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Humour, A Meditation

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Humor, A Meditation†

Back in 1987 when Critical Legal Studies was still "hot," I was shopping a piece that was a long review essay on Laura Kalman's history, *Legal Realism at Yale.*[1] An acquaintance who was on that faculty invited me to present the piece—which I am still quite proud of—at the workshop he was running. Owen Fiss was the first person to ask a question. He wanted to know whether the piece was "serious" work or whether it was just an elaborate joke. Surprised and bewildered by the question, I answered, "Both." In response he asserted that unless it were one or another he could not possibly respond, and for the rest of the workshop he sat squarely in front of me with his arms crossed and a scowl on his face. At that point, I knew that there was something troubling about the use of humor in scholarship, something not captured by the phrase "academic humor."

This odd experience happened about the time that I met Pierre Schlag in the journals. The piece was "Fish v. Zapp: The Case of the Relatively Autonomous Self."[2] I found it very apt, as well as quite funny in places—and wrote him to say so. I also tried to start up a friendship then, but it didn't work—both of our lives were too clotted I suspect. Later I read "Normative and Nowhere to Go,"[3] which was even funnier and even more on point, so I wrote again. A year or two later he invited me to a conference at Colorado and since then we have intermittently spent a lot of time talking about law schools, legal education, Critical Legal Studies, and legal scholarship.

These talks with Pierre can be exhausting but are always fun. I usually learn something; I doubt that Pierre does since I am basically a historian and an amateur theorist. As to the first, he is mostly uninterested, and as to the second, he is a pro. What I acquired along with Pierre's friendship was numerous askance looks when I mentioned him and my enjoyment of his work. As was the case in my meeting with Owen Fiss, these sideward looks surprised me. Still, Pierre and I share a rather black and ironic sense

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1. John Henry Schlegel, "The Ten Thousand Dollar Question," (1989) 41 Stan L Rev 435, DOI: <10.2307/1228749>.
2. Pierre Schlag, "Fish v Zapp: The Case of the Relatively Autonomous Self" (1988) 76 Geo LJ 37, DOI: <10.18574/nyu/9780814739532.003.0009>.
3. Pierre Schlag, "Normative and Nowhere to Go" (1991) 43 Stan L Rev 167 DOI: <10.2307/1228996> [Schlag, "Nowhere to Go"].

of humor and an increasing portion of his work shows—though I would object strenuously to anyone who used "showcases"—that sensibility. It is that sensibility however which I wish to examine.

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What do I mean by "ironic humor?" Well, I doubt that my sense of irony fits very well with perhaps the most famous definition. In the second book of *De Oratore* Cicero speaks of irony as follows:

> "Irony," that is saying something different from what you think, is also elegant and witty. I don't mean the kind I mentioned earlier, saying the exact opposite…[of what you believe], but being mock-serious in your whole manner of speaking, while thinking something different from what you are saying.[4]

In contrast, most of my own humor revolves around the endless stories of the perverse results achieved by bureaucracies, especially University bureaucracies, in pursuit of their ostensible objectiveness. Pierre's humor is more complicated and so, for the time being, I wish to bracket the definitional question until after I have supplied some examples.

The most obvious signs of Pierre's ironic sensibility can be found in some of his titles: "Normative and Nowhere to Go,"[5] "Law and Phrenology,"[6] "My Dinner at Langdell's,"[7] and "Spam Jurisprudence—Air Law and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)."[8] But something as simple as "The Law Review Article,"[9] ostensibly a primer for young academics on how to produce legal scholarship, contains some of the blackest observations on the ways that the structure of the American University and the law school within it make writing meaningful scholarship impossible, at least before tenure, and for most people even afterwards. Similarly, "My Dinner at Langdell's," seemingly designed to be an example of the endless discussions of contemporary jurisprudes with their esteemed elders, turns anthracitic when the invitee is informed that his work is going to consign him to

4. Marcus Tullius Cicero, *De oratore [On the Ideal Orator]*, translated by James M May & Jakob Wisse, (Oxford University Press, 2001), at 176.
5. Schlag, "Nowhere to Go" *supra* note 3.
6. Pierre Schlag, "Law and Phrenology" (1997) 110 Harv L Rev 877 DOI: <10.2307/1342231>.
7. Pierre Schlag, "My Dinner at Langdell's" (2005) 52 Buff L Rev 851, online: <digitalcommons.law.buffalo.edu/buffalolawreview/vol52/iss3/11> [perma.cc/3QEB-EDF3].
8. Pierre Schlag, "Spam Jurisprudence, Air Law and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)" (2009) 97 Geo LJ 803, DOI: <10.2139/ssrn.976078> [Schlag, "Spam Jurisprudence"].
9. Pierre Schlag, "The Law Review Article" (2017) 88 U Colo L Rev 1043, DOI: <10.2139/ssrn.2746650>.

living on as footnote 233, in a surprising invocation of Gregor Samsa in Franz Kafka's *Metamorphosis*.[10] Still, even where Pierre's humor is not this black, there is a certain seriousness to it that sort of matches Cicero's definition that some might find disconcerting.

In "Normative and Nowhere to Go," the footnotes decide to take over the text, seemingly exemplifying the Deriddarian understanding of law that Schlag had explained in previous pieces.[11] Later, in "Spam Jurisprudence," the footnotes come alive in the person of "Daniel" who regularly comments disparagingly on the text and, in frustration that the text seems not to be willing to accept his advice, simply renames himself "Bruce Ackerman," only to slowly give up on his project.[12]

There are many other examples of Pierre's humor from which to choose. I shall start with three oldies. In "Normativity and the Politics of Form," Pierre drops this footnote while discussing the internal perspective on law:

> Can you imagine trying to make sense of the automobile market by adopting the "internal perspective"—and then equating the internal perspective with the dealer's point of view?[13]

In "Clerks in the Maze," after noting that some academic writings "strive to rid the intellectual scene of certain inquiries or points of view by simply *declaring* them to be '*nihilistic*,'" there comes this footnote, "(Many citations omitted)."[14] A few years later, in "Hiding the Ball," when listing some of the many assertions as to what the Constitution really "means," Pierre begins the following paragraph a with a single sentence—"We could go on in this way"—only to begin the next paragraph with—"Let's not."[15] A more recent example can be found in "The De-Differentiation Problem," where the last section is titled "Conclusion: so what," and the following paragraph consists of "An important question, that one."[16]

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10. Schlag, "My Dinner at Langdell's" *supra* note 7.
11. Schlag, "Nowhere to Go" *supra* note 3.
12. Schlag, "Spam Jurisprudence" *supra* note 8.
13. Pierre Schlag, "Normativity and the Politics of Form," (1991) 139 U Pa L Rev 801, at 925 n 318, DOI: <10.2307/3312375>.
14. Pierre Schlag, "Clerks in the Maze," 91 Mich L Rev 2053, 2059 n14 (1993) DOI: <10.2307/1289723>.
15. Pierre Schlag, "Hiding the Ball," (1996) 71 NYUL Rev 1681, at 1700, online: <ssrn.com/abstract=1557247> [perma.cc/YR4X-7PHU].
16. Pierre Schlag, "The De-Differentiation Problem," 41 Continental Philosophy Rev 35, at 57 , online: <ssrn.com/abstract=975810> [perma.cc/W392-S5Y3].

Having established, to my satisfaction at least, that Pierre is a very funny man, it is time to briefly return to Owen Fiss, who had trouble with that piece of mine. I never fully understood why he thought that my piece might have been an elaborate joke. Admittedly parts of the final two thirds of the piece regularly adopted a somewhat flippant tone, as did the "Conclusion," which denied that concluding was possible. But the large central section attempted to deal quite directly with important questions about how one might understand the context within which intellectual texts are written and intellectual lives pursued. At least I sweated blood over it, as the prose made clear.

I like to suppose that the problem for Fiss was that the juxtaposition of some deadly serious theory that might be understood to suggest that doctrinally centered scholarship, like traditional intellectual history, was essentially an incoherent project, might well have been threatening, maybe more so because of the humor that accompanied it. But still, I was just a kid from the provinces. Why did he not just pick the part that he wished to talk about and ignore the rest, as is a commonplace response to a presentation in the iconic faculty seminar? There is another possibility of course. Fiss might have spoken out of fear, for to mix seriousness and humor is to destabilize the activity that is scholarship, to suggest that the hard-driven earnestness which characterizes legal scholarship may be more necessary to the author's sense of place than something that the topic itself calls for. An examination of some of the commentary that appeared with the publication of "Spam Jurisprudence" might provide an understanding of how such a fear could arise.

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Four commentators responded to Pierre's piece: Dan Ortiz, a constitutional law scholar at the University of Virginia Law School, United States Circuit Court Judge Richard Posner, Richard Weisberg of the Cardozo Law School, and Robin West of the Georgetown Law School, whose journal published the piece. Dan Ortiz, who asserted that he taught "Law and Phrenology," admitted the accuracy of Pierre's identification of then-current practice as "Spam Jurisprudence," but argued that Schlag was wrong about the possibility of improvement and spent a large portion of his contribution talking about Duncan Kennedy as a performing "celebrity" who, at the same time, chose to write in "a genre that catered to…[law professors'] professional appetites."[17] Judge Posner thought that Schlag had made "four important points," but had exaggerated "the fourth and as

17. Daniel R. Ortiz, "Get a Life?," (2009) 97 Geo LJ 837, at 839.

a result paints too dark a picture of the current state of academic law."[18] After going through the four points he spent much of his time trumpeting the accomplishments in law and economics, cognitive science, and empirical studies of law in general. Richard Weisberg adopted the persona of Daniel, the character in Schlag's footnotes, to assert a complaint, not about Schlag's analysis, but about the fact that it, and much work like it, paid no attention to the law student's longing to experience leadership that would help in law's attaining justice.[19] Robin West followed Pierre's argument, generally positively, but argued that normative legal scholarship could avoid mimicking the form of the judicial opinion and instead should focus on "what our social world should look like, and what it should not look like."[20]

What is interesting about all four of these comments is that each offered what a common law lawyer would have called "a plea in confession and avoidance." Each admitted that contemporary legal scholarship is "spam"—a processed pork product it must be remembered—and then tried hard to avoid that conclusion. Ortiz and Weisberg directed attention away from Schlag's assertion of the close-to-impossibility of revivifying legal scholarship. Ortiz gravitated toward a singularity that is "Duncan Kennedy," and Weisberg appealed to the law students' search to learn about justice. Posner and West instead sidestepped Schlag's conclusion with an assertion that it would be possible for legal scholarship to veer away from its current course, but without addressing the social circumstances in which the current University Law School finds itself.

On all four of these moves, I put my money on Schlag. The rationalization of legal doctrine is a waste of time for any but the meanest intellect. Still, what interests me is that none of these scholars saw fit to pay attention to the humor in the piece. It is close to hysterical to be listening to the chatter of a footnote when some of that chatter mimics quite wonderfully Schlag's own humor. When faced with the need to speak, as Fiss was not, the four chose to pay attention to the formal argument and not to the seemingly unserious humor. Why? What was there to be afraid of? After all, everyone concerned had tenure!

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18. Richard A. Posner, "The State of Legal Scholarship Today: A Comment on Schlag," (2009) 97 Geo LJ 845, at 845 online: <chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=6204&context=journal_articles>.
19. Richard H. Weisberg, "Daniel Arises: Notes (Such as 30 and 31) from the Schlagaground," (2009) 97 Geo LJ 857 , online: <larc.cardozo.yu.edu/faculty-articles/412>.
20. Robin West, "A Reply to Pierre," (2009) 97 Geo LJ 865, at 872, online: <ssrn.com/abstract=2017030>.

It is here where Cicero might be of help. To say one thing but mean another or to speak the exact opposite of what one believes would not just undermine the premise of scholarship, but would also raise the question of whether I, the reader, am being gulled. Whether someone is pulling a fast one on me. Whether I am being made fun of. What if I am not in on the joke, or, worse, am its object? Best to stay away, to maintain dignity, lest I am exposed as just not "getting" the joke, or worse, not understanding that I am the joke.

The fear of the possibility of being embarrassed by getting caught "with one's pants down" is serious enough, but this is Pierre's work I am talking about. Any modestly well-informed scholar would know that all but the earliest of his scholarship is about speaking the unspeakable, and his humor makes this fact about as clear as possible. "Everybody knows" that Daniel *ille* Footnote should not be complaining about the quality of the text, just as "everybody knows" that demoting the text to a footnote is unacceptable because it would be a world turned upside down. Footnotes are, and only can be, supporting authority; how is a proper scholar to respond to their revolt? And how could one do so without seeming to be a fool?

But the possibility of being seen to be a fool is not the worst possibility presented to any commentator. Pierre's humor is an obvious clue as to how seriously he takes the state of affairs that he regularly bemoans. How so? Here it is important to remember that Robert Cover has a small role in many of Pierre's pieces, though a much larger one in his calculus. Cover's invocation of the field of pain and death that is intrinsic to law informs Pierre's only modestly constrained displeasure with the mess that legal scholarship makes out of its implicit claim to be an exercise in reason.

A scholarship that ignores the violence that is law while merrily going about fashioning personal preferences into norms is not worthy of being called an exercise in reason. No one could be as suspicious of such scholarly behavior as Pierre is without needing humor both to defuse, and at the same time to highlight, the irony inherent in such meticulously formed thoughtlessness. Readers, not to mention commentators, might rightly fear exposure to the concerns both behind the humor and instantiated by it. And, for scholars who participate in such a charade it must be truly frightening to confront the harsh reality that Pierre so fully delineates through his scholarship and so to risk being the point of his humor. A better alternative probably is to ignore the humor and so endure the possibility that it is better to be thought a fool, than to speak and remove all doubt.

Such an alternative is also better because Pierre's scholarship raises the existential stakes inherent in the choice to be a law professor. A subject

matter and approach that are as intensely personal as his violate the distancing mechanisms routinely instanced in proper "academic" form. Thus, readers who consider addressing Pierre's arguments likely find themselves confronting things they may not want to talk about – namely, their professional persona and whether that persona is a put-on or not, and if the former, whether it has any value or has been merely a waste of time. Most scholars are likely to find such existential questions best avoided.

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Interestingly, even people who "get" Pierre, who understand the strength of his arguments about the emptiness of contemporary legal scholarship, seem still to worry about the import of those arguments. The words – "Does Pierre mean that my scholarship is worthless too?" – can be felt hovering even over such an audience, almost as if the old canard about postmodernism's making progressive politics impossible is still alive and well among scholars of a left persuasion. It would be foolish to fail to recognize that the totality of Pierre's scholarship makes it seem that Sartre's *No Exit* fully captures the position of the legal scholar today. However, I rather doubt that such an analogy is appropriate.

True, Pierre's work makes it all but impossible to unthinkingly engage in contemporary varieties of legal scholarship in anything other than Sartrean *mauvaise foi*, but the important word in that proposition is "unthinkingly." Pierre's concern with what passes for the exercise of reason in legal scholarship today should not be taken as a rejection of reason. Quite the opposite. One could not be as concerned about the misuse of "legal reason" as he is and not at the same time be a partisan of reason well exercised.

So, for Pierre, Sartre's four walls and no doors does not capture the position of the scholar who is willing to act thinkingly and so in *bonne foi*. Such a scholar of necessity recognizes the difficulty of exercising reason with respect to the law that is embedded in, and so instantiates, social life. Though Pierre would not put it this way, he does recognize that, as Leonard Cohen put it, "There is a crack, a crack in everything. That's how the light gets in."[21] It is that crack that is always there for scholars who take Pierre's work seriously and so honestly try to avoid all of the perils for the exercise of reason that his work carefully details.

21. Leonard Cohen, "Anthem," on *More Best of Leonard Cohen* (Sony Music Entertainment, 1997).