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Pierre Schlag's The Enchantment of Reason

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Pierre Schlag's *The Enchantment of Reason*

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This book[1] enchanted me. I resisted it, at first vigorously and then tiredly, and then I succumbed to its intellectual brilliance and to the charm of the authorial voice. I started out feeling that I was doing Pierre a favor by devoting my time and energy to his work, repaying the equivalent favor he had done me a year before. I ended my first reading grateful to him for increasing my understanding of the questions about law that interest me the most. It is a learned book, admirably complete in its survey of critical theory as it relates to law, and admirably complete in responding to the arguments against a critical understanding of law. It is a book that patently aspires to originality as one of the supreme virtues, and achieves it.

It is original as a literary production. I am sure that there is not a single work in all of American legal academic literature that sounds even a little like this one, that has anything like this one's prose style. I liked the elegance of the language, its quirkiness, its humor, the highly crafted, aphoristic quality of sentences and whole paragraphs, even the stylistic signatures (some of which I haven't been able to stop myself from mimicking in this review).

I loved the allusions to familiar phrases from popular culture and high culture, always with a twist, and the game of trying to remember where the phrases came from. "Reason is the compliment that interest pays to law in hopes of earthly reward."[2] "Hypocrisy is the homage that vice pays to virtue." La Rochefoucauld? "There's no failure like success."[3] "There's no success like failure." Bob Dylan? Janis Joplin? And so on.

Because I understand myself (for better or worse) to be a politically correct leftist moralist, as well as an ironic modernist/post-modernist, I don't feel comfortable writing stuff that has no political spin (even if my sense is that it will have no political payoff). It is a big pleasure, albeit a guilty one, for me to give myself over to a book that so vigorously refuses not just political correctness but all concession to our desire that enlightenment should be politically edifying.

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1. PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998).

2. *Id.* at 25.

3. *Id.* at 6.

On first reading, my main criticism was not substantive. It was that Pierre writes as though he were alone, or "virtually" alone. Every so often he lets us glimpse his reference group—"anti theory" in the Acknowledgments,[4] the "critics of reason" (plural) in the polemic against Sunstein, Nussbaum, and Sherry.[5] Still, these are only slips, little moments of acknowledging that there are others in the room, perhaps even clustered around him.

In general, he seems to be taking up all by himself the impossible task of addressing, in the voice of critical reason, the great mass of deluded believers in reason. He tells them in advance that there is no way he can convince them through reason, and predicts they will resist because they have such vested interests in the status quo of belief, and so much to fear from disenchantment. The fears aren't even slightly crazy (what will happen to the "rule of law"?), he tells us. He doesn't even claim to have escaped enchantment altogether himself, indeed denies that any such claim could be sustained by anyone.

Nonetheless, from his position as a person trained in a discourse that has been disenchanted, his attitude is that any outsider who accepts the author's invitation to look hard at the king and his royal procession will see that they are all naked. Even a child could see it. As members of the informed intellectual public, he invites us to feel a good bit of superiority, a good bit of contempt for the pretensions, the lack of humility, combined with laughable, self-deluded, incompetent, self-serving argument that characterize his colleagues.

Two authors that come to mind are Nietzsche[6] and Thurman Arnold.[7] The authorial voice comes from a place just outside academia but not located in the general public; it speaks in the name of humble virtues and good sense against idiot academic pretension and delusion, but it insists on utter paradox, not to speak of aporia, predicament, tension, contradiction, and so on, in ways sometimes suggestive of the riddling court jester, the sacred fool, Lewis Carroll, or even the Delphic oracle.

But my sense is that the author's apparent address to a sophisticated general public is a rhetorical trick. His book is so thoroughly allusive, so utterly an insider's work, that it is hard to imagine anyone not a law professor coming close to understanding the part of it that is about law, rather than about the critique of reason in general. How to understand

4. *Id.* at ix.

5. *Id.* at 52.

6. *See generally* FRIEDRICH NIETZSCHE, THE GENEALOGY OF MORALS (Horace B. Samuel trans., 1918).

7. *See generally* THURMAN ARNOLD, THE FOLKLORE OF CAPITALISM (1938).

the odd posture of being all alone addressing on the subject of their enchantment a law professorial public that he thinks is disabled by enchantment from understanding that it is enchanted?

I think the answer to this question is that Pierre knows perfectly well that there is, first, a small literature (perhaps twenty or twenty-five law review articles) of anti-theory or anti-reason or post-structuralist or post-modernist critical legal theory, which approaches law using the same sources and with many of the same attitudes as Pierre himself. There are even several literary generations of authors, many of whom have come and gone from the position, beginning with Jerry Frug, Clare Dalton, Druscilla Cornell, and David Kennedy in the early 1980s; Nathaniel Berman, Matthew Kramer, David Caudill, Jack Balkin, Kendall Thomas, and Gary Peller a little later; Janet Halley, Richard Ford, Mitchel Lasser, and probably a whole bunch of others after that. Not to speak of Peter Goodrich, Costas Douzinas, Peter Fitzpatrick, Ann Barron, and the other Anglo-Commonwealth types.

There are actually many legal post-modernists, all busily not citing one another, and, often, quite firmly refusing to read one another. And then there is the corps of internationally known post-modern non-legal theorists, many of whose members have, over the last decade or so, shown a persistent interest in law. I am not sure why the producers of po-mo legal theory, whether law professors or not, ignore one another.

On second reading, none of the above seemed as important as that *The Enchantment of Reason* is challenging in a way that defines for me a really good book. It repaid detailed, even painstaking, reading and rereading. It turned out repeatedly that when I thought it unclear or confused, earnest giving of the benefit of the doubt caused me to say, "Now I get it, that's a great point that I hadn't seen before," or "there really is no contradiction there after all."

On second reading, I found myself trying to turn the aphoristic, Nietzsche/Thurman Arnold Pierre into a Pierre with a position capable of statement in plain linear form. Having constructed a linear Pierre, I wanted to argue substantively with some parts of the construct. What follows is the fruit of the second encounter.

In Pierre's book, the enchantment of reason has at least four senses, but he never distinguishes them or explains the differences between them. I don't mean that he conflates or confuses them, because I don't think he does. Indeed, I think he keeps them carefully separate, but just fails to explain them as distinct.

ENCHANTMENT I: "AN IMMODERATE CONFIDENCE, AN EXCESSIVE FAITH, IN (YOUR) REASON"

The first sense is that of the Introduction and the first two chapters. The "enchantment of reason" means "an immoderate confidence, an excessive faith, in (your) reason."[8] What justifies the big word enchantment is that if one is overestimating, it will be very hard to recognize the error. Rational contemplation of one's estimate of reason may very well fail to turn up the error.

For this sense of enchantment, as for each of the others, there are two kinds of reasons for failing to turn it up. These two ways of talking about reason in American law recur over and over through the book, getting applied to each of the modes of enchantment.

The first set has to do with the structure of the situation. Once one is committed to a certain interpretation of what reason requires under the circumstances, one is likely to pursue the ensuing strategy "from the inside" so to speak, rather than constantly or even occasionally distancing oneself from it. The failure to "think outside the box" may lead to ignoring the obvious, as in Poe's *The Purloined Letter*.[9] Pierre pushes this point in the direction of an aporia: the question is, "am I prey to an immoderate confidence in my rational procedure?" If I try to give a rational answer to this question, I will be caught in an infinite regress: "Is my rational yes or no answer to the question of immoderate faith itself the product of immoderate faith?" And so on. Throughout the book, Pierre oscillates between critiques of enchantment in the innocuous "don't overdo it" form and critiques in the killer "always already enchanted with no way out" form. Is the point to chasten overconfidence in the uses of reason in legal thought or is it to show that reason is impossible, can never ever do what we would like it to do and can't stop ourselves from asking that it do? Is it that we are prevented from "doing law" as well as we might by our immoderate confidence in reason, or is it rather that if we understood correctly what reason is like, we would see that we can't "do law" at all?

In the opening sections of the book we are allowed a reassuring sense that enchantment is overestimation of something ("reason") that is unproblematic and even useful and even essential when *not* overestimated. In other words, it seems that if we could just refrain from the error, reason would be serviceable, albeit in a reduced role. The initial aporia is that we can't rationally determine whether we have irrationally overestimated reason. The very statement of the aporia seems to presup-

8. SCHLAG, *supra* note 1, at 1.

9. EDGAR ALLAN POE, *The Purloined Letter*, *in* EDGAR ALLEN POE: TALES & SKETCHES 974 (Thomas Ollive Mabbott ed., 2000).

pose that there is such a thing as not overestimating reason. If, in fact, our confidence in it is not immoderate, we're fine; it's just that once we experience a moment of doubt as to whether we are moderate or immoderate, there is no way to tell which it is.

The second kind of reason for failing to catch immoderation is of a completely different character: the overestimation of reason is a "motivated error" rather than an understandable response to the structure of inquiry (have to commit to a strategy; can't be always checking) or a random event. The error is motivated by the various kinds of investment that practitioners of *legal* rationality, in particular, rather than practitioners of rationality in general, have in its capacities. There is an innocent and a guilty form of investment.

The innocent form comes from anxiety about how bad it would be if reason couldn't do what we would like it to be able to do (again, *in law).* Reason is the core of the idea of the rule of law, which is supposed to restrain some bad things that we would not like to see in control of social life. These he variously lists as "self-interest, vengeance, hate, love," "power, interest, prejudice, . . . and personal proclivities," and "arbitrariness, emotion, self-interest, politics, power, and force."[10] We would like reason to be able to restrain these things, and are prone to wishful thinking, or "immoderate confidence" and "excessive faith" in its ability to do so.

The guilty investment is in the power that practitioners of specifically legal reason derive from popular belief in it. Given these popular beliefs, the larger the role of reason, the larger the role of its legal practitioners. So "naturally" they tend to give it as large a role as possible, and then overreach and give it a larger role than possible.

ENCHANTMENT II: "THE RULE OF REASON"

The second mode of enchantment is ambiguously related to the first. It consists of setting up the "rule of reason" (again, *in law).* Faith in reason becomes faith in the preeminence of reason, its superior or privileged status *(in law).* This is not a privilege vis a vis "power, interest, prejudice" and so on. It is a privilege vis a vis alternative "sources of belief such as authority, experience, convention, tradition, ethics (and so on)."[11] This is more than a matter of holding reason to be ruler: it involves a practice of legal thinkers that creates a legal universe in which reason appears to rule.

10. SCHLAG, *supra* note 1, at 20-21.

11. *Id.* at 22.

First, there is the oscillating interpretation of the corpus of legal materials sometimes as subject to reason as transcendence and sometimes as itself immanently rational. Second, these interpretive practices operate to rationalize the world of law, by fitting "experience, tradition, perception, and other sources of belief" into the "grid" legal thinkers establish as they alternately command and inclusively embrace the legal materials. The operation is procrustean: in the end the alternative sources of belief are "degraded" and "lose their intrinsic power."[12]

In this discussion, and in the reprise in the chapter on the legal self and in the Conclusion, Pierre sounds sometimes like Weber on the "iron cage of modernity"[13] or the Frankfurt School in their lament over the rationalization of pre-rational belief systems that are degraded and/or lose their "intrinsic" power.[14] And sometimes he sounds like a neoliberal lamenting that law as regulation is taking over everything, and sometimes like Habermas[15] lamenting the encroachment of rational systems thinking on the "life world." I see this as a weakness—as sentimentality. But it seems inessential as far as the argument as a whole is concerned, so I'm going to ignore it from here on.

The installation of reason as ruler is a particular egregious example of immoderate confidence and excessive faith. Pierre offers an account of why reason can't be shown to rule that is complex, with the same kind of oscillation between types of argument that I described for Enchantment I.

If we ask what is wrong with the portrait of reason as ruler, Pierre's first answer is that for the portrait to convince us, we have to believe simultaneously in reason as transcendence and in reason as immanence, we have to perform simultaneously the gesture of commanding reality in the name of reason and of embracing reality in the name of reason. He characterizes the situation as one of "tension" and claims that American legal thought is obsessed with the tension but "every attempt to stabilize a relation between central command and the big tent collapses."[16] "Stuck with this tension, American law and legal thought remain mired in dissonance."[17] Though it would have been nice to see an extensive quotation of Unger[18] here, I find this part of the argument completely

12. *Id.* at 25.

13. *See generally* MAX WEBER, SCIENCE AS A VOCATION (Peter Lassman et al. eds., 1989).

14. *See generally* MAX HORKHEIMER & THEODOR ADORNO, THE DIALECTIC OF ENLIGHTENMENT (John Cumming trans., 1972).

15. *See generally* JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., 1971).

16. SCHLAG, *supra* note 1, at 29.

17. *Id.*

18. *See generally* ROBERTO UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983).

convincing.

A second answer is that "reason runs out," and when it does then something else is ruling. Just as American legal thinkers spend a lot of time trying to reconcile immanence and transcendence, they spend a lot of time denying that law runs out, deploying a whole armatorium of spurious and evasive arguments to make it look as though reason rules.

With respect both to immanence/transcendence and reason running out, Pierre's exposition has a familiar ambiguity. Sometimes it sounds as though the problem is expecting too much, and that if we just became "moderate" in our confidence in reason, everything would be fine.

For the rule of law, reason, as ruler,

> is the grid of intelligibility that enables legal actors to make the connections of the law—the inferences, the deductions, the analogies, the extensions, the modifications, the limitations, the negations (and so on). It is the conceptual grid that allows legal thinkers to perform the critical operations within and upon the legal materials that mark out the legal domain. . . . In short, it is reason that *ostensibly* enables law makers, appliers, and commentators to select among beliefs, to test beliefs, to monitor their modification or replacement, to map out their proper scope (and so on).[19]

In spite of that threatening word "ostensibly," this can't be all bad. Pierre affirms that along with its degrading and devitalizing effects, "something is gained" through rationalization at the same time that "something is lost."[20]

When we get to reason running out, Pierre affirms that the various devices that are available to deal with an apparent running out "sometimes . . . produce a final outcome in a case—and do so in a way that seems convincing and reasonable (at least to most parties)."[21] It might seem that the way of "moderate" confidence in reason would be to take joy in the cases where reason works, and to confront honestly those in which it doesn't. It would be to push transcendent principles to criticize legal reality to the point where they don't work anymore, and to be open to the immanent rationality of legal reality up to the point where it ceases to be plausible that reality is other than chaos (or one of Pierre's list—conflict, bias, interest, whatever).

In this interpretation, Pierre would be an English positivist in the tradition of H.L.A. Hart, Raz, and MacCormick. His critique of American legal thought would be close to Hart's in *The Nightmare and the*

19. SCHLAG, *supra* note 1, at 24 (emphasis added).

20. *Id.* at 25.

21. *Id.* at 31.

Noble Dream,[22] where the nightmare is legal realist nihilism and the noble but altogether unrealistic, mistaken dream is that reason has the capacity to deal with every case—i.e., the dream that law will never run out.

But there is still the problem of that pesky word "ostensibly." Moreover, right after his affirmation that legal reasons "sometimes produce a final outcome in a case—and do so in a way that seems convincing and reasonable (at least to most parties),"[23] he takes back the reassurance.

> But though these devices often seem convincing or even reasonable, the question nonetheless arises: Is it reason that is doing the work here or something else—something that might variously be called emotion, prejudice, dogma, or the like? Is reason really in control? And if so, which reason and whose reason is it that is in control?[24]

This suggests that Pierre has another aporetical claim in mind, one that would undermine our confidence even in cases where reason seems to be working well. But he doesn't go in that direction.

What follows is a series of demonstrations of ways in which legal thinkers deploy different techniques to make it appear that reason has not run out in particular cases. This is followed in turn by a devastating critique of various attempts to show at a global level that reason does not run out. His are internal critiques, in the sense that they undo arguments either for rationality in particular cases or for the rationality of law in general by picking them apart from the inside.

For Pierre, the errors that he reveals through internal critique are patently motivated. Threats to faith in the rule of reason provoke various kinds of "ontological" fear and anxiety. Failure to counter the threats would, in Pierre's view, seriously undermine the authority of the legal actors who deploy legal rationality. These are the same innocent and guilty motives that drive the simpler error of "immoderate confidence" in reason (as opposed to the more baroque error of attributing rulership to reason, and then denying that it ever runs out).

Both in particular cases and globally, the partisans of reason deploy their very bad arguments (I agree that they often amount to no more than "scams,"[25] "rhetorical tricks and insults,"[26] "banal logical errors,"[27] and

22. *See generally* H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

23. SCHLAG, *supra* note 1, at 31.

24. *Id.*

25. *Id.* at 33.

26. *Id.* at 46.

27. *Id.* at 48.

"ethical bullying"[28]) against what Pierre clearly views as *the truth* about reason. "Gaps, paradoxes, aporia, discontinuities, disjunctions, undecidabilities, ambiguities, ambivalences (and so on) are obstacles that preclude reason from performing its crucial operations. They are, in short, precisely the sorts of things that must be liquidated, reconfigured, or subsumed if reason is to rule."[29]

Pierre's demonstration that the partisans have not successfully performed such a liquidation, reconfiguration or subsumption is a demonstration that we have no reason to believe in the rule of reason. Throughout the chapter he has relentlessly deployed reason, that is, internal critique, against arguments for the rule of reason. A typical flourish is: "The argument for reason here is not a reasoned one. On the contrary, the argument for reason here depends precisely upon short-circuiting any thoughtful consideration of the grounds of reason."[30] I thought I knew what was going to happen at this point, namely an aporetical rabbit punch to the effect that the "faith in reason" that characterizes American legal academia, once the various rationalizations of reason have succumbed to critique, is necessarily the "betrayal" of reason. Reason requires us to test our beliefs according to criteria that are the exact opposite of those of faith. And that goes for faith in reason.[31]

But instead, at the end of the chapter, Pierre returns to another theme, one that is equally . . . shall I say, threatening, disquieting, deconstructive, post-modern, nihilist, globally critical, irrationalist . . . or what? He addresses the question whether his critique hasn't been "too demanding" of reason. His answer is that the defenders of the rational character of legal practices are the ones making a strong claim. Unless reason "is different from and superior to the other kinds of belief systems," it is not entitled to its privileged position within law.[32]

One consequence would be that the votaries of reason could no longer manage their tactic for "shielding oneself from ethical disturbance and ethical strife,"[33] not to speak of suffering a radical dimunition in the legitimacy of their claims to power as intermediaries between reg-

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28. *Id.* at 52.
29. *Id.* at 45.
30. *Id.* at 46.
31. Somewhat down the road, Pierre says something sort of like this:

> One thing, however, is clear: Reason cannot be indifferent to this predicament. Reason cannot take its dependence upon belief with indifference. The cost of doing so—the cost of blithely presuming the rightfulness or the efficacy of reason—is that reason becomes transformed into its traditional enemies: faith, dogma, prejudice, and company.

Id. at 63.
32. *Id.* at 59.
33. *Id.* at 52.

nant reason and the masses. There is a second argument here, one that will recur through the rest of the book, but is quite difficult to figure out.

> [Those who have faith in reason] are not prepared, they remain quite unwilling, to relinquish the various privileges that they accord to reason. They refuse to allow reason to take its place among dogma, bias, prejudice, experience, custom, perception, revelation, and tradition as just another source of belief. And the reason is simple. There is a great deal at stake: for the partisans of reason, it is reason itself that serves as the overarching organization of the world they inhabit. For them, reason is *the web of intelligibility*. And *that* is not something to be given up lightly.[34]

In this formulation, Pierre doesn't claim that intelligibility per se is at stake. Reason is the web "for them," not necessarily for everyone. So in this first formulation, it seems that "we" could stop privileging reason and find another way to make our legal practices "intelligible."

ENCHANTMENT III: DENYING REASON'S VULNERABILITY

In the fourth chapter, Pierre explains why, in spite of the high stakes, "those who have faith in reason" have been and must inevitably be unable to defend it in the strong form that is necessary if it is to be understood as ruling. This involves developing a third sense of enchantment, problematizing the implicit premise of the opening sections that reason would be serviceable if we cut down our immoderate confidence and got rid of our motivated errors. Pierre explicates and creatively transforms the theme of the "vulnerability" of reason, meaning now not vulnerability to being overestimated, but vulnerability in the sense of unreliability.

Pierre organizes the discussion around a distinction between "critical reflexivity," which is the procedure of undermining claims to rationality for particular beliefs by showing their context of origin, and "rational frame construction," which is the procedure of organizing data into a conceptual scheme that will allow us to do things with it. He argues that these apparently sharply contrasting procedures have in common that each has both a destructive and a constructive moment. Then he argues that in each procedure both the destructive and the constructive moments "left unrestrained"[35] or in "unrestrained deployment . . . evolve into pathological forms."[36]

Without going into the details, his thesis is the "necessary" existence of an "unthought" for every thought. The discussion is to my

34. *Id.* at 59.
35. *Id.* at 64.
36. *Id.* at 68.

mind a brilliant synthesis of European critical thinking about reason, and I especially like his demonstration of how critical thinkers can treat the necessity of an "unthought" along a spectrum from "comfortable" to "apocalyptic," without the underlying analytic changing in any way.[37]

The vulnerability of reason, its predicament, the source of its unreliability lies in the unavailability of "grounds." We have no way to decide whether we have failed to "restrain" rational procedures like critical reflexivity or rational frame construction, so that they have "evolved into pathological forms."[38] We know at every moment that this *may have happened*, but reason itself "cannot tell us the appropriate mix," that is, when we should stop criticizing and start constructing or vice versa.

The point about the vulnerability of reason is that there is no way to escape it. Vulnerability is "constitutive" of reason. Now that we no longer overestimate it, we can't trust it. Far from being serviceable so long as we keep it in its place, it is at every moment quite possibly doing just the opposite of what we think it is doing—quite possibly drawing us into mistakes and misperceptions of our situation, rather than allowing us to understand and master our situation.

The two earlier critiques, of enchantment as immoderate confidence in reason and as privileging reason as ruler, constantly reminded us that they were not "anti-reason," but only against its enchantment. Pierre takes the same position with respect to reason critiqued as vulnerable and unreliable. At this point, however, the tension between the two attitudes becomes extreme. Pierre operates a kind of whip-saw:

> The truly vexing thing is that this gap between thought and the unthought can never be bridged—neither through critical reflexivity nor through rational frame construction. Thus not only are the projects of critical reflexivity and rational frame construction in uneasy (and indeterminable) opposition, but each is in important *(not all)* senses doomed to fail.[39]
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> Now, all of this could be read to mean that critical reflexivity and rational frame construction are pointless. But they are not pointless. It's just that they are not everything. And not being everything, they often cannot do the work demanded of them. . . .
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> Both, as soon as they begin their work, produce a displacement of their objects. (Displacement.) What is more, neither can ever complete its task. (Incompleteness.). . . Finally, should either ever achieve a small measure of success, this small measure will ultimately be retired as another banal aspect of context. (Assimilation.)

37. *Id.* at 71.
38. *Id.*
39. *Id.* (emphasis added).

> These problems, of course, are not arguments against reason. . . .[40]
>
> Both as ordered network and as path-creating activity, reason has certain ambivalent implications. In one sense the transformation of the world into the aesthetic of reason can render the world more ordered. It allows individuals to move from one position to another, to travel the pathways, to apprehend and control their actions. At the same time, however, the transformation of the world into the aesthetics of reason may well succeed in misapprehensions, misconceptualizations, misunderstandings of that world. It is never entirely clear whether certain path-making activities or certain ordered networks are necessary or useful, or whether they are instead the unnecessary and unhelpful strands of a reason spinning its own web.[41]
>
> *Constitutive Vulnerabilities.*
> All of this renders reason quite vulnerable. Reason, understood in this light, exists as an assortment of predicaments . . . . For those who are partisans of reason, the attribution of these predicaments to reason is likely to be taken as a kind of criticism. But that is to miss the point. None of these predicaments should be taken as arguments against reason or its use. Rather, they are predicaments that constitute the very identity of reason.[42]
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> As previously mentioned, none of this is intended here as a rejection of reason. On the contrary, there is a sense (and not just an ironic one) in which this recognition of the vulnerability of reason is perhaps closest to what reason aspires to be, but can never actually achieve.[43]

By the time I got to the last of these quotes, I was beginning to wonder. But just at that moment, he finally came clean with a section called "Modesty." Here, he actually endorses the idea that:

> there is a kind of reason that is up to the challenges posed by its own unstable identity. A reason that does not deny yet does not dwell on its own predicaments might be close to that kind of reason. This would be a reason that comprehends that there are other sources of belief that cannot be dismissed simply in the name of reason itself. This, in short, might be called reason as modesty.
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> One can, as various philosophers have, simply acknowledge that reason, at its best, is not in control of its own situation. One can acknowledge that reason is indebted to biology, culture, belief, experience, custom, habit, intuition, aesthetics (and so on). One can heed, for instance, Robert Nozick's advice that we see reason as "embed-

40. *Id.* at 75.
41. *Id.* at 77.
42. *Id.* at 78.
43. *Id.* at 79.

> ded within a context and playing a role as one component along with others, rather than as an external, self-sufficient point that judges everything."[44]

So why isn't this the end of the book? Let's just all go with the modest version, and use Nozick and his American analytic followers in tandem with the Continentals to trash those American legal theorists who have failed to "get it"? It is clear that "reason as modesty" is incompatible with—indeed, in Nozick's formulation, it explicitly contradicts—the notion that reason can rule. Pierre first puts it mildly: "The very modesty of the approach, the radical insecurity of its productions, is somewhat in tension with the ruling normative role that *American legal culture* accords to reason."[45] But a few paragraphs later, the point has swollen to mega-significance:

> The problem with modest approaches to reason is that they are in tension with the normative ruling role ascribed to reason itself. Modesty is not reason's ambition. Reason's ambition is to rule. And this ambition is not a severable defect. It is not severable. And it is not unequivocally a defect. It is instead an ineradicable aspect of what reason is taken to be.[46]

This has a portentous ring to it. But what does it mean? If I may be permitted a testy senior moment, this paragraph is not very helpful. Reason figures as a person, capable of having "ambitions" (rulership) and of emphatically not having other "ambitions" (modesty), a way of speaking that hardly illuminates the underlying argument. We have just heard that there is such a thing as "reason as modesty," so how can it be that it just *is* the ambition of reason to rule?

Then, a role is "ascribed to reason," but we don't know by whom, and particularly whether we are still speaking of "American legal culture," or something else. There are "ineradicable aspects"(whatever that means) of what reason "is taken to be," but we don't know by whom, or whether the way they take it to be is the only way, a good way, or even a faintly plausible way to "take it to be." Then there is the rhetorical flourish of repeating "It is not severable," in place of a hoped-for explanation of *why* it isn't severable. Finally, given all that has come before, *why isn't it* "unequivocally a defect" that reason has as an ineradicable aspect of its nature (as an unidentified someone conceives it) that it aspires to rule? This paragraph might be said to be one of the more important ones in the book, so it is too bad that it's (atypically) such a mess.

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44. *Id.* at 79-80.

45. *Id.* at 80 (emphasis added).

46. *Id.* at 81.

The moment having passed, we can reconstruct Pierre's argument, getting rid of the bizarre personification of reason, the passive voice, and the rhetoric of ineradicable unseverability. This modest version of the modesty argument is very fully prepared by the earlier parts of the chapter. Pierre has repeatedly pointed out that "those with faith in reason" or "the partisans of reason"—that is, those who are implicitly or explicitly committed to the rule of reason—

> are often rendered uneasy by the admission of [reason's predicaments]. Not surprisingly, what they seek is to find some ground, some device with which to circumvent or deny these problems.
>
> But that, as will be seen, is the way of enchantment. And, it is precisely the denial of these problems that leads reason to develop into its pathological forms.[47]

And earlier, the reader may remember this summary statement: "One thing is clear. The unrestrained deployment of critical reflexivity and rational frame construction evolve into pathological forms."[48] Given the predicaments, it is

> a big mistake to suppose that [the question of the appropriate mix] is the sort of question that reason can answer. To suppose that reason can answer this sort of question is precisely to fall sway to the enchantment of reason.
>
> But the enchantment of reason is precisely what happens in law and legal thought. *Reason must be pressed into service to resolve these difficulties.*[49]

The third meaning of enchantment is the *doing of law* by humble practitioners, judges, and professors, and the *theorizing of law* by highly "presumptuous"[50] professors, as if reason were not vulnerable and unreliable, and as if reason could therefore rule *in law*. It is not a question of a personified reason with ineradicable ambitions that are not severable. We are dealing with "American legal culture," and, as Pierre explains, with Rawls, Dworkin, and then in great and admirable and convincing detail, with the "false modesty" of neo-pragmatists and Wittgenstinians named Radin, Grey, Sunstein, Minow, Spelman, Posner, Farber, Sherry, Patterson, and Priest. As he says, in italics, of these peoples' theories: *"They are all in their own way invitations to go to sleep. They are all invitations to forget the predicaments of reason."*[51]

Moreover, Pierre does not generally attribute to "reason" the denial of reason's predicaments. Quite the contrary, his normal strategy is to

47. *Id.* at 75.
48. *Id.* at 68.
49. *Id.* (emphasis added).
50. *Id.* at 91.
51. *Id.* at 68.

characterize this denial as itself "an attempt to deify reason, to fortify reason by transforming it into a seemingly more stable kind of belief—something on the order of faith."[52]

> As will be seen, the very vulnerability of reason leads to attempts to fortify reason by eradicating its tensions, its paradoxes, its contradictory movements—in short, its vulnerable situation. . . . But this sort of response to the vulnerabilities of reason is precisely what leads to the transformation of reason into its traditional enemies: faith, dogma, prejudice, and company.[53]

As with the first "overestimation" and second "rulership" senses of enchantment, there exist strong innocent and guilty motives to deny or disregard the vulnerability of reason. On the discrediting or guilty side, Pierre provides an excellent condensed summary, one corresponding exactly to critical legal studies (cls) dogma if one just substitutes the word law for the word reason:

> [G]iven reason's unstable identity (its difficulty recognizing itself) it can easily be drafted into the service of even the most dubious and most dogmatic of programs.
>
> Sometimes, reason will simply be hijacked to aid a political or normative program. It is easy to see why "reason" should be such an appealing target for political or intellectual hijacking. To the extent that reason, as suggested, lays claim to rule other beliefs, the capture of reason for this or that political or intellectual project is a tempting prospect. The capture of reason becomes in effect the capture of a mechanism that claims to exercise (and perhaps to some extent does exercise) central command over the selection, monitoring, and replacement of other beliefs.
>
> We should not think of the "hijacking" of reason so much in terms of strategic or deliberate action, but rather as the flow of the normal course of events. Thus, it is to be expected that the dominant forms of social life—whether we are talking about commodity production, technology, science, religious practice—should inscribe their own logics within reason itself. To borrow from Marx, it should not surprise if the things of logic should bear the marks of the logic of things.[54]

This is all very well, but what about the more innocent motives that participants in legal culture might have for denying, and that legal theorists might have for trying in some way to overcome, reason's predicaments as manifested *in law*? We have left over from the earlier chapters of the book two very strong innocent motives for denial.

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52. *Id.* at 61.

53. *Id.* at 79.

54. *Id.* at 78-79 (citations omitted).

The first of these is that the liberal political theoretical icon of the rule of law seems to rely in a big way on our belief that reason rules *in law.* If judges are to protect us from our fellows and from executive and legislative actors by interpretation of constitutional, statutory, and common law materials, without getting into "who guards the guardians?" problems, reason must guarantee interpretation against Pierre's lists of "self-interest, vengeance, hate, love," and "power, interest, prejudice, . . . and personal proclivities," and "arbitrariness, emotion, self-interest, politics, power, and force."[55] "*In legal analysis*, any time that reason is perceived to break down, the rule of law is immediately threatened."[56]

According to Pierre, a second major reason for hanging onto the rule of reason, at the cost of turning it into its opposite, namely, faith, dogma, prejudice, and company, is that reason as ruler constitutes the grid of law, so that "[t]here is a great deal at stake: for the partisans of reason, it is reason itself that serves as the overarching organization of the world they inhabit. *For them*, reason is *the web of intelligibility.* And *that* is not something to be given up lightly."[57]

It occurs to one that the meaning of the Delphic phrase, "it is not unequivocally a defect" that reason's ineradicable and unseverable ambition is to rule, might be that the ambition is necessary to maintain the credibility of the rule of law and the intelligibility of the grid. But then we need to ask, "credibility for who?"; "intelligibility for who?"

Why can't we insist on "reason as modesty" and then adopt the attitude that the rule of law is a lot less effective and reassuring than our high school civics class presented it as being, and that law is a lot less intelligible than our first year law school teachers tried to claim it was? Before we take this up, it is time to add the fourth sense of the enchantment of reason, and two further innocent motives for denying the predicaments of reason.

ENCHANTMENT IV: "AN ODD CONJUNCTION OF THE MAGICAL AND THE TECHNOLOGICAL" IN THINKING ABOUT LAW

The fourth sense of the enchantment of reason, developed in the fifth chapter, bears an ambiguous relationship to the first three. Here, "we," as legal reasoners, enchant the world by endowing "law" with properties that it manifestly (according to Pierre) must lack. We alternately animate and objectify law. To succumb to the enchantment (in this fourth sense) of the practices of legal rationality is to engage in a combination of technological with magical thinking. Pierre lays out the

55. *Id.* at 20-21.
56. *Id.* at 20.
57. *Id.* at 59.

enchantment of law and legal reasoning around the dichotomy between an objectivist and a subjectivist aesthetic.

The objectivist aesthetic:

> Legal actors and thinkers come to believe that when they talk about rules, principles, doctrines, and the like—they are talking about things that are as incontestable as "dropping objects" and "bee stings." Indeed, American legal thinkers and actors treat rules, principles, doctrines and the like as if they were physical objects or mindful subjects.[58]

The subjectivist aesthetic: "In this aesthetic, both law and the legal entities are cast as the effective source of legal action. They become personified—endowed with the characteristics reserved for subjects: will, intention, purpose, and even personality."[59]

Objectivist: "substantiality, boundedness, divisibility, extension, spatial location, and temporal location."[60]

Subjectivist: "Law is thus cast as an effective agency. Law 'requires,' it 'demands,' it 'obligates,' it 'compels.'"[61]

I found his exposition quite wonderful, not surprising perhaps since it tracks closely, and greatly improves, the "irrationalist" version of cls orthodoxy as it emerged in the 1980s. (A minor criticism: Pierre acknowledges that this is true for the objectivist aesthetic, but overestimates his originality on the side of the subjective, which was a theme, for example, of all of Peter Gabel's work,[62] and see also the second part of my "Freedom and Constraint," where the "voices" Pierre alludes to get an elaborate hearing.[63])

In the crit version of the 1980s, as Pierre points out, the critique of objectivist and subjectivist aesthetics is welcomed on the ground that it increases "freedom."[64] Pierre has a very different take. He predicts (with evident relish) that there would be dire consequences were law to be disenchanted. Once again, there is a relatively mild or modest and a more threatening, disquieting, deconstructive, post-modern, nihilist, globally critical, irrationalist, po-mo version of his position. It is key to the strong version that the objectivist and subjectivist aesthetics are "constitutive" of law, that they are not "severable."

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58. *Id.* at 97.

59. *Id.* at 98.

60. *Id.* at 101-02.

61. *Id.* at 104.

62. *See, e.g.*, Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); PETER GABEL, THE BANK TELLER AND OTHER ESSAYS ON THE POLITICS OF MEANING (2000).

63. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518, 549-52 (1986).

64. SCHLAG, *supra* note 1, at 155-56 n.10.

> [I]nasmuch as legal thinkers and actors "do law," they have no choice but to take up these two aesthetics. The aesthetics remain sedimented within the discourse, the vocabulary, the grammar of American law. It may be that the objectivist and subjectivist aesthetics produce silly and erroneous visions of law. That, however, does not mean that law can be reformed, ameliorated, or repaired so as to get rid of the silliness or the mistake. . . .
>
> . . . .
>
> . . .[T]he mistake, the silliness occasioned by the two aesthetics are just as constitutive of American law as the belief that this law must comport with intellectual advancements and rationality. The objectivist view may be a mistake—something that a serious intellectual must reject—but it is a mistake that is nonetheless unavoidable for any American legal thinker or actor who takes up "doing law."[65]
>
> But what makes the situation of American law at once interesting and problematic is that its authority and efficacy *depend upon* the metaphysics established through the objectivist and subjectivist aesthetic. In other words, this metaphysics is not an accidental, a contingent, nor a severable aspect of what we take to be "law." Law is, among other things, a *doing*—and one of the ways in which the doing gets done is in virtue of its metaphysics.[66]

Pierre's strongest claim is that once a person absorbs the critiques of the aesthetics, that person will undergo a quite significant impact—one large enough so that it will no longer be plausible that that person can "do law" as "it is taken to be."

First, the critique of the objectivist aesthetic as mistaken, silly, bizarre, and so on, should cause the person to lose the ability to do legal reasoning, since the obejctivist aesthetic constitutes the grid that is essential if one is to do law. Here, Pierre gives a much more elaborate and concrete meaning to the sentence I quoted above from earlier in the book, where he asserted that reason was, for law, "the web of intelligibility."[67]

> The unthinking representation of such phenomena in terms of the object-form yield some significantly bizarre views on the workings of social life.
>
> On the other hand, it is this conventionally unnoticed aesthetic representation of The Law in terms of object-forms that enables legal arguments to occur and to take the shape they do in the first place. . . .
>
> The irony . . . is that the objectivism of American law is both necessary and yet flawed. It is necessary to the construction of the

65. *Id.* at 99.
66. *Id.* at 107.
67. *Id.* at 59.

> frames of law and to our own understanding of what law is. And it is flawed for the very reason that the objectivist aesthetic imports into social and cognitive phenomena of a relational nature characteristics that do not obviously belong (i.e., boundedness, substantiality, and so on)."[68]
>
> But if the suggestion is that American law can be reformulated without such "mistakes" then the suggestion is misplaced. It is not possible to have or to do law (as we understand the term) without engaging in such illusions. It is precisely these illusions that establish the commonality of meaning, and the stability of frame, that make law (even if it is the illusion of law) possible.
>
> . . . The objectivism of American law (even if it is illusion or pretense) is necessary to the establishment of law as stabilized, identifiable, visible frames within which the legally trained and the laity can operate. These achievements (stability, identifiability, and visibility) matter not only to the operational success of law, but to its authority.[69]

Second, the critique of the subjectivist aesthetic as irrational, an instance of magical thinking, a form of animism, etc., should, according to the strong reading of Pierre's claims, cause law to lose all authority as well as all title to "respect."

> The investiture of subjective power in the law and legal entities is, of course, very much akin to the investiture of subjective power in God and his word. The investiture of subjective power in these legal entities—the inculcation of reverence and respect for "rules" and "principles" of law—is thus very much a candidate for a Feuerbachian, Marxian, or Nietzschean critique. The inculcation of belief in the subjective capacity of legal principles, policies, rules, values, and rights is a kind of magical thinking.[70]
>
> Having said all this, it must nonetheless be recognized that the investment of subjective power in law remains essential to the idea and belief in American law. The subjectivist aesthetic remains a necessary aspect of American law. To strip American law and the legal artifacts of their subjectivist powers would leave them inert, without authority. They would lose their ability to command assent and to inspire respect.[71]
>
> Strip away the subjective powers in all legal artifacts, and all you are left with is a lifeless frame—a complex schedule of directives that no one has any reason to honor or respect except to the

68. *Id.* at 103-04.

69. *Id.* at 106 (footnote omitted).

70. *Id.* at 105.

71. *Id.* at 106.

extent it serves one's interests.[72]

Third, consciousness of the critiques of the objectivist and subjectivist aesthetics should make it impossible to do law because of the extreme cognitive dissonance between the presuppositions of the performance and the consciousness of the performer.

> [F]or those who make their lives "doing law," it is very difficult not to inhabit this world. Indeed, for those engaged in "doing law," how could they not believe in the metaphysics at least some of the time? For those who do law, it is necessary, at the very least, to imagine what it feels like for doctrines to "bind" or rights to "trump." More than that, they must act, at least sometimes, as if doctrines do bind and rights do trump. . . . It would be like an actor who had to play Macbeth as authentically as possible, while also continuously recalling to himself that it is just a part.
>
> In fact, for the lawyer or the judge, the task is even more difficult than for the actor playing Macbeth. When Macbeth dies, the actor playing Macbeth nonetheless survives. . . . When the consequences of role-playing have such serious implications, it becomes, of course, very difficult for the actors not to take comfort in metaphysics.[73]

It seems to follow that critical thought and practice have the potential for, as Pierre might put it, a not insignificant impact on American law. If the mere cognizance of the truth of the critiques of the aesthetics would, more or less automatically, disorient the practitioner, delegitimate legal institutions, and incapacitate legal performers . . . then we crits have been in the right line of work all along, disillusioning appearances to the contrary notwithstanding.

Fortunately for Pierre's credibility, though unfortunately for our grandiose ambitions, it turns out that the modest version of the claim is a long way from the strong version. Very oddly indeed, the modest version appears in a footnote placed right in the middle of a string of repetitions of the grandiose claim. The difference between the two claims is as follows. In the strong version, the aesthetics are "constitutive" and most definitely "not severable," but they are silly and mistaken. So it would seem that a rational actor once attaining enlightenment in place of enchantment would have to simply give them up, with the wild consequences already described.

The modest claim is no more than that if the two aesthetics "were to disappear," American law would be, in unspecified ways, very different from what it is now.

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72. *Id.* at 107.
73. *Id.* at 108-09.

> To be clear, I am not here advancing some sort of extrasocial, dehistoricised notion of what law is or must be. I am simply making a small situated observation of the character of American law. It seems to me that the objectivist and subjectivist aesthetic are so wrapped up in what we take American law to be, that *if they were to disappear* we would be dealing with a very different kind of law—one that might not look very much like law from our present understanding of what law is.[74]

This footnote is it, as far as the modest claim is concerned, so there is no exposition in the book of what it might mean for the aesthetics to disappear. Pierre is preoccupied with enchantment, and has nothing at all to say, anywhere in the book, about disenchantment, a point to which I will return. It would clearly be wrong to interpret the strong claims while ignoring the footnote, but the brevity of the footnote makes it hard to know how it fits in with the rest. I agree with the modest claim, but think it incompatible with the stronger one.

It seems to me that metaphysical interpretations of the aesthetics can be critiqued, even annihilated, without causing the aesthetics to "disappear." More: I don't think that the critique of the metaphysics of the aesthetics has to have, or is even likely to have, the kinds of effects that are suggested by the strong claim.

The reason for this is that the aesthetics are not, as Pierre defines them, themselves metaphysics; that is, they are not theories about law, but something quite different. They are "pre-metaphysical," though their contemplation can yield various (mistaken) metaphysical views about them. They are, initially, ways in which practitioners interpret and then operationalize the elements with which they engage in what Holmes described as "a well known profession"[75] (as opposed, in Holmes's phrase, to a "mystery"). Pierre:

> I call these two forms "aesthetics" in the sense that they are stylized forms within which law is perceived, apprehended, and expressed. I also mean to suggest by the term "aesthetic" that these forms of perception, apprehension, and expression are figurations that precede (and almost always evade) the conscious prosecution of legal or philosophical disputes on the relation of epistemology to ontology, language to thought, ideas to materiality (and so on). In American law, the routine rehearsal of both the subjectivist and objectivist aesthetics yields a certain metaphysic in which legal artifacts are routinely taken to be object-forms endowed with certain subjective powers.[76]

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74. *Id.* at 154 (emphasis added).
75. Oliver Wendell Holmes, *The Path of the Law*, 78 B.U. L. REV. 699, 699 (1897).
76. *Id.* at 98.

It seems to me that a person can abandon the metaphysics that "routine rehearsal of the . . . aesthetics yields" without losing their sense of the intelligibility of legal practices, their faith in law's authority, or their ability to "do law." For the profession, as for everyone else, "existence precedes essence." In this case, we have an experience of what it is like to "do law," what it is like to make law, what it is like to submit to law, and the aesthetics are rough representations of this experience. *The metaphysical explications of the aesthetics come after the fact.*

I do not think that belief in the possibility of grounding judgment metaphysically (or just theoretically, or rationally) is constitutive of law "as it is taken to be" or "as we know it." My take would be that the experience of being bound by law, and the contrary experience of being able to make law, are constitutive of law as we know it.[77]

There are a wide variety of at least minimally plausible theoretical attitudes that practitioners can take up toward these experiences when they are speaking at commencement or teaching jurisprudence. They range from retro-formalism to crittish loss of faith. None of these attitudes comes close to being constitutive of law as a practice, and they are all "severable" from it.

Pierre recognizes the phenomenology of freedom and constraint within law in numerous places in the text, beginning with the already quoted passage in which legal reasoning techniques "[s]ometimes. . . produce a final outcome in a case—and do so in a way that seems convincing and reasonable (at least to most parties)."[78]

> To acknowledge that the metaphysics at the heart of law is "nothing" transforms the status of a number of previously respectable activities. To give an example, the previously respectable experience of "being bound by law," or "following the law" comes to seem a lot like the experience of "hearing voices."[79]
>
> It may be that when one is "doing law" the doctrines really do seem to be there—there as real limits, real obstacles, real floors, real ceilings. It may be that when the law "speaks" it has a binding effect. But while all this may be (phenomenologically) true, nonetheless the sophisticated contemporary legal thinker will deny believing in the supernatural metaphysic.[80]
>
> For the legal self who is most rational and most aware of her legal environment, all this should leave her rather confused. It ought to leave the legal self with the sense that she doesn't know whether she is coming or going—whether she is doing things to law or instead

77. *See* Kennedy, *supra* note 63, at 560-62.
78. SCHLAG, *supra* note 1, at 31.
79. *Id.* at 107.
80. *Id.* at 109.

> hearing legal voices. Any objectified vision of law can always flip into a subjectified vision. Any subjectified vision of law can always flip into an objectified vision. This doesn't mean that the flipping will in any given instance be persuasive, nor that it can be done at will. Rather, to some indeterminate extent, the legal self has control over this flipping and to some indeterminate extent, it does not.[81]

Given this phenomenology, which seems to me just right, lawyers doing deals or making arguments have to acknowledge that there will be legal surprises; judges have to deal with the experience of discretion when they might rather experience only boundness. Law professors teaching or writing about particular doctrines have to acknowledge the limits of their ability to "predict what the courts will do." At the same time, the play of freedom in law is the lawyer's bread and butter, the judge's opening for prestigious creativity, and the law professor's invitation to "do a Warren and Brandeis" by inventing a right of privacy.

This means, to me, that the analogy between a disenchanted legal actor and an actor playing Macbeth, incapacitated because he has to play "as authentically as possible, while also continuously recalling to himself that it is just a part,"[82] is doubly odd. First of all, nothing is more familiar than the performance of professional roles by actors with a very strong sense that "it is just a part." This is called alienation. It is in no way inconsistent with successful performance. Second, the legal actor is not "just" playing a part. The experiences of boundness and freedom, and of their indeterminate alternation or "flipping," provide the context or grid for legal work, meaning the self-conscious attempt to shape the legal materials, against their possible complete resistance, in a direction. Moreover, far from setting up an "authority deficit," the combination of the psychic reality with the unaccountability of boundness provides a typical context for "faith" in law—that is, for grounding legal authority extra-rationally.[83]

So I think the strong claim is, at best, overstated with respect to people "doing law" in the sense of practicing, judging, or doing doctrinal teaching or writing. But I think there is a lot to the strong claim if we are talking about Pierre's favorite category: "virtually all American legal thinkers." They, like Pierre himself, are "doing law" in a quite different sense than the first group. They are busily engaged with the metaphysics, a/k/a the rationalization of the phenomena of freedom and constraint.

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81. *Id.* at 139.
82. *Id.* at 109.
83. Kennedy, *supra* note 63, at 550.

As Pierre points out, recognizing the phenomenon of boundness does nothing to set up a plausible metaphysics, a plausible account of how and why law binds or to what it binds. The alternating experiences of boundness and freedom to make law set the terms of the problem, rather than providing a solution, for those who wish it to be true that reason rules in law.

To begin with, "virtually all sophisticated American legal thinkers will deny that they 'believe in' the objectivist and subjectivist aesthetics . . . [t]hey will often go so far as to say that no legal thinkers really believe these things nowadays."[84] It turns out, however, that while

> in their intellectualist or theoretical moments [they] seek to reject the metaphysics of the objectivist and subjectivist aesthetics, they will in their normative moment of "doing law" rush to bring this metaphysics back. They will rush to bring it back for it is necessary to their normative celebration of law.[85]

Or, they invent dodges or evasions that allow them to affirm their disbelief in the metaphysics but have their cake as well as eating it. For the subjective aesthetic, Pierre lists and rejects a series of supposed "new sources" that might substitute as bases for the authority of law once it is disenchanted: "'the internal perspective,' 'careful craftsmanship,' 'good judgment,' 'the interpretive community,' 'Hercules,' 'conscience' (and so on). These are grand but nebulous entities."[86] According to Pierre, this kind of theory gets content only by referring us back to the objectivist and subjectivist aesthetics. It is "necessarily parasitic on the metaphysics that it denies. When the host dies, the parasite will wither as well."[87]

Once again, both the simple backsliding and the more elaborate reconstructive evasions of "virtually all American legal thinkers" are motivated errors—motivated selfishly and also by disinterested or existential concerns. The selfish motives are by now familiar:

> To the extent that "doing law" is an enterprise of legal advocacy, there is no payoff in any public questioning of the fundamental artifacts that make this work of legal advocacy and legal persuasion at once possible and seemingly meaningful. And because virtually all American legal thinkers are committed (and understand themselves to

84. SCHLAG, *supra* note 1, at 98.

85. *Id.* at 100.

86. *Id.* at 112.

87. *Id.* at 114 (apocalyptic tone in original). Here, Pierre sets up a sharp tension with his earlier complaint that the privileging of reason squeezes out alternative "sources of belief," which are degraded and "lose their intrinsic power." *Id.* at 25. He seems to want to have his cake and eat it too, first praising the "other sources" and then denouncing them as "empty." I am more sympathetic to the latter attitude, except for the problem of "conscience" or "ethics" in the abstract, to which I return at the end of this essay.

> be committed) to law and its continuation, the questioning doesn't happen.[88]
>
> The legal academic, too, is likely to slip into legal metaphysics. . . . It is [the] desire for a discipline that leads them to endow law with the structure, the continuity, the transcendence of metaphysics. Without the metaphysics, the legal academics are just court watchers—journalists of case law. With the metaphysics, by contrast, they are working on nothing less than The Law itself.[89]
>
> [O]nce the Christian cosmology is acknowledged to be a metaphysical illusion, God and all his subordinates (including the pope) experience an immediate and radical status demotion. Once the metaphysical illusion is gone, the pope's authority dissipates as well. . . . The same thing goes for law.[90]

The least attractive of the bad motives for the errors of reconstructive jurisprudence, for Pierre, is the presumptuous "normativo" urge of law professors to understand themselves as philosopher kings, or philosopher councilors just a step behind the throne. As Pierre is fond of pointing out, the collective of "virtually all American legal theorists" suffers from something close to clinical delusions with respect to the normative significance of these as of its other activities. Because their claims rest not on the humdrum legal practitioner's techniques of argument through a mix of appeals to statutes, precedents, and policies, but rather on much more abstract and elaborate metaphysical structures, they have a special interest in the viability of the metaphysical enterprise, even if they disagree passionately among themselves as to which reconstruction is right.[91]

The innocent motive is the one set out in the very first chapter: it is anxiety that without the metaphysics there would be no basis for believing in the rule of law. The consequence of taking seriously the critiques of the aesthetics is not that one can't do law or that it loses all authority. But it might be that one has to rethink and possibly just abandon (walk away from) the liberal political theoretical enterprise of reconciling the key concepts of popular sovereignty and individual rights through the mediation of the rule of law. Loss of faith that the aesthetics can be rationally accounted for is potentially devastating to the version of the rule of law in which judges play the role of apolitical referee in conflicts of right holders and in conflicts between the popular sovereign and right holders.[92]

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88. *Id.* at 97.
89. *Id.* at 109.
90. *Id.* at 112.
91. *See id.* at 131-35.
92. *See generally* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 23-38, 97-130 (1997).

Pierre shows no interest at all in responding to the anxiety of the partisans of reason that the critique of legal rationality will undermine the rule of law. His attitude throughout the book is that it is a symptom of the degradation of the legal academy that legal theorists seem to pick and choose what they will believe in according to whether it would or wouldn't be a good thing for the belief in question to be true.[93] His main preoccupation in the last part of the book, in the mode of the critic of culture, is with the boring, dreary, incurious, shallow, presumptuous, decadent, rat-like, willfully blind, and so on, character of the legal self that operates, all the while missing some essential part of itself, in the enchanted legal universe.

At the same time, he returns gleefully, over and over again, to the ways in which core rule of law values become vulnerable once we recognize the unreliability of reason. "[I]n order for law to exhibit its customarily desired virtues—neutrality, impersonality, efficacy, determinacy, and so on—the two aesthetics are required."[94]

> One can, as many contemporary legal thinkers, and actors do, strip the legal artifacts of their mysterious subjective powers—powers to bind, justify, hold, trump (and so on). But the cost of this demystification is to strip the legal ontology of its subjective powers and to relocate those subjective powers in the agents or agencies who invoke its names. The question then becomes: Who are these agents and what is the source of their authority?[95]

In the last chapter, one of his main themes is the freedom of the legal interpreter, whether operating in the objectivist or subjectivist mind set. The main interest for him is the "emptiness" of the free legal self. But he does point out that in each orientation there is a rule of law problem. In the objectivist orientation,

> the legal thinker or actor becomes the master of the law or the legal artifact.
>
> Pushed to its limit, this becomes a problematic stance. . . . If [the legal self] is radically free, then how is it to be restrained and constrained to follow the law? This problem of determining what constrains and restrains the legal self—the problem of the *errant judge* and the *lawless lawmaker*—is one that has occupied and perplexed American legal thought for many generations and remains, to this day, unresolved.
>
> . . . .

93. *See, e.g.*, SCHLAG, *supra* note 1, at 131-32.

94. *Id.* at 100.

95. *Id.* at 111 (footnote omitted).

> If the legal thinker or actor "chooses" the subjectivist aesthetic, he or she assumes a position of submission vis-à-vis the law or the legal artifacts. . . .
>
> This is not an adequate stance or orientation either. The problem with this orientation is that it is not a true submission, but rather a simulated submission. For the attitude here is of "choosing to submit." And that, of course, entails the possibility at any time of choosing not to submit.[96]

What interests Pierre is that in the face of this problem "virtually all American legal thinkers" choose to deny, evade, waffle, or whatever. And that the price of these evasions is that they become boring, dreary, incurious, shallow, presumptuous, decadent, rat-like, willfully blind, and so on. But it seems fair to ask what they would think and what they would be like if they experienced disenchantment. Would they no longer be, as Pierre says they now are, "boring party companions"[97]? And how else might they be different?

Pierre's critique of the legal self is that commitment to the rule of reason has led it to deny that it is only tenuously continuous in space and time, that it is the product of history and context, of factors like "class, ethnicity, age, sex, education,"[98] and a "construction of aesthetics, of rhetoric, of narrative—in short of unexamined (and when one thinks about it, nonrational, perhaps even irrational) formations."[99] Disenchantment might lead legal thinkers to grapple more earnestly with these aspects of their own contingency, though that hope strikes me as being on the slim side. Pierre ends: "Reason is unstable. Law is not benign. This is not a great combination. When reason runs out, but continues to rule, we get precisely what we see all around us—the excessive construction of a pervasively shallow form of life."[100]

CONCLUSION

It is interesting to contrast Pierre's voice with that of Max Weber. Pierre writes about enchantment, critiquing it, in this respect like Nietzsche without the Superman. Weber writes about disenchantment, having read and absorbed and agreed with Nietzsche the critic of reason.

Pierre (like Nietzsche) writes as a "trained outsider" to academia who pretends to be appealing to the informed public, but is actually speaking back into the mosh pit of delusion from which he has managed to wriggle free. Weber addresses his fellow members of the self-con-

96. *Id.* at 136 (footnote omitted).
97. *Id.* at 126.
98. *Id.* at 128.
99. *Id.* at 133.
100. *Id.* at 145.

sciously ruling class on the consequences of what he takes to be just a plain fact: given disenchantment, if you have control of violent means and have to make decisions with large stakes, you are very likely to find that you face irreconcilably conflicting ethical imperatives.

All you will be able to do is embrace an ethic of consequences, knowing full well that it is very possible that whatever you do is likely to have the opposite consequences from those on which you acted. You are obliged to use violence when worse consequences follow from not using it, even though its use endangers "the salvation of your soul" (even if you are an atheist). We will admire you if you have the "manly" quality of finally saying, after doing your best to reason it all out, "I can do no other." But we will be admiring your "manly" quality, not your capacity to correctly determine the universalizable maxim that should be applied to the situation in hand.[101]

In the condition of modernity, critical reason obliges the decision maker to accept that he decides under conditions of disenchantment that put him in moral jeopardy without any possibility of getting out of jeopardy through reason. Luck and genius are the only hopes, each dependent on an arational commitment to one's "vocation."

The satisfying thing about Weber's narrative of disenchantment is that it is about (almost) all of social life, notably including religion, science, economic life, politics, family life, sex, and art. Perhaps the most clearly "wrong" thing about it is that *he refuses to apply it to law.* He is antinomian and decisionist[102] in the tradition of Pascal and Dostoievski and Kierkegaard, but thinks law has been reduced to a science (albeit a science subordinated to legislation, unlike the American legal science whose pretensions to rule are Pierre's subject). Virtually all American legal thinkers are struggling with the now obvious relevance to law of disenchantment in other domains. Whatever is happening in law is much more comprehensible if we put it together with Weber's narrative for religion, politics, sex, economics, art, and so on.

Disenchanting law forces us to recognize a little more than we already do, by adding law to Weber's list, that we are subject to the arbitrariness of others, in this case of judges. And if it works this way for law, we are pushed to acknowledge that we probably won't be able to avoid subjecting others to our own arbitrariness, even in many cases in which we had hoped to be able to find a rational warrant for our choices, within regimes of rules that give us decision making power.

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101. MAX WEBER, *Politics as a Vocation*, *in* MAX WEBER: ESSAYS IN SOCIOLOGY 117 (H.H. Gerth & C. Wright Mills eds., 1946).

102. On decisionism as a category for thinking about contemporary legal debates, see Duncan Kennedy, *A Semiotics of Critique*, 22 CARDOZO L. REV. 1147, 1161-89 (2001).

I stick to the crit orthodoxy according to which disenchantment is liberation, scary as that may be. And that it pushes toward a kind of anarchism: there is no possibility of a legalist excuse for not doing what conscience commands, or of a legalist excuse for doing what conscience forbids (even if you are a judge). But here we must understand conscience not as Pierre initially describes it, as an "alternative source of belief" whose substance is ethics understood as substantive moral theory.[103] Rather, it is his last version:

> Sometimes, "the internal perspective" or "good judgment" or "conscience" are simply offered as names for the subjective power (or powers) that produces law. In this capacity they serve a very modest, but nonetheless useful role. Indeed, it is helpful to have names for the answer—to denote what is unknown and needs to be investigated. It is a convenient thing to have a name for the answer. Here's one: "The Desirable *X*."[104]

Liberation has nothing to do with irresponsibility or nihilism or being able to do whatever you want to. Quite the contrary, it means a rather sinister version in which you are responsible and have to take the consequences of your own calculus of consequences for others, without a method beyond trying your best to figure out "The Desirable *X*."

To my mind, once one takes into account the general Weberian narrative of disenchantment, the innocent motives for embracing reason as enchantress in law are weaker than they appear in Pierre's narrative (because he so completely decontextualizes law). This makes the guilty motive (popular belief in the rule of reason in law empowers legal thinkers) seem all the more important, and all the more guilty. But let me hasten to add that critical reflexivity, hoping paradoxically to set up new helpful rational grids, must be brought to a halt just at the not-rationally-knowable-in-advance moment when it is about to become "pathological."

103. SCHLAG, *supra* note 1, at 28.
104. *Id.* at 114.