, that Pierre's critique applies to us as well.

Such a fear is prudent. For the reasons that Pierre identifies, only with tongue in cheek and fingers crossed can we maintain that reason is a particularly potent tool when used by the Party of the Left, but deny that same potency when used by others. Such a claim would not be "unfair," as the Party of the Right would surely claim. Rather, it is just "silly." Forms of argument simply do not work that way. Specific argu-

2. I believe that Schlag's critique is of wider application in intellectual life because much of that life rests on ideas quite similar to the conventional understanding of the Rule of Law. However, he does not make that claim, so I shall not deal with it.

ments in specific circumstances may have a "tilt,"[3] as Morty used to say, but the logical structure of argument does not.

That said, I believe it would be a pathetic failure of nerve for the Party of the Left to react to its legitimate fears by rejecting Pierre's argument, treating it as interesting but unproven, because it interferes with the pursuit of our objectives. There is another possibility. We might affirm Pierre's critique, not work around it; at the same time, we might reject the understanding of the Rule of Law that conditions normative legal thought, the object of that critique. In so doing, we might begin with the proposition that the problem with thought about law as exemplified by the legal academy's teaching and scholarship lies not in the attempt to exercise reason, but in the conditions placed on that exercise. These conditions follow from the notion of law as the instantiation of reason and authority, the Rule of Law seen as the Rule of Laws. This is the conventional notion of the Rule of Law, the one that the Party of the Left shares with liberal legalists of all stripes, including the Party of the Right. In order to exercise its power, however, this formulation of the Rule of Law has to ignore law's evil twin brother, law as the instantiation of privilege and so of power, a point that we make regularly. We have all experienced law's evil twin brother—the Rule of Politics—yet somehow we fail to consider this aspect of our experience as an integral part of law.

What would happen were we to abandon normative legal thought's basis in the Rule of Laws, and instead fuse the views of law as authority and law as power? Simply this: We might come to understand law not as the application of rules set in timeless opposition to some politics, but as some complex, changing amalgam of authority, that is, reason or law (in the sense of rule), and power, that is, unreason or politics (in the sense of advantage). Hopefully, such an understanding would lead us to a different and, in the long run, a more adequate notion of the conditions that regularly underlie the exercise of law in contemporary life.

For several years now I have wondered why the Party of the Left has failed to argue for the recognition of this fusion of power and authority in law. Only poor lawyers choose to fight on their opponent's ground and I do not think of us as poor lawyers. Overly optimistic, surely, and still too anti-clerical to take the notion of original sin seriously, but not poor lawyers. The experiences of the last thirty years ought to have sapped some of our optimism. Peter Gabel may still believe that there will be dancing in the streets of Berkeley, and if there is, I will still come. But to me, it still seems difficult to maintain, if only

3. *See* Wythe Holt, *Tilt*, 52 GEO. WASH. L. REV. 280 (1984).

by silence, that violence, the exercise of power that counts, the oppressive preference for some people or activities over others, is not an integral part of the Rule of Law and so that non-partisan dancing in the streets is not likely.

It is not just explicit power that I am talking about either. In many ways it is the implicit power that law conveys that is the most violent, for it requires not even the raising of a hand. It is this power that Alan Freeman recognized and struggled with when he got into such trouble over the critique of rights.[4] He articulated a position that can be summarized as the assertion that rights, some of the stuff of law, are a second best alternative to the cultural acceptance of the obviousness of entitlement that makes resort to rights unnecessary. On this view, rights are desirable to have in default of cultural acceptance of entitlement, but still a fall-back position, for they are part of a discourse of alienation, of exclusion even, from the givenness that accompanies community membership. To me, it seems to follow that should we of the left achieve the legal, not to mention the cultural, acceptance of the claims that we as a party support concerning the unjustness of certain categorical social privileges, that achievement would result in violence toward those who persist in supporting such privileges, at least without taking as dangerously seriously the notion of false consciousness and the need for "re-education" when false consciousness is encountered. Law always has a dark side. The Rule of Law does as well.

So, I wish to comment on Pierre's work by following the timeless advice of Yogi Berra: "When you see a fork in the road take it!" I shall affirm that law is politics and politics is law, that the Rule of Law fuses reason and unreason, and I shall see what work legal academics might do in their teaching and scholarship in light of such an affirmation. By doing so I hope to contribute to the exploration of what might be the consequences of seeing the Rule of Law as a regime meshing authority and power that commands some modest respect for its regularity, an understanding of law that would seem to me to resonate better with the experience of law that most of us share, of law as both what you know and who you know.

I realize that in pursuing the course I have chosen, I am rejecting the clear import of Pierre's work: Legal scholars ought simply fold up their tents and steal into the night. Undoubtedly, there is much to say in favor of the suggestion that we "lay down the law." It is hard to believe that more than a tiny part, if any, of the annual output of the law reviews

4. *See generally*, Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity*, 23 HARV. C.R.-C.L. L. REV. 295 (1988).

adds to the corpus of human knowledge. More generally, as Bert Westbrook makes clear, Humboldt's vision of the university, the one on which our understanding of scholarship has been built, is no longer a viable one.[5] Of particular relevance to members of the Party of the Left is the likelihood that continued participation in the practice of normative justification can only have the effect of reinforcing the legitimacy of the system whose individual norms we critique, and do so in a way that a simple, perhaps ironic, legal positivism never could do.

In opposition to these considerations I can offer only the observation that in the bureaucratic successor to Humboldt's university, tenure will be given only in exchange for scholarship, so that the folding up of tents is impossible for a mandarin class that likes Thai food, fine wines, and Italian leather sofas. This, and the faint hope against hope that a well educated mandarinate such as ours might, indeed should, wish to do better than its currently inadequate job, if only because, like good carpenters, we intellectual workers would value a well made house over a shaky, leaky lean-to. It is, of course, on the basis of such implausible hopes that the Party of the Left sustains itself.

Bert Westbrook identifies four possibilities for the work of legal scholars after Pierre's critique: (1) some chastened version of reason; (2) some notion of aesthetics (art criticism or judgment); (3) some version of social inquiry; and (4) some version of the essay.[6] For obvious reasons—among other things, he is a great essayist—Westbrook glides by the first three and focuses on the fourth. I wish to go back and suggest that a more plausible activity for us as teachers and scholars is some version of social inquiry. Thus, the decision to separate Critical Legal Studies from the tradition of social inquiry represented by the Law and Society group was mistaken, not in its political impulse, but in its import for scholarship and teaching.

Adopting some chastened version of reason as the proper work of legal academics "after the fall," as it were, is perhaps the most likely scholarly response to Pierre's critique. Law professors love to make normative arguments; they are by nature "normativos," in Pierre's wonderful word.[7] Given that they are training members of the mandarin class and that that class talks the language of normative justification, it may make sense for legal scholars to teach and talk the language that their students will employ in their mandarin jobs.

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

6. *Id.* at 679-84.

7. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 168 (1990).

Advocacy of such a course of action seems to be a poor idea when coming from the Party of the Left. First, on the scholarship side, there is only a modest amount of evidence that anyone is listening to what we say in print, and our opponents do not fare significantly better. Even the modest amount of evidence that legal scholars have been heard suffers from the fact that it is equally capable of being interpreted as an example of busy bureaucrats adding decorations to an already over-trimmed Christmas tree. At least, one sees little evidence that the arguments of legal academics are successful in persuading a decision maker whose politics are not already sympathetic.

As to teaching, it is important to remember that normative legal argument is a formal activity or skill. Indeed, members of the Party of the Left have written two good works explaining how it is done.[8] The point of that activity is as much obfuscation as persuasion. A commitment to reason as an aid to obfuscation troubles me. But more important is the fact that the structuring of arguments, even for the purpose of obfuscation, is a formal skill. If this skill needs to be taught, then it should be taught directly as a course in practical argumentation, and not indirectly by full immersion in normative argument lest, by repetition in our daily classes, we of the Left unintentionally offer more support for the norms we oppose than criticism of them.

So much for a chastened version of reason. What about aesthetics? Here, I have a certain amount of vaguely relevant experience. My undergraduate studies were centered, to the extent that they were centered at all, in literary criticism, and I have followed that "discipline" desultorily since then. My spouse and son are musicians and my daughter, an artist. From the activities of my family and from my own work, I would conclude that aesthetic criticism that is something other than brutally formulaic is very hard to do. "Vague," "overly jargoned," and "besides the point," are the words that come most frequently to mind. Except as pure description, such criticism seldom is very carefully tied to its object and so has relatively low usefulness, being most generally a fog spread to hide the words "I like this, but not that" from appearing too obviously in the text.

To the extent that, as Pierre correctly asserts is the case, legal scholarship now consists largely of elaborate justifications for "I like this, but not that," aesthetic criticism is likely to repeat most, if not all, the vices of normative legal thought. Thus, to me it seems that a turn to aesthetics

8. PIERRE SCHLAG & DAVID M. SKOVER, TACTICS OF LEGAL REASONING (1986); RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE: HOW TO EXCEL ON LAW SCHOOL EXAMS (1999). For an alternative view of this topic, one more closely tied to litigation, see JAMES A. GARDNER, LEGAL ARGUMENT (1993).

would be an example of valorizing something that lawyers already do very easily and very poorly, and that doing so would be very bad. Similarly, a shift from aesthetics to judgment as a critical lever is not promising. Perelman got nowhere when trying to produce a general theory of judgment,[9] and Schön's reduction of judgment to the idea of a reflective practitioner is noticeably low on content.[10] Each seems to founder on the difficulty of establishing the basis for a particular judgment when small, partial judgments are made as one works toward the terminal one.[11]

For me, the potential of the essay as a form of legal scholarship suffers from defects similar to those of aesthetic commentary. As I said earlier, Bert is a marvelous practitioner of form, but it is a form that is all but dead in contemporary letters, largely having been replaced by the polemic. A good essay requires sensitivity to others and their dilemmas, to irony in one's own thoughts and in the cosmos, and to the fallibility of one's judgments, as well as a tolerance of, indeed almost a preference for, ambiguity and inconclusiveness. All are unlikely to be found in any law-trained individual. Maybe a new generation of law students could be trained to write essays, though not if they also had to write exams and serve on law review. In the short run, however, the form is likely to readily degenerate into the polemic. This would hardly be an improvement to the current state of affairs.

That leaves social inquiry. Admittedly this is an old hobbyhorse of mine, and admittedly the genre is largely dismal. I finally gave up my membership in the Law and Society Association because so little of what was produced for its journal was worth my time; I think the same thing of the Law and History Review more often than I would like to admit to its good editor. As grand theory the stuff is almost unreadable, and as low description it is produced with a faddishness that can only bring visions of lemmings going over the cliffs into the sea. Moreover, taking a longer view, I well know that the history of such scholarship leaves little room for optimism given its meager accomplishments during the past fifty years. At the same time, there is a certain honesty to careful description that seems to me to be valuable and sorely lacking in legal teaching and scholarship, dominated with the notion of the Rule of Law as the Rule of Laws.

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9. CHAIM PERLMAN, VALUE JUDGMENTS, JUSTIFICATION, AND ARGUMENTATION (1961).

10. DONALD A. SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION 68 (1983).

11. Avi Soifer supplied this observation.

The strength of an approach focused on social inquiry is most obvious in legal teaching. Law schools do a horrid job of preparing students for practice, not in the sense of teaching them where the courthouse is, but in the sense of providing them with an understanding of the world in which they will find themselves after they start paying off loans. The world of practice is only rarely the world of normative legal thought, though it is the world of the Rule of Law seen as a mix of both power and authority. In this world there is always a foreground of client objectives—personal, economic, political; mean, noble, indifferent—and most often an array of bureaucratic imperatives, social institutions, and simple routine understandings that enmesh, and are, the client. If there is an opponent, similar structures will be found, and when not, they will be replaced by an array of governmental (in both senses) bureaucracies whose cooperation will be necessary for the client to achieve any objective, if only the objective of being left alone. In the background there are similar, but more abstract (in the sense of general) institutions and structures that serve to limit, channel, or facilitate the client's objectives. In the middle distance one finds various rule structures, sometimes thick, sometimes thin, that are relevant to, but seldom dispositive of, those objectives. Lest one forget, this mix contains the conditions in which the lawyer practices—the need to earn a living, the need to keep various bureaucracies essential to daily life reasonably happy, the client's ability to pay, and ethical or moral obligations, both self and other-imposed—all of which influence what a lawyer is capable of doing to meet the client's objectives.

In one sense, the Rule of Law seen as a mix of power and authority is not new to any good law teacher. But is it central to teaching law? Surely not. It is commented on in passing, not treated systematically, any more than the structure of legal argument is treated systematically. As a student's understanding of this world is never tested, our students, who have gone far in the educational rat-race because they know that they only have to learn what will be on the test, seldom learn from these passing observations. Instead, law schools offer acres of normative argument to students who will acquire little theoretical grounding in what they will have to do in a real job, apparently on the demonstrably false assumption that someone out there will teach our graduates how to practice law after they have endured what can at best be described as a three year bar review course and at worst a seat at an intellectual hybrid of "Vanity Fair," "People," "Rosie," and "Late Night with Conan O'Brien."[12] As if anyone with something better to do and a bar exam to

12. Laura Kalman wonders whether I have not confused the "best" and the "worst" in this sentence.

worry about would care what a law professor might think about what the proper rule of law is in a given circumstance, care even as much as about the burdens Brad Pitt experiences from being a star!

In another sense this is all very new to any good law professor. As a group we know very little about the structure of practice. Structure is not our strong suit and practice is not either, for let's face it, most of us are refugees from practice. We went into law teaching because we hated the a-normative, seemingly a-theoretical nature of practice. Admittedly, the practitioners offered us little theoretic structure to explain what they did. And a good argument can be made that our collective preference for normative legal thought is so strong that we would have left our law jobs because of their a-normativity (often confused with amorality), even if the practitioners had offered a solid theoretic structure. In any case, the practice of law as we experienced it was just one boring job after another, with occasional modest, but finely grained, differing details. We did not want to live out our lives in such a world.

Such experience aside, there is no a priori reason to believe that there is no implicit theoretic structure to legal practice. Though humans are naturally lazy, and so routine saves them time and thought, that does not mean that the routines adopted are not themselves thoughtful, that they don't embrace a theory about how the relevant job needs to be done. As evidence of such a theory, one need only recognize that there is a rhythm to practice in a field. Anyone who from a distance has watched the same type of transaction or the same kind of litigation over and over can identify the rhythm of that practice and come fairly close to understanding, even predicting, the available variations in play. To predict is to understand, and to be literate is to explain that understanding. Law professors pride themselves (probably somewhat erroneously) on their literacy, and so ought to be able to communicate such understanding reasonably readily at least with some effort.

But why should they? The answer ought to be relatively straightforward. For our students. At this point in time law firms do not spend a single excess training dollar on new associates, who are thrown into the fray as if they were raw recruits at the Battle of the Somme or peasants at Stalingrad. The carnage is unbelievable and the results of that carnage, predictable. In any specific stratum of practice, the range of normative skills of law school graduates nationwide is approximately equal. After all, that is what we sort them for. But as to the foreground of client objectives, institutions, circumstances, and the background of social assumptions, institutions, and circumstances, we do no similar leveling. This is not a good thing for the students for whom the Party of the Left ought to have the most concern—those who are not to the

manor born. Law is, as we never tire of saying, the law of the upper-middle class. It is that class's institutions, assumptions, and circumstances written out, but in shorthand. These institutions, assumptions, and circumstances are embodied in the background and foreground of almost all of the practices of law. But, if one is not born into the upper-middle class and thereafter not explicitly trained to understand its institutions, assumptions, and circumstances, then one is at a distinct disadvantage in the helter-skelter of practice when compared to those who learned of such things at the dinner table. Those students whom we profess to care the most about are thus less likely to succeed, to grow on the job, to pay off academic debts, to advance up the rungs of the ladder of upward mobility that a law degree represents.[13] Members of the Party of the Left have every reason to learn about the practices of law and learn to communicate them to our students.

The only way that the Party of the Left will be able to learn and communicate about the practices of law will be patiently to do the necessary empirical social inquiry that leads to such theory as can provide a framework for teaching and understanding. This is not "theory" in the grand sense that Weber, Durkheim, Marx, or Parsons offer—the kind of theory that Duncan enjoys accusing me of advocating—but theory in the small sense, explanations of why certain things are done—more like how to ride a bike or build a bird house—than how a society operates. Yes, that is nickel and dime stuff, but it is not beneath us given that the beneficiaries would be those who pay our salaries and get precious little value for their tuition dollar from our normative theorizing.

Of course, teaching is not the central point of Pierre's work, though that work is, as I hope to have suggested, relevant to the question of what we teach, since teaching stuff that is of little value to our students ought to give pause and encourage us to consider what else we might offer them. I believe that a similar point can be made, however, with regard to the direction in which we should take our scholarship. We know only in the most general way what the practices (in both senses) of law-trained individuals—our former students—consist of in their daily

13. Diane Avery notes a certain slippage in my argument in this paragraph from the students that "the Party of the left ought to have concern for" to those who would climb "the ladder of upward mobility." That slippage is intentional. Our party is routinely unrealistic in its hope that most of our students will be significantly involved in Legal Services work or Left causes. More realistically, we might hope that they learn that law can be fun and useful, that our teaching may help them avoid stupid mistakes in the early years of their practice and that we have helped steel them against the approval of meretricious behavior. Most will at least try to climb the ladder of upward mobility, however. And that is fine. Social circulation is not inconsistent with overall greater equality. Some lawyers with excess income are always needed to supply the funds that another, smaller body of lawyers, more personally involved in Left causes, need to keep body and soul together.

details. It is time that we learned about the routines that demark these practices and bring our much-vaunted intellect to bear on developing theories adequate to understand them.

As an example, consider that horrid activity, beloved by young corporate associates, called "due diligence." At first blush, it seems a tedious, bureaucratic charade, designed to pad bills for corporate clients and cover the salary and overhead of new associates who are mighty bright, but learned damn little of any use in law school, other than the ability to endure intense boredom without seeming to complain that comes from taking the course in research and writing and serving on some law review or other. Certainly some due diligence practice is just that mindless; however, under this activity lies a point. Pre-agreement due diligence is structured around what is known about the business or transaction in question and the expected contract provisions. It is part of an attempt to identify, and so limit by negotiation, the risks in the transaction to those that one might call purely economic—what happens with the asset, product, or service that is proposed to be transferred after the deal is closed. Post-agreement due diligence is designed to verify the "truth" of the contract provisions that have been secured. It is part of an attempt to reduce the risks in the transaction further, either by avoiding its completion or by minimizing potential losses through renegotiation of the terms of the transaction, with the objective of limiting the possibility that, after closing, the client will encounter the enormous and unjustifiable cost of subsequent litigation over compliance with the contract's terms.

Or, consider the absence of a practice—motion practice in small criminal cases. Criminal procedure teachers regularly rail at their clinical students and recent graduates about their failure to defend their clients adequately. The basis for this assertion is that all available defenses to a minor criminal charge are not presented by the appropriate pre-trial motions. Why is that? An analysis might go something like the following. The going rate for a misdemeanor is $750. That rate covers about $250 in overhead and five hours of interview, telephone, and court time. It also assumes disposal of two cases in one court appearance. The court—which is to say the judge and the prosecuting attorney—in which these cases are "tried" "needs" to dispose of twenty cases per day to keep up with its caseload. Such a schedule assumes that there will be a trial about once every two weeks. This court is also under "pressure" to keep a lid on the amount of time that policemen have to spend in court, preferably down to one appearance per case, but surely no more than two. Motions screw up this set of assumptions. They take time to

prepare and time to be heard. All of that time reduces the lawyer's hourly rate and undercuts the ability of the court to move its caseload.

The lawyer can, of course, increase the price for this service—though petty criminals are not known for their financial resources—or accept a reduced income. The court's choice, with its more finite resources—let's face it, there will not be more judges assigned to the petty criminal courts!—is to limit the ability of the lawyer to make motions routinely. Oh, one or two "blizzards" of motions will be tolerated from anyone, provided that the prosecutor's case seems sufficiently "marginal," or that the prosecutor is for some reason or other not accepting a "reasonable" plea bargain. But routine use is another matter. Routine use will bring a quite different response. The lawyer will find that it can no longer count on handling two cases in one appearance. Somehow, inconsistent appearance times will begin to appear on the calendar. Somehow, cases will be delayed in such a way as to take up all day when they should take up no more than half a day. Slowly, the number of cases that can be handled under the going rate assumption will be nearly halved. A small decline in income is one thing to endure, but halving? Of course, at the same time that income declines precipitously, the plea bargains offered to that lawyer's clients will somehow turn out to be "stiffer," though not enough to be seen as "unreasonable." Soon, the word will get to the client base. Fewer calls will come.

Admittedly, this is not a nice story, but it does highlight the way that the common gripes of the criminal procedure teacher—much less the norms of the professional responsibility course—do not come close to offering an understanding, or even providing a plausible model against which to measure, the behavior of this complex bureaucratic system. At the same time, it is surely possible to develop an understanding of the behavior of bureaucratic institutions that would explain this sequence of behavior and possibly suggest ways to alter it. At the least, the presentation of such a theory would mean that the experience of its deleterious effects would not be a surprise to a young lawyer once outside the classroom.

Consider also that old chestnut, judicial decision-making. We have numerous theories of how appellate work is done, at least appellate work at the pinnacle of any court system. I suppose that they are serviceable for the time being, though they seem wildly at odds with much of the biographical evidence that we have. But one might develop quite a different theory of decision-making by looking only at intermediate appellate courts, where the ability to decline cases is significantly limited, resulting in the recurrence of issues, especially evidentiary issues in criminal cases, as part of the daily bureaucratic routine. Such a post-

ing—surely that word, derived as it is from military or colonial service, is appropriate—might best be understood as a different job from the one on the basis of which most existing theory has been developed. A theory that explained the job of being an intermediate appellate judge might serve to help lawyers and law students understand why the output of such individuals is so dreary, why their law clerks are proliferating, why, when faced with a deviation from what they take to be appropriate behavior, their collective distemper seems to be increasing, and why most cases seem to be affirmed. A good enough theory might even explain when it is wasteful of a client's resources to even bother to appeal.

Now, all three of these examples instantiate the proposition that the daily details of any practice are but a sub-species of the mind numbing boredom that infects almost all of the routine of people enmeshed in bureaucratic institutions. Some of that routine, like much of legal scholarship, is an example of tearing paper to keep the elephants away. It is a series of steps, once undertaken for a good reason, the purpose of which has been lost. These steps are continued because no one wants to take the blame should somehow, in some unforeseen, and since uninformed by an understanding of purpose, unforeseeable way, the failure to do so has an adverse impact on a client. CYA,[14] in short. But even for this kind of routine there is often good theory beyond CYA that can make the practice intelligible. Understanding the Rule of Law as a changing amalgam of authority and power could help in making theoretic sense out of such practices of law-trained individuals.

This is most obvious in the criminal practice example where the client gets the short stick in a tussle over the terms of work between defense attorneys and the court, but it is apparent in the other two as well. In the appellate practice example one can see the way that the power that derives from authority is deployed to manage a work environment that undercuts the professional notion of what it is to be an appellate judge. As such, it is reminiscent of Henry Friendly's argument for narrowing federal subject matter jurisdiction,[15] and so limiting the number of individuals who are appellate judges, in order to maintain his notion that being a federal judge was a special enough activity for him to have left a job as counsel to a major corporation in order to accept a place on the Second Circuit. The interrelationship between authority and power is also apparent in the corporate practice example. Due diligence practice is designed to mobilize the formalities of contract law to make an economic objective more secure and to use economic leverage

14. "Cover your ass," FYI.

15. *See generally* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973).

to improve legal positions. Each example thus demonstrates the mixing of the politics of advantage and legal rules in a structured way that highlights the fact that, if one objected to the practices in question and so wished to "reform" one or all of them successfully, one would have to take into consideration both the good and the evil twin brother that together constitute them.

In contrast, according to the conventional understanding of the Rule of Law, that of the Rule of Laws, individuals seem to be acting a-lawfully, if not un-lawfully, in each of these activities. All that conventional understanding can offer is the direction to close the gap between the ideal and the actual in legal behavior. In the criminal practice example, the lawyer sacrifices the client's interest in securing a full and fair examination of his/her individual guilt in pursuit of a livelihood. In theory the criminal lawyer should follow the rules of ethics and eat the professional and personal costs of presenting that full and fair case. In the appellate practice example, the appellate judge is simply whining about being over-worked and insufficiently appreciated. Again, in theory the judge should return cheerfully to the task of personally making the law the best that it can be within the constraints of higher court precedent, forgoing all of the elbow clerks and pool clerks that impede immediate perception of that best law. In the due diligence example, the partners are simply wasting client's money, exploiting the surplus labor value of their panoply of associates to further increase their already outrageous earnings. Thus, the partners should recognize their obligation to their clients by ceasing to pad their bills with unnecessary, and unnecessarily detailed, activities. Now, none of this analysis and its accompanying prescriptions is wrong as much as so narrowly partial as to be unrealistic. It guarantees that the gap between the ideal and the actual in legal behavior will be closed infinitesimally, if at all, and instead perpetuates an asserted problem in the guise of solving it, supporting the continuing employment of law professors, I suppose, but not otherwise being effective.

Admittedly developing theoretical understandings of the practices of law through social inquiry and so avoiding Sysiphysian labor is not a glamorous occupation; it is not the stuff of which careers as talking heads are made. That is not to say that many law professors get to play talking head, except in faculty seminars or AALS panel presentations, venues that clearly do not count in the talking heads game. In favor of the choice to pursue such a project it should be noted that the relevant empirical methods are not hard—something in between Llewellyn's calling up a banker to learn about banking practice[16] and heading out

16. *See* WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

into the field in Samoa—but the payoff in the aggregate for our understanding of law should be enormous. To see law as a system where almost "everyone has a spouse, two kids, and a mortgage payment"—to repeat an answer I once got from a former student in response to my gentle question, "How's practice treating you?"—would complicate our understanding of law enough to make it really interesting in human terms to our communities and to our students. The underlying research would have the virtue of embodying a certain honesty in its creation, much like how a well-made cabinet has a certain honesty, the experience of the feeling that an unimportant, yet necessary, job has been well done. It might even allow one to be less embarrassed when a new neighbor, unaffiliated with the university, asks, "Where do you work?" and then more dubiously, "What do you do there?"

So, why have law professors never shifted their emphasis in teaching and research from normative legal thought to empirical social inquiry? There are many reasons, and at other times I have offered most of them in explanation.[17] I do not wish to retrace that territory. Instead, I wish to consider only law professors who consider themselves members of the Party of the Left. In doing so, let me return to a day at the first Critical Legal Studies (CLS) meeting. I was sitting in the back of the room, my accustomed place at all meetings, being by definition marginal to any group of which I might want to be a part and innately attuned to the oppressive potential of all groups. Law and Society stalwarts Joel Handler and Stewart Macaulay were on either side of me. In response to the discussion one said, "I don't think that I belong here," and the other nodded his head in agreement. Yes, way back then we invited the Law and Society crowd to our party (in both senses) for the purpose of pushing them out, making it clear that their work was not critical enough.

That choice was, I believe, both a necessity and a mistake. It was a necessity because we had to develop our own voice and like all scholarly voices it had to be developed in opposition to something. A purely political opposition, though that was there too, would have been both tedious and open to derision as "purely politics" and not "serious." A methodological opposition, on the other hand—the assertion that the social scientist's method was deficient in that it both claimed to bring knowledge, but only constricted the knowable to the trivial repetition of the difference between the law on the books and the law in action, and

17. *See* JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1997); John Henry Schlegel, *A Certain Narcicissim; A Slight Unseemliness*, 63 U. COLO. L. REV. 595 (1992); John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985).

failed to deal adequately with the things that were crucial to understanding why the supposed triumph of liberal law reform was in fact its failure—gave our position a weight and a notoriety that we both craved and needed.

Why this choice was a mistake is a more complicated matter. Critique is always possible, yet it can only go so far, as far as the assumptions that one is willing to critique. CLS generally, as well as myself and others in print, affirmed that "Law is Politics," that law instantiates relationships of power and so, oppression. From this affirmation we concluded that if we could infuse law with good politics, a politics that liberated the oppressed, there would be dancing in the streets of Berkeley. There is, however, a problem with that understanding of our aphorism. To affirm that "Law is Politics" is also to affirm that "Politics is Law," for in this statement the "is" functions linguistically as an equal sign. Fully accepted, the equality of law and politics would have not just dissolved the liberal legalist dichotomy between law and politics, a result that we surely intended, but also would have abolished the privileging of law over politics that would follow from fusing the categories of the dichotomy, a result that I believe Pierre fully intends. The next step down that slope would have been to recognize that we would no longer be able simply to shout "Politics!" when we noticed oppression/inequality in social life, and thereby get away with urging the vindication of law's ideals. We would instead have to find some other grounding for our understanding of what good law/politics would be, or confront the possibility that no such grounding was possible. Thereafter would have come the really slippery part, for beyond a certain amount of sloganeering—"community," "unalienated," "elimination of racism, sexism, and homophobia," "worker empowerment"—identifying good law/politics would have required the development of a real social/political theory. But, except for Roberto Unger, we were not political/social philosophers; we were law professors, lawyers manque.[18] Our liberal

18. ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975) and ROBERTO MANGABEIRA UNGER, LAW AND MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976) were the books we knew at the time. To these one must now add ROBERTO MANGABEIRA UNGER, PASSION: AN ESSAY ON PERSONALITY (1984); ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADIAL DEMOCRACY (1987); ROBERTO MANGABEIRA UNGER, PLASTICITY INTO POWER: COMPARATIVE HISTORICAL STUDIES OF THE INSTITUTIONAL CONDITIONS OF ECONOMIC AND MILITARY SUCCESS (1987); ROBERTO MANGABEIRA UNGER, SOCIAL THEORY, ITS SITUATION AND ITS TASK: A CRITICAL INTRODUCTION TO POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987); ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996); ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (1998); and ROBERTO MANGABEIRA UNGER, THE FUTURE OF AMERICAN PROGRESSIVISM: AN INITIATIVE FOR POLITICAL AND ECONOMIC REFORM (1998).

legalist opponents had no real social/political theory of their own, and when they tried to develop such a theory the results seemed less than compelling. Moreover, Duncan regularly cautioned us that to attempt to succeed where our opponents had failed was to fall into an obvious trap. We were smart, but not necessarily that much smarter than they were. It seemed to us that it was just easier to avoid the slippery slope entirely by continuing to affirm the traditional notion of the Rule of Law that we shared with the liberal legalists and the Party of the Right. Doing so, privileging law just enough to continue with the business of normative legal scholarship, allowed us to maintain reasonably intact our critique and our politics.

Preserving our critique and our politics had one unfortunate consequence, however. As we had no distinctive substance—critique never does—our voice was eventually overwhelmed by the voices of the fem crits and the race crits whose politics we shared, but who did not share our commitment to critique because to do so would have undermined the privileging of the point of view that was at the heart of their politics. Thus, CLS was accused of having no positive program, of being nothing other than an elaborate instantiation of political point of view, of being irrelevant to any positive understanding of law. That these charges were silly, wrong even, is not important, for in any event we simply faded away.

Had the group remained open to the empirical strand of research in law, it is barely possible, but I think that it would have been enough, that we would have come to understand that we had better turn our critique on the notion of the Rule of Law as the Rule of Laws if we were to continue to work to explain why legal liberalism was inadequate at its time of triumph. Had we done so, we might possibly have kept our ferment alive. Admittedly, to have made such a choice would have been scary for two reasons. First, we would have had to give up our privileged position as oracles of the Rule of Laws, the only privileged position that we had, however much our own critique undermined the grounds of that privilege. Doing so would have required that we extend Duncan's dictum, "There are no killer arguments," to realms where it was not obvious that we as law professors had any comparative advantage. Second, we would have had to place our politics up for grabs as we tried to fashion an understanding of why bureaucratic law was both inevitable in our world and a failure on its own terms. Doing so would have required a sympathetic understanding of the behavior of those humans who administered the legal maze and tried, as most humans do, to do the best that they could. There would always have been the risk

that establishing such sympathy for one's subjects would allow one only the conclusion of Candide about his world.

Yet, doing scary things is as much a part of being human as being scared. It seems to me that Pierre's explanation of the Enchantment of Reason suggests that, if we of the Party of the Left wish to pick up and reinvigorate critique, we have little choice but to try those scary things that might distinguish us from the cacophonic sameness of normative legal scholarship and teaching, thereby allowing our voice to stand out from the crowd again.