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**Spam Jurisprudence, Air Law, and the Rank Anxiety of
Nothing Happening
(A Report on the State of the Art)**

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ESSAY AND RESPONSES

Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)

PIERRE SCHLAG*

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* Byron R. White Professor of Law and former Associate Dean for Research, University of Colorado Law School. © 2009, Pierre Schlag. I wish to thank many people who would no doubt prefer not to be associated by name with this essay. By way of providing some context, I offer the following observations:

During the rock n' roll era (circa 1955–1980), young males developed a habit of imitating their favorite rock stars by pretending to play a non-existent guitar. This behavior became known as “air guitar.” It was a practice of dubious value: On the one hand, air guitar produced no real sound. On the other hand, no one playing air guitar ever struck a false note. The definitive article is Adam Liptak, *Playing Air Guitar*, N.Y. TIMES, Sept. 1, 1985, at A40. The relation of air guitar to contemporary legal scholarship is relatively straightforward. As for Spam Jurisprudence, it pretty much speaks for itself. Rank Anxiety—a more interesting phenomenon—was the ruling epistemology in law schools at the beginning of the twenty-first century. At that particular juncture, radical insecurity about the nature of the enterprise (along with the intense corporatization of the University) led to widely publicized efforts to gauge individual and institutional contributions to “legal scholarship” by reference to various ranking schemes. Virtually everyone decried the rankings. Virtually everyone followed them. It is thought that Spam Jurisprudence and Rank Anxiety were related phenomena. Some suggested a positive feedback loop.

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In 1969, I saw *The Endless Summer*.¹ It was a surfer movie about two guys (Robert and Mike) who traveled the world in search of the perfect wave. High art—it was not. Plus, the plot was thin. But there was one line that, for my generation, will go down as one of the all-time great movie lines ever. And always it was a line delivered by some local to Robert and Mike, the surfer dudes, as they arrived on the scene of yet another dispiritingly becalmed ocean. And every time, the genial local, always and forever smiling, would look at Robert and Mike and say, “You guys reeeeeaaaaaaaaally missed it. You should’ve been here yesterday.”

I mention this because it was exactly this line that popped into my mind right before I was to give a talk at Harvard to young law faculty. Now, please understand that I know that you are never—ever—supposed to say that to younger generations. It’s bad form. And so as I walked towards the room for the talk, I told myself, “You can absolutely not say that.”²

But it came out anyway: “You guys reeeeeaaaaaaaaally missed it. You should have been here yesterday.” Well, not in so many words, but close enough. And the reason I’m mentioning this now is to make it incontestably clear that I really do know you’re not supposed to say that and also that I’m about to say it again.

You guys reeeeeaaaaaaaaally And the reason that’s true is that American legal scholarship today is dead—totally dead, deader than at any time in the past thirty years. It is more dead, vastly and exponentially more dead, than critical legal studies was ever dead during its most dead period.

Nothing’s happening.

Now it’s true that we’re producing at a vastly faster rate than ever before. More papers. More conferences. More panels. More symposia. More blogs. And

1. The movie was actually released in 1966.

2. It’s really not responsible to say this as a tenured faculty member. I mean here are these young professors on your faculty, looking to you for help and what is that you come up with? “You guys really missed it?” You cannot say that. It’s unacceptable. Utterly and totally unacceptable.

faster and faster too. More and faster. Over seven thousand American legal academics³—and all of them cranking out those talks and papers as fast as possible. The speed of legal scholarship is just off the charts right now.

And yet, nothing's happening.⁴

How could this possibly be? The short answer is that, all around us, there is more, vastly more, of nothing happening than ever before. Now, this might seem odd, but upon reflection, it's not. In fact, not at all. Indeed, if anything, the accelerated culture of legal scholarship has positive feedback effects on nothing happening:⁵ Who, after all, would have the time to notice the vacancy of the enterprise? More to the point perhaps, who would be foolish enough to point it out?

This would be me.⁶

Now, I do have enough sense not to dwell on how absolutely terrific things were twenty years ago. (Which, by the way, in a relative sense, they were.) Instead, I will dwell on how truly awful things are today.

Could things be any different?

On the one hand, I want to say of the dominant paradigm of legal scholarship: It is what it is—an institutionalized social practice. And as such there is no particular reason to suppose that it should be any different from what it is (or is becoming) simply because a few of us (many of us?) think it ought to be a whole lot more interesting or edifying or politically salient or whatever. It's true that most of us generally think of law, or at least legal thought, as the kind of social practice that is responsive to serious intellectual critique and interrogation.⁷ Indeed, we tend to think of serious intellectual critique and interrogation *as integral* to the social practice of law and legal thought. But that's just our representation of the thing. And if we think about it, there's really not much reason to believe it's right. No one has yet adduced any convincing evidence or offered any compelling argument to show that this representation is indeed true or often true or even true enough. Nor has anyone attempted to show how it might be true if true it is (which quite likely, it's not).

What do I think about this representation? Simple: I think that the relation of serious intellectual endeavor to the practice of law or legal thought is plural

3. Association of American Law Schools, Statistical Report on Law Faculty 2007–2008, at 24 (reporting 7,671 tenured and tenure-track law faculty).

4. Which leads me to wonder: just where are all the punk law professors? Just what happened to that generation? And where's gen X and the slackers? I want to know. The quick answer is that they were selected out or self-selected out. No doubt true—but that doesn't explain very much does it?

5. Excuse me, hello, but could I possibly get some cites here, maybe?

6. Apparently, this sort of thing has happened before. Pierre Schlag, *Normative and Nowhere To Go*, 43 STAN. L. REV. 167 (1990). Several times apparently: Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997).

7. I have spoken with the author. This is what he says and I quote: “The manifest sense among law professors that law is somehow responsive to serious intellectual argument is facilitated by the conventional representation of law as *a field of ideas, propositions, theories and the like*. It's as if els never happened. Hell, it's as if Holmes and Llewellyn never happened.”

(many relations), contextual (in all sorts of ways), highly mutable (not temporally constant), and arguably often antithetical (an interference).

All of this, of course, would make the relations of thought to practice radically indeterminate—not the sorts of things that can be known fully in advance.⁸ From this radical indeterminacy though, one can draw an utterly unfounded hope (which I do). As an unreconstructed optimist, I can't help but think that it would be so easy for at least some legal academics to turn their backs on the dominant paradigm, strike out on their own—alone or in small groups—and do something intellectually edifying, politically admirable, or aesthetically enlivening.⁹ The way I see it, tenure is forever, the discipline is weak, and there are no real sanctions for intellectual experimentation.¹⁰

And there have to be some legal academics who are passionate and engaged—who are not beaten down by the drone of legal discourse. People who have missed it—in the sense that they came of age in some truly dreary political/cultural moments.¹¹ But who have not missed it in the sense that they are still alive. They still have aura.¹²

Now, I'm not completely utopian, and I realize that this would not be a large group. But the upshot is that being a legal academic can still be, if one makes it such, one of the last truly great jobs on earth¹³—a job where one can actually decide what to think, what to write. All of this is to say that there is no compelling reason to simply emulate the reigning paradigms of legal scholarship. No compelling reason at all.¹⁴

But I guess I'm afraid that many people do follow the dominant paradigm simply because . . . well, it's the dominant paradigm. It's what everybody else is doing. I get the sense that for most people in the legal academy these days, there's no elaborated conception of what legal scholarship is supposed to be or do (or any such thing).¹⁵ And there isn't much in the way of independent

8. Could we have some cites, please? Really. I would like to cite to Duncan Kennedy here. Oh to hell with it. Here goes: Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147 (2001).

9. My relations with the author are becoming somewhat strained. See notes 2–7, *supra*. I feel that he is not expressing himself as well as he could. I also think that some of his views are simply untenable. I do not think we are compatible.

10. And by “experimentation” the author actually means “deviance.” And sure there are sanctions for deviance. You draw ire. You get called names. Hell, the author himself has been called paranoid and irrational. The author points out that this is nothing. He says he's also been called sophomoric, nihilistic, jejune, a deconstructionist, a critical legal studies scholar, a son of cls, a postmodernist, a legal realist, a romantic, a rationalist, a hyper-rationalist, a disappointed rationalist, a poststructuralist, a comic, a satirist, an *enfant terrible*, an iconoclast, and more. He points out that none of these things is really true—that he's just a regular guy. Says he used to drive a pick-up. Cuts his own firewood. Virtually a pragmatist.

11. See generally CLARE MESSUD, *THE EMPEROR'S CHILDREN* (2006).

12. Aura? AURA? What's aura? And since when do we allow “aura” in a law review article?

13. This idea is from Sarah Krakoff.

14. Yeah, sure, except for what he just wrote two paragraphs back.

15. Yeah right like he has one. Give me a break. This is what he says: “Very broadly speaking, I would say legal scholarship entails two kinds of enterprises. First would be those enterprises aimed at a kind of non-trivial retrieval of beliefs, practices, information pertinent to law. Second would be those

research agenda—as in “I have things to say . . . and I’m going to say them.” The upshot is that legal scholarship turns out to be an exercise in imitation. Legal scholarship is whatever it is that other legal academics do. And there is not much in the way of a critical appreciation of whether “what other legal academics do” is of value or why or how. Instead, people in the academy simply presume that legal scholarship (conceived here as what other legal academics do) has some redeeming intellectual or moral or political value.

As presently constituted, I’m not sure it does. This, of course, brings up the thorny question: “compared to what?” Is it better for legal academics to follow the dominant paradigm as opposed to . . . Doing nothing? Doing consulting? Doing journalism? Playing video games? My compared-to-what (for purposes of this essay) is an optimistic conviction that some (many?) legal academics could do scholarship in much more intellectually interesting or politically helpful or aesthetically enlivening ways if they abandoned the reigning paradigm.

I could be flat out wrong about this: it may be, as I’ve suggested above, that the only thing we can say of legal scholarship is that it is what it is. It may be that given the present circumstances in the legal academy, we are doing just about as well as can be expected. It may even be that departing from the dominant paradigm is undesirable (things could get worse). In some ways, they very likely will. But probably not in all ways and not necessarily for everyone.

And so I write this essay. I am going to be doing three things at once. (That means no three cleanly divided parts on this score.) One: I will be trying to show that the dominant paradigm is fundamentally uninteresting from an intellectual, political, and aesthetic standpoint. Two: I will be trying to briefly sketch some of the constitutive features that render this dominant paradigm (unavoid-

creative enterprises aimed at rethinking the way we think or do law.” I asked the author, “But what about the normal definition of scholarship?” I quoted: “Scholarship is the pursuit of academic research, whether in the arts and humanities or sciences, and in all such fields means *deep mastery of a subject*, often through study at institutions of higher education.” I pointed out that I obtained this definition from an unimpeachable authority on the normal—to wit: <http://en.wikipedia.org/wiki/Scholarship> (visited Jan. 1, 2007). He pointed out that this definition had been edited out of existence. *See id.* (last visited Dec. 30, 2008). I pointed out that the same definition could be found at <http://www.nationmaster.com/encyclopedia/scholarship> (last visited Dec. 30, 2008). This is what he said back:

Deep mastery of a subject is not itself scholarship. “Deep mastery of a subject,” when it’s in written form, is what we usually call a dissertation. Many academics never get over the experience. Having done very well on their dissertations, they take it as a model of scholarship and end up writing dissertations all their lives. Mercifully, these are usually called by a different name—university press monographs. The big difference between a dissertation and a monograph is that the latter have real cool covers and frequently get reviewed. So far “dissertation disease” has been mostly a problem in other parts of the university (not the law school). But dissertation disease is beginning to make its appearance in the law school as we become more interdisciplinary. As for your wikipedia definition of scholarship, that’s simply a manifestation of the triumph of the experts. It’s the triumph of expertise as the dominant model of knowledge and of knowledge as the dominant mode of thinking about world and law.

ably) uninteresting. Three: I will be suggesting that following the dominant paradigm is an existentially impoverished and impoverishing thing to do. It's not a life. It's just a genre. And not a very good one.

Now, as you can tell, this is not subtle. It's all aimed at providing motivation to abandon the dominant paradigm. That's my rhetorical strategy here. I'm hoping that, by the time you have finished this essay, you start to think that participating in the dominant paradigm is not really worthy of your time or effort or perhaps even respect. I'm also hoping that you start to think about writing something else—something less life impoverishing.

Of course, I realize that I have no hope of convincing anyone, except maybe a very few people who are on the margins, who are vaguely dissatisfied with legal scholarship and who sense that maybe it's not what it's cracked up to be. The essay is aimed at those people who have begun to wonder—just what is the point? Not the grand cosmological point of it all. But a more modest existential point—as in what is the point of doing legal scholarship?

My answer? You have to bring the point with you. Just as a lawyer needs to have a client in order to have a case, you need to bring something to legal scholarship to make it worthwhile. Because, unless you bring meaningful existential commitments to the practice of legal scholarship, it will have no point. Think of it as a genre. It has no more of a point (in fact quite possibly less of a point) than other genres—say, the novel or the poem.

Now it is claimed by aficionados of the dominant genre that legal scholarship is aimed at the mastery or production of knowledge, the elimination of error, the promotion of the good, and so on. But those are just claims—representations. To my knowledge, no one has ever provided any convincing argument as to why participating in the dominant form of legal scholarship is, in and of itself, a morally good, intellectually respectable, politically admirable, aesthetically enlivening, or otherwise worthy thing to do with one's life.¹⁶ No one.¹⁷

There are some people, of course, who have said that it is part of the job description and therefore one is duty-bound to do it. But that's just wrong: Part of the job description (academic freedom and all that) is to be able to develop your own scholarly agenda.

16. Right, and no one's ever provided a good justification for using a fork either, but you don't find the author railing on about that now, do you?

17. This is what he wants me to say here:

There are, of course, commentators like Judge Harry T. Edwards who celebrate the kind of default legal scholarship I'm talking about here on the grounds that this sort of scholarship is ostensibly helpful to the courts (presumably, appellate courts). *See generally* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). That, of course, is a truly stellar argument if one is convinced that helping out appellate courts—could we call this free-lancing for the state?—is a really worthwhile thing to do. (Working the law. Working the law.)

I. EXCELLENCE IN MEDIOCRITY

So start here, with a relatively uncontroversial point: I will simply take as true what we legal academics secretly suspect but wish fervently to deny—namely, that legal thought is not rocket science. It's just not: Putting cases together (case-crunching), recognizing their patterns (theory), weaving them into this or that well-known argument (legal advocacy), turning extra-legal expertise into legally cognizable material ("LCM")—all in all, it's just not the sort of thing that requires or permits the display of great intellectual prowess.

Now, this is not to say that our people are cognitively challenged. They are not. Nor is it to say that intelligence does not help in practicing or thinking about law. It clearly does. It is to say, however, that no matter how intelligent we may be at working at the thing we call legal thought, at the end of the day, it is still legal thought that we are working on and that (as it turns out) entails some very serious limitations on what intelligence can beget. Now it's true that there are many really good and smart moves you can make in the game. And being a natural helps a lot. The fast mind excels. Experience counts. So please do not misunderstand: I am not saying that our people are cognitively challenged.

While we're talking about things I don't want to say, here's another one: I don't want to say that all thought about law is mediocre. Nor that thinking about law (by virtue of the subject) yields mediocrity. That's clearly not true. But we do have this dominant paradigm of legal thought—soon to be elaborated—which is in fact steeped in mediocrity. On the cheerful side though, it's generally aimed at high-end mediocrity.

I suspect that most law professors—including you and me—had hoped for something better. Let's be candid here. The stock legal academic dream is to wield intelligence as power to achieve something good.

Three strikes.

But still, hardly an ignoble dream. And it was not all that far fetched: The dominant paradigm seemed to promise, that if only one were good enough at it—good at the dominant paradigm, that is—it would all come to pass.

Wrong.

Or at least wrong so much of the time. You almost always have to sacrifice at least one of the key terms: intelligence, power, or the good. And even then the odds are still way against you.

Mediocrity's pretty much the going thing. Now, not just any kind of mediocrity. There's nothing sloppy about good legal thought. It's going to be high-end mediocrity we talk about here. Rigorous mediocrity. Scholasticism—highly elaborated, carefully crafted mediocrity.

A. THE VIRTUES OF EXCELLENCE IN MEDIOCRITY

Mediocrity is not generally a term of praise—particularly not for an enterprise with intellectual pretensions like law. Still, we ought not to let the negative

valence of a single term (mediocrity) determine our analysis. After all, we could easily substitute more benign words for mediocrity—terms such as “common sense,” “reasonable,” or “well grounded”—all of which sound a whole lot better than “mediocrity” and all of which are in fact routinely used in tenure and promotion letters as terms of praise for the scholarship under scrutiny.

Moreover, we ought to consider forthrightly the possibility that legal thought is the sort of thing where mediocrity is oddly functional.¹⁸ There are such enterprises. Here I think of the Yellow Pages. The Yellow Pages are designed to assist the high-end average consumer (read: average mediocre mind) as efficiently as possible. The Yellow Pages thus require an excellent reproduction of the high-end average consumer’s taxonomy of goods and services (perforce, a mediocre taxonomy). A designer of the Yellow Pages must seek to simulate a certain kind of taxonomic mediocrity in a really excellent kind of way.¹⁹ Of course, a key difference between the designer of the Yellow Pages and a legal academic is that the latter often feels obliged to stay within “the internal perspective”—to take up the point of view of a participant in the legal system.²⁰ This leads to all sorts of quandaries such as: must the legal thinker be mediocre at mediocrity or not? Or only some aspects of mediocrity? Designers of the Yellow Pages do not generally labor under such limiting burdens. They can thus be very smart about achieving mediocrity.

Notice that, once one thinks about it, a tremendous number of contemporary professions are similarly devoted to the production of a kind of excellence in mediocrity: advertisers, syndicated columnists, radio talk show hosts, blockbuster movie producers—all must be able to display excellence in mediocrity.

These latter professionals would, I believe, accede to this point. A really great advertisement plays to the high middle of the relevant consumer bell curve. A really great op-ed plays to the high middle of the relevant newspaper subscribers. Excellence in mediocrity is a constitutive feature of these arts. And I don’t think advertisers or op-ed writers would feel at all insulted if we told them that in their work they practice excellence in mediocrity and in fact aim to achieve high-end mediocrity. The question is: what will law professors think?²¹

18. The author asked me to cite to Senator Hruska’s famous observations on the need for mediocrity on the Court—those were my instructions. Hruska is the Senator from Nebraska who, in the face of claims that Carswell, Nixon’s nominee to the Supreme Court, was a bit dim noted, “Even if he were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren’t they, and a little chance?”

I will oblige the author and provide the cite. No, on second thought, I won’t. I asked the author, “Do you think that mediocrity deserves representation on the Court?” He said . . . no I can’t quote him . . . but it was something like: “not a real problem.” Unbelievable! (I’m trying to enlist the help of the editors. So far—no luck. More as it happens.)

19. Of course, even the author would have to recognize that designers of the Yellow Pages must, at some point, try to emulate the internal perspective of the user. I have a point here, don’t I? A pretty good one I’d say.

20. See H.L.A. HART, *THE CONCEPT OF LAW* 86–88 (1961).

21. Can you believe the sort of nonsense this guy makes me write? The guy tells me that—yes, “excellence in mediocrity” is a kind of oxymoron. But then he has the temerity to say that social and

B. THE TYRANNY OF THE TWO BELL CURVES

Notice that, reality aside, there is no particular reason why legal academics (like the children of Lake Woebegone or the graduates of the Yale Medical School) should not all be above their community's averages. Law schools, like other precincts of the University, have high ambitions—"excellence" is almost always the threshold standard for the award of tenure.

Still, one suspects that high institutional ambitions are insufficient to repeal the bell curve. I suspect that "excellence" for law schools in 02138 or 06520 does not mean the same thing as it does, say, in 93301²²

This is not welcome news. Imagine if truth in advertising were to prevail in the law school admissions brochure:

Welcome to the Beachhead School of Law! You have made the right choice!
A couple of our faculty are truly excellent teacher-scholars. Most are moderately competent.
Also, housing is not a problem.

In its obeisance to the bell curve, law is not alone: every discipline, every school, every university, is *prima facie* subject to the bell curve. In this bell curve sense, mediocrity is not accident, but fate.²³

This is not the interesting bell curve. I mention this bell curve simply in order to put it aside. All disciplines, presumably, are subject to this bell curve—namely the one that speaks to a distribution of capacities and competencies among the discipline's personnel.

My point, the more interesting one, pertains to character or organization of the discipline as a whole. Some disciplines may be devoted to the achievement or appreciation of performance at the upper end (the truly excellent part) of the curve. In music, we hear more about Mozarts than Salieris. In philosophy, more about Kant than Baumgarten.²⁴ Few disciplines that I can think of are aimed at the lower end of their curve.²⁵ Other disciplines (law will turn out to be one of

intellectual practices can be organized in the form of oxymorons. Well, that's just great. Kind of blows rigor right out of the water, doesn't it? He said, "Sure law can work itself pure. It can also work itself into a mess." Unbelievable.

22. . . . which would be a reference to Bakersfield, California (where there is no AALS accredited law school as of yet and not much excellence to speak of).

23. . . . which is not to say, I should remind the author, that one cannot try and even succeed in modifying the shape of the curve or getting one's own curve to look better than the next law school's curve. I've said this. He ignores me.

24. "What about cultural studies—that's not exactly Mozart or Kant, is it?" This is what he said: "Cultural studies does focus on popular objects or marginal subjects, but it does so within the terms set by high theory. You can be sure that a university press book on Crest White Strips will not be just about Crest White Strips. In fact, it may not be about Crest White Strips at all (which, of course, brings forth its own set of problems)."

25. I have tried really hard to help the author out here: I've tried to think of enterprises that strive for performance at the lower part of the curve. These would be enterprises devoted to a kind of slumming. The most obvious candidate is the fashion industry, which occasionally promotes downscale clothing.

these) may be devoted to the reproduction of performance at the middle part of the curve (albeit the high end of the middle part).

II. A THEORY OF THE SORRY STATE

Why is this? I offer a number of answers below, among which are: the absence of great texts/methodologies, the dominance of judicial discourse, the inability to break free of folk understandings and cultural norms, and more.

A. B+ JURISPRUDENCE²⁶

Certain things are in need of no demonstration though they do need to be mentioned from time to time. One of them is Judge Posner's observation that law has no great texts (*Palsgraf?* Blackstone's *Commentaries?* *The Concept of Law?*); that it has no great methods (Comparative impairment analysis? Controlling case doctrine?); and that it has no great questions (The legitimacy of judicial review? When to use a rule and when to use a standard?).²⁷

It is true, of course, that legal questions are often very important consequentially, but then so are wars and epidemics, and that does not endow troop movements or cell reproduction with the imprimatur of intellectual excellence. It is possible, in fact likely, that generals can be smart and that being smart will often help. But this does not say much: intelligence is important for lots of enterprises (petty crime, student council elections, and so on). Similarly, intelligence is often extremely important in writing a good brief or in preparing a good deposition, or in writing a good law review article. But all of this is neither here nor there: the fact that intelligence often gives the people who have it an edge in whatever enterprise they are pursuing says little about the mediocrity or excellence of the enterprise itself.

B. AIR LAW

Now, having no great texts, no sophisticated methodologies, no great questions, and nothing else of any fundamental intellectual value, the discipline of law is organized as a kind of mimesis—specifically, the imitation of judicial idioms, tasks, gestures, professional anxieties, and the like.²⁸

Even there, however, it bears noting that when the fashion industry slums, it will nonetheless strive for the higher end of the low part of its curve. Moreover, it will invariably price its slum-lines at the high end of the industry pricing curve. Indeed, high-quality slumming almost always commands (and requires by way of certification) a high price. If you do not pay a high price, well, then it's not authentic slumming, but something else akin to fake slumming. Fake slumming, of course, would be a double negative. Or possibly a super-negative. It is all so very confusing. It's just very hard to be inauthentic these days, no matter how hard you try.

26. I have to point out that the B+ is a result of grade inflation.

27. See Richard Posner, Judge, 7th Circuit U.S. Court of Appeals, Remarks at Association of American Law Schools Conference (Jan. 5, 1991), reprinted in Myers, *At Conference, Posner Lambasts Academics for Weak Scholarship*, NAT'L L.J., Jan. 21, 1991, at 4.

28. According to the author, jurisprudence celebrates this mimesis under the banner of "the internal perspective."

The law review article is an imitation of the legal brief and the judicial opinion. There are, of course, some important differences. The law review article is typically more intricate, more thoroughly researched, more detached, and more abstract. It is also, interestingly, written on behalf of no client, in no pending case, without a court date and addressed to no one in particular. We're talking air law here. And here, it's safe to say that by and large, law review articles are causally and constitutively pretty far removed from any real stakes, save perhaps for the career of the author and a few other people. And unlike a brief or a judicial opinion, a law review article generally does not register in an already established network of authoritative official action.

And yet, despite these striking differences, the standard law review article nevertheless tracks closely with the form of the legal brief and the judicial opinion.²⁹ Indeed, the law review article (legal brief) begins by laying our claim to the reader's attention (Statement of Jurisdiction), followed by a framing of the issues (Issues Presented). We then set forth the factual context (Statement of Facts), marshal the legal arguments (Legal Argument), and end with a single normative prescription (Prayer for Relief).

Even interdisciplinary scholarship typically submits to this legalist form. That scholarship occasionally escapes the advocacy orientation, the rule of legalist arguments, and the deference to judicial concerns, but not often. And almost never does it escape the law review equivalent of the prayer for relief—namely, the normative prescription, the “And therefore the court should or the legislature should or we should or the zeitgeist should”

The fact that the discipline of law consists in this imitation of the legal discourse of judges and appellate advocates means that the state of *their discourse* matters crucially to the excellence or mediocrity of our own. This is not good news. Judicial discourse is not intellectually edifying. It is not designed to be. Quite the contrary: judicial discourse is in many ways intellectually arrested and arresting.

Why?

C. LEGITIMATION NEEDS

Judges must often legitimate their decisions to a wide variety of addressees: other courts, lawyers, clients, interested parties, the intelligentsia, the press, and the public at large.³⁰ Some of these parties can be quite sophisticated in their understandings of law. Others are not.³¹

The legitimation needs of judges are not constant across contexts. There are

29. See generally Ed Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835 (1988) (describing and criticizing “the unity of discourse” among legal academics and judges).

30. JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973). I don't really know why this cite is here, but I was pretty sure no one would really notice. Also from now on, I'm going to write whatever I want. Also I've decided to call myself “Daniel.”

31. Here's a poem I've been working on:

some areas of law that are so far removed from any conventionally charged moral, political, or economic stakes that legitimation needs are fairly low-level. Moreover, in some contexts, the addressees are sufficiently sophisticated and law-savvy that the courts can deploy a fairly sophisticated and esoteric discourse. Similarly, some aspects of statutory and regulatory law are so saturated with the language of expertise that popular understandings are of necessity bypassed. But often the courts must strive to legitimate their decisions to a fairly unsophisticated public.³² Here, the courts must (and often do) use fairly simplistic conceptions of social and economic life in rendering their decisions. To put it bluntly, judicial discourse often tracks with popular understandings of causation, choice, consent, duress, etc., etc., etc. These popular understandings—shaped largely by mass culture—are, not surprisingly, often intellectually bereft.

The upshot is that judicial discourse is seldom terribly responsive to intellectual advancements in the social sciences or the humanities. Not that it necessarily should be: Understandably, judges cannot jettison popular understandings simply because these have been shown to be intellectually antiquated. This constraint on intellectual possibility is not a problem for judges and lawyers. But it is a problem for legal academics. To the extent that they embrace and think within the grammar and semantics of judicial discourse, their intellectual possibilities remain severely limited.

D. THE FACTICITY OF LAW

There is another important reason for courts to speak in popular idioms. The decisions of the courts must “glom” onto or “insinuate” themselves into the social and economic fabric. This means that a legal opinion must at some point

Mist-filled gardens across the sky.
Jurisprudence in my teeth
Where does New York?

© by Daniel (Dec. 30, 2008).

32. It's rarely an unmediated process. On the contrary, there are groups such as the bar, the media, and the expert talking heads who serve to translate judicial discourse into a popular understanding.

If the author knew anything, he would cite Alexis de Tocqueville. That's certainly what Daniel would do. Here goes (and by the way, the author gets no credit for this):

Scarcely any political question arises in the United States which is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are, or have been, legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habitude to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habits and the tastes of the judicial magistrate.

ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 357–58 (Henry Reeve trans., 3d ed., Harv. Univ. Press. 1863) (1835).

necessarily join with the social institutions and social understandings in place.³³

At the very least, the order and decree must be capable of realization (of being made real). The remedies that a court decrees must be capable of material inscription into the social fabric. This means that the court often must track the received understandings of the material organization of social reality. Indeed, the social identities and relations that are in place—materially and socially—are effectively the handles through which law is imposed on and insinuated in the social fabric.

Once again, the popular understandings of social institutions and relations are often likely to be intellectually stunted and possibly incoherent. Consider that according to a poll taken in 1997, sixty-one percent of Americans believed that god performs miracles.³⁴ A significant majority also believe in the existence of angels.³⁵ These sorts of widespread beliefs do not instill much confidence in the intellectual wherewithal of popular understandings generally. At the same time, however, it's not as if judges and other legal officials can simply take leave of popular understanding simply because they prefer the *New York Review of Books* (which, in any event, they likely do not).³⁶

E. REDUCTIONISM RULES

Judges must render decisions. They must decide. Their thought processes thus tend towards the monistic, towards that final line in the opinion which reads, "Judgment for the Plaintiff," or "Judgment affirmed," or yet again, "It is so ordered." Judges can remand, they can decline jurisdiction, they can retain jurisdiction—they can do all sorts of things. But the one thing they cannot do is fail to decide. The judge cannot effectively write, "We don't know whether we have jurisdiction or not. So ordered."

When faced with a contest of incommensurables, judges, aided by lawyers, experts, and juries, must somehow transform it into a dualist dispute of commensurables. When faced with a bipolar dispute of commensurables, judges must decide in favor of the one side or the other and transform the bipolar claims into a singular decision. The movement is thus from pluralism through dualism to monism. One can see the metamorphoses at work in the trial process. The trial process (when it "works") typically moves towards an increasingly narrow and precise articulation of the legal and factual issues to be decided. As the various

33. This notion that an opinion must *at some point join* with the social institutions and social understandings in place is worthy of greater elaboration (indeed, it is worthy of an entire essay in its own right) but this is not the place. See instead, Erika Sontag, *Continuity and Disjuncture in Judicial Rhetoric* (forthcoming).

34. High Personal Contentment, Low News Interest, Dec. 22, 1997, <http://people-press.org/report/99/high-personal-contentment-low-news-interest> (citing a 1997 poll conducted by the Pew Research Center).

35. *Id.*

36. John Hart Ely once gently pointed this out to Ronald Dworkin. Ely suggested that perhaps judges need not "follow the *New York Review of Books*." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 58 (1980).

civil procedure and evidence motions are made by the contending parties, there is an increasing refinement of the contested legal and factual issues. The substitution of forms proceeds from the plural through the binary to the monistic. This substitution is effectuated via the invocation of authoritative legal materials, the performance of legal reasoning, the exercise of legal interpretation, the construction or re-construction of facts (and so on).

The question is, of course, how are these metamorphoses from pluralism through dualism to monism achieved? The characteristic techniques used by judges are denial, reduction, abstraction, essentialization, and the like.³⁷

Judges, of course, are hardly the only people to engage in such rhetorical operations. Intellectuals, politicians, and marketing divisions do it all the time. What is important to focus upon here is not the fact of denial, reduction, abstraction, essentialization, etc.—these rhetorical operations are ubiquitous. Instead the important thing here is to appreciate the ends towards which these rhetorical operations are deployed and the ways in which they are performed.

The thing is that the job description of judges is very different from that of intellectuals. The latter are usually committed to something like “truth” or “edification” (however problematic those concepts have become of late). When intellectuals deny, reduce, abstract, and essentialize, it is with a view to serving those ends. Judges, by contrast, may be interested in “truth” or “edification” (which I believe they generally are) but not as an end itself. Truth and edification are valued by judges, but only to the extent that these serve the end of reaching a decision, a holding, an order and decree. This is an important point. It is not that judges are unconcerned about truth or edification. Rather, truth and edification are subordinate concerns. Judges work with and within a discourse that has for centuries subordinated truth and edification (in any deep sense of these terms) to the dispensation of justice, the resolution of disputes, the rendition of decisions, the formulation of orders and decrees, and the clearing of dockets.

And perhaps this is even the way it should be. (It’s the truth vs. goodness thing.) But it is not hard to see that after a few centuries of this sort of thing, the discourse of the judges—the discourse that the judges have propounded and have ultimately become—will be mainly focused on closing the deal—truth and edification being reduced to accessory considerations.

Then too we must consider the way in which the reduction from pluralism through dualism to monism is achieved. There is a constructive aspect here, but also a destructive one.

One can think here of judicial discourse as a very elaborate, centuries-old mechanism designed to reduce pluralistic messes into singular conclusions. As Robert Cover put it, judges are jurispathic actors. “Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy

37. Oh well, that’s really nice. Attaway guy: they’re sure to come around to your side now.

or try to destroy all the rest.”³⁸ The parties are compelled to “translate” their stories and claims in the idioms of law. They are compelled to adopt law’s ontology, its categories, its networks of causality and symbolic associations. The stories and the claims must conform to the formal limits of the law itself, to its language, to the authoritative doctrines, policies, principles.

This account of the reductionism of judicial discourse is a fairly stark one, and it is not terribly popular among legal academics. Understandably so. To the extent that legal academics pattern their thought on the model of judges and to the extent that judges are jurispthic actors, academic emulation of judicial discourse arguably becomes a questionable business.

Accordingly, legal academics tend to describe the reductionist character of judicial discourse in more charitable terms—as a discursive process. They describe judicial discourse (or at least the academic version of judicial discourse) as a “conversation” or in some equally mood-elevating metaphor.

These visions of adjudication as a “conversation” are, of course, much more inviting than Cover’s view of law as a series of jurispthic action. While the “conversation” metaphor has some appeal, as I will suggest, a note of caution is appropriate. If adjudication is a kind of conversation, then one should remember that it is a fairly unusual kind of conversation—one that is initiated by a summons, where attendance is mandatory, and which is played out under the threat of contempt. And if anyone should require reminding, the most compelling agents of the state are never very far down the hall.

Still, as I said, the conversational metaphor has some appeal. Judicial discourse is not simply a series of jurispthic acts. The reductionism of the law cannot be purely formal: some leeway, some play, some give, must be allowed if judges are to take an intelligent cognizance of the social and economic realities that they seek to regulate. If judges were completely insensitive in the ways they take cognizance of those social and economic realities, their decisions would be silly and ineffective (as indeed the decisions of our more formalist judges sometimes are).

If legal decisions are going to be sensible and efficacious, then all things being equal, it is necessary for those decisions to recognize and track the social realities that they seek to adjudicate and regulate. This means in effect that the substantive and procedural law must enable an intelligent understanding of the social context. In turn, this implies an openness both to the interpretation of the factual setting as well as an openness to those expert knowledges that will enable an intelligent understanding of the social context.

At the same time, of course, this interpretive openness is on a specific mission—namely, to enable and help legitimate a decision for one side or the other. Thus, there is a dialectical relationship here between the need to obtain an intelligent understanding of the matters before the court and the need to render a

38. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983).

legitimate decision. The two are at once mutually antagonistic and yet mutually supportive.

This is where neurosis can help. I am thinking here, maybe, say—an elaborate taxonomy or perhaps an extended methodological reflection. Barring neurosis, one has to confront the prospect that in the midst of this tension, it is easy to go wrong. At one extreme, an understanding could be so sophisticated, wide-ranging, and open that the court would be unable to produce a rhetorically convincing decision. Indeed, the judge himself might experience a kind of decisional paralysis.³⁹ At the other extreme, one might imagine a court that begins its analysis just one step short of its conclusion. This kind of performance would entail a failure of judgment, quite literally the failure to recognize the losing party's arguments.

Rhetorical acuity clearly requires some sort of trade-off. But no single trade-off will please everyone. Audiences differ in their demand for sophistication, breadth, and openness. And it is not as if the middle of the road is safe. One might strive for the middle of the road and quite conceivably fail both at legitimation and at an intelligent understanding of the matter.

Not surprisingly, after a few centuries of dealing with the openness/closure dialectic and the understandable anxieties associated with its negotiation, the vacillations of judicial discourse between openness and closure have been inscribed in the law itself. Indeed, the openness/closure dialectic is played out over and over again, albeit, under different banners, in different precincts, and at different levels of abstraction:

Closure v. Openness

Law v. Equity

Rules v. Standards

Formal Law v. Free Law

Formalism v. Realism

Sameness v. Difference

Essentialism v. Anti-essentialism

Etc., etc., etc.⁴⁰

The important thing to remember is that, in law, there is an asymmetry to these disputes. Openness is in service of closure (not the other way around). Judges do not construct formal schemes to foster interesting anthropological explorations of our culture. The situation is quite the reverse: they engage in anthropological exploration (if at all) only to the extent this exploration serves the enablement and legitimation of their decision.

There are thus severe limitations on the ways in which a judge takes cognizance of the matters brought before him or her. He or she will start the

39. We could cite the tragic case of Supreme Court Justice Whittaker, who had great difficulties reaching decisions, but that would be neither kind nor entirely right, and so we will not do so.

40. The author is fond of lists. I'd like to see him upgrade to the outline form. It would give me something to do. He says I don't understand. (Like that's believable.)

analysis with a necessarily truncated and simplified understanding of the situation. The categories and grammar of the judicial discourse do not allow anything else. The upshot is somewhat dispiriting: To the extent that legal thinkers pattern their thinking and writing on judicial discourse, the intellectual limitations will be severe.

The reason is simple: Often the social and economic disputes that judges deal with are intractable. Nonetheless, judges must render a decision and must make it seem authoritative. Just how does this happen? How does one start with an intractable dispute and end up with a confident conclusion for one side rather than the other? A tentative answer: not by any intellectually respectable means. But then again, judges do not primarily answer to intellectual respectability. As legal actors responsible to the community and to individuals, they must also answer to moral and political responsibility.

When legal academics imitate judicial discourse, they operate within a linguistic universe that is designed in important ways to avoid, stifle, and shut down intellectual edification. Intelligence can be brought to bear in elaborating the discourse of judges. But it is important to understand that, as a structural matter, there is only so much one can do within this discourse. To put it too strongly: It is like talking with a really bright kindergartner. She really is bright. But she also really is a kindergartner.

F. POST-MORTEMISM

There is yet another reason that law as a discipline is ensconced in mediocrity. Many of the major critiques that have been launched throughout the past one hundred years remain unanswered to this day. Some of these critiques are convincing. Some I would describe as devastating—the kind of critiques that arguably ought to prompt in our ranks a wide-scale reconsideration of career choice or a sustained attempt to relocate our tenure-home to some more respectable corner of the university.⁴¹

Such a wide-scale exodus has yet to happen.⁴² There are, of course, many academics who have quietly stopped writing. And there are some who take to the bottle or, in a less anti-social vein, to gardening or ornithology.⁴³ But most everybody hangs in there. What then do they say about the critiques?

41. This is all a bit coy actually: the fact is that pretty much every discipline in the social sciences and the humanities has also been subjected to devastating critiques. Yet they too go on. Moreover, if one looks at the unexamined pre-suppositions that underwrite any discipline, one will find that those very same pre-suppositions constitute the highly controverted subject matter of some other discipline. It's all a kind of intellectual Ponzi scheme in reverse. So, if you ask me, I don't know what the guy's ragging on about. Also, I've decided to change my name to Bruce Ackerman.

42. Apparently, "Bruce Ackerman" is already taken. *See supra* note 41. I'm going back to Daniel. *See supra* note 30. Also, at this point, I would like to say that I am gay. In fact, I am the first gay footnote to come out in an American law review—ever. In fact, I believe I am the first gay footnote to come out in a law review anywhere. This has never happened before—anywhere.

43. You know, Ludwig Wittgenstein did that for a while. Took an interest in birds, I mean. Yes, it's true, he had a mental breakdown and took up watching and caring for birds. RAY MONK, LUDWIG

First off: as little as possible. The critiques are by and large ignored. When they cannot be ignored, legal academics engage in denial or play burden-of-proof games (“Well, the critique is not conclusively established and . . .”), or they confess and avoid by pointing out that “Yes, the critique is right but the rule of law, or judicial review or federalism or whatever is necessary, or unavoidable, or already on the books and, therefore, we must just go on . . . as before.” All of these are understandable responses. They are all in part motivated and justified by the legal academic’s identification with the judge. After all, one cannot imagine judges renouncing their office simply because some luminary at Columbia or Yale has unequivocally established the bankruptcy of the discipline. Things just do not work that way.

Still, over time, as the critiques accumulate both in depth and number, it takes increasing efforts not to notice. At first, in the face of a few anomalies, it is pretty easy to turn away the gaze. One dumbs down in order not to notice. Or one does not notice and accordingly dumbs down. Something like that. Either way, it works. For a while. When the anomalies pile up and the critiques turn virulent, however, it requires increasingly intense acts of willful dumbing down to avoid noticing them.

Gradually, however, we become accustomed, both individually and institutionally, to not noticing, not learning, not seeing, not thinking. It becomes a way of (academic) life. If our jurisprudence becomes too silly to believe, we act *as if* we believed it—a practice akin to the doctrine of mental reservation among certain Christian sects. And because what we do as legal academics is a kind of pretend-law (unlike the courts, when we declare what the law is, nobody listens), we can also attach to this pretend-law a kind of pretend-intellectual integrity.

Over time, this not-seeing, this not-noticing, becomes inscribed as the structure of legal thought. The discipline becomes organized as an elaborate defense mechanism, designed to thwart the kinds of knowledges and thinking that might disrupt our happy, steady state.

In this respect, law has a considerable advantage vis-à-vis other disciplines: So long as the organized bar supports or tolerates our efforts, the character of our scholarly enterprise does not matter too much.

We are not like other departments. Philosophy might become intellectually sterile. Sociology might hit a dead-end. Classics might run out of texts. And if so, the university will cut budgets, withhold lines, invest elsewhere. Grants will dry up. But the discipline of law is relatively immune to such corrective actions: its necessity, its continued existence, is secured not so much by the value of its intellectual achievements but by the requirements of the organized bar. We legal academics never have to justify that what we know is a valuable thing. We only

WITTGENSTEIN: THE DUTY OF GENIUS 526–28 (1990). (This, by the way, is the obligatory reference to Wittgenstein. There will be no others.)

have to justify that we know it very well (whatever it happens to be).⁴⁴

III. WHAT IT'S LIKE

There are good reasons then why mainstream legal scholarship tends to converge toward the sorry state. Now, it's not always been absolutely awful. There have been times—three—when things were moderately exciting in the American legal academy. But they did require invention and departure from the standard understandings.

First was the Langdellian era, when law professors went about systematizing the unruly assembly of cases into a systematic corpus. Arguably, this systematizing enterprise bears some resemblance to what we call “theory” today. Nice work if you can get it: The Langdellians not only organized the corpus, but helped develop the principles of organization.

But now it's been done. We still need some treatise writers (say six or seven for each field) who can continue to shelve the cases into the corpus. It's a helpful thing to do. It's helpful to judges and lawyers. A responsible thing to do. I'm glad someone is doing it. But we probably don't need five hundred people in each field doing that.

Second, there was the realist period—when the upstarts set about destroying the fathers' paradigms and putting up their own. Of course, in its positive program, it was an abject failure. But it was a very interesting and captivating failure. It made people think. And despite the fact that the theories were failures, we keep doing some version of them today.

Then there was the “law and . . .” period of the 1980s. This too was a failed project. Of course, law is like literature, economics, politics, etc. How could this, the last of all generalist disciplines dependent upon folk understandings and beholden to cultural narratives, economic organization, and political contestation—how could it not be like all these other things? Well this is the view from hindsight. In point of fact, all this “law and . . .” brought a lot of insights that people hadn't recognized before. Again it made people think.

All of these three moments—the Langdellian systematizations, the realist revolt, the “law and . . .” enlightenment—were reinventions of the discipline. They failed in the sense that they failed to reproduce themselves as vital intellectual enterprises. But they did not fail in making people think. Now, we live amidst their ruins. We are in need of another re-invention. That does not seem to be happening. Instead what we have is:

A. CASE-LAW JOURNALISM

Case-law journalism is a legacy of Langdellianism. As an intellectual enterprise, Langdellianism came to an end when the work of taxonomic organization was completed. Now, as mentioned above, Langdellianism did leave some

44. Trust me: Five, maybe ten years from now, this guy will have to recant on this.

academics in each field to do the useful work of entering the new cases into the old taxonomies and to make modest modifications of the latter whenever it seemed advisable. This took care of keeping six or seven legal academics in each field busy (for a lifetime).⁴⁵ As for the other what—ninety-eight percent?—they would have to do something else. The legal academy clearly did not need five hundred contracts teachers to write treatises on contracts (six would do). How then to keep the other 494 duly employed? A three-pronged answer: (1) heighten the intricacy of analysis, (2) let the academics issue lots of normative recommendations, and (3) have them argue incessantly amongst themselves.

The possibility of outdoing the courts in terms of intricacy was a natural for the legal academy. Courts have dockets. Legal academics have time. Given this asymmetry, the academics could always outdo the courts in the intricacy of their analysis. For legal academics, more searching, more precise, more detailed analyses were always possible. And it was also possible along the way to chastise the courts for their analytical shallowness. Indeed, one legal-process wag in the 1950s once complained very soberly that the essential work of the Supreme Court was suffering because the Justices clearly did not have sufficient time to give proper attention to writing their opinions.⁴⁶

The second possibility—to issue lots of normative recommendations—was also a successful full-employment strategy. To the extent that legal academics could make recommendations to the courts as to what should be done, the work would never dry up. Indeed, normative prescription pretty much opened up the world of legal scholarship to the future—in fact, to all kinds of futures, ranging from the modestly improved to the wildly utopian.

The third prong—to let the academics argue among themselves—was also well suited for the legal academy. Surely if Professor X had a better solution than the courts, then, of course, it should be published. And surely if Professor Y found that Professor X's proposed solution was somehow flawed, it would be useful to publish that too. And surely, further responses might also add to the storehouse of knowledge. And surely too there would be value-added for

45. The author wishes to quote from Jack Schlegel here:

Langdell's world, the world of rules, was, I suppose, an exciting one in those early years. There was the enormous job of systematically stating the law, a job that was carried out not just in treatises but also in casebooks. But when that job was done, legal academics in Canada (by the late sixties I surmise) and the United States (by World War I) faced a terrible problem. There really wasn't much more to do. The notion at the root of the Langdellian program, that law is a definable and finite body of knowledge, meant that the task with which scholars were left once that body was substantially defined was to monitor the small changes in the law—chronicling, where possible, a new development in eminent domain or a new wrinkle in consideration. Some did (and do) this necessary and time-consuming work patiently and lovingly, but for most the endeavor was less than exciting.

John H. Schlegel, *Langdell's Legacy or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1529–30 (1984).

46. See Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, (1959).

Professor Z to show that while both Professor X and Professor Y had made valuable contributions, neither of them understood the problem quite as well as Professor Z. And so on. The possibilities were endless (in a kind of mock common law sort of way). And because all the legal materials (as had been demonstrated over and over again) were fraught with contradictory values and imperatives, the game could keep going forever.

These three prongs are very much a part of case-law journalism. But they are too formal to capture the ethos of the practice—for this is a practice, not a set of rules to follow, not a model, but a well-settled, fully socialized, thoroughly internalized way of thinking and writing.

By way of analogy to this practice, consider the mythical reporter covering the police beat. Think 1950's film noir here. In the opening scene, the reporter waits at the police station (today, by his pager) for the suspects to trickle in. The action starts. He interviews the cops, then reads the arrest report, calls the wife or husband or girlfriend, as appropriate. Then, should zeal strike, he might visit the crime scene. In the end, he writes and files his report, which is then published in the morning paper.

Case-law journalism is much the same except for three things.

First, the case-law journalist is a professor of law. And she writes law review articles, not newspaper articles.

Second, she does not wait by the police desk. She is by her PC looking at Lexis or Findlaw or the SCOTUS website.⁴⁷

Third, unlike the journalist who is supposed to stick to the facts, the case-law journalist inserts the cases into some sort of normative narrative. Almost invariably, the case-law journalist ends on a cheery normative prescription for betterment of law, nation, or world. (Indeed, when was the last time you saw a law review article end on the note, “Oh my god, there’s nothing we can do. We’re ruined.”?)

B. LCM

The most critical aspect of case-law journalism and its variations is the submission of issues, problems, artifacts, methods, or whatever else might come over the transom to the logic of judicial discourse in a way that produces legally cognizable material (“LCM”).

There is a great deal of LCM produced in the legal academy. One gets the sense here of a great machine composed of many legal academics—each one ready and able to process the materials through the logic of judicial discourse. In the early days, up until the late 1960's say, it was mainly cases that were crunched. Today, the field has opened up. We will crunch anything. No matter what comes up—O.J., thick description, postmodernism, blogs, *Bush v. Gore*, the anniversary of *Brown v. Board*, anything at all—we will turn it into LCM.

47. “Your needs drive our *innovation* drives your success.” LexisNexis, A Division of Reed-Elsevier Inc. All rights reserved.

When the thing really needs a lot of crunching, we will hold a symposium and get a small group to crunch the thing together. We are ready, willing, and able to crunch the stuff (any stuff) and turn it into LCM.

The consumption metaphor is also apt here. Anything that comes to us, we legal academics will chew on and ultimately digest. Our job is to be there—ready to process the cases, to answer the call from CNN or NPR or 9NEWS, to provide a pithy quote for the morning paper, to argue importantly at the law review symposium, and then to go back to our offices and do it again the next day (for life).

This is not nothing, of course. If you do this, it allows you to display knowledge-mastery. In turn, this will please your dean and get you lots of lines in the alumni magazine. Like this, for instance:

Professor Brancroft spoke on ___ at NPR on July 20. He published three articles on the Bankruptcy Act and Putative Spouses—and a sequel to his earlier He also presented a talk at _____ to the State Commission on special courts and appeared on CNN to discuss And so on.

Or more candidly:

Professor Brancroft has not become a world-class party animal (surprise—that one) and is not visibly suffering from jungle rot. What's more, he shows evidence of working on the kinds of things that the mental giants at CNN believe is worth air time. So the upshot is that he's doing something and the rest of us at the law school are doing something. We are all doing something. The future looks bright. So give us your money please.

Legal thought is a lot like that these days. Notice that if this is the job description—producing lots of LCM—it's kind of hard to have ideas. It is a lot like trying to have a truly creative idea in the middle of taking a law school exam—which, as we all know, is seldom a good idea).

C. THE PERPETUAL LAW SCHOOL EXAM

And there's a thought: the state of the art really is like a perpetual law school exam. The prototype of the contemporary legal academic is someone who is constantly either preparing to take or is in fact taking a law school exam. In one sense, of course, it's not quite a law school exam because the law professor is talking about things that are actually happening: court proceedings, legislative deliberations, etc. On the other hand, it has that same sort of form—answering stock questions in terms of stock issues by deploying stock arguments. Go to the blogs: I speak truth.

This is a weird job description. It is even weirder that people (besides the six who are very helpfully writing the treatises in each field) would choose to make this their job description when they could clearly choose to make their job

description something else. I strongly suspect, though I cannot prove, that this has a lot to do with the kinds of people we hire. By and large, we vet people very seriously for doing really well on exam-like tasks, writing law review kinds of things, while hardly vetting them at all on anything else. Not surprisingly, when they set about writing, many of them take up the familiar spot and crunch of the perpetual law school exam. What else would they do? What else could we reasonably expect?

Even much of the recent flurry of interdisciplinary activity seems to have come down to a highly academicized case of LCM production. Earlier, in the introduction, we encountered James Boyd White looking at the pile of reprints on his desk with dread and ennui.⁴⁸ I ask you now to imagine something different—namely, a stack of interdisciplinary university press monographs on your desk. The first thing to notice is their covers—beautiful colors, awesome designs. But then you imagine actually reading one of them. Do you not, gentle reader, dread the dryness of the prose, the lumbering lurch of the argument, and the deadening thuds of the footnotes?⁴⁹ For apart from the striking cover, is there not this uncanny sense that what you see before you is simply a very, very, very long law review article?

Still, we should take heart. There may be something highly functional about all this. As intellectually pointless as the perpetual law school exam may be, it serves to display mastery—namely, mastery of the law by the individual legal thinker. To be really good at the perpetual law school exam is to confirm that one is really well-prepared to be a really good case-law journalist. Also it means putting out lots of LCM.

The exercises also show mastery at a higher level of abstraction. They show the mastery of “the law” over current cultural trends, intellectual currents, and social events. This is an important task because it demonstrates performatively that law and its authorized agents are still dominant.⁵⁰ LCM. Moreover, case-law journalism is the way in which we confirm to each other and to outside parties (lawyers, judges, the press, tenure committees, other departments in the university) that we really are in possession of some kind of expertise.

And we are. LCM does not just happen. It takes years of effort and hard work

48. That’s not the way I see it. I don’t recall seeing Professor James Boyd White looking at reprints on his desk with “dread and ennui.” This is just being pulled out of thin air by the author. He has become, I fear, an “unreliable narrator.” From Professor White, I did find this, however:

Think for example of the piles of books and journal articles that litter your office: With what expectations and what feelings do you turn to them? If you are at all like me, you do so with a feeling of guilty dread and with an expectation of frustration. We live in a world of specialized texts and discourses, which all too often seem marked by a kind of thinness, a want of life and force and meaning. How often, for example, do you simply skim-read what is before you, and how often do you feel that nothing is lost?

James Boyd White, *Intellectual Integration*, 82 Nw. U. L. REV. 1, 5–6 (1987).

49. Hell no. Footnotes rock. The author is on drugs.

50. I’m going to cite Cass Sunstein here. This is a kind of anticipatory cite—meant to indicate that if Cass Sunstein has not already written on the subject identified, he will very soon.

to be really good at putting out first-rate LCM.

D. WHERE DOES IT ALL END?

Right here: Spam Jurisprudence. SSRN, SSRN, SSRN. Spam, spam, spam. Ether, ether, ether. Nothing, nothing, nothing. Also—"14th" or "3,468" or, what the hell: "54,973,823." Whatever. Who cares?

Spam!

Vladimir: "Well, shall we stop?"

Estragon: "Yes, let's stop for a moment."

*(They do not stop.)*⁵¹

(Spam!)

E. RANK INSECURITY

Some people think that legal thought is pretty dead these days. I appear to be one of them. I think we are experiencing one of the many dreary default periods in the short of history of American academic law—the return to case-law journalism.

We're coming home. Homeostasis is here. And yet, for a return to the homeland, it is not without a certain anxiety. This anxiety is perhaps best reflected in our obsessive fixation on rankings—rankings of law schools, rankings of law reviews, rankings of legal scholars, rankings of citations and impact, and soon to come, by way of the web and pomo, rankings of rankings. Quantification rules as the major parameter of academic excellence. To put it simply: lots of articles + lots of pages + lots of words + lots of certification = double-plus good knowledge.

Many of our contemporary rankings are pretty vacant. Not only are their methodologies a statistical embarrassment, but even if they were not (which they are), it remains entirely unclear what the rankings are supposed to measure. Not to be rude or anything, but where's the referent? It is true, of course, that as exercises in tautology (the rankings measure . . . what they measure) their value is unimpeachable. Beyond that, their usefulness drops off considerably. Indeed, what exactly is to be learned from the fact Professor X published 223,000 words in the top 20 law reviews during 2003. He writes a lot? And so what that three professors from Texas or Gonzaga or wherever (one in tax, one in torts, and one in environmental law) think that the faculty at Minnesota is significantly better (or not) than the faculty at North Carolina. Who gives?⁵²

These rankings (which are all offered without the slightest trace of irony) bring to mind the famous rock magazine interview with Nigel Tufnel, lead singer for the legendary rock group Spinal Tap. When asked why his new amplifier was better than the old one, Nigel pointed out, with unimpeachable formalist logic, that the volume on the new amplifier went up to eleven, whereas

51. SAMUEL BECKETT, *WAITING FOR GODOT* (1954) (as modified by the author).

52. Perhaps the students and faculty at Minnesota and North Carolina—you think?

the old amplifier only went up to ten. “Iss like louder, ya know?”⁵³

Yes.

Still, these rankings may have some modest heuristic value. Perhaps they are even a tiny meritocratic step up from the most obvious alternative ranking system—namely, the word of mouth from the old boys club. On the other hand, we have to note that the rankings are themselves largely a reflection of the beliefs of the old boys club. Echoes of echoes of echoes (and so on).⁵⁴

While for law schools and law professors, these rankings do create a certain anxiety, there is also an anxiety-relieving function served. Indeed, any doubts that we might have about the value of what law schools and legal thinkers do are eclipsed by our intense fixation on how good we are at doing it relative to each other.⁵⁵ We don’t have to worry that the enterprise might be entirely worthless if we’re totally fixated on how well or how badly we are doing it relative to everybody else. (Up is good, down is bad—what can you say?) This, of course, is an exchange of one anxiety for another, but the latter seems more benign.

The obsession with rank has significant effects on legal academia inasmuch as administrators and faculty are keen to improve the standing of their law schools in the rankings. To the extent that law schools respond to these concerns, the focus is on increasing the magnitude of quantity (and vice versa). Or in short: lots more = high value. It’s, like, louder, ya know?

F. SO WHAT?

I have been told that some of the foregoing might be off-putting to some legal academics.⁵⁶ That’s very hard to believe. But let’s just put that aside. Instead,

53. We pick up the interview with rock legend Nigel Tufnel pointing out to rock reporter, DiBergi, that Nigel’s new amp goes up to eleven.

Nigel Tufnel: The numbers all go to eleven. Look, right across the board, eleven, eleven, eleven . . .

Marty DiBergi: Oh, I see. And most amps go up to ten?

Nigel Tufnel: Exactly.

Marty DiBergi: Does that mean it’s louder? Is it any louder?

Nigel Tufnel: Well, it’s one louder, isn’t it? It’s not ten. You see, most blokes, you know, will be playing at ten. You’re on ten here, all the way up, all the way up, you’re on ten on your guitar. Where can you go from there? Where?

Marty DiBergi: I don’t know.

Nigel Tufnel: Nowhere. Exactly. What we do is, if we need that extra push over the cliff, you know what we do?

Marty DiBergi: Put it up to eleven.

Nigel Tufnel: Eleven. Exactly. One louder.

Marty DiBergi: Why don’t you just make ten louder, and make ten be the top number and make that a little louder?

Nigel Tufnel: [Pause] These go to eleven.

THIS IS SPINAL TAP (Spinal Tap Prod. 1984) (rockumentary manqué).

54. OK, and what isn’t?

55. The rankings industry has helped immeasurably in this respect.

56. Actually, what I said was: “They will stone you.”

let's ask the crucial question: *Assume the foregoing is true—so what?*

First, let me suggest that mediocrity—particularly high-end mediocrity—might well be functional to the training of lawyers. In other words, excellence in mediocrity for legal scholarship might well be functional to the training of lawyers-to-be. Perhaps the redemption of scholarly excellence in mediocrity then is to be found in its pedagogical function.

The idea is not wholly beyond the pale: When one thinks of what lawyers must strive to do—which is mainly resolve difficult disputes and control the future through documentary writings—certain things emerge as crucial to their work.

One is that they speak and think in a common language. The ability to translate complex disputes and transactions into a stereotyped language helps lawyers transact with each other and with judges. To the extent that “all lawyers think alike,” they can with some certainty predict what other lawyers will do—both in litigation and in transactional contexts. This is arguably socially useful.

Maybe.

In terms of social organization then, there may be something to be said for creating a professional corps (lawyers) whose modes of communication are widely shared and relatively standardized. Notice that if this is the objective, then the only place where that sort of standardized communication can be widely shared is somewhere close to the middle of the bell curve. Both intellectual sloth and intellectual excellence are, by definition, aberrant and thus detract from our efforts at standardization.

Thus, training for mediocrity does serve a social function (within limits, of course). Mediocrity is not the only aim here. One would like this mediocrity to be the best it can be. We would like legal professionals to share a language and a mode of thought and, at the same time, for that language and mode of thought to be as perspicuous and intelligent as possible. Given the omnipresence of the bell curve, these desiderata are obviously in tension. The economists would likely talk about achieving “the optimal degree” of intelligence and mediocrity at the margin, but my sense is this will only get us so far.

For law professors, the tension is bound to be somewhat frustrating. What many law professors would like—because many of them are intellectually inclined—is to bring intelligence to bear within legal discourse. This is bound to be a somewhat frustrating venture. Legal discourse is not designed to produce intelligence and, frankly, the materials and the discourse can only bear so much.

Good judgment, groundedness, reasonableness—any of these virtues is often enough to snuff out real thinking. Indeed, whatever appeal good judgment, groundedness, and reasonableness may have for a judge or a lawyer (and I am prepared to say the appeal is considerable), such virtues are not particularly helpful to intellectual achievement. On the contrary, intellectual achievement requires the abandonment of received understandings. In fact, I would go so far as to say that intellectual vitality (at least in the context of a discipline like law)

requires some degree of defamiliarization, some reach for the exotic. The thing is, those sorts of efforts are not going to get very far if they constantly have to answer to good judgment, groundedness, reasonableness, and the like.

And at this point, I would like to flip the argument made earlier in the paper. Here, I would like us to think of appeals to good judgment, groundedness, and reasonableness in legal thought as appeals to mediocrity. Making people see things involves things far different from good judgment, groundedness, or reasonableness. It involves a kind of artistry—a reorientation of the gaze, a disruption of complacency, a sabotage of habitual forms of thought, a derailling of cognitive defaults. This is part of what a really good education is about. Constant obeisance to good judgment or groundedness or reasonableness, by contrast, will systematically frustrate such efforts.⁵⁷

This is all rather vexing. Legal academics—with aspirations to intellectual excellence—are thus destined to play out the myth of Sisyphus. The main difference, of course, is that Sisyphus had a real rock to push up a real hill. The law professors' rock and hill, by contrast are symbolic—imaginative constructions of their own making. Arguably, pushing a symbolic rock up a symbolic hill is substantially easier than doing it for real. At the very least, it is easier to fake it and to claim success. At the same time, though, the symbolic nature of the exercise perhaps makes it more transparently pointless. As between these two points, there is a certain dissonance. On the one hand, we are dealing with pushing rocks up hills—and that is surely hard work. On the other hand, the rocks and hills are of our own imagination—so it should be easy. This is very confusing.⁵⁸ My best guess (and I offer this only as a preliminary hypothesis) is that the dissonance here might yield a certain degree of neurosis.⁵⁹

Still the question pops up again: “So what?” So what—so you have maybe seven thousand-something law professors in the nation and you know, maybe ninety-six percent are engaged in a kind of vaguely neurotic scholarship. So what? Maybe it's borderline tragic. Maybe, these people could have done so much better. None of this, by the way, is clearly established. But let's just assume, it's true.

Who cares? Seven thousand people—that's not a lot of people. Plus, it's hard to feel for them. I know that nearly all of them would be us (but still). It's an extraordinarily privileged life. So why care about this?

Here's why. The thing about legal scholarship is that it plays—through the mediation of the professorial mind—an important role in shaping the ways, the

57. Plus, as an aside here, there's the small point that obeisance to good judgment, groundedness or reasonableness, is totally unwarranted in our context: This is not a reasonable society. No one with good judgment would run things this way. Nobody with an ounce of groundedness would do the things we do. The invitation to good judgment is basically an invitation to surrender to a less than entirely benign oxymoron: exercise good judgment within an intrinsically unreasonable form of life.

58. Not really.

59. You think?

forms, in which law students think with and about law.⁶⁰ If they are taught to think in essentially mediocre ways, they will reproduce those ways of thinking as they practice law and politics. If they are incurious, if they are lacking in political and legal imagination, if they are simply repeating the standard moves (even if with impressive virtuosity) they will, as a group, be wielding power in essentially mediocre ways. And the thing is: when mediocrity is endowed with power, it yields violence. And when mediocrity is endowed with great power, it yields massive violence.⁶¹

All of which is to say that in making the negotiation between the imprinting of standard forms of legal thought and the imparting of an imaginative intelligence, we err too much on the side of the former. (Purely my subjective call here—but so is everybody else’s.) Another way to put it is that while there is something to be said for the standardization point made earlier, generally, standardization is overdone.⁶²

G. WHY THINGS WILL GET WORSE

Two things: Personnel and Institutionalization.

Personnel. Well, enough on that subject.

Institutionalization. Ironically, it is at this very moment—the moment when legal scholarship seems so thoroughly compromised—that law schools have decided, seemingly *en masse*, to intensify the monitoring of scholarly quality and quantity as well as to enforce scholarly output maximization strategies. Law faculties and administration are all increasingly heavily invested in mentoring, career positioning, SSRN download rates, citation indices, article placement strategies, blog announcements, and glossy scholarship advertising. It’s all a kind of massive “no law professor left behind” scheme.

All these techniques and strategies are ways in which law professors and law schools can all watch each other with great ease and in great detail. The important part is not so much the watching, but rather that we all know we are being watched. It’s as if we, who are responsible for all this (and this would seem to be nearly all of us), had read Foucault’s account of the panopticon and

60. Legal scholarship has virtually no effect on the courts unless, of course the author prescribes what the courts are already doing. No wait . . . that would still be to no effect. But this does not mean that legal scholarship is without effect. True: its sundry normative recommendations are fairly ineffectual. But what does matter, however, is the mode of thought conveyed and rehearsed in legal scholarship. That truly is important. The ways of thinking become imprinted in the law students. And they will be reproduced when the students become lawyers, judges, politicians.

61. There is, of course, a powerful counter-argument. See generally DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* (1969).

62. HOW can he say that?!! There he goes again—contradicting himself. Unbelievable. This is what he said and I’ll have to paraphrase here because, frankly, I’m a whole lot better than he is at making things clear. He says he’s trying to train me (get that!) . . . he’s trying to train me to deal with uncertainty in intra-professional conflict. He says that’s why he brought me into the picture in the first place.

Absurd: I am an autonomous footnote.

decided it was way cool and that we should institute our own version as soon as possible.

The upshot sadly is that, at the very moment (1) that some terribly unenlightening paradigms are holding sway over legal scholarship, we also have (2) a radical intensification of quantity and quality control mechanisms. For my part, I believe it would vastly improve matters if at least one of those two things were not happening.

Things will get worse. On the cheery side, one can always count on (1) the contributions of exogenous forces and (2) the fact that Malthus was and still is wrong.

H. ARE DEANS RESPONSIBLE?

Of course they are. I am. We all are.

I. WHAT SHOULD BE DONE?

Last summer, I did a stint as a swamper with AZRA, a commercial outfit in the Grand Canyon.⁶³ For many people, going down the river can be a life-changing experience. It's easy to understand how. The towering red and yellow walls, the intense play of light and shadow, the stark lines of the encroaching horizons, the extreme heat and the breathtaking dryness of it all conspire to put the real world in abeyance. All the little demands, requirements, schedules, preoccupations of that real world quickly begin to seem trivial. And then they fade entirely, until they are gone. Then too there is the rhythm of the river—of getting up early everyday, of going down the river, of making camp and breaking camp, and doing it every day so that each day is the same as every other day. With days like that, you can really think. You can imagine for yourself another existence. And many people do. The trip ends and they drop their jobs, partners, wives, husbands, material possessions. They fall in love with the river, with their guide, with the desert and, in some important ways, they never come back.

I'm a reasonable person (as well as a law professor) so all I came back with was one really tiny insight. Not only is it tiny, but it's not even very original. And it begins like this: There is something pervasively neurotic about the structures of contemporary life. The excruciating intricacies of everyday demands, the symbolic overinvestment of meaning in the trivial, the obsessive monitoring of everything to within an inch of its life, the constant piling on of little local meta- and infra-layers of thought—all these things are, from the

63. On Grand Canyon river trips, a "swamper" is a cook's helper—and so far as river trips are concerned, it seems to be a term unique to the Grand Canyon. The term was originally derogatory, implying a subaltern status. Of late, efforts have been made by commercial outfits to substitute the term "assistant" for "swamper." Persons such as the author, however, have come to prefer the traditional appellation "swamper" to the more politically correct designation of "assistant." Also, the author's work was only a two-week stint.

perspective of the river, pervasively neurotic.⁶⁴ Contemporary life ensnares us in all sorts of little maze-games that seem to matter tremendously and yet ultimately do not—except in the negative sense that they distract our attention from what does or at least could matter.

Now, lots of people have had this sort of insight—the most famous perhaps being Heidegger (the “fallenness” thing).⁶⁵ But my insight, and it really isn’t much of an insight at all, is about legal scholarship. I think the practices and institutions of contemporary legal scholarship (spam jurisprudence, case law journalism, rank anxiety, nothing happening, etc.) are extremely intense versions of this generalized neurotic structure.

It’s as if we were all working really hard on an imaginary bus schedule. Someone writes an article saying we need to optimize the number of buses. Another person can’t resist pointing out that it might be preferable to start by optimizing the number of bus stops instead. Soon someone writes that we should reconstruct the entire schedule. Someone else will suggest that we should split the schedule along eight different parts. Someone says, the eight parts are really sixteen. Some truly original thinker says there are ten. And then, some ranker comes along and starts ranking whose law school has the best bus scheduling program going. And somebody else decides to hold a symposium on bus schedule rankings. (Remember the traveling show on *Bush v. Gore*?)⁶⁶ And then fifty years from now, someone will write a book: *How Should the Bus Schedules of 2000-Whatever Have Been Decided?*⁶⁷

Pretty soon, we’ve got a collective imaginary going and we’re pushing buses and bus stops all across pages of the *Yale Law Journal* and it all feels kind of real and pretty important. And it’s not hard to believe that it’s important. For one thing people are getting real rewards—prestige jobs, chairs, program fund-

64. I ask you—does the author really think these terms are self-defining? “The constant piling on of little local meta- and infra-layers of thought”—what the hell does that mean? He tells me to mention “nesting” and to cite to Piaget. Okay, fine. See JEAN PIAGET, STRUCTURALISM 28–29 (1973) (on nesting). There it is. I even got the pincite. Someday, I’m going to be in a *real* law review article.

65. I’m certainly glad he mentioned Heidegger. I know it helped me out a lot. And I’m sure the editors are just euphoric.

66. Gosh, really glad I didn’t miss that one. See (or not) Symposium, *Bush v. Gore*, 68 U. CHI. L. REV. 613 (2001) (yet another installment of “the thrilling tradition of Anglo-American law” as it “works itself pure”). The first quote is a reference to a statement by Henry Hart. Hart, *supra* note 46, at 99. The second quote has a somewhat uncertain pedigree. Sometimes the phrase is attributed to “old trope.” The quote has also been attributed to cases such as, say, *Omychund v. Barker*, 26 E.R.15, 33 (1744). See Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. CHI. L. REV. 41, 107 n.136 (1994).

67. This is a part of Jack Balkin’s current oeuvre. So far we have JACK BALKIN, WHAT ROE V. WADE SHOULD HAVE SAID: AMERICA’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION (2005), and JACK BALKIN, WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: AMERICA’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (2001). I definitely see a future here. For instance: HOW SHOULD THE PEACE OF WESTPHALIA HAVE BEEN DECIDED? And, of course, not to be missed would be: WHO SHOULD HAVE WON THE BATTLE OF HASTINGS?, to be followed by the obvious sequel, WHY 1066?

Also, do you like the small cap font above? I live for that.

ing—for imaginary bus schedule breakthroughs. And adding to the increasing reality of the thing is the undeniable fact that we can't just dismiss buses or bus schedules as unreal. (If everything else fails, by the way, this is your takeaway: Buses are real.)

But the thing of it is, our legal academic bus schedule remains imaginary. Even if it looks a lot like the real thing, it's still imaginary. When we put out our bus schedule, no buses run. Word.

And no Rapid Transit District (RTD) that I know of is going to change its schedule just because some new bus stop entries have been introduced in the pages of the *Yale Law Journal* or wherever. Not going to happen. So here we are, legal academics working on our collective imaginary bus schedule.

And one of the things that troubles me about this is that the imaginary bus schedule is in some important ways not at all like the RTD's bus schedule. The RTD faces real stakes. We legal academics don't. Our reality principle—to the extent we have one at all—is decidedly indeterminate: get tenure/avoid showing cause. So if we want to construct a bus schedule with stops every ten yards (all in the name of rigor or precision) then we can have at it. And realize, please, that I'm not being extreme here. It's not like this hasn't been done. Over and over again.⁶⁸

And then there's the normativity thing. I once read an article that purported to elaborate about what the Constitution should be. Now what struck me as odd was that the author really did want to free himself (and his reader) from any official pronouncements of what the Constitution is. This struck me as incredibly weird. What an odd thing to do. If the question "What should the Constitution be?" is not anchored in what the Constitution *is* (whatever that might be), then why not go for broke: I say let's have a constitution that guarantees universal health care, tastes a lot like Ben & Jerry's ice cream, and is laugh-out-loud funny. You leave it to me? I say: Go big.

Is this flip? Well, of course, it is. But hey, I'm not the one who invented this practice of normative legal thought. I'm just pointing it out. In fact, that's what I do these days. Check that: It's what I used to do. I used to have a pretty good job as a satirist. Good working conditions. Not much competition. I'm out of business now: Legal thought satirizes itself. For me now, it's all just point and shoot.

There's something gratuitous about legal scholarship. No one, of course, writes that the constitution should be like Ben & Jerry's ice cream. But just what is it that precludes anyone from suggesting that the Constitution should guarantee universal health care. (I'd be in favor—I really would.) The answer:

68. There is no way I'm going to cite people here. That would be career suicide. Not very nice either. I have a future. I, Daniel, wish to be cited. Also, I want you to know that I, Daniel, have been invited to a dinner-party in Cambridge. See generally Pierre Schlag, *My Dinner at Langdell's*, 52 *BUFF. L. REV.* 851 (2004). They want me to be "233." I have no idea what that means. But, without presuming too much, I do believe it's going to be my big break. I am so stoked.

there are constraints on what we argue. Sure there are.⁶⁹ And who generates . . . the constraints? Well, in part, we do.⁷⁰

So what we have is an imaginary legal thought shaped by imaginary collective constraints, one of which is the injunction that we should follow those constraints with great rigor.

My question: Is this a neurotic structure?

Yes, it is. Straight out—full-flower. It has to be because without the neurosis, there would be nothing there. No constraints at all.

Now please understand: As a matter of form, I have nothing against collective imaginaries. My only problem is this: if we law professors have to work so hard (and so painfully) on our collective imaginaries, couldn't we pick something more interesting, or important, or aesthetically enlivening, or morally salient, or politically relevant than bus schedules? I mean, couldn't we?

Uh, no. Which raises perhaps my final point. It's not very nice, but someone's got to say it, and apparently it's going to be me. As mentioned earlier, our people are not cognitively challenged. They are, bell curve and all, very intelligent. It is easy then for people like you and I, when we look at the extreme intricacy of the work produced by these very intelligent people, to associate the intricacy of their work with their manifest intelligence. Indeed, we are likely to think of the relation in reciprocal terms: Because they are intelligent, their work is intricate, and because their work is intricate, it shows great intelligence.⁷¹

But the thing I want to suggest as a possibility here is that all this intricacy of legal scholarship is less a function of intelligence than it is a manifestation of neurosis in the face of intractable conflicts. What conflicts? Consider the prototypical needs of the legal academic:

A need to display great intelligence in a discourse (law) that will ultimately not bear it.

A need to contribute to disciplinary knowledge in a discourse which is not really about knowledge or truth in any profound sense of those terms.

A need to say something intellectually respectable within a disciplinary paradigm that we know, on some level, is intellectually compromised.

69. Yeah, but we don't generate the constraints any which way. That's what I told him. He said, yeah that's true—absolutely true in a contextual kind of way—but it's still not much of a constraint.

70. "Yeah we do and so does Justice Kennedy." That's what I told him. This is what he said back. "If all these normative constitutional law thinkers paid attention to what Justice Kennedy thinks, they would be incapable of writing three quarters of what they in fact write. As for the other one quarter, we don't really need it: Justice Kennedy has already thought it."

71. So what's going on here—to hell with Ockham's razor, or what? Has this guy read Kuhn? Anyone know?

A need to display control over social, political, and economic transactions that are in important senses not subject to control.

A need to activate moral and political virtue in a discourse that uses both largely as window dressing.

A need to make one's thought seem real and consequential in a discourse that is neither.

I want to suggest then, and this is perhaps the unkindest cut of all, that *within the dominant paradigm of legal scholarship*, it may be that there is very little of enduring value to be said. In the main it's the rehearsal of a form, a genre—and not a self-evidently good one.⁷²

I have a cheery ending and a not so cheery ending

The cheery ending is that it has not always been like this. And, maybe it doesn't have to be like this now.

The non-cheery ending goes like this: It's going to get worse in many ways. The forces are in play—the rankings, the administrators who want to enhance the reps of their schools, the status insecurities of young (and old) faculty members, the pervasive triumph of pomo (ahem, ahem, told you so)⁷³—all these forces will converge to produce ever more spam jurisprudence.

And then something else will happen.

72. Hello? Full employment anyone? Have we forgotten something here?

73. You are never, ever, supposed to say that. Also, I have to say: I actually saw *The Endless Summer*. And you know what? You know who really missed it? Well, towards the end, one of the surfer dudes answers back, "No guy, YOU really missed it . . . because . . ." So, if you, gentle reader, can make the appropriate analogy, I think the parallels with the author here are fairly evident.

That's it. I am out of here.