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## A. Reason's History: Disciplinarity and the Academy: *Pierre Schlag and the Temple of Boredom*

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# Pierre Schlag and the Temple of Boredom

DAVID A. WESTBROOK\*

## INTRODUCTION: CONFUSION

When Pierre and I first met, we talked for some eight or nine hours. As a visiting speaker, he was trapped, but at least our mutual friend Jack Schlegel provided refreshments at decent intervals. Since then, Pierre's collegiality—a word I mean in the highest sense—has been one of the best things about my academic life, and so I am delighted to participate in this symposium.<sup>1</sup>

Even though I am a sympathetic reader, I often find myself thinking hard about what Pierre is saying, or maybe what he is “really” saying. It is not the writing, at least in any simple sense, that gives me trouble. Pierre writes with admirable clarity. Indeed, for a certain kind of reader, and most of you know who you are, Pierre's work seems to be quite accessible.<sup>2</sup> The vocabulary is familiar. While the moves, prejudices, and intellectual history are very smart, none are completely unexpected; and Pierre has a real gift for exposition, for the turn of phrase that makes a hard idea click into place. Although seemingly easy, his writing is truly funny, which makes it a pleasure to read. I have avoided a lot of

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\* Associate Professor of Law, University at Buffalo Law School. I thank Jack Schlegel and Pierre Schlag himself for the great conversations. My thanks go also to Michael, Pam, and Molly Fischl for opening their home to so many law professors, and the University of Miami School of Law for putting on a conference about right and reason. As a traditionalist, I'm happy to take full responsibility for whatever failings this text has. In particular, some readers may feel that this essay's insouciant tone may require some excuse, if not an outright apology. Such readers may feel that a certain sobriety, even *gravitas*, is proper to legal scholarship, and that this essay is just too flip. I agree, and I blame Pierre—his critique simply demands a certain effervescence in response. This piece required smiling to write. So, guilty as charged, I find myself pleading with Fatboy Slim: “Please don't play this for anybody. I don't normally do this.” FATBOY SLIM, *IN HEAVEN, ON YOU'VE COME A LONG WAY, BABY* (Astralwerks Records 1998).

1. My delight is not entirely selfless: I have spent so much time reading and thinking about Pierre's work that someone may (again) accuse me of wasting time. Junior professors are trained not to read, think, or write for free, so I feel a certain professional obligation to talk, publish, or somehow get credit for my efforts.

2. If you are not sure whether you are such a reader, you may find the following simple matching test helpful:

|                    |  |
|--------------------|--|
| Legal Realism      | my work                                    |
| critique           | voices of reason                           |
| law                | Hercules                                   |
| Roberto            | good                                       |
| Ronald             | suspect                                    |
| Akhil, Cass, Frank | precursor to cls                           |
| insightful         | about to be important politician in Brazil |

work by reading Pierre instead. And yet, in the midst of the playful reverie his writing induces—nothing like witty social theory to while away a winter's night—there will be a knock at the door, and I will realize that I have no idea where, intellectually speaking, we are.

This sudden sense of dislocation is a bit surprising. In many ways, Pierre's writing signals that it wants to be read in the company of other minds who think about law in a critical mode, that is, both analytically and with a certain moral antagonism to what those minds see as the regnant ideology, minds that easily fit into what our host calls "left legal theory." Compliantly enough, I therefore tend to read in the reasoned and normative fashions that we usually employ while reading legal theory. This causes problems because Pierre seems to be against reasoned and normative fashions.

*The Enchantment of Reason*,<sup>3</sup> the immediate topic of this symposium, is a highly reasoned book about the impossibility of reason, at least among law professors. This follows hard on the heels of *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind*,<sup>4</sup> a book of essays about the impossibility of normative discourse, at least among law professors; a frankly normative book, one might add, written by the current occupant of the Byron White Chair in Jurisprudence, a position from which one might hold forth on what it is to do legal scholarship. Legislate, so to speak, if perhaps only in some non-coercive way. But Pierre says legislation is inappropriate, even as he strongly suggests we transform our practices; first, by ceasing to interrupt thought with the plaintive whine, "so what are we to do?" Despite their clarity, Pierre's texts are somewhat befuddling, like martinis. Such confusion leads me to ask: What is Pierre Schlag up to, anyway? What are his larger intentions?

There is another reason to ask after larger intentions. As already mentioned, Pierre's opening moves seem so familiar—so familiar as to be a bit odd, at least in certain circles. Lazy postmodernists like myself tend to confront the sorts of contradictions that Pierre finds in legal reasoning with a shrug: "Surely you didn't think we really meant 'REASON,' did you? We're just trying to get by in our interpretive communities." But Pierre has actually read Stanley Fish, instead of just the criticism, and seems unimpressed by this line of argument. Thus, perhaps a bit more hesitantly, we might point out that our discourse is normatively structured around ill-defined political ideals like justice,

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3. PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998) [hereinafter SCHLAG, *ENCHANTMENT*].

4. PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* (1996) [hereinafter SCHLAG, *LAYING DOWN THE LAW*].

progress, and so on. So why can we not keep talking about such things? Maybe a little bit of it will stick somewhere. But Pierre eschews—or just has no inclinations toward—such invocations of pragmatism, and evidently believes that academics (which he persists in expecting to be intellectuals) should avoid muddling through and should attempt to think as clearly as possible. Conversely, Pierre can not be suggesting that if we abandon normative argument and stop sounding like judges *manqué*, then some sort of social justice will arise? Surely Pierre does not understand law as some sort of oppressive system that can be transcended, giving free rein to heretofore suppressed human goodness? That seems, well, to put it bluntly, so '80s. But Pierre does not seem to think that criticism is the prelude to justice, either. Getting edgier, we might ask whether Pierre thinks that the act of criticism is itself simply liberating? Is Pierre indulging in some sort of trashing as performance art, disbelief as the only possible form of liberation? I think Pierre's writing is quite susceptible to such a reading, but to me liberation usually seems implausible and trashing seems silly, so I asked Pierre, and he said, "No, no, I'm not so foolish as to think better criticism will set us free."

It pains me to relate that at some point in our colloquy I must have gotten frustrated enough to ask: "So, what is this for?" So gauche. I have purged the details, but I remember enough to report that Pierre is dubious of such an interruption in his thought. Questions like that are diversions, distractions, expressions of a desire to stop thinking, all of which are bad. Worse, such a question has already decided on a utilitarian frame—completely unjustified, of course—for the universe of discourse, an unthought move in which Pierre is not going to be complicitous, no way. Moreover, any answer that Pierre might give to such a question, were he so inclined and so foolish, would only set up a metadiscourse that would import problems of its own. And . . . there is not much need to go on, is there?<sup>5</sup>

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5. Because this piece is about and for Pierre Schlag, I cannot resist a note on interpretation. I realize how anachronistic it sounds for me to be reading in terms of conscious authorial purpose, but then again, Pierre is not some legal theorist across the water, or dead. Instead, he is our colleague sitting right over there. He is smart and has worried about these matters for years, and we are giving this symposium on his thinking, so it seems appropriate to try to figure out what he believes he thinks. More broadly, it may be time to reconsider the emphasis on the reader. In this age of communication between tiny elites, like those at this conference, I do not regard Pierre's articles as "publications" written for an educated but unknowable public. Instead, much of the writing and reading we actually do amounts to finely polished e-mails, which are themselves a form of conversation. It is polite to try to figure out what one's interlocutor thinks, but more than politesse is at stake here. As I hope to demonstrate in some small way, it may be only by focusing on the activity of thinking—and so, the intentions with which thought is carried forth—that we may respect reason, that we may be rightfully enchanted.

Pierre himself says (but always before rushing on to something else) that we should consider the context in which thinking is done. Moreover, we need to consider the address of a thought—for whom is a thought intended? So, in trying to understand what a reasoned attack on reasoning might mean, or what normative discontent with normativity could signify, let us take Pierre's own advice, and ask about the context of his works. Pierre's writing is very much located within the law school, which itself is located within the university. When Pierre says law, he means "law professors' law."<sup>6</sup> Pierre's work is consciously by and for law professors and about law professors' law, and only derivatively has anything to say outside of that context. I think Pierre's work is very important, but directly so to only a few people. Us, for example.<sup>7</sup> I therefore want to consider Pierre's work by situating its critique within a narrow context, the few hundred law schools recognized by the AALS, and then within a broader context, the modern university. I conclude with a few thoughts about how a respectable intellectual life might be possible within such contexts.

## I. THE LAW SCHOOL

### A. *Betrayal and Subversion*

While criticism of the professoriate is not new (consider not just Critical Legal Studies (cls),<sup>8</sup> but policy studies, the Realists, or even Pound or Langdell), perhaps nobody has devoted as much attention to the law professor qua professor as Pierre. For the last hundred years or so, American legal critics have tended to talk about someone else, judges, usually, or professors as judge trainers. This choice of objects is understandable: What judges do in America is clearly important, and therefore criticism of judging (and by extension, the schooling of prospective judges) would seem to be a worthwhile activity. In this way, law professors fulfill a very traditional notion of their duties as public intellectuals—the task of the professor is to improve the polity through criticism. Pierre himself has written more than a few words about judging.

From this perspective, now traditional, it might seem inconsequential or even juvenile to follow Pierre in making legal scholars the center

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6. SCHLAG, ENCHANTMENT, *supra* note 3, at 12 ("This book deals with reason in the discipline of American law.").

7. Pierre's work could be read to suggest a theory of modernization in which law, on the contemporary American model, colonizes swathes of life. Such a suggestion, if it were developed (something I would like to see), or any response to such a suggestion, obviously would be important to many people outside the legal academy.

8. It is said that the lower case indicates that this discourse inscribes no hegemonic aspirations.

of our attention. Calling our scholarship into question, however, is important and ultimately quite mature—a positive step for our profession.<sup>9</sup> Under the model of criticism traditional in the law school, bad law, or bad politics, are ascribed to more or less bad people, and criticism tends to descend into name calling. More to the point, criticism has tended to be easy. Pierre spends far more time talking about scholars. Us. (Well, not us, of course, but people we know well.) Pierre criticizes the profession on its own terms: he argues that our normative/reasoned intellectual projects make no sense; they are silly. There is nobody else, no vast right wing conspiracy we can blame. We are the objects of critique, and in Pierre's judgment, what we do is not worthy of respect. The possibility that his judgment is correct merits our serious attention.

Indeed, Pierre's objects/audience have paid attention. Many respond to Pierre's attacks on normativity and reason as attacks on their way of life. Pierre agrees, but says that he is not mean-spirited. He intends his work to be therapeutic, a clearing of delusion. Pierre argues at length that law professors are wrong to claim that their positions are normatively justified or rationally reached. Such claims simply cannot be sustained, in the sense of are not proven. Members of the legal professoriate either understand the various fallacies in their thinking and are lying, or do not understand their errors, and so are delusional. Pierre, charitable soul that he is, prefers to think of his colleagues as delusional.

Like many of Pierre's uses of rationalism, the image of the doctor is misleading and suggestive. "Delusion" is not a term of endearment, but is instead a diagnosis. In order to make a diagnosis, the doctor must examine the patient as an object. In order to diagnose legal discourse, Pierre already must have removed himself from legal discourse. In arguing that law professors' law is not what it claims to be, Pierre has already decided that he does not want to think, talk, or write like a law professor, and so must consider himself, if only in his imagination, as something else. Regardless of how good Pierre's arguments are, their mere presentation signals a betrayal. To make matters even more awkward, while Pierre may not want the academy, the academy wants Pierre. He holds a chair at a good law school where he can ski a great deal, and he continues to publish in the top law reviews. How embarrassing for us responsible members of the professoriate, to have our love so publicly unrequited.

Although the grammar of a diagnosis is independent of its content, the content does matter. (Consider the words "benign" and "malignant.") Pierre's diagnosis of the legal academy, "delusional," is pretty

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9. It gives me great pleasure to note how salutary Pierre's work is for the discipline.

grim. In calling law professors' law delusional (as opposed to "imaginative"?), Pierre publicly denies the legal academy's ability to set standards worth taking seriously. Setting standards, however, is the heartbeat of the legal academy. The vital social and political functions of the law school all require standards. Without standards, one cannot pass a course, still less earn honors (and one's peers cannot do worse), one cannot graduate, be licensed by the state, become an academic, or attain prestige. Academic life is impossible without standards. So Pierre's diagnosis of our situation is grim indeed. To make matters worse, like patients in the hands of a medical expert, we, the professoriate, have little means with which to defend ourselves against this particular charge. Once Pierre has had the audacity to conclude that his colleagues are delusional, there can be no counterargument. ["I am not drunk!" (?)] Pierre has thus betrayed the legal academy by placing it in a position in which its *raison d'être* is called into question, and from which it cannot defend itself.

The well-meaning law professor is driven to ask, "but why won't Pierre take us seriously?" Why does he keep calling us names? Why does he keep suggesting we do something else? Pierre provides reasons—hence the slew of articles and books—but it hardly matters what his reasons are because the mere fact that Pierre is claiming that we should do something else is enough to make his argument more powerful than even his fine logic can. It is just here, in fact, that Pierre's work is subversive. Many a law professor secretly, or not so secretly, wants to do something else. Even as he asks Pierre why law professors' law is so unconvincing, our exemplary law professor may be troubled by the fact that he finds so much of his own work boring. In a moment of introspection, our exemplary professor may realize that his questions are driven by an anxious recognition that he himself is no longer enamoured of his own way of thinking. Pierre will not convince many law professors that their tradition is bankrupt—law professors rarely allow themselves to be convinced of anything—but he may give them the opportunity to acknowledge what they already feel.

We have come to suspect that our exemplary professor's boredom, Pierre's boredom, our boredom, with the law is neither accidental nor some personal failing, but is instead normal, ubiquitous. For those of us with the leisure that university life affords and in the absence of a paying client or other particular contest, what is worth learning? Malebranche may have said that attention is the natural prayer of the soul, but what aspect of the law is worthy of our personal attention?<sup>10</sup> Perhaps equal

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10. Michael Hamburger, *Introduction to PAUL CELAN, POEMS OF PAUL CELAN* 31 (Michael Hamburger trans., 1989).

protection, some grand story of emancipation from the evils of slavery, . . . perhaps the construction of the peaceful order of international rule of law . . . perhaps environmental law, the securing of an Arcadian dream at the heart of industrial society . . . perhaps. But lawyers know well enough how to make such stirring stories mind numbing. More importantly, such stories explain a tiny fraction of the law, and a truly inconsequential part of the law that our students are likely to practice. Consider, instead, the Code of Federal Regulations, or the papers required to purchase even a small and closely held corporation, or the reams of utterly ordinary documents that every garden variety litigation generates. That is law, and it seems distinctly unworshipful. The mind's acknowledgement of complexity that it feels no need and has no desire to engage is the sensation of boredom. Law professors' law, even the law of the Supreme Court, complex without being intellectually compelling, is boring. The legal academy, the place where thinking about uninteresting things is glorified, is thus a temple of boredom.

Those of us within the legal academy usually cope with the law's often undeniable boredom by saying that the law is "hard," and the mind must be disciplined in order to master it. Discipline is worthwhile because thinking like a law professor both: (1) is a morally good activity ("normative" or "progressive" or "right"); and (2) yields a certain truth ("reasonable" or "strategic" or "empowering").<sup>11</sup> We thus present ourselves as servants of justice and truth, not complexity or boredom. Enduring boredom is simply the cross that we must bear.<sup>12</sup>

Pierre's writing suggests that he feels such defenses have some power, perhaps because like most of us, he spent a great deal of time and effort becoming a law professor. Therefore, it is to Pierre's great credit (it is courageous) that he places our usually tacit justifications for the intellectual discomfort that the legal academy requires into question. "To put it bluntly, it is less than pleasant to actually consider the emptiness of a discipline when it is one's own."<sup>13</sup> Pierre thus asks us to confront the possibility that several decades of his and our individual efforts were a waste of time. He concludes—it is a foregone conclusion, but an existential challenge all the same—that law professors' law simply can-

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11. Apart from occasional talk of craft values, nobody really thinks that the law is beautiful, so Pierre has not had to write a book demonstrating that the law is ugly. Perhaps he should; his recent concern with aesthetics suggests that legal scholars should be more conscious of the forms in which they work.

12. Or not. That is, we might understand law to be politics, and indeed turn from law to politics. In the legal academy, however, we do not really turn to politics, which presumably would entail that we give up the dental and other benefits we claimed as recompense for teaching the law.

13. SCHLAG, ENCHANTMENT, *supra* note 3, at 10.



not be justified as either an effort to do good or find truth. Law professors' law is merely boring, boring without redemption, and we academics should stop pretending otherwise. In fact, if we can afford to (if the university will let us?), we should find other ways to think, or maybe other things to think about.

It is worth pausing to emphasize that Pierre has diagnosed an epidemic, that his complaint applies to almost all of his colleagues. Pierre addresses law school discourse as if it were fairly unified, and he chooses his examples from among a handful of well-known professors at major law schools. It is tempting to hope that Pierre's focus on the usual famous suspects exempts the rest of us, who are not famous and so must be thoughtful. Similarly, scholars who think of themselves as very progressive, radical, or otherwise "outside" the dominant discourse may be tempted to claim that Pierre's critique does not apply to them because they oppose the law school, or American law, at least as it is currently configured. Such temptations should be resisted, because almost all of us engage in the intellectual moves Pierre decries. One cannot speak or write much in the legal academy without engaging in reasoned normative discourse. Progressive or even radical legal scholarship is as vulnerable to Pierre's critiques of reason and normativity as are Pierre's usual targets, the law professors who float upon the mainstream. Indeed, radical legal scholarship, which by definition has no sanction in history or popular will, tends to rely even more exclusively than mainstream legal thought on the authority of reason and the desirability of an argument's result, that is, on reason and right. Consequently, radical legal scholarship may be especially vulnerable to Pierre's critiques. Rephrased, Pierre's work criticizes the grammar of our legal thought. The substance of our thought is hardly relevant—it is no defense to point out that our thoughts are both nicer than those of the mainstream and antagonistic to the (tyrannical) status quo. So long as we law professors stick to reasoned normativity (and it is difficult to imagine progressive/radical/outside legal scholarship that was not both reasoned and (highly) normative), we will be vulnerable to Pierre's critiques of reason and normativity.

If we concede that Pierre's critique applies to us, it would seem incumbent upon us to ask: Is he right? Probably, but this is the wrong approach to the question, too simple-minded. Pierre argues that law is not reasonable *enough* to satisfy its own imperatives to ground authority in rationality.<sup>14</sup> Normative justification cannot do a good *enough* job of apologizing for the exercise of legal power. To which one might ask, how much is enough? There can only be one answer to that question:

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14. See especially *id.* at 60-61.

enough is enough. In this light, Pierre's arguments are elaborate ways of saying, over and over again, "I no longer take this seriously; why do you?"

Academic arguments thus serve as approaches to a deeper issue, for which we have little explicit language: should we continue to be loyal to the model of legal education in which we were trained? Pierre talks about the failings of legal reasoning not because his superior logic will show the invalidity of less fine arguments, but because such intellectual parlor games are one way to entertain the possibility that orthodox American legal scholarship is no longer an enterprise worthy of undertaking. The pivotal question here is not whether Pierre is right, any more than the question in Cold War thrillers (and sometimes life) was whether the Soviet spy really understood History. The question is whether Pierre, the spy, speaks in a way that we are already prepared to understand, even affirm. It is a painful possibility, because abandoning our training, allegiances, and sunk costs requires us to admit at least that we were wrong, and that we are now betraying what had been our beliefs, and that we have grown older meanwhile. If the possibility of abandoning law professors' law nonetheless seems tempting, then Pierre's analysis provides a rationale for the betrayal we have already committed.<sup>15</sup>

All of this can be put much more directly: When you sit down to write, does a law review article emerge, and do you believe in it? If the answers are yes and no, then Pierre may well be right for you.

### B. *The Seduction of Policy*

Before turning to what our disenchantment with law might mean within the context of intellectual life more generally, and what, if anything, we might do with our newfound liberty, let us cast a look backward and think a bit more about the object of Pierre's criticism, law professors' law as practiced in the United States. To simplify his position radically, and to put words into his mouth, Pierre is against the idea of legal discourse as policy discourse. Law grounded on policy has become so habitual for American legal academics that it is difficult for us to see how extraordinary it is. But consider, by way of contrast, three

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15. The most surprising aspect of this symposium for me was the ease with which many scholars resisted Pierre's temptations. Many scholars continue to accept the grammar and logic of orthodox policy discourse, especially insofar as it allows or even fosters the construction of radical moral and political arguments. Many scholars who understand law (especially American law) as a bad thing—the exercise of dominant interests upon a field of pain and death, to use Cover's overworked phrase one more time—nonetheless continue to speak as law professors. I find this surprising because I cannot believe that our complicity in the law's procedures can be redeemed by really clever substantive critique.

traditional grand sources of legal authority: God or nature, History or tradition, and the will of the sovereign (whether the king or the people).<sup>16</sup> Entire jurisprudences are built around such ideas of what makes some articulation of our lives together law-like. Contemporary law professor's law retains traces of all three types of authority: we share some commitments to rights; we presume an idealized version of U.S. history; we bow in the direction of the people or Congress on occasion. Professorial practice, however, is usually different. In our hallways and articles we generally talk in terms that are independent of, even in spite of, such authority.<sup>17</sup> This presents a historical puzzle. At some point, it appears to have become thinkable that American law got its authority from conformity to policy, i.e., something that was not itself law, and certainly was not the word of God, the workings of History, or the will of the people.<sup>18</sup>

For example, many professors tell some version of a "grand progressive narrative" of American constitutional law, in which America trends, in the long run, toward the fulfillment of the promises implicit in our history. Such stories are not themselves historical, neither in the sense of being true to past history (obviously), nor even in seeking their justification in a glorified version of history, a mythological past. Such stories presume that American law can be justified only by a future that is yet to come, a myth that is only suggested by our past. This, obviously, is pretty mysterious stuff. Fortunately, of course, the law professor is on hand to tell us what promises are really embedded in our history, what those promises mean, and therefore what the shape of our redemption might be.

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16. I took this typology from my teacher, Harold Berman. Pierre's list is somewhat different. "Indeed, among contemporary American legal actors, reason stands in a generally superior position to other sources of belief such as authority, experience, convention, tradition, ethics (and so on)." SCHLAG, ENCHANTMENT, *supra* note 3, at 22. The point is that in understanding reason, or perhaps "normative reason," to be self-sufficient, we are taking a radical, indeed weird, position—a position that needs some sort of justification other than silence.

17. While one does sometimes see efforts by legal actors to show that reason is grounded in our authoritative texts, in our traditions, in our experiences, most of the efforts run in the other direction. Hence, most often legal actors strive to redeem authority, experience, tradition (and so on) by demonstrating their grounding in or consonance with reason.

*Id.*

18. Duncan Kennedy has argued that this is distinctively American, and perhaps he is right. Certainly the legal profession seems to be the situs for politics in America in a way that it is not traditionally conceived to be in other countries. See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} (1997). This is all the more interesting in light of the real possibility that the European Court of Justice may in fact have seen the most important politics in Europe in the last few decades. See generally JOSEPH WEILER, THE CONSTITUTIONS OF EUROPE: DO THE NEW CLOTHES HAVE AN EMPEROR? AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999). That court, however, employs the law/politics distinction regularly.

Similarly, I recently read (in the teacher's manual to a casebook!) a professor fulminating to the effect that products liability cases were contract cases, with non-waivable terms.<sup>19</sup> The fact that American law, in the sense of actual court decisions, treated products liability cases as torts was "completely irrelevant." In the actual decision under discussion, however, a decision on a motion reported as *In re Silicone Gel Breast Implants Products Liability Litigation*,<sup>20</sup> the distinction between tort and contract was dispositive, and therefore relevant to everyone involved. Defendant Bristol-Meyers Squibb had moved for summary judgment, arguing in important part that fundamental principles of limited liability insulated it from any tort claims that might be brought against a Bristol subsidiary, Medical Engineering Corporation (MEC), for harms caused by allegedly defective products (breast implants) manufactured by MEC. Bristol argued that piercing the corporate veil required a finding of fraud or like injustice, and because plaintiffs had presented no evidence on this point, Bristol was entitled to summary judgment. The court disagreed, noting that in many jurisdictions (this was a federal multidistrict proceeding, applying the laws of various transferor courts) piercing the corporate veil to reach the assets of a shareholder/parent in a *tort* case, as opposed to a *contract* case, did not require a showing of fraud or injustice. Since this case was founded upon tort rather than contract, the court might well need to employ the lower standard, and therefore Bristol was not entitled to summary judgment. Undaunted, the professor/casebook editor plunged ahead into his own world: women harmed by breast implants by MEC could and [damnit!?!] should have sought separate guarantees from the parent, sole shareholder, and marketing outfit, Bristol, or gone to a competitor.<sup>21</sup> The professor clearly believed that what he was doing was law rather than a personal (and oddly vehement) opinion—even though it was not binding, coercive, generally agreed upon, transcendent, foundational, or otherwise typical of law—and that the actual law, the discourse of decision in an actual American court, in a case involving real victims, real money, real companies, and so forth, should be ignored.

In both of these examples, "the law" in question—the law that Pierre takes as his target—is not the law on the books, nor the law as usually decided by judges, nor even the set of conventions currently in force. Instead, the law here is the policy position taken by professors, i.e., the conclusion of reasoned, normative argument. Pierre's position may be summarized as a denial of the proposition that the political opin-

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19. Nothing would be served by a citation.

20. 887 F. Supp. 1447 (N.D. Ala. 1995).

21. The case also raised issues of direct liability.

ions of professors, however well reasoned, can or should be understood as law.

Pierre's understanding of "law" hardly exhausts the meaning of the word. Indeed, for a practicing lawyer to think seriously like a professor—persistently saying "how courts come out," to use the old Legal Realist phrase, is "irrelevant"—could lead to disbarment. Fortunately enough for them, young associates quickly learn how to "turn off" much of what they learned in law school. Almost as obviously, however, the legal professoriate is hardly interested in teaching legal rules as they actually may be applied someplace in America. Professors play another game, policy, and the objectives and rules of that game are not very clear to most people, including most lawyers. (Pierre's diagnosis of law professors' law as a "delusion" is all too plausible.) From the perspective of the legal professoriate, America is a society perpetually in need of justification, and justification is the realization of, or at least the earnest attempt to realize, the best policies. Imagining and articulating the best policies, then, is the law's deepest, most profound way of being. To be unfair to Plato, law professor's law may be seen as intensely Platonic. Policy is the form of law; the actual positive laws that we usually perceive are mere shadows. Law professors, therefore, continually urge the need to test our actual positive law against the intentions of the "underlying" policy, of which the positive law is a mere expression. What law professors do—think/talk/write policy—is what it means to live in the law. What lawyers do is sophistry.

It is important to emphasize that in current American legal discourse this claim does not have a political tilt, at least not "political" in the ordinary sense of a position along the spectrum defined by "left" and "right." We law professors, almost all of us, use policy because policy is central to what it means to be a law professor. Not merely Pierre's usual targets, the mostly center-left moderate constitutional rights scholars who dominate the academy politically, but also radical feminists, critical race theorists, property rights afficianadoes, law and economics missionaries, radical pragmatists, republican communitarians (the list goes on but we need not) all *argue* that in light of fundamental commitments, there ought to be a law that says [*normative position*], and the absence of such a law on the books is symptomatic of the deeply flawed and unfinished state of our republic.

Although almost all legal scholarship holds a brief for some policy or other, very few, if any, policies issue directly from the offices of law professors. In legalistic societies such as the United States, government bureaucracies produce real policies. The deeper function of such a bureaucracy, then, is to justify American positive law, to mediate

between policy (the true reality of the law) and our actual arrangements (the positive law that we perceive). Bureaucracies mediate between ineffable justice and black letter rule, or better still, ruling. In linking our mundane arrangements, and more problematically still, our willingness to use force, to the deep structure of justice, bureaucracies become the institutionalizations of our redemption, the places where we write stories that let us forgive the world. Bureaucracies not only govern, they apologize for their acts of governance.

As institutions, bureaucracies like the SEC, the EPA, or the judiciary itself, are limited in their scope, the subject matter over which they have authority. The limited scope of particular governing bureaucracies is why we need universities, institutions I will discuss as an ideal, the "University." As the name implies, the University claims universal jurisdiction, viz., the capacity to articulate the principles of every human activity within a doctrinal frame.<sup>22</sup> The University takes as one of its concerns the arrangement of society itself, in the social sciences generally and, especially, in the law school. The faculty concerned most explicitly and deeply with policy, regardless of content, is the law school faculty. The law school thus occupies the same superior position among the bureaucracies that philosophy traditionally claimed among the sciences, or even the life of the mind. Law schools provide a meta-justification for particular bureaucracies.

At this point in the argument, most scholars will protest that they are, in some sense, critical, perhaps radically so. Few professors see themselves as mere apologists for the status quo. Instead, law professors' law attempts: to justify the arrangement of things as they perhaps once were (if it is conservative); or to tell a sensible redemptive story of America becoming justified in the sweet by and by (if it is modestly reformist); or (if it aspires to be radical) to condemn actual laws' function as a betrayal of some possibility for, or even gesture towards, justice. But the substantive differences among such perspectives should not blind us to the fact that the logic, the grammar, of law professors' law remains the same regardless of its substantive commitments. All of our scholarship is grounded in the authority of policy, that is, the idea that the professoriate's imagination is the law. We professors argue in the name of the law (policy), regardless of whether we identify ourselves as well meaning members of the middle class (incidentally white male and affluent), radical romantics, outsiders, the voice of the marginalized, or what Kundera elegantly calls "angels."<sup>23</sup> Instead of God, History, or

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22. Consider creative writing, sexuality, peace studies, university administration, and business.

23. MILAN KUNDERA, *SLOWNESS* (Linda Asher trans., 1997).

the People, our society has a bunch of folks who do very well on standardized tests, who are well-kempt enough to land good clerkships, and who for these and similar reasons claim enormous authority. We claim that the power of our thought enables us to decide what should and should not be done. Fortunately, nobody listens much.

## II. THE DECLINE OF THE UNIVERSITY

By shifting the focus from law as done by judges to law as done by professors, Pierre situates his critique not only within the context of the law school, but also within the context of the University. As has already been suggested, one might expect that Pierre's diagnosis of a problem at the heart of the American law school is important for the University as well. This might be good for Pierre, but would be unfortunate for the rest of us. His recommendation that we should do something else may not be easy if the University itself suffers from the same, or a related, version of the malaise that Pierre has diagnosed in the law school. To switch metaphors, we cannot rescue our intellectual lives by changing faculties (or through "interdisciplinary studies"), any more than we can save our bodies by changing cabins on a sinking ship.

There is good reason to believe the ship is sinking. For some years now, powerful writers from across the political spectrum have claimed that the modern University, understood as the ideational home for intellectual life, is broken, finished, over. Such writers contend that the modern University has a history. The idea of the modern University was born in early nineteenth century Germany and was instantiated with Humboldt's proposal for the University of Berlin.<sup>24</sup> In the course of the Nineteenth century, this German understanding of academic life decisively transformed the idea of the University in America, and hence, in the fullness of time, the world. Such writers contend that Humboldt's idea is no longer credible, so contemporary universities do not embody any belief—they are no longer worth a spiritual commitment. The University may well continue to flourish as a mechanism for distributing the goodies that contemporary society affords its children, but it can no longer function, as it has for some two centuries, as the setting for an intellectual life worthy of public admiration. For convenience, I call this contention the "Decline of the University." Articulations of this contention include Bloom's *Closing the American Mind*, Lyotard's *The Postmodern Condition*, and Reading's *The University in Ruins*.<sup>25</sup>

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24. BILL READINGS, *THE UNIVERSITY IN RUINS* 7 (1996).

25. ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987); JEAN-FRANCOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984) (1979); READINGS, *supra* note 24 (1996).

None of these authors worry too much about the fate of law schools. Perhaps they assumed that the collapse of intellectual life in the legal academy would be like a fire in a morgue, dramatic but inconsequential. As law professors, however, we cannot afford to be so cavalier. Not only do law schools provide much of our intellectual sustenance, but the idea that law schools matter gives purpose to scholarship, nay, life itself (just kidding). How does Pierre's critique of law school life relate to the Decline of the University? Practically speaking, what can the activity of legal scholarship mean in view of the possibility that the University is itself in decline?

Consider Pierre's two books. *Laying Down the Law* is a critique of the normative sufficiency of legal scholarship.<sup>26</sup> *The Enchantment of Reason* is a critique of the rational sufficiency of legal scholarship.<sup>27</sup> Why are two critiques necessary? Because legal scholarship makes two substantially different commitments. First, we claim that our arguments are good and therefore should guide our actions. Second, we claim that our arguments are true, that they describe our world, and that they are logically valid. Obviously, both of these commitments are necessary to the very enterprise of doing policy. Who would want a policy that was true, but truly evil? Or a policy that was good, but impossible? In fact, such dual commitments to right and reason are not just inherent in doing policy, they are inherent in thinking about politics.

The problem—one of the oldest in political philosophy—is that the commitments tend to be in tension, even antithetical, to one another. Reason (the true, the object of critical and speculative thought) is perennially at odds with right (the good, the object of normative and practical thought). Reason considers possibilities in the abstract; right chooses among concrete limitations. Reason tends to open; right tends to close. Reason is interminable; rights must be exercised in time. The practice of philosophy (the celebration of reason) considers context the object of critical inquiry; the practice of politics (summarized by writs declaring rights) must rely on context (tradition, faith) that is well-settled or otherwise held above critique. Such tensions led Plato to insist that the very idea of the philosopher-king is a self-contradiction, an oxymoron.<sup>28</sup> As speculative philosophy moves towards practical politics, it ceases to be philosophy. Conversely, the move towards philosophy has long been understood to require a certain withdrawal from the world of affairs.<sup>29</sup>

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26. See generally SCHLAG, LAYING DOWN THE LAW, *supra* note 4.

27. See generally SCHLAG, ENCHANTMENT, *supra* note 3.

28. See PLATO, REPUBLIC 22 (471c-474b).

29. See HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 55 (Ronald Beiner ed., 1989) (discussing Pythagorean distinction between participating and watching, arguing that philosophy depends on the latter).



The war between reason and right, possibility and instantiation, cannot be won. The question is how to manage the hostilities. This question has always been a problem in the University, which from its beginnings both fulfilled social and political roles (trained priests, lawyers, and doctors), and served as the site for inquiry, critique, debate—philosophy. Consider Abelard at the beginning and Luther at the end of what we regard as the medieval University, each of whom set minds against their political commitments. The question became still more pressing for the University during the Enlightenment, with that era's efforts to instantiate thought, against the backdrop of early modern Europe's understanding that wars between different constellations of faith and reason could result in real wars, killing wars. As with Pierre's work, questions of real politics have long lurked around seemingly "academic" discussions of what to do with the schools.

More importantly for present purposes, however, for years the modern University was understood to be not only likely terrain on which to have such struggles, but also as a workable answer to the problem itself. Put bluntly, for almost two centuries the University bid fair to unify politics and philosophy, the state and reason, normativity and rationality, perhaps even culture and nature. Maybe "unify" is too strong, but if the University could not exactly dissolve the antinomies of intellectual life, the University could at least bring such deeply human tensions into sufficiently close conjunction that an intensely meaningful intellectual life could be lived among them. University life was worthy of respect, even admiration, even a sort of adoration. (Many academics living today are cynical about almost everything, including academic life, but still have a hard time imagining how people cope with the banality of almost any job besides that of professor.) The Decline of the University is the contention that the University can no longer manage the conflicts among the mind's commitments, that the time when the University was a plausible answer has passed.

In its understanding of what the University was, of course, the Decline of the University serves as an analysis of what the University has become—indeed, in most hands, the story is explicitly critical, rather than historical, in character. Proponents of the decline of the University would have us understand that University life is no longer worthy of admiration. It is (probably) respectable in the sense of an honest way to make a living, a job, but little more. University life is not ethically or intellectually commendable; the academy offers no elegant compromise between the active and the contemplative life. Here, the similarity between Pierre's work and the Decline of the University is too great to be ignored: How worthy is it to be a law professor?

In order to explore this question, it helps to know how the modern University managed the conflict between right and reason. More simply, what was the modern University? While books have been merited, and while most of the thoughts of academics are in play, let me attempt a sketch. As is often the case, Kant provides a good place to start. At a superficial level, Kant's solution to the problem was jurisdictional, which was sensible enough because Kant had a legal problem. Late in life, Kant ran afoul of the Prussian state censor for the publication of *Religion Within the Limits of Mere Reason*, ultimately published at Königsburg in 1793.<sup>30</sup> Theological outcry was substantial, leading in 1794 to a demand by Minister of Justice Woellner, acting in the name of King Frederick William II, that Kant give an account of his work, and not disparage Christianity, and in the future refrain from corrupting the youth (the classic charge).<sup>31</sup> In his reply, Kant denied the charges, but also promised the King (whom he knew) that he would not publish anything that might be problematic.<sup>32</sup> After Frederick William II's death and in light of further developments in his thinking, Kant saw fit to publish more on the relation between religion and philosophy. While he was at it, he bundled the religion essay with two other essays that concerned the relation between philosophy, the master science, and a branch of higher learning, in one case law and in the other medicine. Kant then tried to tie all three essays together with a preface on his political problems and a brief introduction on the political functions of the University, despite the fact that the parts had been composed at different times and for different ends. The somewhat ungainly result was published as *The Conflict of the Faculties* in 1798.<sup>33</sup>

In the first part of *The Conflict of the Faculties*, "The Conflict of the Philosophy Faculty with the Theology Faculty" (of Kant with his critics), Kant sets forth his scheme of the University.<sup>34</sup> Kant distinguishes the three higher faculties of theology, law, and medicine (what we would call the professional schools), which are governed by their

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30. This history is derived from IMMANUEL KANT, *THE CONFLICT OF THE FACULTIES* (Mary J. Gregor trans., 1992) (1979).

31. *Id.* at 11.

32. *Id.* at 19.

33. *Id.* at vii.

34. I concentrate on the first part. The second part, "The Conflict of the Philosophy Faculty with the Faculty of Law," is less about the conflict of the faculties, and more about progress; that is, the unification of right and reason in history, what we might call the possibility of enlightened politics. It "appears to have been written in 1795," *id.* at xxiii, that is, the same year as *On Perpetual Peace*, and should perhaps be read in conjunction with that essay. While the idea of unifying right and reason in history is clearly relevant to Pierre's work, this essay has taken other paths. The third part, "The Conflict of the Philosophy Faculty with the Faculty of Medicine," is about regimens (discipline), superstition, and the body, among other things, all of which are interesting, but even further afield.

allegiance to authoritative texts, from the lower faculty (what we would call the college of arts and sciences, headed by philosophy), which are governed by their commitment to reason.<sup>35</sup> In their dependence on an external source of authority, their respective texts, the higher faculties are deeply empirical, ultimately superstitious. Their task is to interpret what the texts *really* mean, but the authority of the text is located in the world, external to the intellectual life of the professor. For example, the fact that a law may be perceived to be unreasonable does not make it any less authoritative, because the law's authority is not derived from its conformity to a professor's idea of what is reasonable, but instead from its status as law. It is the world that gives the higher faculties their authority. This thought can be expressed politically: the higher faculties are essentially expressions of the state. Moreover, as a matter of historical fact (the occasion for Kant's thinking, though hardly its limitation), the higher faculties in Prussia were under the direct supervision of the state.<sup>36</sup> In turn, the higher faculties in Prussia and elsewhere generally had certain regulatory powers, like the power to issue licenses.

In contrast, the lower faculty is autonomous, because the only authority it recognizes is the internal light of reason.<sup>37</sup> To continue the example above, a given position within the moral law, i.e., the law philosophically derived from *a priori* principles of morality, rather than empirically derived from the reading of texts, must be reasonable because only through reason can a position be maintained in philosophical discussion. In the lower faculty, what is not reasonably understood cannot be authoritative, and because understanding cannot be commanded, the lower faculty cannot issue orders. This is why the lower faculty is "lower"—it is politically lower, unable to command anyone. Instead, members of the lower faculty have a duty to say whether a proposition is true, that is, in accordance with the appropriate *a priori* principles. Because the lower faculty serves to propagate knowledge and has no other interests, the state should (and in Prussia generally did) leave the lower faculty more or less to its own devices. More to Kant's point, the state should not interfere with philosophical debates, that is, should censor scholars rarely, if at all.<sup>38</sup>

Kant is quite aware that his jurisdictional solution for the University is inherently unstable because reason—the lower faculty—can be expected to criticize the upper faculties, or tradition. Such criticism of exogenous authority is indeed the duty of the lower faculty. Over time,

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35. KANT, *supra* note 30, at 31-47.

36. *Id.* at ix.

37. *Id.* at 43-44.

38. *Id.* at 45-47.

the higher faculties can be expected to work themselves pure, that is, their empirical bases will be stripped of all that does not conform to their true natures (stripped of all that cannot be thought on a purely *a priori* basis). Christianity will be understood to be identical with natural religion; positive law will conform to natural law; medical practice will promote a healthy life as opposed to palliating symptoms and encouraging unhealthy indulgence. The conflict among the faculties thus ends with the total victory of reason. This is not a matter of mere academic interest. Since the political function of the University is to train professionals (servants of society or the state), the University may be understood to be the institution that places political life under the scrutiny of reason, and ultimately establishes political life on a foundation of reason. Rephrased in a way that should sound familiar to law professors, the conflict among the faculties ends when right becomes reasonable, when education creates a good polity.<sup>39</sup>

It is worth pausing to elaborate the position of law in this schema.<sup>40</sup> At least for the Kant of *The Conflict of the Faculties*, law is clearly one of the higher faculties, its authority derived from texts. The contemporary American law school, however, is at one and the same time both a higher and a lower faculty. In the law we teach our students, or at least for the lawyers we expect our students to become, the law is the expression of some authority—what the contract, the court, the legislature, or the regulator says. Such authorities need not be, and often are not, the voice of reason. Thus, even today, law is an expression of external authority, the voice of the state, and so should be taught in graduate or professional school. On the other hand, law professors' law, the law we think, write, and often teach, appears to answer to reason, and certainly pays little respect to other sources of authority. "The Supreme Court was wrong," we often say.<sup>41</sup> From this perspective, law is a species of political philosophy and is appropriately located within the lower faculty. The often remarked disjunction between teaching and scholarship, or the even more embarrassing disjunction between practice and scholarship, bespeaks a deep uncertainty about what authorizes our scholarly lives. It is just this uncertainty, this near schizophrenia

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39. *Id.* at 59.

40. As mentioned in note 34 *supra*, in the section devoted specifically to law, Kant asked about progress. Specifically, whether the authority of the law would come to be understood in reasonable terms, that is, in the republican terms of the revolution in France.

41. We might understand the contemporary American law school as interminably trying to complete the Kantian project of basing political power on reason, i.e., of perfecting the state in terms of reason. The Supreme Court is wrong because we can still perceive a disjunction between the state and reason. What has changed for many of us, and the sense in which the present offering is postmodern, is that we have lost our belief that this disjunction can be made to disappear.

between politics and philosophy, that Pierre's criticism so effectively exploits.

Even though the dispute that led to the publication of *The Conflict of the Faculties* was real, it is important to remember that Kant's subject here (and almost everywhere) is the life of the mind, and that tip of the iceberg we think of as Thought, rather than life itself. Kant is concerned with the limitations internal to autonomous minds. Because such limitations are internal to the enterprise of thinking (are "*a priori*"), they are knowable through critique. For example, Kant begins his discussion of intellectual authority with reference to actual faculties, his faculty, in traditional universities, in real places, like Koenigsburg. But Kant is hardly "situating" the text. *The Conflict of the Faculties* is not to be confused with understanding the particulars of faculty strife at Koenigsburg. In fact, the opposite is true: Kant is interested in the relations that must obtain in principle, as opposed to actual relations, if reason is to be institutionalized. For Kant, the question is what are the institutional relations that allow reason to flourish? His answer is that the lower faculty—philosophy—must be allowed to convert first the University, thence the state, to the party of reason. Kant, in short, requires a theory of the (always somewhat fictional) University, and indeed state, that could provide the institutional circumstances in which autonomy could be learned, practiced, and ultimately instituted in the wider society.

This is all very beautiful, even if somewhat impractical (hardly a devastating criticism of an expression of the mind as sufficient unto itself as any artwork). But even considered on its own terms, Kant's understanding of education as the development of Thought, unfettered rational autonomy, is highly problematic.<sup>42</sup> To use imagery that John Rawls made familiar: If the point of education is to produce autonomous individuals who decide questions disinterestedly, as if they were behind a veil of ignorance, then such individuals must try and forget their parents, their homes, their more recent loves, all those things that bind the

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42. In *Critique of Practical Reason* and the other moral works, and in *The Conflict of the Faculties*, Kant tried to make reason account for both truth and morality, both right and reason. Phrased negatively, Kant believed that ethical mistakes ultimately could be shown to be logical mistakes (a belief widespread even today among the legal professoriate). In *Critique of Judgment*, however, Kant realized that reason—at least as developed in *Critique of Pure Reason* and *Critique of Practical Reason*—did not suffice to generate moral thought from conceptual thought. Kant therefore turned to aesthetics, more generally, to the faculty of judgment, but it remained unclear how abstract thought, reason, was to generate particular prescriptions, right. That is, from the perspective of *Critique of Judgment*, I at least do not see how reason, even in theory, is to win the conflict among the faculties. Indeed, perhaps this is Pierre's main point in *The Enchantment of Reason*: Reason runs out before we reach the determinate prescriptions required for law and claimed by the professoriate.

heart and thereby restrict autonomy.<sup>43</sup> The Kantian adult has no memory of childhood, and even if this were to be deemed a good thing, it is difficult to imagine a process of education that proceeded without memory.

One might worry, as did Schiller the poet, that the Kantian scheme has no place for sentiment. What about those attachments, emotions, and passions that form so much of the human condition, but that clearly are impediments to autonomy? Are such things merely to be jettisoned in the quest for autonomy? This seems to put one in the strange position of arguing that “education” does not include art, not even poetry, or history, in the sense of the formation of a patriotic identity. Even if education somehow does not include art, how is the Kantian scheme to work as a theory of the reformation of the state if there is no way to tell histories? To repeat, and as Kant knew, the mind with which Kant is concerned is simply inhuman, but still worth studying. Thought is less than life, but is certainly important. Still, we might ask, along with Schiller and other Kantians, for more. We might, in short, make an unreasonable request for an actual politics, specifically a practical theory of the University.

In *Letters on an Aesthetic Education*, Schiller helps to make such a theory possible by decisively modifying the Kantian imagination of education.<sup>44</sup> Rather than reasoning from functionally defined faculties in some fictional University, presumably populated by autonomous minds, Schiller uses an explicitly aesthetic ideal of the cultured citizen to encompass the tension between right and reason entailed in intellectual, thereby University, life. Schiller’s modification, the move from reason to culture as the regulative ideal for intellectual life, is decisive because the cultured citizen is an ideal that is more capacious and complex, yet more easily attained, than Kant’s reason, or the truly autonomous mind required to perform reason. Schiller’s vision is more human than Kant’s, and though Schiller’s idea of the cultured citizen teaches us less about the limits of our thinking than Kant’s, Schiller’s conception is far more useful to the project of building a University. The University of Culture associated with Schiller and other Kantians therefore replaced Kant’s fictional University of Reason, and in time, an actual university,

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43. The imagery of the veil is from JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

44. Certainly Schiller was not alone in creating the German idea of culture. Readings concentrates on Schiller but also discusses Schleiermacher and Fichte. READINGS, *supra* note 24, at 62-66. Bloom pays attention to Goethe, Schiller’s mentor and friend. *See, e.g.*, BLOOM, *supra* note 25, at 302-04. Obviously, any discussion of a time as culturally rich and influential as Germany around the turn of the 19th century is bound to be an oversimplification.

University of Berlin, was built.<sup>45</sup>

In the University of Culture, one learned to be civilized (one might even say worldly), that is, one learned to encompass, tolerate, perhaps even appreciate, contradiction. This training for contradiction was accomplished by exposing the student to the dual endeavors of the University, research and teaching, which treated culture in different ways. Culture was the object of academic inquiry, the subject of science (*Wissenschaft*), which necessarily assumed that the researchers were already in a position to know about a thing. In contrast, the purpose of teaching was to become cultured, i.e., culture (*Bildung*) was a process that had not yet been achieved. In the University, then, culture had thus always already and never yet happened.<sup>46</sup>

It is this ambivalence about its own temporality that allowed the University of Culture to encompass the conflict between right and reason. Right could be understood in terms of the culture that had already been attained; reason might be understood in terms of our aspiration to know what we do not yet know. This very German notion of culture, as both process of *Bildung* and object of *Wissenschaft*, animates Humboldt's successful proposal for the University of Berlin (and the competing proposal by the Kantian idealist Fichte),<sup>47</sup> and hence the modern University.

Although this German talk is strange enough, the presumptions and intentions sound old-fashioned but still quite familiar, the stuff of graduation speeches. The purpose of the modern University is to train citizens to be critical thinkers. Critical thought is good for its own sake and for the sake of the polity. In a democratic republic, the citizen has a political duty to think critically, at least before voting. At the same time, the cultured citizen is a citizen, with allegiances to the state, and so understands that certain things are politically necessary. To put the matter in excessively philosophical terms, the cultured citizen understands that reason is not the only authority, and, therefore, that reason does not rule. The cultured citizen knows when to criticize (follow the internal dictates of reason) and when to stop reasoning and obey (follow the external dictates of political authority). The cultured citizen has judgment. Perhaps that is what it means to be cultured: able to encompass antinomies

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45. The labels "University of Reason" and "University of Culture" are Readings.' See READINGS, *supra* note 24.

46. The ambivalence that characterizes the University is highlighted when we regard other institutions of intellectual life: the academy does research but does not teach; it is beholden to truth but only faintly to politics. The high school teaches but does no research; it answers to the needs of the state but does not advance knowledge or engage in criticism.

47. READINGS, *supra* note 24, at 65-69.

like right and reason, just and true, democratic ideal and commercial decision, and indeed, adjudicate among them.

The modern University is thus founded upon culture, a context in which antinomies make sense. To understand a culture (in which contradiction abounds) requires a turn from reason (with its intolerance of contradiction) to aesthetics. This turn to aesthetics occurs in two senses. First (and for both Schiller and Kant), the ability to make judgments is often understood through aesthetics because it is in contemplation of beautiful objects that we experience the faculty of judgment most directly. But the faculty of judgment is not restricted to paintings; judgment is, indeed, required in order to be able to think at all.<sup>48</sup> Of particular concern to us, as just discussed, judgment is necessary to police the frontier between politics and philosophy, between right and reason, between willing and knowing. An aesthetic sense, the faculty of judgment as opposed to the reason of concepts or even of morality, thus emerges as the principle of coherence for our intellectual lives.

Second, our understanding of the role of judgment is made possible by an aesthetic in the ordinary sense, a congeries of images and presumptions that allows us to think. The modern University instantiates itself through what Pierre might call an unthought, a prefiguration of thought that facilitates the mind's mobility. Instead of Kant's faculty of reason exercised by a rather unspecified mind, the University of Culture is constituted by specific images of what it is to lead an actually thoughtful life, what Bloom imagines as the student as hero and the professor as old hero.<sup>49</sup> In *Ravelstein*, Saul Bellow uses Bloom himself as the imagination of such a life, and by extension—and in dialogue with his, Bellow's, own life—an inquiry into why, at the end of the day, we bother to think at all.<sup>50</sup>

The modern University thus answered the ancient conflict between right and reason, between power and philosophy, with an image of the University and the lives led within it, or trained by it. Humboldt's University and its progeny aspired to train men who were capable not just of criticism or allegiance, but of judgment.<sup>51</sup> This is the same aspiration

48. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050 (2002).

49. Readings on Bloom: "I am inclined to agree with Bloom's conclusion that the story of what he calls 'the adventure of a liberal education' no longer has a hero. Neither a student hero to embark upon it, nor a professor hero at its end." READINGS, *supra* note 24, at 7.

50. See SAUL BELLOW, *RAVELSTEIN* (2000); see also Saul Bellow, *Forward* to ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 11 (1987).

51. "As Fichte put it, the University exists not to teach information but to inculcate the exercise of critical judgment." READINGS, *supra* note 24, at 6. But Readings would agree with Lyotard that "[t]he old principle that the acquisition of knowledge is indissociable from the training (*Bildung*) of minds, or even of individuals, is becoming obsolete and will become ever more so." LYOTARD, *supra* note 25, at 4.



that we see in the Harvard of Charles Eliot Norton, or the Chicago of R.M. Hutchins, or Roosevelt's Brain Trust, the aspiration we mean when we speak of the liberalism of Walter Lippman, who understood thinking in explicitly republican terms, or, more darkly, when the Best and the Brightest went to Washington for Kennedy. As these examples suggest, the modern University's answer may be particularly crucial for the United States, which sought to understand itself as an Enlightened republic even after tidewater Virginia and patrician Boston became politically insufficient. The Decline of the University is the contention that such talk now seems quite old-fashioned, a contention that Americans especially should find threatening.

That the contention is now difficult to deny can be demonstrated by asking a sophomorically simple question: On what were the judgments of the cultured citizen to be based? How do such elite men know when reason should stop, know *comme il faut*, know when to stop talking and start executing? A serious answer appears to be unavailable, at least unavailable in the way in which the question is asked.<sup>52</sup> We are inclined to dismiss such talk of "culture" as economic privilege, European white male ethnicity or the like. While it is unclear what constituted the "culture" that came to define the University, there is widespread belief that such culture is no longer publicly and institutionally available—this, too, is what it means to say the University is in decline. What can it mean to talk about culture if, as Lyotard puts it, we are suspicious of metanarratives?<sup>53</sup> What can it mean to talk about culture if we believe the University to be a training ground for bureaucrats? What can it mean to talk about culture in the wake of the Twentieth century horrors, *Bildung* after Treblinka?<sup>54</sup> Or, in the wake of our solution to such hor-

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52. The question is bad in at least two other ways. First, it is a question of Reason, and the answer must be something that precedes Reason, and therefore opaque to Reason. "Reason is a myth that makes mythmaking impossible to comprehend." BLOOM, *supra* note 25, at 307. Second, the question seeks to unify judgment, and implicitly, forms of knowing. But from a postmodern perspective such as Lyotard's, unifying of forms of knowing no longer seems a sensible objective. We understand knowledge: (1) as a commodity; and (2) in terms of particular communities ("true" statements within a language game). For both reasons, we do not expect knowledge to unify even individual experience, much less to make experience communicable. I think, however, that modern experience is more profoundly homogenous than Lyotard is willing to countenance. A contemporary myth of the unity of knowledge (at least superficially) is hardly impossible, and may even be inevitable. Indeed, does not Lyotard tell such a story?

53. LYOTARD, *supra* note 25, at xxiv. One might be heartened to note that Lyotard then undertakes a historical account of the status of knowledge.

54. More pointedly for present purposes: what could culture mean for thought after Heidegger's Rectoral Address (*Rectoratsrede*), in which a (the?) leading twentieth century philosopher espoused the Nazi cause for reasons intimately bound up with his philosophy? The Rectoral Address is commented upon by Bloom, Lyotard, and Readings. See THE HEIDEGGER CONTROVERSY: A CRITICAL READER (Richard Wolin ed., 1991).

rors, global capitalism?<sup>55</sup> Or, perhaps most distressing to legal academics, what can it mean to talk about culture if we seek at least formal equality? If we need to talk about the concept of “culture” in such abstract and contested terms, the tacit and publicly shared understanding of what it is to be cultured no longer serves as a lodestone for our intellectual lives.

Pierre’s critique, that law professors’ law delivers neither on its claim to normative justification nor on its claim to reason, thus comes at an unpropitious time, when the University’s claim to have unified power and philosophy, to have made thinking morally respectable, even politically required, is losing its credibility. Pierre’s two books may be seen as a special—and for us law professors, crucial—retelling of the Decline of the University. Politics and reason now (again) appear to be two profoundly different undertakings, and our University, including the law school, is fundamentally a site for bureaucratic politics, not reason or culture. We have moved from the Kantian University of Reason, to the modern University of Culture, and finally to the postmodern University of Bureaucracy, which I call the “Mandarin University.” This leads to two inquiries with which the final two sections of this essay will be concerned. First, what can be hoped from our University, understood as a political, and more specifically, a bureaucratic, institution, headed by the law school?<sup>56</sup> Second, what can we say about philosophy, or just leading an intellectual life that we respect?

### III. THE MANDARIN UNIVERSITY

The Decline of the University is an argument about the changing meaning of the ideal institutionalization of intellectual life we call the modern University. It is not a claim that in the foreseeable future there will be no institutions known as universities. Indeed, there is no reason to believe that specific great universities, which have maintained institutional identities in some cases for well-nigh a thousand years, will disap-

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55. Actually, perhaps “culture” means quite a lot in the context of supranational capitalism. How the cultural understandings of global capitalism are useful to the contemporary University—as opposed to the modern University inaugurated by Humboldt—will be suggested at the end of this essay.

56. We thus see that the shift in the nature of the University reflected by the dominant faculty. For Kant and most of the nineteenth century, the dominant faculty was philosophy. In the twentieth century, and for reasons there has been no space to discuss, the dominant faculty may be imagined to be literature. See, e.g., READINGS, *supra* note 24, at 70. At the end of the twentieth century, the administrator replaced the professor as the central figure in the University. READINGS, *supra* note 24 at, e.g., Chapter II, “The Idea of Excellence”; see also LYOTARD, *supra* note 25, at 53 (discussing the “knell” of the age of the professor). If the administrator, the bureaucrat, has become the central figure in the University, it would seem to follow that the law faculty has become the central faculty.

pear. There will always be a Harvard. But “Harvard” does not mean what it once did. It could even be argued that, relative to the other institutions in society, the University has never done better. As already maintained, the University, understood as one bureaucratic institution among others, may claim to be the most encompassing, and hence noblest, of them all. To transpose the same set of developments into a slightly different key, once knowledge is understood to be intellectual property, then actual universities must be rich. And so they are. Transposed again, once politics is claimed to be the public intercourse of equals in a society based on financial incentives, then there is need for institutions to serve as the just arbiter and creator of inequality. We call this accommodation meritocracy, and the contemporary University is one of its central institutions. Universities assign resources to people, as kings used to assign lands to doughty knights. In short, universities are not about to disappear.

Similarly, despite the problems Pierre has diagnosed, the institution of the law school appears to be robustly healthy. While we still make nasty jokes about lawyers, it would be difficult to maintain that lawyers’ roles in society are diminishing or are likely to diminish. Particularly as we come to understand law as bureaucracy, and to understand our society as essentially bureaucratic, we should expect to see lawyers (and their ilk, e.g., persons trained in accounting or finance, often in addition to law) to be pretty much everywhere. The law school may be the temple of boredom, but the services never have been so well attended.

From this perspective, the practices of the law school are hardly indefensible. Even the case method is not so bad. Cases are a good way for young and inexperienced mandarins to learn how their society articulates conflicts. Cases teach students how to translate relationships into the idiom of law, that is, language formalized to facilitate bureaucratic discourse. They learn how to play out arguments, and thus begin to learn how to think sequentially and strategically. If they are really good, students will learn how to do this silently and so begin to think in a way we might call “Byzantine.” Perhaps most importantly, students begin to understand the idea of jurisdiction, that is, how to navigate among authorities. This may not be the very best way to train students, but it has a certain practical appeal.

A similar (self-consciously bureaucratic) argument could be made for orthodox legal scholarship. We live in a vast society that has to make some sort of sense to itself, and so it needs some sort of justification, and the places where that happens—officially happens—are bureaucracies. The idle prince among bureaucracies is the law school. But even princes have constraints, gentle though they may be. Not even

a law professor can simply say “the law says” and expect people to accept that truth as self-evident. So we law professors say, “here is the policy the law is trying to achieve,” and then tell a story of accomplishment, or exhort to further efforts, or argue for reform, as the situation warrants. Better yet, we may understand the issue at hand to implicate competing policies, thereby requiring “balancing.” For example, we might have a population of uneducated children, a history of de jure segregation, a bunch of buses, an incompetent city government, economic inequality, and parents trying to look out for their kids in a competitive society. That is a good problem for smart people, maybe even former Supreme Court clerks (princes of the blood?), to solve. We depend on bureaucracies, and bureaucracies entail normative reason, which is why law professors keep writing the articles Pierre bemoans. To do otherwise, to become bored, dis-“enchanted,” or “to lay down the law” is to leave the bureaucracy. Where would we go? And why bother? Our positions would be filled, and life would go on much as before.

The reason to bother, of course, is that we might have more respect for ourselves, and in that sense, be happier. The professoriate’s problem is that the Mandarin University does not inspire anything close to adoration, and we have “but one life to lose for [our] country.”<sup>57</sup> Contemporary understandings of the University are probably not wrong, they may even be quite right, but serving as an exchange for intellectual capital or a training ground for bureaucrats just does not lift the heart like “pursuit of truth.” Contemplating the sense with which we confront the Mandarin University (disengagement, boredom, even a shade of disgust?) brings us pretty close to what Pierre is really talking about: Pierre cares about Truth, and the Mandarin University is not about Truth. The Mandarin University is about power in the sense that mandarins care about, comfort and stability. Pierre may object vehemently to this characterization of his position. “Truth” is certainly at odds with the postmodern intentions and methods of Pierre’s writing. Indeed, the word, Truth, sounds so archaic that I must mean it as a provocation. I do, which is childish of me, so let’s substitute Lyotard’s impeccably postmodern phrase, “the honor of thinking.”<sup>58</sup>

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57. The line is reputedly the last from the young American spy and Yale graduate Nathan Hale, a tale charmingly retold for children by the Central Intelligence Agency: “The British executioner asked if I had any final words, and I told him, ‘I only regret I have but one life to lose for my country.’” Central Intelligence Agency website, at <http://www.cia.gov/cia/ciakids/history/nathan2.html#2>.

58. JEAN FRANCOIS LYOTARD, *THE DIFFEREND: PHRASES IN DISPUTE* xii (George Van Den Abbeele trans., 1988) (1983).

Pierre cares about this honor. I know, because over time, discussions between him and me have taken on a characteristic pattern: He criticizes anointed intellectuals—usually law professors but sometimes judges—for being insufficiently careful with their thinking and for advancing claims under the cover of reason, like MacDuff's army under bushes. I respond: "But seriously, Pierre, what else could you expect? What makes you think such people want, can, or have time to be so reasonable? Moreover, if reason is half as limited as you say it is, why do you expect these people to reach their decisions through careful reasoning? For them, for all of us, reason means reasonably enough." Pierre has little patience for this forgiving, maybe even patronizing, line of thought, and often says, usually with a degree of exasperation, "but these people claim to be intellectuals!" Sometimes in those very words.

Such conversations reveal three aspects of Pierre's thinking that have only become evident to me with the passage of time. First, as already mentioned, Pierre takes reason, thinking, very seriously. Underneath the pomo apparatus, there is an almost reactionary—if I can use that word in the best possible sense—quality to Pierre's thinking. Conversely, Pierre is relatively unmoved by sources of authority that might compete with reason, such as faith, tradition, experience, and so forth, although he does have a soft spot for beauty. Second, like Kant on a gloomy day, Pierre is pretty sure that reason is almost useless in our real worlds, that reason will fail in its ambition to specify itself adequately enough to satisfy the reasoning mind. Third, and antithetically to the second, Pierre expects to see good ideas institutionalized.<sup>59</sup> Although he understands his institution to be bureaucratic and to be generating bureaucracy, Pierre still expects to find the pursuit of truth somewhere in the law school, perhaps the faculty lounge.

From this perspective, one can understand the undercurrent of anger in Pierre's work. Orthodox legal argument is offensive (to someone who cherishes reason for its own sake) insofar as it uses reason as a way to make claims that merely help realize a political interest. My major premise; my minor premise; my conclusion; my team wins; I win. Pierre sounds like Plato charging the sophists: "You sound like you are making an argument, but you are merely lying in logical terms." For Pierre, most of legal argument is a very thinly veiled power grab: "Just what kind of game is it where some of the players not only play the game, but get to referee and 'reconstruct' the rules as they go along?"

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59. I considered entitling this essay "The Last Philosophe," i.e., Pierre may be the last person to expect actual institutions to meet serious standards of reason. I think, however, that the more important thrust of Pierre's work is fundamentally anti-political, and therefore "The Last Philosophe" is a bit inapposite.

This sounds an awful lot like being a judge in one's own case."<sup>60</sup> This is not argument in pursuit of truth; it is argument in pursuit of power. Legal scholarship is not philosophy, it is ideology, and as such, it is offensive to those who care about philosophy. *The Enchantment of Reason* can be read conversely: it is Pierre who is enchanted with reason, and it is his very enchantment that makes him so intolerant of the sins committed in reason's name. From a philosophical perspective, the deployment of reason in the law school is appalling. In this reading, *The Enchantment of Reason* is intensely, painfully, Socratic: unwilling to countenance the final authority of the culture that permitted its composition. My point is so old-fashioned that it is easily missed, especially by those who understand their intellectual lives in terms of their political commitments. To be blunt, Pierre's books are at bottom anti-political, and therefore outside the Enlightenment paradigm (the unification of right and reason) that makes it possible to talk about a stance called "the left." For what it is worth, Pierre appears to sympathize with the political mainstream of the professoriate, that is, he appears to be a left-leaning liberal.<sup>61</sup> Even were Pierre to feel otherwise about *Lochner*, in light of his critique, how could he seriously be upset at the substantive political commitments of law professors? After all, whatever lies law professors tell tend to be rather harmless because nobody reads most law review articles. Perhaps telling lies to students is worse than writing bad articles, but most students understand that whatever the law school game is, it is quite different from the law practice game. While being a professor clearly has a moral aspect, like any job, that morality is more limited in scope than we like to admit. Most of us have some students who take us seriously, somewhat fewer such readers, and for them we should try to do our jobs right.<sup>62</sup> Thus, for most of us, the moral tasks at hand are fairly modest.

This may be a problem. It is a bit disappointing to learn that our professional lives are not dramas in which we are heroes, struggling for good on the field of pain and death. It would be flattering, but ultimately silly, for Pierre to understand law professors (or even judges) as ideological dragons who oppress the countryside, to be unmasked, slain by the sharp sword of our analyses. Pierre, to his credit and in marked contrast to much progressive scholarship, does not delude himself that he is some sort of St. George. Society may be evil (as opposed to what?), and we may be critical, even radically so (why not?), but the

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60. SCHLAG, ENCHANTMENT, *supra* note 3, at 37.

61. See, e.g., *id.* at 33 (agreeing with Dworkin and Amar).

62. Moral categories are perhaps unavoidable but exceedingly difficult to use in the context of writing.

idea that we can make the proletariat happy with a few more hours in the library (more currently phrased: the idea that one more transgressive artifact will do the trick) is strange indeed, for all the uses the old left pose still has for moral accreditation in the academy. For Pierre, politics is barely a distraction.<sup>63</sup>

Unfortunately for us, neither the moral worthiness nor the practical triviality of our thought is much of an excuse. In Pierre's acid view, the legal professoriate's thinking is in bad form, and it is as thinkers that he finds us wanting. He persists in believing that the University is defined as a space for nurturing thought and that it should be a space where reason is deployed for reason's sake, where thought is free to be tentative, useless, elegant. The University should be a place where speculation without moral or other utility is possible, where we could consider thinking as we do other labors of the spirit such as music or poetry, as something beautiful and admirable, but ultimately useless, existing for no purpose beyond appreciation. In a community devoted to the pursuit of truth, one might hope that thinking itself—rather than boredom—would be glorified.

But the University in which Pierre believes is a place very different from the Mandarin University where we work. Our University explicitly understands itself in the competitive terms of the marketplace; it

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63. There is, of course, another sense in which Pierre's work may be read as a critique of modernization, and therefore the work of law professors is implicitly political, even constitutional. See, e.g., SCHLAG, *LAYING DOWN THE LAW*, *supra* note 4, at 149. "To be a fit subject of law in our age is in effect to be a bureaucrat—to pay one's bill's on time, to manage one's money, to buy insurance . . .," or at page 166, suggesting that "we stop treating 'law' as something to celebrate, expand, and worship." *Enchantment* ends in a similar vein: "Law will use (and use up) the materials at hand to fortify and extend its dominion. . . . Given the chance, law will appropriate, consume, and corrupt any cultural or intellectual resource—including reason itself." SCHLAG, *ENCHANTMENT*, *supra* note 3, at 145. But this reading of Pierre's work must be treated with caution. First, the "politics" toward which Pierre gestures is merely a different name for the grammar of modernization that he explicates. Such politics is not the object, purpose, or even in the interests of the legal professoriate (or of judges); it is simply part and parcel of what they do in being law professors. "And [normative legal thought's] end is coextensive with the operation, performance, reproduction, and proliferation of bureaucratic practices and institutions." SCHLAG, *LAYING DOWN THE LAW*, *supra* note 4, at 35. Second, Schlag has little patience for the specific, especially good, policies that legal scholars tend to imagine provides their justification. "Normative legal thought—this form of thought so concerned with producing normatively desirable worldly effects—has, ironically, become its own self-referential end." *Id.* Third, and as we have seen before in the tradition stretching from Nietzsche to Weber and Freud, to thinkers like Foucault, the specific normative imperatives that stem from one's awareness of a process of modernization are, to say the least, hazy. To critique the possibilities of thought hardly provides much of a plan for action. Fourth, Pierre has only gestured toward some idea of political life that law, in its expansion, precludes. His books, to date, are about the expansion of law's dominion, not the territory conquered. If and when he writes a book outside the law, about life understood in terms other than the operations of bureaucratization, we might be able to understand Pierre to deliver a critique that was "political" in the everyday sense of the word.

understands its mission as the achievement of “excellence” in whatever service is for sale. To use the traditional divisions, scholarship is openly regarded on the model of the applied sciences as property, and serves entrepreneurial functions for both individuals and their institutions. Teaching is understood to be training students for a meritocratic labor market. Rather than a place where useless thought is glorified, the Mandarin University is instead an integral part of our political economy, and what could be more useful than that?

Insofar as the Mandarin University has a transcendent meaning, it appears to be returning to its roots in theology, hence the relatively recent emphasis on “service.” (Scholarship and teaching are not service enough.) In a development often ridiculed as the emergence of political correctness, the University’s role as a public conscience appears to be growing. The Mandarin University is a place for adopting moral stances, not necessarily, indeed quite rarely, in the service of a pragmatics, but instead because people often need to understand themselves as moral.

Kant, reason, lost the conflict among the faculties. We find ourselves in a university that is profoundly, literally, genetically, political—the Mandarin University generates much of the contemporary social order. The University indoctrinates the young and sends them to their places within the world, defines the social bond by setting the terms of acceptable discourse, and articulates a moral stance for the whole. Unsurprisingly, the moralizing stance generated by the University is reasonable, and claims to be authoritative because it is so reasonable. Reason is the professoriate’s great strength (their advantage over the rich and the beautiful), and reason’s formalized structures comport well with the other aspects of modern life, particularly administrative bureaucracy and markets. For us in the Mandarin University, reason is not the play of thought, but instead the articulation of our society’s good. We may play at being transgressive, but we are anything but critical. *Ideologie, c’est moi.*<sup>64</sup>

#### IV. THE PROFESSOR AS DOUBLE AGENT

If we can make our peace with the Mandarin University—with the University understood in terms of politics as opposed to the terms of

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64. With apologies to Louis XIV (“l’etat, c’est moi”), and Duncan Kennedy (“George Bush, c’est moi”). Duncan Kennedy insists that *his* statement about George H. Bush only makes sense with reference to Flaubert (“Madame Bovary, c’est moi”), i.e., that we construct our interlocutor. While I am delighted with the thought that George Bush makes criticism possible, Duncan also knows that we lose (never had) control of our own statements. In particular, the content of our statements, even if they be loyal opposition, or radical critique, does not free us from participation and responsibility. We teach law, and that means a lot besides what we intend.



philosophy—then how, if at all, are we to do philosophy? In the abstract, we might take up Kant's project anew and try to establish an institution that would be safe for philosophy. As argued above, however, this possibility does not seem available to us at this juncture in history. The difficulty becomes obvious if we think in practical terms: How can we imagine the legal academy responding to the charge that it is boring? With what resources can we imagine the law school reformulating itself as intellectually compelling? (The boredom of law school is hardly the end of the world. Most jobs are boring. But law professors do not believe they are paid for "just doing a job.") After reading Pierre, and if we are honest with ourselves, it is difficult to imagine a mode of discourse that simultaneously: (1) is about law; (2) can be instituted (bureaucratized in a functioning university); and (3) is worthy of the honor due to thinking. Yet, if the law school cannot be made safe for philosophy, what can be expected from the institution? After we concede the limitations that our institutional context places upon our thought, what do we, the theoretically minded members of the academy, do? Is there anything left? Or should we abandon the practice of thinking about law and simply deploy arguments and wait for summer?

Here is where Pierre's turn from the judge to the professor is crucial. He invites us to reconsider not what the law is, but what it is to be a legal intellectual. What is it scholars do? We read, think, talk (not necessarily in that order), but most concretely, we write. The writing and reading of a law review article is the central activity of the law professor, more central even than teaching. Nowhere else does the law professor have the power she has in the article, so if the article does not succeed, one may fairly ask whether any aspect of the professor's enterprise succeeds. We could, therefore, distill Pierre's two critiques of law professor's law—the critiques of normativity and of reason—into a genre criticism, an attack on the law review article. And the attack succeeds (or do you enjoy reading law review articles?). Law review articles, by and large, fail for the reasons Pierre indicates; they do not achieve their explicit intentions of rational persuasion to a determinate normative end, and they have no other redeeming value. For the law professor, this is significant: the failure of the law review article to achieve its intentions calls into question the entire enterprise of being a law professor, the ideal of intellectual life of which the article is the concrete expression.

The collapse of the law review article, however, may also be seen as an opportunity. If we feel that this inherited ideal of legal scholarship no longer makes sense, we might make a change by adopting a new mode of expression, and in the process a new modality of thought. To

be bluntly normative: we could modify the nature of scholarship by abandoning its characteristic form, the law review article, with its pretensions to summation, determinate analysis, and more or less binding prescription, and write something else. But what should be written in lieu of law review articles? There are no doubt others, but four plausible, and not completely distinct, ways we might write for the legal academy spring to my mind: (1) perennial critique; (2) a turn to aesthetics; (3) history/external social critique; and (4) the essay. Each of these possibilities is problematic.

### 1. *Perennial Critique*

As Pierre has shown and the history of cls has rather convincingly demonstrated, the law school is quite comfortable with perennial critique. It has become just another perspective, routinely offered up whenever it is time to canvas the available positions with regard to this or that policy question. Moreover, normativity's claims on our interest are not so easily silenced: what is this for, we often ask, in spite of, or alongside, even an admired analysis.

### 2. *The Turn to Aesthetics*

The turn to aesthetics is probably inevitable in law; indeed, it may be happening now. Aesthetics means at least two things, but both are too difficult to be much use to the legal academy. First, there is the philosophical and theoretical sense: as suggested above, liberalism turns toward judgment. It would therefore be surprising if we did not hear a great deal more about aesthetic approaches to law, much as we have heard a great deal of talk about the need for legal thinking to be self-consciously pragmatic. But neither Arendt, Cassirer, nor Kant himself lived long enough for a convincing account of the role aesthetics (judgment) plays in the life of the mind. In light of the intractability of the problem, it would be unsurprising if aesthetics proves to have even less purchase on our intellectual lives than recent talk of pragmatism.

Second, "aesthetics" might also mean an effort to do legal scholarship in ways that are formally expressive, satisfying, or powerful, with little regard to the explicit or even rational character of their internal logic. In short, we might try to confront law through artistic modes. But while law is a magnificent subject for art, it is very hard to be a good artist, and few good artists are good in the way bureaucracy requires, regularly. Moreover, the character expected by the legal academy (a competitive obsession with relative and institutional indicia of intellectual standing, such as grades) is at war with the character we associate with being an artist (somewhat independently convinced of the rightness

of a vision). In short, telling law professors to become artists is only slightly more ridiculous than telling law professors to become professional wrestlers.

### 3. *History/External Social Critique*

My colleague Jack Schlegel believes that the only real hope for legal scholarship is to treat law as an object of study, from which we would try to learn something, perhaps even make some generalizations, much as other disciplines, like history or sociology, treat a particular social arrangement. The legal academy might aspire to collect some theories about legal practices, relatively general descriptions of specific legal interactions such as negotiating with a bureaucracy, putting together a commercial transaction, passing goods from one generation to the next, and so forth. I think Jack is right, at least with regard to teaching, and attempting to generalize about our actual practices is a big part of how we teach transactions at the University at Buffalo. That said, I doubt that such a chastened idea of scholarship can satisfy the emotional longings of legal scholars. So much legal scholarship is clearly an effort to understand social life as profoundly meaningful, and to express that search for meaning in some professionally acceptable way. We write as if history turned on our texts, which rarely amount to much more than a sequence of footnotes, suffused with a grand narrative. If our scholarship is written against a backdrop of intense alienation and insecurity, then it is difficult to see how saying something reasonable about some aspect of legal life, e.g., the dynamics of a commercial real estate market, could be satisfying to that cadre of minds who do the bulk of publication in our law reviews.

### 4. *The Essay*

This brings me to the essay: It would be good for us to confront our meanings, or meaninglessness, more directly, even nakedly. What do we think, really, and why are these thoughts worth thinking, much less discussing, for people who have other things to do? From this perspective, the intellectual's primary responsibility toward the law would not be to explain it (we usually do a bad job), justify it (ditto), critique it, or make it better (law could be improved, but few projects are as ineffectual to that task as the law review article). The job of the intellectual would be to articulate his or her own true thoughts about the law; the form of such articulation is the essay.

The question answered by the essay is always some version of “how have I come to this place in my thinking?” As Musil has it, an essay is not a provisional or incidental expression of a conviction capable of being elevated to a truth under more favorable circumstances or of being exposed as an error (the only ones of that kind are those articles or treatises, chips from the scholar’s workbench, with which the learned entertain their special public). An essay is rather the unique and unalterable form assumed by a man’s inner life in a decisive thought.<sup>65</sup>

To say that the essay, properly understood, is the form of our scholarship is to say that the job of the intellectual is self-critical: the intellectual’s job is to make his or her own commitments to law, or more frighteningly, rebellions from law, able to be thought, even spoken. Rephrased, the topics are complicity and betrayal. Law school could be the place where power meditates on its exercise, contemplates its sins. Critique could be carried on in the face of an understanding that these are our practices, our commitments, or our rebellions. If the purpose of the medieval intellectual was to gain knowledge of God, the purpose of the contemporary intellectual could be to resuscitate such old-fashioned ideas as truth in light of complicity. Why? Because someone who confronts their own complicity—the consequences and even horror of their own truths—is respectable. It is not the only way to be respectable, but it is the sort of respect we should give minds who turn their reason upon their own situations.

It will not work, of course, as Jack argues, the essay will not become the central mode of legal scholarship.<sup>66</sup> Let me add a bit to his denial of my thought. The essay does not lend itself to teaching. The form requires great discipline, and that is very hard to teach. Moreover, the essay does not lend itself to establishing hierarchies, such as the grading system, or to obtaining teaching positions. But it is scholarship where the essay presents insurmountable difficulties. Taking the essay seriously would require a level of honesty and tough-mindedness evident almost nowhere in the contemporary academy, which is structured around narratives of blame and redemption. In particular, the reflective quality of the essay raises great temptations to confess, if not our sins, then our own moral worthiness. A legal academy structured around “thoughtful” essays might be an even more whiny place than the current academy. For all these reasons, the essay is not a great solution to the institutional poverty Pierre describes so well.

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65. ROBERT MUSIL, *THE MAN WITHOUT QUALITIES* 273 (Sophie Wilkins & Burton Pike eds. and trans., 1995) (1952).

66. John Henry Schlegel, *But Pierre, If We Can’t Think Normatively, What Are We to Do?*, 57 U. MIAMI L. REV. 955 (2003).

Although the Mandarin University does not know what reflection is good for, perhaps nonetheless reflection can be tolerated, even afforded, in the space of the University.<sup>67</sup> For those who care about the honor of thinking, the University is best seen to support intellectual life rather than the armature for thought itself. Being a professor is not a bad way to afford to think. A professorship is much more attractive than poverty, which is too cruel to bear in a meritocracy; a professorship is a form of patronage acceptable to a polity without a viable aristocracy; a professorship provides a sinecure in a society where most labor markets are brutally efficient. From the Mandarin University, in short, one may write essays. The question, “how, if at all, are we to do philosophy?” can now be answered: we are to do philosophy in the spare time we have at school. The University allows us to be double agents, quietly serving reason even as we fulfill the mandates of the state. And for protecting the possibility of philosophical thought, a degree of respect is due even to the Mandarin University.

As faint as that note is, let me close on a barely audible tone. If we understand the essay to be a narrative about a mental journey, the story of how we have come to think, we tend to write essays about places that are special, that were difficult for us to reach. In writing essays, we say to our imagined readers, “this is what I think, and it was a close call, an adventure getting here—let me tell you about it.” What honestly strikes an essay’s author as a problem is also likely to seem problematic to other people, that is, there may be an audience. And if the author is a member of the upper reaches of a powerful society, for example, a law professor in the United States, the author’s wrestling with such a problem may have a political quality. There may be actual readers. Pierre, for example, has readers, which he richly deserves. It is unlikely, but possible, that readers might be persuaded, or even more, might actually do something. In writing essays we, maybe even Pierre, seem to hope for at least the scant community of an audience. Perhaps we even hear whispers of politics.

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67. If knowledge is the subject of expertise, “exteriorized,” LYOTARD, *supra* note 25, at 4, then it is unclear what role something so internal as reflection could play.