Dalhousie Law Journal

Volume 47
Issue 1 *Thinking With and Against Pierre Schlag*

Article 7

4-2024

Show and Tell

Liam McHugh-Russell
Dalhousie University, Schulich School of Law

Liam McHugh-Russell*

Show and Tell

> ...to break the rules wisely, you have to know the rules well.
> –Le Guin, *Steering the Craft*

I finished my doctorate in June of 2019. Most of my waking hours that late summer and early fall were spent writing and rewriting cover letters, teaching statements, and research agendas (and equity statements, long CVs, short CVs, etc)—all the variegated materials demanded from applicants to tenure-track positions in North American law faculties. Writing those materials, and integrating the feedback on early drafts that I received from a host of generous peers and colleagues, became an accidental study in the principal subtext of my doctoral research: questions of genre, audience, and what we do through our writing as legal scholars.

One generous colleague sent me Karen Kelsky's *The Professor is In*.[1] The book was unquestionably beneficial as I drafted my materials. Its central guidance for drafting an application, that your materials should show rather than tell, was pivotal as I revised and rerevised.[2] That said, the book's advice perfectly embodies today's prevailing vision of the scholar as an entrepreneur of academic capital, notwithstanding Kelsky's obvious sympathy with critics of the political-economic context that has made academic entrepreneurialism a winning strategy.[3] In contrast to our vocational ideals, Kelsky's messaging on the presentation of self, echoed by the book's acolytes among my peers, draws troubling distinctions between what should be shown, what told, and what left unsaid. The emphasis on methods, sources, results—and on outputs, outputs, always outputs—expose a university system not only beholden to neoliberal audit culture,[4] but imprisoned in a modernism defined by the idioms of the hard sciences.[5] The chapter titles alone offer fodder enough for an entire law review article: "Managing Your Online Presence," "Building

* Assistant Professor, Schulich School of Law, Dalhousie University. A version of this essay was presented at a symposium, "A Day with Pierre Schlag," organized by Vincent Forray and Jean D'Aspremont at McGill University in September 2019. It was drafted with the support of a postdoctoral fellowship from the Labour Law and Development Research Lab, McGill University. I am grateful to crucial feedback from Genevieve Painter, Hyo Yoon Kang, and two anonymous reviewers. All errors are mine.

1. Karen Kelsky, *The Professor is In: The Essential Guide to Turning Your Ph.D. into a Job* (New York: Crown, 2015).
2. See e.g. *ibid* at chs 22, 25.
3. *Ibid* at ch 1.
4. Marilyn Strathern, ed, *Audit Cultures: Anthropological Studies in Accountability, Ethics, and the Academy*, European Association of Social Anthropologists (London New York: Routledge, 2000); Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015) ch 6.
5. As one colleague wrote: "I suggest using strong, simple verbs that lead to a demonstrable finding: My work shows X; I find Y and so on. I caution against claims about intervening in debates, paying attention to, emphasizing and so on."

a Competitive Record," "Why 'Yourself' is the Last Person You Should Be."[6]

Though I considered titling this essay "Application Materials," echoing Pierre's recent essay "The Law Review Article,"[7] I decided a focus on the job market would smack too much of sour grapes. Nonetheless, my discomforts with the hiring process, not just as a social phenomenon but as an institutionally structured writing exercise, bolstered my belief that attention to the schematics of style and aesthetic, and to how different genres bring together ways of showing and telling, provide useful keys to appreciating the power of Pierre's oeuvre.[8]

We will come back momentarily to Pierre's views on (and contributions to) legal scholarship as genre. Paradoxically, though, it may be easiest to arrive at an understanding of what he is doing by starting somewhere else entirely. As I began this essay, the text I found myself mulling over was not a piece of legal scholarship, but the introduction to a work of science fiction, Ursula K Le Guin's *The Left Hand of Darkness*.[9] The book is a testament to what can be achieved in science fiction and fantasy—genre literature *par excellence*. Le Guin's achievements in this field are not limited to *Darkness*, of course, but also include *The Lathe of Heaven*, the Earthsea trilogy, and especially *The Dispossessed*.[10]

I landed on *Darkness* because of its bone-sharp author's introduction.[11] If reading enough of Le Guin's fiction gives you a hint of her game, the introduction to *Darkness* fully tips her hand.[12]

---

6. Kelsky, *supra* note 1 at chs 7, 13, 42.

7. Pierre Schlag, "The Law Review Article" (2017) 4 University of Colorado Law Review 1043 [Schlag, "The Law Review"].

8. This hunch finds some corroborating evidence in Pierre's most recent major project analysing the pathologies of the American political-legal order. On the one hand, the book's diagnosis is short on the kind of humour most would identify with his work. Rather it is, as he described it to me, "grim." On the other hand, in motivating his particular typology of thinking and organizing state power, he conceives of his types not as discrete discourses, ideologies, dispositifs, dispositions, or logics, but as *genres.* See Pierre Schlag, *Twilight of the American State* (Ann Arbor, Michigan: University of Michigan Press, 2023) at 183-194.

9. Ursula K Le Guin, *The Left Hand of Darkness*, 50th Anniversary ed (New York: Ace, 2019) [Le Guin, *Darkness*].

10. Ursula K Le Guin, *The Lathe of Heaven* (New York: Scribner, 1971); Ursula K Le Guin, *The Dispossessed: An Ambiguous Utopia* (New York: Harper & Row, 1974).

11. The Introduction was not written for the first edition of the book. It was added in 1976 but does not appear in all subsequent editions. In the edition cited here, Le Guin, *Darkness*, *supra* note 9, it appears as "Author's Note."

12. Le Guin is distinguished among authors of fiction for the amount that she wrote about the practice, virtues, and craft of literature. See e.g. Ursula K Le Guin & David Naimon, *Ursula K. Le Guin: Conversations on Writing* (2018); Ursula K Le Guin, *Words Are My Matter: Writings About Life and Books, 2000–2016 with a Journal of a Writer's Week* (Northampton, MA: Small Beer Press, 2016); Ursula K Le Guin, *Steering the Craft: A Twenty-First-Century Guide to Sailing the Sea of Story* (New York: Harper Perennial, 2015) [Le Guin, *Steering the Craft*]; Ursula K Le Guin, *The Wave in*

The short text offers the kind of tightly coiled writing, with no word or phrase out of place, that bucks any effort at explanation. Hearing about it second hand simply cannot do it justice.[13] Here is a taste:

> Our philosophers, some of them, would have us agree that a word (sentence, statement) has value only in so far as it has one single meaning, points to one fact which is comprehensible to the rational intellect, logically sound, and—ideally—quantifiable. Apollo, the god of light, of reason, of proportion, harmony, number—Apollo blinds those who press too close in worship. Don't look straight at the sun. Go into a dark bar for a bit and have a beer with Dionysios, every now and then. I talk about the gods, I am an atheist. But I am an artist too, and therefore a liar. Distrust everything I say. I am telling the truth.[14]

(Who can fail to revel at the flair Le Guin gave to lines of attack that critical legal scholars were elsewhere bringing to bear against legal positivism and its others?)

My goal is not so much to tell you about her essay as to do something with it, so I hope you will indulge the violence I will do to Le Guin's text by sketching out its key moments. Le Guin mounts her introduction as a rebuttal to those who hold that science fiction serves, or is supposed to serve, a predictive function.[15] Her essay is not specifically about science fiction, though, but about fiction in general, and especially about the novel. "Fiction writers," she says,

> at least in their braver moments, do desire the truth: to know it, speak it, serve it. But they go about it in a peculiar and devious way, which consists in inventing persons, places, and events which never did and never will exist or occur, and telling about these fictions in detail and at length and with a great deal of emotion, and then when they are done writing down this pack of lies, they say, There! That's the truth![16]

Unsatisfied with this stab at her target, Le Guin moves on, first offering that a novel works, via "elaborately circumstantial lies" to "describe certain aspects of psychological reality," then suggesting that fiction is a way of

---

the Mind: Talks and Essays on the Writer, the Reader, and the Imagination (Boulder, CO: Shambhala Publications, 2004); Ursula K Le Guin & Susan Wood, *The Language of the Night: Essays on Fantasy and Science Fiction* (New York: Putnam, 1979).

13. Really though, whatever you might get out of reading these meta-reflections, you are sure to get significantly more out of finding the original and reading it yourself. I urge you to do so. Really. It's easy to find online. Here, for example: <https://perma.cc/TKR2-RXH3>. Go ahead! By all means. I'll wait.
14. Le Guin, *Darkness*, *supra* note 9 at 21.
15. *Ibid* at 16-18.
16. *Ibid* at 19.

observing what "we already are."[17] Finally, near the close of the essay, she suggests that "[a]ll fiction is metaphor," but then immediately reverses herself: "A metaphor for what? If I could have said it non-metaphorically, I would not have written all these words, this novel."[18]

If Le Guin plays with the paradox of these concepts, she does so because of her awareness that observation, description, metaphor, the idiom of truth versus falsehood—each is ultimately a poor fit for what the novelist is up to. They are not just "telling" a story, but nor do they intend simply to tell their reader about the world outside the book. They are not, as the philosopher JL Austin would put it, attempting to make a constative utterance.[19] A writer cannot say what a book means because: "The artist deals with what cannot be said in words. The artist whose medium is fiction does this *in words*." She summarizes: "The novelist says in words what cannot be said in words."[20]

The point can be rephrased with less poetry, and less of the care Le Guin herself takes for the sound of its saying.[21] Explicitly stated rather than illusively shown, we might say that the novelist shows with words what cannot be told or, perhaps, that she *does* by words what cannot be done by saying. The thrust in any case is that a novelist, at least a novelist of Le Guin's caliber, should not be understood as engaged in *communication* at all, at least not if we take that term to mean picking out some moral or truth or idea held inside one's own head and trying to copy it into the mind of another.

Le Guin, at her most direct, tries to make us understand what does happen between author and reader by adopting the latter's perspective:

> In reading a novel…we have to know perfectly well that the whole thing is nonsense, and then, while reading, believe every word of it. Finally, when we're done with it, we may find—if it's a good novel—that we're a bit different from what we were before we read it, that we have been changed a little, as if by having met a new face, crossed a street we never

17. *Ibid* at 22.
18. *Ibid* at 23-24.
19. The distinction between constative utterances, which make a claim about states of affairs, and performative utterances, which involve the performance of an action or attempt to achieve some purpose, is due to JL Austin, *How To Do Things With Words* (Oxford University Press, 1975). The conventional illustration draws on a comparison between stating "I am married" and saying "I pronounce you man and wife" as part of a marriage ceremony. Part of the point of Austin's book, however, is that the distinction is more analytical than real: all performative utterances presuppose or entail claims about states of affairs, while constative utterances are almost never made except as part of the performance of some action, or in pursuit of a goal.
20. Le Guin, *Darkness*, *supra* note 9 at 23.
21. Le Guin places the "sound of the sentence" first among the principles that shape her writing. See Le Guin, *Steering the Craft*, *supra* note 12 at ch 1 ("The Sound of Your Writing").

> crossed before. But it's very hard to *say* just what we learned, how we were changed.[22]

So, for example: it is easy to describe the moral of Steinbeck's *East of Eden* in terms of the idea that humans have the capacity for moral action, and that this ability, rather than a tendency or obligation to do good, is at the core of what makes us human.[23] But stating that point does not have, cannot have, the same effect on its hearer as reading Steinbeck would (to put it mildly). Nor is the significance of having read *East of Eden* captured, say, by talk about the strength of a reader's belief in the predicate that "the human capacity for moral, altruistic action is our most essential, valuable inheritance." What I am gesturing toward here resonates with Bourdieu's idea of habitus, but it is perhaps simpler just to say that the takeaway of *East of Eden* is to be found in a prickle on your skin, in a weight at the pit of your stomach, and in a welling up at the edges of your eyes.[24]

So. The novelist is neither trying to tell their readers anything, nor to show them. They are trying to do something to us. A novel, in other words, is what Austin called a performative utterance.[25] And here's the rub: so are most other genres of writing. So is legal scholarship.[26]

Which prepares the ground for a return to Pierre's writing. The drive-wheels powering his most well-known scholarship have been an acute concern for what the genre (or genres) of legal scholarship is (are) supposed to do, a frustration with the failure of most legal scholars to engage with that question—opting instead for "an unquestioned and unexamined aesthetic"[27]—and an abiding interest in using his own writing, not simply

---

22. Le Guin, *Darkness*, *supra* note 9 at 22-23.
23. John Steinbeck, *East of Eden* (New York: Viking, 2003).
24. One of Bourdieu's key contributions to social theory was an account of regularities of behaviour, which others had articulated as a matter of structure, script, or calculation, recast instead in terms of practices informed by a *feel for the game*. That metaphor was intended to emphasize the intuitive, unreflective aspects of much human action, as well as its connection to affect and embodied experience. See Pierre Bourdieu, *Outline of a Theory of Practice*, translated by Richard Nice (Cambridge: Cambridge University Press, 1977); and especially Pierre Lamaison & Pierre Bourdieu, "From Rules to Strategies: An Interview with Pierre Bourdieu" (1986) 1:1 Cultural Anthropology 110. My point, then, is that literature functions primarily not at the level of opinion or belief, but at the level of our feel for the game; that is intellectual import is literally felt in the body not just understood in the mind.
25. Austin, *supra* note 19.
26. *Cf* Constable's account of law as "language that acts," including a characterization of various sorts of legal texts—doctrine, legislation, judicial judgements—as speech acts in Austin's sense. Marianne Constable, "Law as Language" (2014) 1:1 Critical Analysis L, online: <cal.library.utoronto.ca/index.php/cal/article/view/20973/17141> [perma.cc/R96P-XW57].
27. Pierre Schlag, "Normative and Nowhere to Go" (1990) 43:1 Stan L Rev 167 at 167 [Schlag, "Normative"].

to make an argument but to *do something* to an audience of other legal scholars.[28]

There are relatively quotidian examples. In *Normative and Nowhere to Go*, Pierre countersigns a critique of American legal liberals who have continued writing for a Supreme Court which stands ready to embrace progressive, principle-based, normative reasoning, which looks to the legal academy to embody those arguments and which—unfortunately for the scholars still writing with this audience in mind—no longer existed by the early 1990s.[29] What exactly, he implies, are such scholars hoping to achieve by this mode of scholarship?

But Pierre's aims are broader and, occasionally, more explicit. It is obvious to him, and he has said so out loud, that legal scholarship is never just a matter of making claims about the world but is always performative in Austin's sense, or at least aspires to be.[30] Whether we have read Austin or not, most legal scholars take the performativity of our scholarship as given. That is, most of us seek, most of the time, not only to metaphorically whisper in the ear of the prince but expect or at least hope that those whispers will actually shape how the prince acts.[31]

---

28. Focusing on the capacity of language to exercise an affective or aesthetic force on its readers, rather than just communicating information or presenting an argument, inevitably invites the spectre of political speech that *appeals to the emotions*. But this conceptual passage, from concern with the performativity of writing to apology for demagoguery, relies on a series of misconceptions. First, my operating premise is that *all* language works affectively, via the body. Modern cognitive science research has put the lie to the mind-body dualism at the base of our workaday folk psychologies. Even the purest reasoning processes, it turns out, are mediated through affective response: you *feel* what's reasonable as much as knowing it. See e.g. Antonio R Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Quill, 2000). This means, second, that Aristotle's famous typology of modes of persuasion, appeal to reason (logos), appeal to character (ethos) and appeal to emotion (pathos), provides a deeply imperfect map of how our writing works on readers. Thus, thirdly, the important distinctions are not about whether writing will have aesthetic force on the reader, but about what the force of that writing is being used to do. Lastly, and critically for thinking about the impact of legal scholarship, notwithstanding that actions that writing can perform and the effects it can have must involve individual readers, those actions and effects can land much wider, reverberating in shared practices, conventions, institutions, and forms of life.

29. Schlag, "Normative," *supra* note 27 at 168, fn 3, citing Ronald KL Collins & David M Skover, "The Future of Liberal Legal Scholarship" (1988) 87:1 Mich L Rev 189; Steven Winter, "Indeterminacy and Incommensurability in Constitutional Law" (1990) 78:6 Cal L Rev 1441.

30. See e.g. Schlag, "Normative," *supra* note 27 at 183, n 47.

31. Let me address one potential objection I can see to this claim. There is a conventional distinction drawn between positive (analytical, descriptive) scholarship, staged solely as explanation of law as it is (lex lata), and normative (evaluative, prescriptive) scholarship that makes explicit overtures to readers regarding what the law should be (lex ferenda). While I have sympathies for various critiques of this distinction, rooted in skepticism about the possibility of doing interpretation in a non-normative way, my claim here is much simpler. To wit: scholarship which tries to summarize the law in an area, or to explain it, or even to clarify it, still tends to be motivated by a belief that helping lawyers, judges, agents of the state, and/or members of the public understand the law will in turn shape their conduct, perhaps by bringing their conduct more in line, however imperfectly, with the law as it is, or alternatively by nourishing more informed public debate about what the law should be. Indeed, some

And if Pierre is exasperated, and I agree with others who believe that his occasional glibness veils exasperation,[32] it is not because legal scholars view themselves as objective, truth-telling scientists, but because they all too often write as if "[they] are addressing some morally competent, well-intentioned individual who has his hands on the lever of power."[33] Pierre's bugbear is that their (our) writing is oblivious to the modes in which power is configured, to the ways in which those configurations of power channel the effects of discourse and, consequently, to the kinds of effects that a piece of legal scholarship might possibly have.[34] There is no benevolent prince lying beneath the judge's robes. No man behind the yellow curtain. So why, Pierre asks, are we still trying to get an audience with the wizard?

These intentions are the key, too, to understanding his experiments with genre, including "The Law Review Article," "Normative and Nowhere to Go" and, perhaps most infamously, "My Dinner at Langdell's."[35] Crafting these articles may have allowed Pierre a respite from the soul-deadening repetition of a uniform aesthetic that ensnares so many legal scholars. Their existence may have even encouraged others to break out of that prison-house style. Yet these experiments served a deeper function. In "Le Hors de Texte, C'est Moi," Pierre argued that legal scholars should understand linguistic form as a matter of politics.[36] His experiments in genre, by contrast, tried to show, rather than just tell, how the force of legal scholarship might be limited and constrained by its customary formalistic structures, by its bloodless style, and by its implicit addressees.[37] The point was to explore and encourage exploration of strategies that would allow legal thought to make an effective intervention in the "decentred economy of bureaucratic institutions and practices" in which it would inevitably

positivist scholars eschew the rhetorical register of persuasion precisely because they believe their scholarship will have more performative effect—will be more likely to do something in the world—if it is expressed in tones of scientific objectivity. On this last point see e.g. Tarunabh Khaitan, "On Scholactivism in Constitutional Studies: Skeptical Thoughts" (2022) 20:2 Int J Const Law 547.

32. See especially Schlegel's contribution to this issue: John H Schlegel, "Humour, a Meditation" (2024) 47:1 Dal LJ [forthcoming].

33. Schlag, "Normative," *supra* note 27 at 187.

34. So e.g. failure to ask these questions leaves legal scholars blind to "the extent to which the cherished 'ideals' of legal academic thought are implicated in the reproduction and maintenance of precisely those ugly 'realities' of legal practice the academy so routinely condemns." Pierre Schlag, "Normativity and the Politics of Form" (1991) 139:4 U Pa L Rev 801 at 804-805.

35. Schlag, "The Law Review," *supra* note 7; Schlag, "Normative," *supra* note 27; Pierre Schlag, "My Dinner at Langdell's" (2004) 52 Buff L Rev 851.

36. Pierre Schlag, "'Le Hors De Texte, C'est Moi'—The Politics and the Domestication of Deconstruction" (1989–1990) 11:5-6 Cardozo L Rev 1631 at 1633 [Schlag, "Le Hors de Texte"].

37. Despite its playful structure, Pierre's most direct critique of the tacit politics of the traditional law review article is offered in Schlag, "The Law Review," *supra* note 7.

be received;[38] to find forms of legal scholarship that would not be so immediately co-opted, domesticated, and neutralized.[39]

Thinking of legal scholarship in terms of strategy leads me back to Le Guin. In wondering about what a novel might do to its readers, Le Guin smuggles in a decisive subclause: "if it's a good novel."[40] We can probably agree with Le Guin that the measure of a good novel is not an aesthetic something internal to the text but lies in the extent of its power to act upon its readers. Yet there is a great distance between grasping that point in the abstract and knowing how to do it ourselves. Le Guin wrote extensively about the mechanics of writing and the craft of storytelling, but she did not elaborate on the hows of good writing, in this sense. In particular, she offered little guidance, except by example, about how to achieve the *why*, that is, the intended act that an author hoped a piece of writing would exercise on its reader, using the *how* by which that aim would be undertaken. It is not clear, moreover, that an explicit list of Le Guin's strategies would be of much help to most writers, given the gap between knowing *about* how to do something and actually knowing how to do it.[41] It's one thing to be told how to parallel park, but actually getting the car into a tight spot, well…

Producing good legal scholarship in the sense developed here faces the same order of obstacles. But what shapes does that challenge take? Let me show you one. When I first delivered this paper, I was on the job market, so I felt bound—"linguistically, cognitively, and institutionally" as Pierre would have it[42]—to talk about my dissertation.[43] Superficially, the dissertation was about two things: the precursors, nature and limits of a "socio-evolutionary" tradition of theorizing legal change[44] and,

38. Schlag, "Normative," *supra* note 27 at 185.
39. On the domestication of deconstruction, see Schlag, "Le Hors de Texte," *supra* note 36.
40. Le Guin, *supra* note 9.
41. As pointed out by an anonymous reviewer.
42. Schlag, "Normative," *supra* note 27 at 181, fn 41.
43. Liam McHugh-Russell, *The Limits of Legal Evolution: Knowledge and Normativity in Theories of Legal Change* (PhD Dissertation, European University Institute, 2019) [unpublished].
44. The broad tradition draws in, *inter alia*, Albert Kocourek & John H Wigmore, *Evolution of Law: Select Readings on the Origin and Development of Legal Institutions* (Boston: Little, Brown, 1915); W Brown, "Law and Evolution" (1920) 29:4 Yale LJ, online: <digitalcommons.law.yale.edu/ylj/vol29/iss4/2>; Donald T Campbell, "Variation and Selective Retention in Socio-Cultural Evolution" in Herbert R Barringer, George Irving Blanksten & Raymond Wright Mack, eds, *Social Change in Developing Areas: A Reinterpretation of Evolutionary Theory* (Rochester, VT: Schenkman Publishing Company, 1965) 19; Friedrich A von Hayek, *Studies in Philosophy, Politics and Economics* (Oxfordshire, UK: Routledge & K. Paul, 1967); Paul H Rubin, "Why is the Common Law Efficient" (1977) 6 J Leg Stud 51; George L Priest, "The Common Law Process and the Selection of Efficient Rules" (1977) 6 J Leg Stud 65; Peter Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 1980); Robert C Clark, "The Interdisciplinary Study of Legal Evolution" (1981) 90:5 Yale LJ 1238; Niklas Luhmann, *Law as a Social System*, translated by Klaus A Ziegert, Fatima Kastner et al, eds,

second, the World Bank's *Doing Business* project, which until its abrubt cancellation in 2020 measured various dimensions of business regulations for 192 countries, and then ranked countries according to the project's idea of what business regulations should be.[45] The study adds some meat to debates over what is happening across the globe as legal rules and regimes come increasingly into contact with other forms of governance, rooted in claims of scientific validity and expertise and empowered by innovation in techniques of social quantification. The findings are of interest to people who study (or engage in) the politics and social dynamics of international governance. The text also synthesizes and critiques a large body of law-and-economics research, in service of finally driving a stake through the heart of Posner's notorious claim about the purported 'tendency' of the common law to allocate rights efficiently.[46]

Those intended contributions aside, my tacit audience was primarily other scholars, especially those ensorcelled by two perilous intellectual aspirations. The first is the seemingly indefatigable ambition to provide a *general theory* of the relationship between legal change and the operation of various social forces. Such efforts run from the obtuse characterization of norms as the equilibration of countervailing interests,[47] to the more robust but often arcane accounts of law and the economy as social "systems" in a process of co-evolution.[48] By showing how extra-legal expertise has been implicated in an immensely successful project of global legal reform, my research rehearsed a historicist critique of social-scientific positivism that is now between forty and two hundred years old, depending how

(Oxford: Oxford University Press, 2004); Gunther Teubner, *Law as an Autopoietic System*, translated by Anne Bankowska & Ruth Adler, Zenon Bankowski, ed (Cambridge, MA: Blackwell, 1993); Simon Deakin, "Legal Evolution: Integrating Economic and Systemic Approaches" (2011) 7:3 Rev L & Econ 659. In some sense, the best summary of jurisprudence rooted in "evolutionary functionalism" is offered by one of its noted critics, Robert W Gordon, "Critical Legal Histories" (1984) 36:1-2 Stan L Rev 57.

45. World Bank, *Training for Reform: Doing Business 2019* (Washington, DC: World Bank, 2018); Rush Doshi, Judith G Kelley & Beth A Simmons, "The Power of Ranking: The Ease of Doing Business Indicator and Global Regulatory Behavior" (2019) 73:3 Intl Organization 611.

46. Richard A Posner, *Economic Analysis of Law*, 1st ed (Boston: Little, Brown, 1972) chs 5, 23; Richard Posner, "Some Uses and Abuses of Economics in Law" (1979) 46:2 U Chi L Rev at 285, online: <chicagounbound.uchicago.edu/uclrev/vol46/iss2/2>. Notably, these critiques required me to take a deep dive into Ronald Coase's "The Problem of Social Cost" (1960) 3 JLE 1. Like seemingly anyone who has spent time with this classic article, I developed what was surely a unique, and uniquely correct, interpretation. I should note that the most lucid exegesis of Coase's project and methods is none other than Pierre Schlag, "Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis" (2013) 99 Iowa Law Review 175.

47. George J Stigler, "The Theory of Economic Regulation" (1971) 2:1 Bell J Econs & Management Sci 3; William M Landes & Richard A Posner, "Adjudication as a Private Good" (1979) 8 J Leg Stud 235; Paul H Rubin, "Common Law and Statute Law" (1982) 11 J Leg Stud 205.

48. Luhmann, *supra* note 44; Teubner, *supra* note 44.

you measure.[49] There is *no* general theory of the relationship between knowledge practices, economic interests, social structure, and legal systems; you cannot do socio-legal history without getting into the mess of actual history.[50]

Complementary to this search for a general theory of legal change has been a broader project to revive politically neutral legal science, by founding affirmative claims about law on the application of social-scientific methods to legal and non-legal materials.[51] A presumptive neutrality on the part of the theorist in a sense comes "baked in" to efforts to articulate a general theory of legal change and its relation to social change. A general theory might propose an interplay of social forces that the theorist does no more than describe. Or it could admit a role for scholarship, but only as an objective map of means to be wielded by political actors who are ultimately responsible for choosing among means and especially among the ends they might be used to achieve. To admit that the scholar plays an active role in legal change, however, means dismantling the status of their own theorizing as mere explanation. By tracing the frameworks, premises and methods of from one body of 'expertise about law' into a global campaign of legal reform, while exposing the failures of that research to satisfy its own standards of epistemic validity, my research illustrated just how entangled legal scholars are in global knowledge politics, and by implication, our role in politics per se, no matter our stated methodological commitments.[52]

---

49. See e.g. Michel Foucault, *Archaeology of Knowledge* (Oxfordshire: Routledge, 2002); Thomas S Kuhn, *The Structure of Scientific Revolutions*, 3rd ed (Chicago: University of Chicago Press, 1996); Georg Wilhelm Friedrich Hegel, *Lectures on the Philosophy of History*, 3rd ed, translated by J Sibree (London: Bell, 1914).

50. Gordon, *supra* note 44 at 75-87.

51. Since the early 20th century, conventional modes of legal reasoning have been subject to various critiques. The effect of those critiques, or at least their intended effect, has been to strip away the veneer of scientific objectivity such modes of reasoning would otherwise grant judicial decisions and legal scholarship. The open texture, indeterminacy and multiplicity of these conventional forms of reasoning mean that arguments relying them are not only exposed to criticism, but opened to accusations of being motivated by political bias or ideology. Duncan Kennedy, "The Hermeneutic of Suspicion in Contemporary American Legal Thought" (2014) 25:2 L & Critique 91. The flipside of this point is that, intentionally or not, the choices a judge or legal scholar makes about modes of reasoning and how to apply them leaves room for subjectivity and preference, foreclosing the ability to assign responsibility for the consequences of their work onto "science" or "the law" and thereby implicating them personally in politics. One can understand much of 20th century legal theory, and especially methods that seek to ground law in empirical (social) science, as a set of efforts to recover an objective standard that keeps the jurist above or at least out of the political fray. Joseph William Singer, "Legal Realism Now" (1988) 76:2 Calif L Rev 465; Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021).

52. Orford, *supra* note 51.

My motivations, I would say, were much the same as Pierre's. He was certainly one of the few scholars whose work I could cite when it came time to articulate why anyone should care about my findings.[53] Like him, at least part of my intention was to encourage an "intensif[ied]…critical reflexivity" among legal scholars.[54] In Austin's terms, the *illocution* of my research—the doing intended by the presentation and expression of my findings—was not just to rehearse a logical refutation of a particular mode of or approach to conducting legal scholarship. My aim was to actually, eventually, disabuse some scholars from embodying that approach.

Admittedly, 125,000 words and five years seems like a great deal of effort to expend just to encourage a dissertation examining board to "intensify [the] critical reflexivity" of their work. Of course, I cannot affirmatively claim the effort was in vain. Not least because, to a significant degree, the "presentation and expression" of my project is unfinished. There is (I am strongly advised) still a book to be written out of the dissertation or at least, but only if (these advisors insist) I really can't find another way, a series of articles. Challenge enough to make a project accessible, topical, and interesting![55] The "anxiety of influence" most legal scholars suffer is not "the melancholy of the creative mind's desperate insistence upon priority."[56] To the contrary, we mostly dread the purgatory of never being read at all. It is already a struggle to think about how to make an intervention that will reach readers. How much harder is it to write if you care about how you might actually move them?

Here the tribulations of the job market swing back into view. Even if I had possessed the secret to writing in ways that would 'take,' the constraints of the application process tacitly exclude making an intervention. I was, I am, supposed to be producing knowledge.[57] And having come, in the time between the first drafting of this essay and its publication, from being unsure about my job prospects to being on the cusp of applying for tenure, I am acutely aware that my professional context expects me not to

53. I took particular inspiration from Pierre Schlag, "Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)" (2009) 97 Geo L J 803 [Schlag, "Spam Jurisprudence"].

54. Schlag, "Normative," *supra* note 27 at 177, n 28.

55. *Cf* Murray S Davis, "That's Interesting!: Towards a Phenomenology of Sociology and a Sociology of Phenomenology" (1971) 1:2 Philosophy of the Social Sciences 309.

56. Harold Bloom, *The Anxiety of Influence* (Oxford: Oxford University Press, 1997) at 13.

57. On the problematics of "knowledge production" as an orientation of legal scholarship, see Pierre Schlag, "The Knowledge Bubble—Something Amiss in Expertopia" in Justin Desautels-Stein & Chris Tomlins, eds, *Searching for Contemporary Legal Thought* (Cambridge: Cambridge University Press, 2017) at 428.

affect readers, but to effect (and articulate) concrete "contributions to the literature."

For straining against the pressures that professional context places on the task of good writing, Le Guin and Pierre present two different models. Le Guin was notoriously critical of capitalism, and of the ways the profit motive could come into conflict with the aims of the artist.[58] Her writing though did not primarily address that context so much as seek to change how the individual reader came to the world and to thereby, indirectly, move the world in which we collectively live. Pierre's most celebrated work, by contrast, addresses us as fellow writers, provoking us to attend to the constraints the world places on good writing—on our writing. As legal scholars, as we seek to produce powerful writing, we are haunted by an awareness that our readers are themselves products of the neoliberal university, harried by increasingly exacting audit processes for tenure and promotion, and subjected to inter-institutional "rank anxiety."[59] Pierre has unflaggingly encouraged us to think about how our scholarship can be responsive to, or resistant to, that institutional context—though he is far from alone in doing so.[60]

In the grand scheme, though, the problem of fundamental ignorance may swamp the challenges posed by institutional context. Inasmuch as we are trying not just to tell an audience something, nor even to show them, but to actually have them see, and, more profoundly, to have our readers undergo some change, "as if by having met a new face, crossed a street [they] never crossed before," it strikes me that we are still mostly in the dark about whether any of this works, to what extent, and when.[61] Still, I worry, too, about how we can create the space, in a world that demands outputs, outputs, always outputs, to foster intervention, to provoke

58. See e.g. Ursula K. Le Guin, "Speech in Acceptance of the National Book Foundation Medal for Distinguished Contribution to American Letters" (19 November 2014), online: <https://www.ursulakleguin.com/nbf-medal> [perma.cc/MBY5-772B].

59. Brown, *supra* note 4; Strathern, *supra* note 4; John Holmwood, "Sociology's Misfortune: Disciplines, Interdisciplinarity and the Impact of Audit Culture" (2010) 61:4 Brit J Sociology 639; Schlag, "Spam Jurisprudence," *supra* note 53.

60. See e.g. Ntina Tzouvala, "The Future of Feminist International Legal Scholarship in a Neoliberal University: Doing Law Differently?" in Susan Harris Rimmer & Kate Ogg, eds, *Research Handbook on Feminist Engagements with International Law* (Elgar, 2017), DOI: <10.4337/9781785363924.00024>; Brenna Bhandar, "Registering Interests: Modern Methods of Valuing Labor, Land, and Life" in Justin Desautels-Stein & Chris Tomlins, eds, *Searching for Contemporary Legal Thought* (Cambridge: Cambridge University Press, 2017) 290; and see Jana Bacevic, "Knowing Neoliberalism" (2019) 33:4 Soc Epistemology 380 (addressing the wide gap between critiquing neoliberalism and knowing what to do about it).

61. I have long harbored doubts about the possibility of knowing anything about the effect of our scholarship on the world. See Liam McHugh-Russell, "On Ideas that Matter," mchugh-russell.ca (June 7 2018), online: <mchugh-russell.ca/2018/06/07/on-ideas-that-matter/> [perma.cc/E6TU-BREK].

exasperation, and to cultivate the genres of legal scholarship that make those moves possible.