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Paper Tectonics

Patrick O. Gudridge*

I begin with Herman Melville and Thomas Bernhard.

Legal writing is often and rightly enough an ant-like exercise, an effort to take up the work of others and extend or alter it, in the process passing the project on to the next in line. It is therefore important, I think, to seize outside treatment of law wherever we find it, to try to appreciate whatever the particular effort shows us about the structure and possibilities of our ordinary work that might not be so visible in familiar, close at hand forms. To this end, I look closely at two Melville stories -- *The Paradise of Bachelors* and *The Tartarus of Maids* is perhaps not widely read, but *Bartleby, the Scrivener* is of course famous. I also extract passages from Bernhard's novel *Correction*. Both writers are preoccupied by paper, by its ubiquity and proliferation and legal concomitants, significant notwithstanding utter ordinariness. A largely excluded possibility within contemporary jurisprudence emerges, I want to suggest. Roughly the last half of this essay elaborates on this opportunity, propagating terms like "documentary substrate," "paper tectonics," and "legal seismics." Readers run risks, therefore.

I. Melville, Paper, Law

There is nothing new, of course, in the suggestion that works of Herman Melville might offer readers provocative ideas or images of law. Sometimes, we know, legal process is an immediately evident and obviously integral part of the story (in *Billy Budd*, for example.)¹ In any case, we ought not to be surprised if

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In other work, I initially sketched somewhat different versions of parts of the approach that I develop in the latter sections of this essay. See Patrick O. Gudridge, *Title VII Arbitration*, 16 BERKELEY J. EMP. & LAB. L. 209, 263-65 (1995); Gudridge, *Mit Schlag (Repetitions)*, 57 U. MIAMI L. REV. 607, 625-28 (2003); Gudridge, *An Anti-Authoritarian Constitution? Four Notes*, 91 MINN. L. REV. 1473, 1487-90 (2007).

¹ The necessary reference is, of course, Richard Weisberg, *How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist*, 57 N.Y.U. L. REV. 1 (1982). For judicial perspective, in a careful and extended recent essay, see Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103 (2004).

Melville sometimes wrote about legal matters given his father-in-law, the famous Massachusetts Chief Justice Lemuel Shaw.² I am not interested here, however, in straightforward, foreground presences. Rather, I look at law in the background, call attention to a maybe distinctively Melvillean stress, evident even if treated as given in *Tartarus* and *Bartleby*.³

A.

Herman Melville's story *The Paradise of Bachelors and The Tartarus of Maids*, first published in 1855,⁴ brings together two accounts -- about a dinner a narrator

² See Brook Thomas, *The Legal Fictions of Herman Melville and Lemuel Shaw*, 11 CRITICAL INQUIRY 24 (1984).

³ Brook Thomas discusses *Bartleby* at length in his magisterial essay and briefly juxtaposes it with *Tartarus*. See Thomas, *supra* note 2, at 34-39. Professor Thomas, working out the implications of his juxtaposition of Melville and Chief Justice Shaw, is more interested in how Melville's preoccupations overlap the substance of American judge-made common law as Shaw (and others) were working it out at the time. In this respect, Thomas's essay foreshadows his later important book: BROOK THOMAS, AMERICAN LITERARY REALISM AND THE FAILED PROMISE OF CONTRACT (1997). For other recent, interesting discussions of *Bartleby* from legal academic perspectives, see, e.g., George Dargo, *Bartleby, the Scrivener: "A House Like Me,"* 44 NEW ENG. L. REV. 819 (2010); Alfred S. Konefsky, *The Accidental Legal Historian: Herman Melville and the History of American Law*, 52 BUFF. L. REV. 1179, 1219-45 (2004) (also briefly discusses *Tartarus*).

⁴ I will cite to a readily available recent republication. See Herman Melville, *The Paradise of Bachelors and The Tartarus of Maids*, 1 THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 2277 (4th ed. 1994) [hereinafter *Tartarus*]. The reading of this story that I develop here is, as far as I can tell, considerably different from other recent glosses that, for reasons that will become obvious even within my account, emphasize notions of gender, sexuality, class, and knowledge. Thus, for example, Wai Chee Dimock treats this story in *Residues of Justice* as one illustration among many others of the tropes of disproportion and incompleteness, one confirmation of the ubiquity of the theme of "misfit justice" in nineteenth century American literature. She calls attention to what readers today (at least) might regard, somewhat uncomfortably, as Melville's altogether over the top depiction of the London diners -- all men, it turns out. Melville's emphasis on their bachelor status and (what Dimock reads as) their effeminacy tends toward (what she thinks we would today regard as) homophobia. See WAI CHEE DIMOCK, RESIDUES OF JUSTICE: LITERATURE, LAW, PHILOSOPHY 84 (1996). The workers in the paper mill, in contrast, are all (except for supervisors) unmarried women, all wan servants of the machinery, all victims. "Melville offers . . . a contrasting tableau of privilege and oppression, rendered in the idiom of class as well as the idiom of gender." *Id.* Dimock emphasizes Melville's failure to recognize commonality, the possibility of commensurable lives. Women workers of the time, we know, and Melville might have recognized too, were sometimes anyway not at all as he portrayed them. Free of family bonds, empowered by the financial rewards of factory work, sustained by new friendships with co-workers: women workers (some of them, anyway) may well have considered themselves genuinely better off. *Id.* at 87-88. For extended consideration of the question, juxtaposing *Tartarus* with other, contemporary depictions, see DAVID S. REYNOLDS, BENEATH THE AMERICAN RENAISSANCE 351-57 (1988). For other discussions, see, e.g., MICHAEL PAUL ROGIN, SUBVERSIVE GENEALOGY 201-08 (1979); Elizabeth Rodrigues, *Melville's The Paradise of Bachelors and The Tartarus of Maids*, 66 THE EXPLICATOR 164 (2008); Sarah Wilson, *Melville and the Architecture of Antebellum Masculinity*, 76 AM. LITERATURE 59, 71-72 (2004); David Hurley Serlin, *The Dialogue of Gender in Melville's The Paradise of Bachelors and the Tartarus of Maids*, 25 MODERN LANGUAGE STUD. (No. 2), p. 80 (1995); Karen A. Weyler, *Melville's "The Paradise of Bachelors and the Tartarus of Maids": A Dialogue about Experience, Understanding, and Truth*, 31 STUD. SHORT FICTION 461 (1994); Philip Young, *The Machine in Tartarus: Melville's Inferno*, 63 AM. LITERATURE 208 (1991); Robyn Wiegman, *Melville's Geography of Gender*, 1 AM. LITERARY HISTORY 735 (1989).

attends in London, and a visit the same narrator makes to a paper mill somewhere in New England. Melville sets up an explicit equation at the end of his account of the paper mill: "Then, shooting through the pass, all alone with inscrutable nature, I exclaimed -- Oh! Paradise of Bachelors! and oh! Tartarus of Maids!"⁵ Perhaps this is "only an obligatory apostrophe."⁶ The narrator, however, repeatedly refers to his London experience while visiting the mill. We are, as readers, invited -- indeed, pressed -- to solve the puzzle of his juxtaposition. The last sentence sets out two obvious points of departure. It is the bachelors and the maids who are to be contrasted or equated. Or, read literally, it is the Paradise and the Tartarus -- the dining room and the factory. Taking this second tack supposes, before the process of comparison itself, some additional description. It is easier, I think, to begin with the paper mill.

The women workers are machine tenders. "Machinery -- that vaunted slave of humanity -- here stood menially served by human beings, who served mutely and cringingly as the slave serves the Sultan. The girls did not so much seem accessory wheels to the general machinery as mere cogs to the wheels."⁷ The machinery as such, at one level, is what is remarkable about the factory. "Yours is a most wonderful factory. Your great machine is a miracle of inscrutable intricacy."⁸ But Melville's narrator more often finds the most striking aspect of the paper-making machines is their combination of biology and mechanism. The paper itself is so obviously organic at the outset: "a white, wet, woolly-looking stuff, not unlike the albuminous part of an egg, soft-boiled."⁹ Even at the end it is "piles of moist, warm sheets" attended by a woman who was "a nurse formerly."¹⁰ The workers themselves are transformed perilously by the mechanical process, which literally enters into their lives.

To and fro, across, across the sharp edge, the girls forever dragged long strips of rags, washed white, picked from baskets at one side; thus ripping asunder every seam, and converting the tatters almost into lint. The air swam with the fie, poisonous particles, which from all sides darted, subtilely, as motes in sunbeams, into the lungs.

....

⁵ *Tartarus*, *supra* note 4, at 2293.

⁶ DIMOCK, *supra* note 4, at 86.

⁷ *Tartarus*, *supra* note 4, at 2287.

⁸ *Id.* at 2292.

⁹ *Id.* at 2289.

¹⁰ *Id.* at 2291.

“What makes these girls so sheet-white, my lad?”

“Why . . . I suppose the handling of such white bits of sheets all the time makes them so sheety.”¹¹

The machinery itself seems to be at the same time mechanical and alive -- monstrous.

Something of awe now stole over me, as I gazed upon this inflexible iron animal. Always, more or less, machinery of this ponderous, elaborate sort strikes, in some moods, strange dread into the human heart, as some living, panting Behemoth might. But what made the thing I saw so specially terrible to me was the metallic necessity, the unbudging fatality which governed it. Though, here and there, I could not follow the thin, gauzy veil of pulp in the course of its more mysterious or entirely invisible advance, yet it was indubitable that, at those points where it eluded me, it still marched on in unvarying docility to the autocratic cunning of the machine.¹²

The paper ultimately produced is potentially of many uses. “All sorts of writings would be writ on those now vacant things -- sermons, lawyers’ briefs, physicians’ prescriptions, love-letters, marriage certificates, bills of divorce, registers of births, death-warrants, and so on, without end.”¹³ “All sorts of writings” perhaps, but we quickly grasp that most of the items on the list are legal documents of one kind or another.¹⁴ It is this fact, I think, that is the pivot, the fold that brings together the two stories that Melville’s narrator tells. The Tartarus is a factory; but the paradise, the dinner scene, is set specifically in London’s Temple precincts, formerly the domain of the Knights Templar, who were supplanted (after their banishment) by the Inns of Court, combination legal offices and lawyers’ housing. The “bachelors” -- Melville emphasizes -- are lawyers, at home at work just like the paper mill “maids.”

Does this mean we should somehow equate the situations of the lawyers and the factory workers? The lawyers, at their dinner, have a wonderful time, eat and drink and talk exuberantly (albeit civilly). The workers, by contrast, are slowly dying, victims of the machinery they serve. Or -- more complexly -- should we understand the lawyers to be in some sense like the factory

¹¹ *Id.* at 2288, 2289.

¹² *Id.* at 2291-92.

¹³ *Id.* at 2291.

¹⁴ See Weyler, *supra* note 4, at 466.

machinery? Melville's two accounts incorporate cues suggestive of this assimilation. For example, the paper-making machinery is powered by the "red waters" of "Blood River"; the feasting lawyers "[a]ll the time, in flowing wine, . . . most earnestly expressed their sincerest wishes" ("the decanters galloped round").¹⁵ In the mill, each woman who processes the rags which become the raw material for paper stands before a "vertically thrust up . . . long, glittering scythe, . . . The curve of the scythe, and its having no snath to it, made it look exactly like a sword."¹⁶ (It is these scythes which chop up the rags, thus creating the particles the women inhale.) The sexual imagery here is obvious.¹⁷ But Melville's narrator draws a conspicuously legal analogy:

Yes, murmured I to myself; I see it now; turned outward, and each erected sword is so borne, edge-outward, before each girl. If my reading fails me not, just so, of old, condemned state-prisoners went from the hall of judgment to their doom: an officer before, bearing a sword, its edge turned outward, in significance of their fatal sentence. So, through consumptive pallors of this blank, raggy life, go these white girls to death.¹⁸

The narrator's description of his dinner with the lawyers starts with its location ("not far from Temple-Bar"¹⁹), evokes the Knights Templar and their ambiguous history, plays with the conceit of the Templars alive in contemporary London, and finally identifies their successors (not just in tenancy):

But the iron heel is changed to a boot of patent-leather; the long two-handed sword to a one-handed quill; the monk-giver of gratuitous ghostly counsel now counsels for a fee; the defender of the sarcophagus (if in good practice with his weapon) now has more than one case to defend; the vowed opener and clearer of all highways leading to the Holy Sepulchre, now has it in particular charge to check, to clog, to hinder, and embarrass all the courts and avenues of the Law; the knight-combatant of the Saracen, breasting spear-points at Acre, now fights law-points in Westminster Hall.

¹⁵ *Tartarus*, *supra* note 4, at 2288, 2281, 2282.

¹⁶ *Id.* at 2288.

¹⁷ DIMOCK, *supra* note 4, at 85.

¹⁸ *Tartarus*, *supra* note 4, at 2289.

¹⁹ *Id.* at 2277.

The helmet is a wig. Struck by Time's enchanter's Wand, the Templar is to-day a Lawyer.²⁰

First, the factory machinery is associated with swords; second, swords are associated with legality; and third, legality is associated with (is the successor to) swords. Shouldn't we also associate -- in some sense equate -- factory machinery and law and lawyers?

What happens, what are we led to notice, if we take seriously an analogy of the lawyers in Paradise and the Tartarus machines? The lawyers are machine-like, presumably, in their work; insofar as their dealings with each other are patterned or repetitive, and insofar as the result is some product -- obviously law, or legal documents of various types. Perhaps the dinner is a kind of allegory of legal process. If so, it is easy to explain the otherwise somewhat curious prominence of the waiter who organizes, administers, presides over the feast -- "a surprising old field-marshal . . . with snowy hair and napkin, and a head like Socrates"²¹ -- and who is responsible for the decorum of the event: the waiter is either judge or judge's bailiff. That the dinner's entertainment is not conversation but "all sort of pleasant stories" now matters: anecdote is, perhaps, a model for common law ("a sort of pell-mell, indiscriminate affair, quite baffling to detail in all particulars"); indeed, one among the anecdotes (presented as of a piece with the others) is "a funny case in law."²² That the dinner is set in London is also now telling -- again, common law.

If it is thus the common law that is (or we may suppose to be) Melville's subject, then the characterizations of the paper mill machinery become jurisprudential criticism. "[I]nscrutable intricacy" -- but also, we readily note, "metallic necessity," "unbudging fatality," "autocratic cunning." "It *must* go."²³ In all of this there is also the theme of heartlessness. It is this which is the source of the paradox, the essential monstrousness as it were, of the identification of the machinery with "some living, panting Behemoth"; it is this which Cupid, the factory tour guide, in effect the machinery's spokesman, exemplifies: "More tragical and more inscrutably mysterious than any mystic sight, human or machine, throughout the factory, was the strange innocence of cruel-heartedness in this usage-hardened boy."²⁴ "[S]trange innocence," "cruel-heartedness," "usage-hardened": *this too is the monstrousness of lawyers, of the common law.*

²⁰ *Id.* at 2278.

²¹ *Id.* at 2281.

²² *Id.* at 2282, 2281, 2282.

²³ *Id.* at 2291, 2292.

²⁴ *Id.* at 2291, 2289.

Seemingly “a city by itself,” the lawyer-templars, preoccupied by their rituals of self-entertainment, ignore the results: “marriage certificates, bills of divorce, registers of births, death-warrants, and so on, without end.” “So, through consumptive pallors of this blank, raggy life, go these white girls to death.” *The lawyers do not care*²⁵ -- Melville’s narrator is perhaps not so much appreciative or envious as outraged:

The thing called pain, the bugbear styled trouble -- those two legends seemed preposterous to their bachelor imaginations. How could men of liberal sense, ripe scholarship in the world, and capacious philosophical and convivial understandings -- how could they suffer themselves to be imposed upon by such monkish fables? Pain! Trouble! As well talk of Catholic miracles. No such thing. -- Pass the sherry, Sir. -- Pooh, pooh! Can’t be! -- The port, Sir, if you please. Nonsense; don’t tell me so. -- The decanter stops with you, Sir, I believe.²⁶

“Systematic gaiety,” Michael Rogin observed.²⁷ His characterization of the fate of the paper workers, we can see, implicates the lawyers as well. “Mechanical production does not replace human labor; it takes it over.”²⁸

B.

Bartleby, the Scrivener appeared in print in 1853, two years before *Tartarus*.

Bartleby -- solitary, stubborn, uncooperative -- captures the reader’s attention. He seems to personify something important, to stand as critique of something basic in economic or other social arrangements. As every reader knows, Melville supplies remarkably little to work with, makes Bartleby so much a “man without qualities,” makes this absence of personal history so central to the story, that it is this absence -- this ultimate opacity -- that sticks in memory, making *Bartleby, the Scrivener* a provocative, moving riddle.

It is always a surprise, therefore, to remember that as written *Bartleby, the Scrivener* is not first and foremost Bartleby’s story -- but rather, his unnamed

²⁵ See Weyler, *supra* note 4, at 463. Robyn Wiegman calls attention to “the bachelors’ intellectual and moral bankruptcy,” Wiegman, *supra* note 4, at 736.

²⁶ *Tartarus*, *supra* note 4, at 2282-83.

²⁷ ROGIN, *supra* note 4, at 201.

²⁸ *Id.* at 204.

employer's. "I AM a rather elderly man."²⁹ The narrator is a lawyer, involved in a transactional practice recently supplemented by work as a chancery master (taking testimony, etc.). It is because of the new business that Bartleby comes on the scene:

Now my original business -- that of a conveyancer and title hunter, and drawer-up of recondite documents of all sorts -- was considerably increased by receiving the master's office. There was now great work for scriveners. Not only must I push the clerks already with me, but I must have additional help. In answer to my advertisement, a motionless young man one morning, stood upon my office threshold, the door being open, for it was summer. I can see that figure now -- pallidly neat, pitiably respectable, incurably forlorn! It was Bartleby.³⁰

By this point in the story, about a quarter of the way through, readers have had the chance to become well too acquainted with the narrator: he is, as Melville sets things up, speaking directly, full (too full) of good humor, self-satisfaction, and a certain cluelessness. The other employees -- and their barnyard nicknames (Turkey, Nippers, Ginger Nut) -- are already characterized at length, and the day to day, ordinary skirmishing that is part of the business of managing scriveners has become clear. It is something like the politics of organizing the efforts of temperamental working animals (we find it easy to suppose that this is how the narrator conceives of it).

From this point, Melville presents the famous account of Bartleby's oddly limited work routines ("I would prefer not to"), his use of the office as living quarters, and his employer's difficulty in devising a successful way to remove him from the premises. The narrator sketches his several strategies. He asserts hierarchy: "Bartleby, quick, I am waiting."³¹ He gives reasons for his requirements (or requests): "These are your own copies we are about to examine. It is labor saving to you. . . . It is common usage."³² He treats Bartleby as an equal, as a gentleman: "I am pained, Bartleby. I had thought better of you.

²⁹ Herman Melville, *Bartleby, the Scrivener*, 1 THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 2234 (4th ed. 1994).

³⁰ *Id.* at 2238.

³¹ *Id.* at 2240.; For a brilliant, provocative discussion stressing Bartleby himself, identifying him with both the work and the implicit jurisprudence of his employer's chancery business, see CORNELIA VISSMAN, FILES 29-38 (2008).

³² *Id.*

I had imagined you of such a gentlemanly organization, that in any delicate dilemma slight hint would suffice."³³

But in the end the narrator succeeds by treating Bartleby as a legal problem -- as a problem to be solved transactionally, through means commonplace in the narrator's own practice. We witness the narrator thinking like a lawyer:

What! surely you will not have him collared by a constable, and commit his innocent pallor to the common jail? And upon what ground could you procure such a thing to be done? -- a vagrant, is he? What! he a vagrant, a wanderer, who refuses to budge? It is because he will *not* be a vagrant then, that you seek to count him *as* a vagrant. That is too absurd. No visible means of support: there I have him. Wrong again: for indubitably he *does* support himself, and this is the only unanswerable proof that any man can show of his possessing the means so to do. No more then. Since he will not quit me, I must quit him. I will change my offices; I will move elsewhere; and give him fair notice, that if I find him on my new premises I will then proceed against him as a common trespasser.³⁴

Bartleby, of course, does not leave the old office. The narrator now finds himself legally positioned to deny any obligation in the face of protests by the landlord and the new tenant. "[B]ut, really, the man you allude to is nothing to me -- he is no relation or apprentice of mine, that you should hold me responsible for him."³⁵ And thus, when the landlord summoned the police, who arrested Bartleby and incarcerated him in the prison within which he would shortly die, the narrator acquiesced:

When again I entered my office, lo, a note from the landlord lay upon the desk. . . . It informed me that the writer had sent to the police, and had Bartleby removed to the Tombs as a vagrant. . . . At first I was indignant; but at last almost approved. The landlord's energetic, summary disposition had led him to adopt a procedure which I do not think I would have decided upon myself; and yet as a last resort, under such peculiar circumstances, it seemed the only plan.³⁶

³³ *Id.* at 2250.

³⁴ *Id.* at 2253.

³⁵ *Id.* at 2254.

³⁶ *Id.* at 2256.

Ordinary legal transactions, altogether unremarkable, possess dramatic power. The narrator, having hired Bartleby to produce legal documents, realizes that he can rid himself of Bartleby (who refuses to leave after termination of employment), through execution of one or two such documents -- a notice to terminate a lease, and a new lease in a new building. Or so we may assume reading *Bartleby* the story within the point of view of its narrator -- he barely alludes to the details of the transaction in fact, censors reference to the pertinence of his own expertise (not surprisingly, given his commitment to denying responsibility for Bartleby's fate). With the narrator now legally irrelevant, Bartleby becomes a trespasser and is removed to jail at the behest of the landlord.

What ought we to conclude?

(a) It is more important to be a subject of -- to figure in -- legal documents than to be a maker of such documents. This is what the narrator finally realizes. He gives up asserting his law office authority -- his own status within the office -- and becomes instead his own client. Law is applied reflexively to regulate the process of its own production. People become paper. *Bartleby* -- the story -- thus conjoins or overlaps the two stories juxtaposed in Melville's *Tartarus*.

(b) Or rather: in *Tartarus* the workers become physically like paper in a process of manufacture which seems at the same time oddly biological (indeed sexual); paper also becomes like people. In *Bartleby* people matter only insofar as they are acknowledged on paper -- become marks on paper. There is no need to depict this process as remarkable, as in *Tartarus* -- it's just writing, so matter of fact as to disappear into the background within the story -- become its documentary substrate, as it were -- and not its decisive action.³⁷

(c) In *Tartarus*, in both parts, there is an intense sense of presence. Melville seems to mean to convey a feeling of what it's like for the narrator to be there, a feeling of both place and people. This feeling is not an impression of particular persons as distinct individuals; rather, it is a depiction of the narrator's perceptions -- point of view is pronounced. From the standpoint of the narrator, the principal impression is supersaturation: what's perceived is too vivid, too evocative, over-wrought -- too much. *Bartleby* is very different. The narrator initially evokes a similar sense of heightened local color in describing his office and its occupants. But Bartleby refuses to act in a way which can be brought within this thick description. He possesses no detail. And in the end, the narrator must deal with Bartleby by abstracting -- by reducing the office to its bare legal identity as property subject to transfer.

³⁷ People in *Bartleby* are often depicted enclosed -- in the office, in the carriage, in prison. It's something akin to existing only within the four corners of the document.

(d) The narrator realizes that the office is -- or may at any time be treated as -- nothing more than what it is on paper. If so, then the office -- and its occupants -- are subject to the manipulations paper makes possible. Specifically, paper tends to plurality -- it's "sheety" (the vivid term in *Tartarus*): one document leads to another, becomes subject to the logic of documentary relationships (addition, modification, substitution, etc.).³⁸

(e) The movement of the story is also a progression from hierarchy (the narrator's relationship with his long-time employees -- rustic squire-archy) through equality (the narrator's effort to deal with Bartleby as an individual subject to persuasion -- and Bartleby's seizure of the opportunity to refuse consent) to formality. The politics of paper is not necessarily either hierarchical or egalitarian although it might be either. It both supports and undercuts both usual status arrangements.

II. Bernhard, Accumulating Paper, *Correction*

Correction purports to tell the story of Roithamer, who decides to spend his inheritance constructing a house for his sister, located at the exact center of a large forest.³⁹ The house is built in the shape of a cone (and named accordingly: "the Cone"). Roithamer does not discuss this project with his sister, who becomes ill and dies shortly after visiting the Cone for the first time. He commits suicide. Thomas Bernhard spends surprisingly little space in *Correction* filling in the details of these events. Rather, the text presents two streams of consciousness. The first consists of the thoughts of Roithamer's literary executor (never identified by name). The second stream is as an accumulation of Roithamer's attempts to explain his project and himself, before and after his sister's illness and death, indeed down to just before his suicide.

In all of this, at scattered points but nonetheless prominently, documentary multiplicity figures as a preoccupation. Bernhard and Melville are cousins in a way. For example, this is a passage in *Correction* attributed to Roithamer, notably specifically legal in its reference:

[B]ut in fact the world is only held together by a patchwork of contracts, as we soon perceive, and in this network of hundreds and thousands and hundreds of thousands and millions and billions of contracts the trapped human beings are squirming. There's no way to get around contracts except by suicide.

³⁸ This paperly abstraction seems somehow of a piece (as it were) with the beautiful abstract patterns which show up in *Bartleby* in the descriptions of the office -- the black and white opposition -- and the prison -- the arrangement of brown and green.

³⁹ THOMAS BERNHARD, *CORRECTION* (Sophie Wilkins trans., Univ. of Chicago Press 1990) (1979).

Contracts everywhere, they've already choked everything to death, a whole world choking to death on its contracts, so Roithamer. To suppose that it is possible to exist without contracts or other written agreements and run away, anywhere at all, is to find ourselves soon caught again in contracts and written agreements, anyone who thinks otherwise is a madman, a malicious falsifier of the nature of things. It's only in childhood that we don't know what kind of a trap it is in which we squirm and despair and keep on despairing as we go on squirming in it, ignorant that these are the nets of contracts and other written agreements made by the grown-ups, by history. If anyone were to succeed in doing away with all these contracts and other written agreements, all he'd have accomplished would be the end of the whole world. In the future, where everything is possible, this too is possible. But so far it hasn't been possible, nor is it possible in the immediate future, so Roithamer, the foreseeable future is all contracts, written agreements, and the resulting fits of despair, impediments, sicknesses, causes of death, that's all. Our entire being is tied to contracts, written agreements, assessments, we're trapped in them for life, no matter what we do, no matter who we are. Still we keep trying all our lives to escape from these contracts and other written agreements, efforts as painful as they are senseless, so Roithamer.⁴⁰

On other occasions multiplicity becomes a methodological prerequisite. Documentary profusion calls attention to or indeed shapes the form of possible attempts at coming to grips, at "perspective," at ordering or making progress. Thus Roithamer also reports:

I had squirreled away in Hoeller's garret every conceivable book and paper I could lay hands on and that could be of use to me, as well as all the books and papers I could do without, and I'd torn the pages I most valued out of these essential books and papers and tacked them on the walls of Hoeller's garret, pages of Pascal, for instance, again and again, much of Montaigne, very many pages of Pushkin and Schopenhauer, of Novalis and Dostoyevsky, I'd tacked almost all the pages of Valery's *M. Teste* on the walls before I'd covered the walls of Hoeller's garret with my plans and sketches for building the Cone; to gain perspective I've always pasted or tacked all the papers important to me on my walls, even as a child I'd covered the walls of my room in Altensam with other people's most important (to me) ideas, pasted or tacked on, so I'd

⁴⁰ *Id.* at 153.

first covered the walls of Hoeller's garret with the most important sayings of Pascal and Novalis and Montaigne, before I'd tacked them up and pasted them up with my sketches and anyway all kinds of ideas for building the Cone, and so I always could immediately clear out of Altensam and move into Hoeller's garret and find refuge in Hoeller's garret in those thoughts on the walls of Hoeller's garret, the fact that it is possible for me to go to Hoeller's garret where I always found everything I needed for my thoughts and reflections, all those thoughts of other men and through them, also all my own thoughts.⁴¹

Profusion creates crisis for the literary executor. He accidentally tosses together all of the collections of Rothamer's papers that he had carefully acquired and kept separate -- as a result, in the course of contemplating the confusion, the executor abandons the editorial project he had originally planned:

For me to bring together all these bits and pieces, perhaps to put them in the right relation to each other so as to make a whole out of all these bits and pieces of his thought, something to be published, was out of the question, for I'd had to consider, from my first contact with Roithamer's papers, that they consist for the most part of mere fragments which he had intended to combine into a whole himself, after completing or perfecting . . . the Cone. . . . So what we have here are in fact hundreds, or thousands, of fragments which Roithamer left to me, but which I shall not edit, because I have no right to edit them, anyway no one has a right, no matter who is editing what, he never has a right to do it . . . I shall not commit this editorial crime, . . . I shall put Roithamer's papers in order, sift them, then possibly pass them on to his publisher, . . . I would sort and sift Roithamer's legacy, . . . but I will not edit it I won't change a line, I won't move a comma, I shall sort and sift it.⁴²

This passage is strikingly jurisprudential. "[R]ight relation" becomes "right to edit," or rather "no right" -- "this editorial crime." Why? Why is it proper to "put Roithamer's papers in order," to "sort and sift," but not to "change a line" or "move a comma"? In either case, we might think, the aim is the same, "to make a whole out of all these bits and pieces of his thought." Or perhaps this is the "editorial crime" -- to present the executor's own readings (own interpretations) as though they were Roitnamer's own. The "bits and pieces" need therefore to be respected, to be left unchanged within their own terms, left

⁴¹ *Id.* at 223-24.

⁴² *Id.* at 127-30.

as “mere fragments,” to be “sort[ed] and sift[ed],” “order[ed]” to this extent, but no more.

* * * * *

Scruples such as these, notably, are not matters for special attention within the main line of modern legal theory -- in the United States and Great Britain, anyway.

Jeremy Bentham recognized the problem that a multiplicity of instruments might create, calling attention to the proliferation of statutes in particular:

At present such is the entanglement, that when a new statute is applied it is next to impossible to follow it through and discern the limits of its influence. As the laws amidst which it falls are not to be distinguished from one another, there is no saying which of them it repeals or qualifies, nor which of them it leaves untouched: it is like water poured into the sea.⁴³

But for Bentham, the solution lay precisely in what Roithamer’s executor thought to be “editorial crime,” a wrenching exercise in *both* rearranging and rewriting:

Take then on the one hand all the imperative provisions belonging to the several laws that compose the code, add together their respective amplitudes: take on the other hand all the qualificative provisions belonging to the same laws, add together in like manner their respective amplitudes, on the other side; from the sum of the one combined with the sum of the other results the general character of the whole system.⁴⁴

Two centuries later, Joseph Raz echoes Bentham:

There is no one-to-one correlation, or any other regular correlation between law-making activities and rules of law. . . . Rules, especially long-standing rules, are often the product of a variety of law-creating acts, some legislative some judicial, fashioning the current rule, changing and developing it, over time. Similarly,

⁴³ JEREMY BENTHAM, OF LAWS IN GENERAL 236 (H.L.A. Hart ed. 1970). Bentham’s manuscript, completed in 1782, was discovered in 1939. *Id.* at xxxi.

⁴⁴ *Id.* at 237. See also *id.* at 156–83 (“Idea of a Complete Law”); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 70–92 (2d ed. 1980).

single acts of legislation, like the passing of one Act by the legislature, typically create or modify more than one rule.⁴⁵

Jules Coleman proceeds similarly, tersely characterizing legal instruments as such as simply objects, as pretty much raw materials. “There are at least two components to a theory of legal content. The first is the set of official pronouncements; the second is a function that operates on those pronouncements to generate the content of the law.”⁴⁶

Ronald Dworkin also follows Bentham’s lead. Dworkin understands his own approach to be “interpretation,” but he too would move past the documentary stage as such to what he regards as the real work of articulating and assessing normatively basic complexes of principles:

First, there must be a “preinterpretive” stage in which the rules and standards taken to provide the tentative content of the practice are identified. (The equivalent stage in literary interpretation is the stage at which discrete novels, plays, and so forth are identified textually, that is, the stage at which the text of *Moby-Dick* is identified and distinguished from the text of other novels.) I enclose “pre-interpretive” in quotes because some kind of interpretation is necessary even at this stage. . . . But a very great deal of consensus is needed -- perhaps an interpretive community is usefully defined as requiring consensus at this stage -- if the interpretive attitude is to be fruitful, and we may therefore abstract from this stage in our analysis by presupposing that the classifications it yields are treated as given in day-to-day reflection and argument.⁴⁷

Dworkin recognizes, but appears to take as given, whatever is involved in distinguishing “the” legal text at hand from “other” legal texts. In working with particular documents, at least on some occasions, he also describes the text as such in bare bones terms, leaving as large a role as possible (we might think) for interpretation:

⁴⁵ JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* 5, 6 (2009). Leslie Green’s summary, we can see, is rightly carefully balanced: “The law begins and ends with the *sources* -- the statutes, cases, and conventions, insofar as their existence and content can be ascertained by reference to matters of social fact (including complex facts about what people and institutions believed, wanted, and intended).” Leslie Green, *Three Themes From Raz*, 25 OXFORD J. LEGAL STUD. 503, 504 (2005).

⁴⁶ JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* 161-62 (2001). “An interpretation operates on the set of authoritative legal pronouncements as the ‘data points’ of the interpretation of the law of a community.” *Id.* at 162.

⁴⁷ RONALD DWORKIN, *LAW’S EMPIRE* 65-66 (1986).

We have a constitutional text. We do not disagree about which inscriptions comprise that text; nobody argues about which series of letters and spaces make it up. But, of course, identifying a canonical series of letters and spaces is only the beginning of interpretation. For there remains the problem of what any particular portion of that series *means*.⁴⁸

"[C]anonical terms . . . provide a limit," an "important" limit.⁴⁹ But not all terms in use in Dworkin's interpretive exercises are strictly canonical, come into play and encounter whatever limits that emerge not because of the constraining effect of a particular document as such, but because of the form or content of the notions in play themselves. As a result, "sorting" and "sifting" à la Bernhard's narrator in *Correction* is now not a matter of documents but of ideas:

In fact, judges often disagree not simply about how some rule or principle should be interpreted, but whether the rule or principle one judge cites should be acknowledged to be a rule or principle at all. . . . [T]he argument *for* a particular rule may be more important than the argument *from* that rule to the particular case . . .⁵⁰

* * * * *

It is difficult not to ask questions: Is Bethamite separation really necessary? Must "legal material"⁵¹ be so strenuously reworked to put it in usable form? Construction of a "whole system," a well-defined arrangement of legal propositions displacing original legal materials, may be one appropriate way of proceeding -- but maybe not the only course. The ordinary plurality of legal materials describes an accumulating, shifting environment (Melville and Bernhard restated as matter-of-factly as possible). Is this instability only confounding chaos or noise? Or might we imagine a paper tectonics, a way of acknowledging the recurring "bits and pieces," a recurring need to "sort and sift" -- in this way rework our own expectations, and ultimately legal strategies? Perhaps Bernhard's narrator, coming to grips with his own mistake, in fact describes the right approach.

⁴⁸ Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 *FORDHAM L. REV.* 1249, 1251 (1997).

⁴⁹ Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057, 1087 (1975).

⁵⁰ *Id.* at 1089-90.

⁵¹ *RAZ*, *supra* note 45, at 72.

III. Paper Tectonics? The Documentary Substrate and Its Instabilities

“Legal studies lack any reflection on their tools.” Suppose that Cornelia Vismann is wrong.⁵² Consider -- as if a sequence of observations in some sense implicit in the juxtaposition of Melville and Berhard I have just pushed together:

Legal documents are understood to be delimited or bounded, but only provisionally so, always at risk of decomposition into sequences of documents or subsumption within some more encompassing document. A constitution or statute or contract might be considered as pertinent in its entirety: taken as whole. Or a particular article or section or sentence or phrase or particular words might be understood -- in isolation -- as the relevant text. Analysis might, of course, move back and forth between narrower and broader document specifications. Documents within their own terms may include statements asserting norms derived from all sorts of sources -- expressed, for example, as rights and duties; depicted as rules, principles, or policies, for example. The content of such normative statements, it may appear (sometimes, anyway) varies depending upon the definition of documentary boundaries. Legal work is kaleidoscopic. Documents fall into patterns vulnerable to rearrangement. There can be no necessary starting point or conclusion. Some patterns may persist or recur, and particular patterns -- so long as they persist -- may define hierarchies. Patterns are always provisional. Aggregated or individually, documents are not necessarily complete or coherent. Overlaps, gaps, inconsistencies, and ambiguities are common.

These assertions suggest, among other things, that law -- insofar as its elaborations have consequences -- may be a means of either ordering or disrupting. A given document might be understood as tantamount to a direct description of fundamental moral, political, economic, or cultural “facts,” and therefore foundational, precisely fixing legal order. But this understanding might also provoke a counter-politics recalling the “merely” documentary status of postulated legal order, proposing to replace one document with another. Or in circumstances in which norms are not otherwise cemented, legal articulation may work to highlight or emphasize, and therefore work to affirm or establish norms, motivating political, popular, or cultural support, putting off subsequent legal revision even if such revision is not entirely precluded. Even if legal materials appear to acknowledge, for example, extant cultural or economic norms, the instability of legal forms may open ways to undercut these norms. The legal “field” (the materials that might be conceived as supplying the setting or ground for legal arguments and conclusions) tends toward “flux” (the recurring composition, decomposition, and recomposition of legal materials).

⁵² CORNELIA VISMANN, FILES 11 (2008).

In any particular legal exercise, these dynamics may influence analysis side-by-side with immediate, independent considerations of content. Much more of ordinary law is concerned with textual prerequisites or relations than we might at first suppose. For example, statutes, judicial opinions, constitutions, regulations, contracts, and treaties are depicted as defined, individuated, limited somehow in content, as ones among many and are also routinely broken into parts or subsumed (in whole or in part) into larger aggregates. Thus, one statute may displace another statute, or accommodate another's content; a statute may limit administrative interpretation or take its own content from that interpretation; a statute may limit common law or be understood to codify it.⁵³ In the course of fixing these relations, particular terms may acquire prominence or may recede. Consequently, these ordering exercises may change our understanding of pertinent content. In every instance, there is, therefore, a formal politics -- even if often routine. Law "is"-- comes into being within the perspective of this politics -- because of the congruence of document specifications and conditions of salience. Documents exhibiting this congruence become "legal instruments." Document specifications are component parts of would-be instruments -- what is and what is not included within a given document. Conditions of salience are criteria that document specifications do or do not meet. Matches of salience conditions and documentary characteristics generate apologetics; mismatches generate critiques.

Matches and mismatches are equally plausible states. Neither apologetics nor critique may claim priority. This formal politics and whatever norms figure in the content of particular documents may also interact, of course. Documentary shifts and dictates of content might compete in claiming priority. Or a pluralist pressure could manifest itself -- a tendency for differing contents to co-exist rather than displace or recede -- paralleling the formal preoccupation with differentiating legal documents. Dictates of content might prevail by and large, and the content dictated might be relatively uniform or harmonious. But it is also possible that the formal politics might sharply fragment documentary contents. Legal normativity is consequently complex.

IV. Legal Freedom as Such

In *Leviathan* Thomas Hobbes famously depicted freedom (or liberty) as exterior to law, and as primarily a negative notion: a way of referring to the range of choices that the law itself did not specify. Joseph Raz proceeded oppositely in one important respect in his *Morality of Freedom*,⁵⁴ developing

⁵³ Cf. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1117-35 (2003).

⁵⁴ JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

conceptions of freedom and personal autonomy rich in (sometimes surprising) positive content. But Raz -- not unlike Hobbes -- also supposes that law itself is not the medium within which the idea of freedom immediately or directly acquires defining content. Law is quintessentially an assertion and expression of authority, insofar as it is accepted (a key question for both Raz and Hobbes, of course), and therefore the logic of "institutionalization" comes first, definition and protection of legal rights of individual choice following thereafter. "[B]eing institutionalized one is not at liberty, assuming the institution is based on legitimate authority, to act on one's own judgment as to the proper weight of the interest where it differs from that of the authority."⁵⁵ But what if the content of law itself is, as we have seen, at one level always a matter in question, if the question of pertinent materials is always open to re-resolution? In recent writing, Raz acknowledges something like this possibility as holding with regard to interpretation of norms -- legal content somehow extracted and abstracted from immediate legal instruments. In the end, however, his discussion of "pluralism and innovation" reverts to "authority," to the primacy of institutional considerations.

Jean-Luc Nancy resets "freedom," considers it as a distinctive "experience" -- and in the process suggests terms that attach greater significance to interpretive freedom as such.⁵⁶ He begins with a proposition with which Raz (for example) would not disagree:

Freedom cannot be presented as the autonomy of a subjectivity in charge of itself and of its decisions, evolving freely and in perfect independence from every obstacle. What would such an independence mean, if not the impossibility in principle of entering into the slightest relation -- and therefore of exercising the slightest freedom?⁵⁷

Raz proceeds by understanding freedom as the individual's opportunity to choose across a range of more or less already given "social forms" of expression, interaction, and thus obligation, all originating in the community at large.⁵⁸ Nancy, in contrast, particularizes "relationships," stresses the idea that interactions always present themselves, at the moment, as unique or distinctive vis-à-vis all other possibilities:

⁵⁵ RAZ, *supra* note 45, at 262.

⁵⁶ JEAN-LUC NANCY, *THE EXPERIENCE OF FREEDOM* (Bridget McDonald trans. 1993) (1988).

⁵⁷ *Id.* at 66.

⁵⁸ See RAZ, *supra* note 45, at 308-13.

Singularity consists in the “just once, this time,” whose mere enunciation . . . establishes a relation at the same time that it infinitely hollows out the time and space that are supposed to be “common” around the point of enunciation. At this point, it is each time freedom that is singularly *born*.⁵⁹

Freedom therefore becomes first of all a characteristic of a state of affairs -- the experience of possibility, in advance (as it were) of the experience of assumption of obligation:

[T]he originary setting into relation is contemporaneous and coextensive with freedom insofar as freedom is the discrete play of the interval, offering the space of play wherein the “each time” takes place: the possibility of an irreducible singularity occurring, one that is not free in the sense of being endowed with a power of autonomy . . . but that is already free in the sense that it occurs in the free space and spacing of time where only the singular *one time* is possible. . . . Freedom is that which spaces and singularizes -- or which singularizes *itself*.⁶⁰

It is this idea -- freedom conceived as expressed or realized in the degrees of freedom presented by an environment -- that allows legal freedom to be both recognized and regarded as not anomalous, as structurally integral and therefore potentially affirmatively valued. Legally as in other settings, we might think, an individual’s capacity to control circumstances is tied to -- depends upon the extent to which -- the individual’s ability to arrange and rearrange the priority or proximity of various legally defined contexts, posing various risks and opportunities. Legally, these contexts present themselves as complexes of norms and associated institutions, which individuals might find to be more or less apt, or (characterized pragmatically) better or worse settings within which to maneuver in pursuit of chosen goals.⁶¹ Freedom in law becomes at least in part freedom to choose law.

This is not a new notion. The idea of freedom of contract, for example, in its radical Jacksonian/Reconstruction versions, was plainly understood as a chance to put in place -- to put a legal instrument to work to establish as decisive -- one’s own sets of relationships; a freedom therefore corrosive of relationships regarded as already fixed -- as in effect dictated -- by status. To be sure, it soon

⁵⁹ NANCY, *supra* note 56, at 66.

⁶⁰ *Id.* at 68.

⁶¹ On this juxtaposition, considered more generally, see ALLAN GIBBARD, RECONCILING OUR AIMS 23-26, 53 (2008).

seemed obvious to many that important contractual undertakings and therefore the governing terms of relationships are often enough at the mercy of movements (market circumstances or the like) outside any one individual's control, at least past certain quickly reached points. Statutory and common law arrangements came to be understood often, although hardly ever without dissent, as alternative origins of possibility, means through which individuals might extend their efforts at control, either directly through litigation or indirectly in the wake of governmentally initiated administrative or adjudicative processes. Of course, these alternative arrangements are as vulnerable as freedom of contract to the risk of interpretive truncation – sometimes making possible recognition of individual or legislative power to critique and remake, but also sometimes affording cover (in effect) for elaborate apologetics ordering and reestablishing a restrictive status quo.⁶²

Questions concerning modes of interpreting particular legal instruments, and as importantly, anterior questions concerning which instruments to treat as applicable, become occasions indicative of the degree to which given documents further the project of legal freedom or some other agenda -- in the aggregate, of course, suggesting something about the commitments of the legal regime overall. Within these terms, it is apparent that legal instruments in and of themselves are plausibly conceived as real, albeit complex units of analysis. They are potentially ultimate subjects of inquiry, in parallel with Hohfeldian, Dworkinian or other conceptual descriptions of legal norms in terms of rights, duties, principles, policies, etc. Individual instruments may be usefully considered as “possible worlds,” as it were; each in principle describing a field or environment within which legal arrangements are constituted or, more crucially, reconstituted. To be sure, this formal doubling may not be acknowledged. One way in which the interplay of the documentary substrate and abstracted surface jurisprudences sometimes comes to conclusion in particular settings precisely involves emphatic denials of documentary multiplicity. Bentham prevails: it is as though legal instruments are simply fragments of law, revealing parts of underlying “real” legal concepts. There is no reason to suppose, however, that this conclusion is itself anything other than “fragmentary,” as likely occasional rather than thorough-going.

Individuals bringing suit or drafting or otherwise acting legally have the opportunity to call into question, to repoliticize, usual patterns. It is clear, for example, that the formalization of litigation has as one of its effects precisely a highlighting, arguably an exaggeration, of triggering circumstances. But more generally, legal instruments may be understood as reopening the question of structure not only to resolve the particular case, but also to assert (or reassert) the

⁶² See, e.g., Patrick O. Gudridge, *Carrington, Cooley, Kennedy, Klare*, 22 *CARDOZO L. REV.* 837, 854-60 (2001).

relevance of triggering, now reconstitutive concerns. Stressing this reconstitutive possibility obviously evokes Bruce Ackerman's view of constitutional politics. But there is also a crucial difference. The "constitutional moments" recur, do not reduce to "normal" working out of past crisis and resolution, instead re-instantiate the original crisis as it were, inserting past politics into present practice. There is no bright line between either past and present or ordinary and constitutional politics. At least some statutes, and other legal instruments as well, do not necessarily fit comfortably into an overall legal scene. They may be understood and brought to bear, instead, to call into question precisely that which, legally, is otherwise validated.

V. The Theater of Confrontation

Complex formal competition obliquely suggests a distinctive model of society -- something like a substantive counterpart, if only glimpsed in general outline. This model often competes for priority with other models implicit in the peculiar content of particular legal documents. Such struggle, where it occurs, is irreducible.

Within law, within the perspective implicit in the idea of the unstable documentary substrate:

Social transformations appear to be utterly contingent, never settled, always at issue; no form of social integration, once emerged, relinquishes its claim to priority. Discourse, legal or otherwise, mirroring and prefiguring this irrepressible conflict, is always itself a theater of confrontation. Sincere efforts at reaching understanding can never definitively establish themselves free from challenge, and can therefore maintain themselves only by also building upon "forceful" strategic postures and (successful) imaginative constructions. Legal institutions are on the one hand the scene of conflict, as other forms of social integration present themselves as sources of ideas of order, within the legal setting appearing as simultaneously foreign and familiar. But legal ideas are also aggressive. They purport to reinterpret other social phenomena or regimes in jurisprudential terms. The question as to how law reconciles itself with other social forms defies settling answer.

Recurring formulations often framed in terms of rules or standards or other abstracted forms are commonplace in law, accumulating continuously in multitudes of legal documents. Some of these secondary vocabularies are routine -- invoked as a matter of course.⁶³ Others are consciously considered and actively worked out. The various constructions sometimes extend across

⁶³ This is obviously just Holmes updated. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 31-32 (Howe ed. 1963) (1881).

otherwise highly fragmented legal domains. These bridging formulas may exhibit distinctive, relatively definite (if never definitive) orientations and acquire a presence or status of their own -- as "doctrine," we sometimes say, or perhaps more accurately, as indexes, as organizing markers.⁶⁴ It is also easy, however, to pick out what might be shown to be distortions -- disguises and displacements -- endemic in such second order formulas ("legal fictions," as it were). The result may be an accumulating mix of organizing terms, some understood as problematic and others not at any given time, all subject to challenge, recurring problems or questions therefore. Multiple, fragmented levels and attendant, sometimes orienting, sometimes distorting formulations and reformulations: we might think of these phenomena as equivalents of fault lines, mappable features accordingly. This shaky assembly may come closest to approximating stable ground within a legal regime like that of the United States.

The legal complex itself⁶⁵ -- the composite interacting levels of indexing and synthesis -- is thus chronically out of joint. There may be good reason, as a result, to re-situate efforts like those of Ernest Weinrib or Ronald Dworkin or Herbert Wechsler to identify notions of coherence or integrity or neutrality or such as distinctly *governing* "legal" values. Orientations, even if recurring, may be fragmentary, artifacts of interactions across syntheses that are always vulnerable to challenge. "Values" are not legal fundamentals. If anything, accumulating legal materials routinely work, or are chronically prone to work, to put in question, counter, over-simplify, over-qualify, or otherwise undercut values appearing "in" law.

There is, however, no reason why participants in legal regimes cannot press "internal" values like coherence or integrity or neutrality, just as they might press any other values, subject to the counter-efforts of other participants and the fragmenting and distorting effects of the various accumulating and interacting legal indexes and syntheses. A legal regime is thus a political environment (in effect complete with "weather") of a distinctive sort. There is no mechanism akin to vote counting or market clearing routinely weeding "losing" positions out of the regime as a whole.⁶⁶ There is no thorough-going Habermas-like bar to strategy, theater, or disingenuousness. Assertions of "internal" norms, like other claims, run risks of fragmentation and distortion, and the

⁶⁴ For further discussion of the idea and role of "index terms" in legal corpora, see Patrick O. Gudridge, *Complexity and Contradiction in Florida Constitutional Law*, 64 U. MIAMI L. REV. 879, 907-10 (2010); *An Anti-Authoritarian Constitution*, *supra*, 91 MINN. L. REV. at 1491-94.

⁶⁵ I take the phrase (although I may use it somewhat differently) from FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM (Terence C. Halliday, Lucien Karpik & Malcolm M. Feeley, eds., 2007).

⁶⁶ Ideas like *stare decisis* -- which might generate at least partial orderings -- are not surprisingly understood to be problematic (even if nonetheless sometimes put to use).

countering efforts of opposing participants. It might be that the appeal of coherence or integrity or neutrality is enhanced in an environment of this sort, and will emerge (sometimes, anyway) in the course of interacting syntheses.⁶⁷ But such values do not figure as presuppositions -- rather, as results.

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If certain questions and problems appear within the legal complex as coming closest to resembling common ground, it is not only because such questions recur. Proposed answers not only repeatedly appear to be attractive, but are also often revealed to incorporate displacements or disguises, to make decisive use of what appears to be tellingly truncated content. Exercises in exposure -- obviously along side recurring assertions of particular "answers" -- keep questions open, and at least potentially relevant. Internal instability, rather -- more precisely, the persistence of unresolved problems, and the accompanying, repeated perception of too simple responses -- is the register of continuity, a measure of recurring use, and thus (however paradoxical this may seem to be) the organizing form for legal order. Precisely simultaneously, it is also the organizing form for dissent: the hint, at least, of the possibility of legal opposition.

We might imagine, therefore, a *legal seismics*. Instead of understanding legal theory as a search for order taking the form of settled understandings, doctrine, neutral principle, integrity, base-and-superstructure, etc. -- it may make more sense to try to gauge instability. Sometimes the push and pull of recurring conflicts indeed ends in radical fragmentation, to the point no patterning is more than momentary. But sometimes push and pull interweave (as it were), persist, and over a course of time conflicting forces acquire increasing internal lamination or definition or elaboration. This is an order of sorts, we might think, even if never settled. Some sort of diagnostics, some account of transitions might become conceivable, a way not only to recognize tremors, but to put them in perspective vis-à-vis each other -- theoretical order at least.

VI. Written, Not Read?

And ye are complete in him, which is the head of all principalitie, & power. . . . And you being dead in your sinnes, and the vncircumcision of your flesh, hath hee quickened together with him, hauing forgien you all trespasses, [b]lotting out the handwriting of ordinances, that was against vs, which was contrary to vs, and tooke it out of the way, nayling it to his Crosse: And

⁶⁷ On the use of metanorms to hold together a normative regime, see ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION* 44-68 (1997).

hauling spoiled principalities and powers, he made a shew of them openly, triumphing over them in it.⁶⁸

Sometimes judges write watershed opinions whose deep logic only gradually becomes clear and whose language fails to capture that deep logic. In such cases, there is no need for courts and scholars to cling to the original language of the opinions, at least where abandoning the original language would clarify matters without loss of content.⁶⁹

The idea that texts give way, are somehow deficient and somehow superseded, recurs -- provoking opposition to be sure, but opposition itself tending to become embattled, caught in the suspicion that invocations of texts ultimately turn into references to other entities, "original intent" or whatnot: versions once more of faith or reason. If persuasive, this proposition calls into question the premise here. "Documentary substrates," "paper tectonics," and their concomitants matter much less, it seems, if texts are sideshows, if the real work draws on texts little or not at all. Accumulating documents become, in and of themselves pretty much beside the point. Jeremy Bentham, the epistle-writer given sixteenth century English translation, and Matthew Stephenson and Adrian Vermeule -- all are right.

Then why write? If documents are (at most) points of departure, to be quickly scanned to identify topics addressed thereafter in ways making only occasional, illustrative or ornamental use of document terms, is the surface complexity of so many legal documents -- in the aggregate and also often individually -- a kind of noise or static or froth? But if this is not right, what must we suppose? Put too generally: there is -- we need to think there is -- something important made possible by modes of reading that take seriously documentary complexity.

Sometimes documents are simply records of deals or bargains and complexity is a kind of optical illusion, lying in the transactional juxtaposition of so many desired outcomes sought by so many parties. There is no "there there" independent of the list, no consistency or inconsistency or unity or conflict. It may be entirely appropriate, as Frank Easterbrook among others has argued, to deal with legal conjunctions of this sort by adopting interpretive biases aimed at motivating drafters to define straightforwardly the accumulating individual items. It is also true that documents may not be written, entirely or in part, to be

⁶⁸ Colossians 2:10, 13-15 (King James 1604-11).

⁶⁹ Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 609 (1999).

definitive. Their provisions work to transfer responsibility from their drafters to other institutions or individuals, authorize some next set of documents to address matters at hand largely if not entirely autonomously. Efforts to read closely, therefore, to seek out intricacy and its implications rather than outlines of general topics, become in these cases misplaced as well. There needs to be a third type.

Consider: *Documents may be at times conceived as records of engagement.* They present themselves -- or may be read -- as efforts to come to grips with matters not reducible to distributive lists. These at least momentarily intractable matters, it would appear, elude definitive resolution but nonetheless demand attention, it seems, in ways that acknowledge the outlines of difficulty, mark aspects of the given conflict that attempted resolutions should address. These documents are not algorithms -- steps to resolution. They are instead something like maps of possible emphases: highlightings, sometimes competing and sometimes consistent -- without, however, definitive relief, as though the question of relative prominence remains open, so long as the several highlightings remain more or less apparent.

Readers of complex legal documents are impressed, up to a point anyway. If they take documents seriously, readers treat possible arrangements of emphases as normative preliminaries, as conceivable contours of answers to questions at hand. Of course, they also bring to the occasion whatever else triggers concern -- circumstances, other documents, expectations, any and all normative and non-normative pertinent contexts. These other contributors may set conditions of salience, on some occasions conditions so sufficiently pointed or otherwise elaborately wrought that explorations of legal documents become cursory, quick readings in search of confirmation, echoes of expectations already set. Complex documents become -- are treated as and represented to be -- straightforward. But if the interpretive environment is less well-resolved, either before reading documents or afterwards (it now appears), to this extent complexity may become a map or model: an occasion for coming to grips not only with a legal document itself, but in the process taking hold of -- committing to and putting to use -- a now decisive normativity. The "metaphorics of writing" become a "politics of reading."⁷⁰ Thinking through complexity may not always succeed in this way, of course. Particular documents in the end may sometimes leave a reader as incompletely resolved as other considerations do. The distinctive character of legal literacy (or perhaps literarity?⁷¹) thus comes into view: its *intermittence*, its sometime appearance as simply surface law, as ready-made, standard propositions, documentary packages for conclusions

⁷⁰ ADAM ZACHARY NEWTON, NARRATIVE ETHICS 186-87 (1995).

⁷¹ Cf. MICHAEL FRIED, REALISM, WRITING, DISFIGURATION 129 (1987).

otherwise reached -- *and also* its sometime irruptive occupation of attention, its successful impress of its own array of emphases, distinctively documentarily modeled.