

4-1-2003

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Recommended Citation

Maria Grahn-Farley, *An Open Letter to Pierre Schlag*, 57 U. Miami L. Rev. 755 (2003)

Available at: <http://repository.law.miami.edu/umlr/vol57/iss3/14>

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An Open Letter to Pierre Schlag[©]

MARIA GRAHN-FARLEY*

This letter is a written version of my spoken address on the works of Pierre Schlag at the symposium, *Beyond Right and Reason: Pierre Schlag, the Critique of Normativity, and the Enchantment of Reason*, at the University of Miami School of Law, hosted by Pamela and Michael Fischl.¹ This letter is written with respect and appreciation for Pierre Schlag's work and I prefer that it be read with that in mind. I truly respect and appreciate the contribution Pierre's work makes to the legal academy by unmasking the myths through which law and politics find their authority to rule. These are also the myths that make citizens perceive that they freely have given their consent to being ruled over.²

Pierre describes *The Empty Circles of Liberal Justification*³ as the multiple myths⁴ constructed out of a liberal thinking to merge the con-

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I want to express my deepest gratitude to Pamela and Michael Fischl for opening up their home and not only making everyone feel warmly welcome but also making the conference on Pierre Schlag's Critique of Normativity and the Enchantment of Reason a meeting of friends. I also want to specially thank Pamela for giving so generously of her own time in the midst of her own professional responsibilities. I want to thank Phyllis Goldfarb, whom I have thanked so many times before in my work, but also to whom I can never often enough repeat my gratitude for her support as a friend and as a scholar in the important field of feminist theory. Keith Aoki has always been of great support ever since we met my first week in America. I want especially to thank Peter Goodrich and Linda Mills for their great help. I also want to thank my fellow panelists: Deborah Maranville, Duncan Kennedy, David Westbrook, and Patrick Gudridge for insightful comments, which were inspirational as well as challenging. I am grateful to Pierre Schlag for giving such friendly comments regarding this letter and for supporting its publication. Finally, I want to thank my wonderful husband Anthony Paul Farley for all his support and time.

1. *Beyond Right and Reason: Pierre Schlag, the Critique of Normativity, and the Enchantment of Reason*, 22-24 Feb. 2002, University of Miami School of Law.

2. Pierre Schlag is Byron White Professor of Law at the University of Colorado. He teaches constitutional law, torts, and jurisprudence. He has published across a broad range of fields, including theory, antitheory, disciplinarity, deconstruction, interpretation, ethics, law and economics, and postmodernity. His most recent books include *THE ENCHANTMENT OF REASON* (1998) and *LAYING DOWN THE LAW* (1996).

3. Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1 (1997) [hereinafter *The Empty Circles*].

4. *Id.* at 12.

flicting concepts of authority, reason, and freedom⁵ into the paramount hierarchical norm, the so-called constitution.⁶ This is done through the myth that Pierre named a “constitutional narrative,” which takes place in 1787 when the people⁷ speaking as one, “We the people,” also consent⁸ to become citizens and to be ruled over and, at the same time, to be the rulers.⁹

One important aspect of the mythology of the liberal state is that its citizens¹⁰ make themselves into liberal subjects to fit the self-image of the liberal state.¹¹ This transformation is accomplished through the construction of the liberal subject as an empty abstraction:¹² “The empty subject has to perform as a fitting symbolic, psychological, and political representation of the full subject.”¹³ The empty subject is authorized through law to rule over the full subject (the citizens).¹⁴ This circular justification is repeated on the political level.¹⁵

The Empty Circles of Liberal Justification was the first jurisprudence article I read as I was completing my LL.M. at Gothenburg University in Sweden. I read the article while attending a specialized course in international public law at Stockholm University. After four years in law school and at the beginning of my fifth year, I was quite dizzy and disoriented from so many loops around the circles of legal education.¹⁶

In his book, *The Enchantment of Reason*, Pierre uses Edgar Allan Poe’s short story, *The Purloined Letter*, to illustrate “the way in which academic disciplines miss their mark,”¹⁷ because, as he says in his own words:

[P]recision and exactitude are not everything. The police in “The Purloined Letter” learned this point the hard way: with all their care and caution, they missed the letter. The detective explains why: the methods of the police are “but an exaggeration of the application of the one principle or set of principles of search.”¹⁸

5. *Id.* at 7.

6. *Id.* at 3-4.

7. *Id.*

8. GEOFFREY BENNINGTON, *Post Politics and the Institution of the Nation*, in LEGISLATIONS: THE POLITICS OF DECONSTRUCTION 240, 248-49 (1994).

9. *The Empty Circles*, *supra* note 3, at 7.

10. BENNINGTON, *supra* note 8, at 248-49.

11. *The Empty Circles*, *supra* note 3, at 33-34.

12. For a discussion on the relationship between race and gender in liberal legal theory see Maria Grahn-Farley, *The Law Room*, 36 NEW ENG. L. REV. 29 (2001).

13. *The Empty Circles*, *supra* note 3, at 35-36.

14. *Id.* at 36.

15. *Id.* at 37.

16. Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681 (1996).

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

18. *Id.*

My open letter is a friendly challenge to Pierre the legal theorist to approach his own purloined letter.

I do not know Pierre very well as a person, we have only met twice. I am familiar with him through his legal scholarship. My friendly challenge to Pierre is to go towards the places where his work would be appreciated and understood in ways that it deserves. Pierre writes of the legal academy's self-identification with the judge:

The self-identification of legal thinkers with the figure of the judge also yields what might be called *the juridification of legal thought*. It is through this self-identification that all manner of habits, rhetorics, even forms of social organization proper to judges become part of American legal thought. The intellectual vehicle for this transposition is the internal perspective. But again, it is the implicit self-identification of the legal thinker with the judge that produces the results—many of which are radically anti-intellectual.¹⁹

I challenge him to go to the places where he will be able to ask questions and receive answers. Places where the legal academy does not have the internal perspective created by the self-identification with judges. I identify those places to be feminist theory and critical race theory.²⁰

As I read the work of Pierre I find a lack, there is something missing. Pierre's wonderful, intelligent, and imaginative ways of communicating *The Empty Circles of Liberal Justification* or *The Problem of the Subject*²¹ have been of tremendous value to the legal academy and to me personally. The way he is *Laying Down the Law*²² is both masterful and beautiful. The way he leaves it up to the reader to observe and to evaluate the white-senior-tenured-male academia of the eighties and nineties is crucial for both a general understanding of legal education and for an understanding of the specific role that legal education serves in upholding the mystic beliefs in law as normative and at the same time objective and truthful.

Pierre talks about the violence of the law²³ but he does not talk about those whom the violence of law serves or those whom the violence of law violates. Pierre describes the practice of liberal justification as a way to make possible coexistence between difference and same-

19. Pierre Schlag, *Anti-Intellectualism*, 16 *CARDOZO L. REV.* 1111, 1118 (1995).

20. See *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (Francisco Valdes et al. eds., 2002); *CRITICAL RACE FEMINISM* (Adrien Katherine Wing ed., 1997); *COLETTE GUILLAUMIN, RACISM, SEXISM, AND IDEOLOGY* (1995); *GLOBAL CRITICAL RACE FEMINISM* (Adrien Katherine Wing ed., 2000); *FEMINIST PERSPECTIVES ON LAW & THEORY* (Janice Richardson & Ralph Sandland eds., 2000); *RESPONSIBLE SELVES: WOMEN IN THE NORDIC LEGAL CULTURE* (Kevät Nousiainen et al. eds., 2001); *FEMINIST LEGAL THEORY* (Frances E. Olsen ed., 1995).

21. Pierre Schlag, *The Problem of the Subject*, 69 *TEX. L. REV.* 1627 (1991).

22. PIERRE SCHLAG, *LAYING DOWN THE LAW* (1996).

23. *ENCHANTMENT*, *supra* note 17, at 104.

ness²⁴ by finding identification between the ruler and the ruled.²⁵ One place where this is done is in the “constitutional narrative,” mythologically placed in 1787, of “We the people.” Angela Harris writes that the myth, “We the people,” only works “as long as the contradictory voices remain silent.”²⁶ Groups that have been silenced in the myth of “We the people” have been women and people of color. Women of color have been silenced by men as well as by white women.²⁷

Vilhelm Lundstedt, a Scandinavian Realist, argued that it is impossible to justify legal punishments from a position of justice because a justification of punishment through law is dependent on the perspective of the observer.²⁸ Lundstedt argued that it is not justice that is the cause for punishment through law, but utilitarianism.²⁹ Everything is based on causality and not on culpability, and without culpability one cannot justify punishment through law.³⁰ According to Lundstedt, the imagined morality of labeling specific acts as criminal and punishing those acts through law serves a collective utilitarian purpose, namely, social order.³¹ Punishment through law serves the need of the society to control specific behaviors.³² To do so through law is to make the punishment seem to be a natural consequence of specific behaviors, through this people are conditioned to recognize specific acts as naturally prohibited.³³ Lundstedt argued that punishment does not have any effect at all on the individual criminal because it is other factors such as the social context of the person’s childhood and the social context of the person at the time of the criminalized act that determine whether a person will become a criminal or not.³⁴ This perspective of the law has been labeled “The Sacrificed Animal Theory.”³⁵ According to this theory, the criminal is a martyr in the name of law and social order.³⁶

Pierre Schlag’s work only takes the first step, to unveil the non-rational in the belief in reason as a way to explain the way law operates

24. *The Empty Circles*, *supra* note 3, at 10.

25. *Id.* at 7. See Bennington on the construction of the citizen. BENNINGTON, *supra* note 8, at 248-49.

26. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 583 (1990).

27. Harris writes about the risk that the experiences of black women in the women’s movement will be silenced for the sake of “We the women.” *Id.* at 586, 588.

28. KARL OLIVERCRONA, *GRUNDTANKAR HOS HÄGERSTRÖM OCH LUNDSTEDT* 20 (1972).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 21.

34. *Id.*

35. *Id.*

36. *Id.* at 20.

and the way law should operate. Pierre's work does not identify the martyr in the context of an American social order. Pierre's work does not either identify what in an American context would be the social order that has to be protected through the mysticism of law.³⁷

Pierre's work found its way to Stockholm University at a special time in my life. A few months earlier I had an experience, or rather, I experienced another person's experience of a quite brutal home situation. This other person was a young immigrant girl who lived in a violent family situation. She had turned to me for help, and I had in turn turned to law for an answer.

My background—I was born in South Korea and raised in the north of Sweden after being adopted by Swedish parents—gave me a unique ability to move between the immigrant and the Swedish communities without much friction. This and the fact that I am of female gender might have facilitated a trust to grow between the immigrant girl and myself, and to later blossom into a deep friendship. I believe that on a personal level I have benefited and suffered from being identified as an Asian-looking woman, or as “a woman of color,” a term I learned after moving to the United States. My friendship with this immigrant girl is a source of joy to me just as the sexism and racism that causes women of color so much pain is a constant source of sorrow.

I had been searching for an answer in law on what to do and how to help her. Not as a surprise to you, the reader, but as a surprise to me at that time, law gave me an answer but it was the wrong answer. The answer was that there was nothing law could do about the situation. The answer was that the young immigrant girl is the martyr and that the sacrifice of her is the price Swedish people pay in the name of social order to hold on to their belief that law is coherent.

In legal terms this is called a “frame law.”³⁸ This means that it is up to the social service to decide when a family situation is so violent that it has to be interfered with, either in ways that support the family as is, which later became the case in this family, or in ways that interrupt the family by removing the girl from her home, which she did not want.

I am glad to tell the reader that the girl today is a student at one of the universities in Sweden and that her family today, after quite massive support from the Swedish government, is what would be described as a normal happy family. This was not the case at the time that I picked *The*

37. SCHLAG, *supra* note 22.

38. A “frame law” is a law that serves as a frame for a specific area of life inside which the representatives of the state are, through law, given the authority to exercise their “common sense.” Many of the laws regulating social services are frame laws that give the social services extensive authority to exercise their common sense onto the people in need of their services.

Empty Circles of Liberal Justification up from the shelf in the law review section of Stockholm University.

The girl's family was at that time considered to be too dangerous for the social services to intervene. There had been some highly publicized cases of immigrant (and other) clients assaulting and at times killing social services representatives.³⁹ This family was considered to be that type of "risk" family. There was no doubt that there was brutal violence occurring in the family, but what made the social service decide that it was a much too dangerous family to intervene with was the fact that they were an immigrant family. The family violence was directed towards the young girl due to the fact that she was female. The social service even went so far as to conclude that the life of the girl was in acute danger and, because of that conclusion, to ask me if I could intervene and take the girl out of the family. They explained to me that they assessed it to be too dangerous for them to do so, but they encouraged me as a fellow citizen to take on the case.

This experience taught me about the violence that is the price of the desire for the coherence of law, and about the impact race and gender have on the outcome for those who, according to reason, become the martyrs of law and social order. In this case the martyr was a young immigrant girl. The law abandoned and would have sacrificed the girl. I took a semester's leave of absence from my own studies and intervened on her behalf. She and I together were able to find a way through that difficult time of her life.

It was in this situation that I picked up the blue cover of *The Empty Circles of Liberal Justification*. I felt that my thoughts about law could find resonance in Pierre's work, so I went further and read most things that I could find through the law library and Pierre's web page.⁴⁰

It is here Pierre and I part ways. The work of Pierre is the beginning but not the end of where I want to go. The way his work describes white-adult-male hegemony in the United States looks similar to white-adult-male hegemony in Sweden. This is also where Pierre and I part.

I do not disagree with Pierre at all regarding his descriptive descriptions of white-adult-male power. The big difference between Pierre and me is not our understanding or perception of white-adult-male power, the big difference is that Pierre finds it to be an interesting place to stay and I find it to be an interesting place to leave. The places that I find to be not only of interest but to be the core of my society are the same

39. Oscar Hedin-Knut Kainz Rognerud, *Socialsekreterare Knivhuggen på Kontoret*, AFTONBLADET INRIKESNYTT, July 30, 1998.

40. Pierre has an excellent Web page with many of his articles accessible through the Internet, at <http://stripe.colorado.edu/~schlag/> (visited on Feb. 28, 2002).

places Pierre refuses to go. They are the places where he feels that he has nothing to say or to add. I might even agree with him here, that he might not have much to say or to add in those places. Where we deeply disagree is whether those places are interesting or important to Pierre's work. I believe that those places are most important to his work because they are places where he might not have much to say or to add and, at the same time, they are places where he has much to hear and to learn.

It is not only a quantitative question that Pierre does not footnote feminist theorists, and footnotes even fewer critical race theorists, it is also a qualitative question, not about Pierre as a person, but about the impact and quality of his work. As I read his work up until now, I find it has a lack.

To Pierre's credit, he recently attempted to deal with his own lack by referring to critical race theory and feminist theory in what can be interpreted as Pierre's "Lost and Found Section," and is in Pierre's own words referred to as section III C, "Missing Perspectives," in *The Aesthetics of American Law*.⁴¹ Pierre dedicates almost two pages of his seventy-one page Harvard Law Review article to women and people of color combined and their once *lost* but now *found* perspectives on law.⁴²

I mean two things by lack: First, I mean that his work is incomplete, it is incomplete in the sense that it focuses on a very incomplete part of legal academia. Duncan Kennedy⁴³ expressed this as praise and I expressed this as a failure in the work of Pierre. We expressed our thoughts on the same panel in Miami when, in the presence of Pierre, we were both invited to comment on his work.

The legal academy that Pierre describes is a very narrow group, in a very narrow time, in a very narrow space. The group he and Duncan bond over is their mirror image: white-adult-males.⁴⁴ The time described according to Duncan is the eighties and early nineties. The space described is a secluded section of the law faculty. It is the white, senior, tenured, male faculty within mainstream American law.

Second, the lack in Pierre's work also symbolizes to me the wish that there will be more. That there should be more: more intellect, more

41. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1085-87 (2002).

42. See generally *id.*

43. Duncan Kennedy, Presentation on Panel IV, on February 24 at the Symposium: *Beyond Right and Reason: Pierre Schlag, the Critique of Normativity, and the Enchantment of Reason*, 22-24 Feb. 2002, University of Miami School of Law.

44. As Duncan remarked in an interview on the relationship between those in the critical legal studies movement and their predecessors: "These authoritarian older men really scared everybody to death; no matter where you were coming from it was very difficult not to experience them as the avenging father type." Gerald J. Clark, *A Conversation with Duncan Kennedy*, *ADVOCATE*, Vol. 24, No. 2 (Spring 1994).

clear-sightedness, more fun, more creativity, more newness, more people, more spaces, and more times. At the same time that Pierre expresses a wish for more, his work focuses on the narrowness of people, space, and time. While he is determined to never step outside of the narrow group of people he has made into his center, while he is determined to never step outside of the narrow space he has made into his center, while he is determined to never step outside of the narrow time he has made into his center: He calls for more.

It is possible that what he is looking for might be found at the very same places to which he refuses to go, the places of feminist theory and critical race theory, places where it is very clear who the martyrs of law and social order are, places where it is very clear which law and social order is protected, places where it is very clear whose coherency is upheld.

I ask the question that Pierre does not ask: WHY? Why does Pierre not go there? Why does he not go where he would find answers to so many of the dilemmas and paradoxes that occupy his work?

I have a thought about this, and I want to clarify that what I will present as a possible answer is only based on Pierre's work and not on him as a person. In *The Problem of the Subject* he writes:

If you are a young liberal thinker circa 1975, you experience this jurisprudential rhetoric not at all as an exercise of reasoned argument (which it represents itself to be), but as a kind of rhetorical police action—the intellectual or discursive equivalent of police lines. Not only are there things that you cannot do or say—lines you cannot cross—but you are not even permitted to talk about the fact that there are lines you cannot cross or inquire into the whys of wherefores.⁴⁵

Pierre continues:

Not only are you prevented from making the kinds of arguments and articulating the kinds of visions of law you want, but you are being groomed (like it or not) to become the next Dean Rusk of Property, the next Dr. Kissinger of Contracts, the next William Westmoreland of Torts. In a word, you are being asked to become the one thing you are quite sure you don't want to become: "Dad."⁴⁶

I support Pierre completely when he rejects the objectification imposed on him through the gaze of his senior colleagues. Even though many women and people of color have the same problem in reverse—that racism and sexism prevent white-tenured-senior-American mainstream-law faculty to see women and people of color as anything close to the next Dean Rusk of Property, the next Dr. Kissinger of Contracts,

45. Schlag, *supra* note 21, at 1680-81.

46. *Id.* at 1681.

the next William Westmoreland of Torts—it still is a worthy cause to reject and resist objectification.⁴⁷ And also to refuse to serve with your body as the sign which people with power over you can read their own desires into your very flesh.⁴⁸

Pierre's critique of normativity could be interpreted in the light of Scandinavian Realism as a rejection of manipulation and as a refusal to do what "Dad" tells you to do. Pierre's work, in this light, is an effort to resist subordination and objectification, the very same thing that women and people of color in feminist theory and critical race theory have explored and expanded as the core of their scholarship.⁴⁹ To reject normativity is to fight the desires that the voice of "Dad" summons within your body.⁵⁰ Pierre's rejection of normativity is a rejection of "Dad" but at the same time a fetishization of "Dadhood."

Pierre's relationship to "Dad" is a complicated one. As with most bad relationships that persevere through bad times, it does so through the hope that the good times will make up for the pain caused by the bad times.

Pierre stays in this bad relationship he has with the "Dads" of legal academia, he cannot move himself away from the gaze of "Dad," and at the same time he cannot feel happy under the gaze either. He keeps arguing and fighting them, he keeps explaining to them what they do not want to hear, he keeps asking them what they do not want to answer. All in all, it seems to be a rather exhausting relationship.

Pierre is not alone in staying in a bad relationship. The color line, the gender line, the class line, are all symbols of bad relationships that seem to persevere both in time and through space. One way in which those bad relationships are maintained and nurtured is through the hope and the belief that one day, white-senior-tenured law professors doing American mainstream law will understand and change. One way in which the color line, the gender line, and the class line are all maintained and nurtured is the normative language of rights.

To understand a right is to already have understood a lack. To connect the self to a right is to also connect the self to a lack. To understand the self as incomplete, as not yet done, as missing, is to understand one's rights. A right does not give a direction, it fixes us to where we are. Rights are to women and people of color as "Dad" is to Pierre; the

47. For a discussion on the connections between signs and the authority of the legal professional actor, see Peter Goodrich, *Europe in America: Grammatology, Legal Studies, and the Politics of Transmission*, 101 COLUM. L. REV. 2033, 2049 (2001).

48. Maria Grahn-Farley, *Not for Sale!*, 17 N.Y.L. SCH. J. HUM. RTS. 271 (2000).

49. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

50. For a discussion of the desire of the flesh see Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457 (1997).

hope that there will be another day, and that that day will be a better one than the present. One day women will be equal to men, one day people of color will be equal to people without color, one day "Dad" will tell you that you were right all along. Rights are to women and people of color what the gaze of "Dad" is to Pierre. It is the magic power of law and legal reasoning that frustrates us, that teases us, but most of all that fascinates us; it fascinates us so much that we would rather stay where we are than break out of the liberal circles of empty promises and empty justifications.

To be able to understand a lack, a norm has to be understood. We need a norm against which we can measure the distance between where we are today and where we are going tomorrow. The norm against which women and people of color are measuring their arrival is the master norm of white male hegemony. The norm against which Pierre is measuring his arrival is the master norm of white male hegemony. It is against this norm that a lack can be understood and a sense of what we are not can help us to define who we are. It is against this norm we have an understanding of what we are made to be less than; less than white, less than men, or less than tenured faculty. Pierre writes:

Indeed, you have just landed in a rhetorical zone whose recursive argument pathways (such as neutrality, objectivity, universality, and a curiously intense fascination with authority-based arguments) immediately rule out or disable your kind of argument as extralegal and overly political, not to mention bad and probably nontenable.⁵¹

The attempt to reach the master norm through a normative rights language is indeed a project doomed to fail.⁵² The attempt to reach the master norm through dialogue is a project doomed to fail. The master norm itself is invisible, the master norm is of non-substance, and the master norm is unreachable because it does not exist as a fixed entity. The master norm is only visible through its effects, through its function. The master norm operates out of a power relationship and its function is to uphold that relationship. The master norm, because it is functional, will always, from a descriptive and normative perspective, remain unreachable and in constant flux. Its function is to uphold the power relationship and so it will not matter with how much reason we argue reason or unreason. Because reason itself is defined out of a power relationship, between the one who has the power to define reason and the one who does not have the power to define reason, the power relationship will determine what is and what is not reason. It will not matter if

51. SCHLAG, *supra* note 22, at 1681.

52. On this point, Pierre and I are in agreement. See Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 170 (1990).

we argue reason or non-reason with or without reason. All that will matter is who has the power to define reason and who has the power to define what is reasonable. This is where Pierre has both much to give and much to gain from looking away from all the “Dads” of legal academia, and looking instead towards feminist theory and critical race theory.