

THE LAW REVIEW ARTICLE

PIERRE SCHLAG*

Keywords: genre, frames, framing, scope-setting, baselines, flux, form, aesthetics, legal reasoning, legal scholarship, absurd, cass sunstein

Abstract: What is a law review article? Does America know? How might we help America in this regard? Here, we approach the first question on the bias: As we have found, a growing body of learning and empirical evidence shows that genres are not merely forms, but forms that anticipate their substance. In this Article, then, we try to capture this action by undertaking the first and only comprehensive “performative study” of the genre of the law review article.

Drawing upon methodological advances and new learning far beyond anything thought previously possible, we investigate “the law review article” qua genre. What is it? What does it do? What are its implications? How does it make you feel?

By teasing out the infrastructural determinations section by section, we demonstrate rigorously that there is both far more (and far less) going on than meets the eye. In what is the first instance in the history of the United States (and perhaps the world) we enact in each section of the law review article (e.g., Part I, Part II) whatever that section is ideally supposed to accomplish. This is what we mean by “performative study.” Using this approach, the reader can

* University Distinguished Professor & Byron R. White Professor of Law, University of Colorado. A version of this piece was presented at the IGLP Conference Panel on Contemporary Legal Thought at Harvard, June 2015 organized by Christopher Tomlins and Justin Desautels-Stein where the piece was appreciated by some and not by others (as usual). My thanks to my friend Fred Bloom who provided keen advice on this piece and who is in no way responsible for its contents (or lack thereof). This work is part of the Tenure Assist Network Forum and will be promoted through Equity-More Citation Services. The FT Impact-Prognostics Factor was rated 4.3 (.2 tolerance) on March 10, 2017.

experience first-hand what the law review article does to him or her IRL. In a more conventional vein, it is hoped that this Article will be useful to junior legal scholars, young scholars' workshops, elite law school boot camps, faculty evaluation committees, associate deans for research, law review editors, and law school deans everywhere.

The Article closes with a call for improvements to the law review genre, cooperative federalism, daylight savings time, and the nature of the universe generally. The Article is addressed not merely to the Court, but to the President, to Congress, and, of course, to "We the People." Perhaps more than anything, we call for further sustained study of "the law review effect." A sequel, entitled "Dissertation Disease," is currently contemplated in order to undertake a similar study of the University Press Monograph.

INTRODUCTION

The most important thing at the beginning of a law review article is to excite the reader's imagination, to evoke the hope that what comes next is truly gripping. A page-turner. Something totally out of the ordinary. Perhaps not even a law review article at all. Once this moment is reached, it must be brought firmly to an end, perhaps with the aid of a long elliptical sentence, wandering around through pointless verbal detours, ultimately to leave the reader disoriented and wondering: What's going on here?

There. Done.

With this attention-grab move out of the way, and before the reader can recover his wits, he needs to be gentled into recognizing that, as with so much else in life, things sadly often are pretty much what they appear to be; that here, as elsewhere, escape and exception are unlikely, and that the typescript now well underway is indeed a law review article after all. It is time for the hook of the first paragraph to be domesticated into a manageable overarching statement that will capture the serious work to follow in the march of the

Parts.¹ (Part I, Part II, Part III. And so on.)

Now to be sure, none of this means that what follows cannot contain a bit of errant humor, a couple of gestalt shifts, or perhaps a flight of heroic transport. Still, in the main, the prose to follow will be a measured display of expertise and mastery—each weighted down and secured by the accumulating *gravitas* of available data sets, archival references, and serial bouts of case-crunching. With luck, most of this will be reserved for the footnotes. Meanwhile, in the text, seriousness is in the offing. Moderation and reasonableness predicted. Yes, there will be some romance (glimmers of utopia visible), but in the main, we will be doing accounting. Literally or figuratively. Accounting and documentation.

Voila. We are only at the fifth paragraph and already expectations have been excited, subdued, and dramatically lowered. Thus cowed into submission, the reader is prepared to undertake the familiar journey. With readerly expectations thus reset, it is the time to lower the burden of argument, as well. This can be done explicitly (not very good form) or through a more subtle frame-setting.

We will call the frame-setting happening now “*entry-framing*” so as to distinguish it from other kinds of framing that will occur later in the law review article. Among other things, entry-framing allows the author to elicit certain kinds of readerly attention (and inattention) as well as readerly hopes (and anxieties). This is the law review equivalent of the trial lawyer’s opening argument. It is a question of putting certain audience faculties and orientations on high alert, while lulling others to sleep. What we have here is what Althusser called “interpellation”—the calling forth of a particular self, oriented and motivated to undertake certain ideologically structured roles, tasks, functions² (and crucially, *not certain others*). Genres can do that. Yes, they can.

In the main, we will be foregrounding and backgrounding. Certain issues, problems, questions, actors, agencies, action will be placed front and center. Others will be set backstage or

1. Reference is made here to David Foster Wallace’s incomparable description of the plane flight of the tax auditor. DAVID FOSTER WALLACE, *THE PALE KING* (2011).

2. Louis Althusser, *Ideology and Ideological State Apparatuses*, in *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 127, 175–76 (Ben Brewster trans., 1972).

even off-stage. For the committed advocate, entry-framing is the place to smuggle in the most controversial claims and to do so *not* in the guise of claims at all, but rather more subtly as unobserved aspects of the scene.³

Soon it will be time to close the Introduction. But first we need to pose the inquiry that will organize all that is yet to come. What inquiry? Note that it will have to be the sort of inquiry that is susceptible to a plausible resolution through law or law-like surrogates. The law-like surrogates are not quite law, but take the place of law. “Legal theory,” for instance, is a law-surrogate. Legal theory often presents itself (without ever actually saying so) as the law of laws, the norm of norms, the doctrine of the doctrines. Occasionally, we will put entire disciplines or sub-disciplines in charge like this. But only if they are good law-surrogates (in other words, only if they already exhibit law-like aesthetics). Economic analysis and analytical philosophy come to mind.

The important thing in articulating the inquiry to be pursued is that the formulation must be stated in such a way as to render resolution possible. The point is obvious and nearly indisputable: law review writers never discuss that which they cannot fix. No one writes a law review article where the end line reads: “Well, in conclusion, it seems like we’re all pretty much screwed.” That simply doesn’t happen. Which means—and this is important—that if ever we were screwed, you wouldn’t hear about it in a law review article. Ever. In fact, the more thoroughly and intensely screwed we are, the less likely you would be to hear about it in a law review article.

Weird, isn’t it? Yes. But it’s like that.

Let’s not think about it too much. The really important thing, always in a law review article, is to carry on. Perfectionism is the enemy. Capital letters and periods are your friends. Keep moving.

On the bright side, the commitment to address only those

3. Kenneth Burke’s “dramatistic approach” helpfully shows how narratives, ideologies, and philosophies can emphasize different theatrical terms (scene, agent, agency, action, purpose) to achieve a variety of rhetorical effects. Here, I am suggesting that one of the classic ruses of rhetoricians lies in using entry-framing to ensconce their more controversial claims as aspects of the scene so that these are registered as a background given (or not registered at all). KENNETH BURKE, *LANGUAGE AS SYMBOLIC ACTION* (1966).

problems we can resolve renders topic selection much easier than might first appear. As with so many other things in life, the thing to do is to start at the end and reverse engineer. That is what lawyers do for their clients and what we legal academics do for our particular juridical utopias.

So then, what is the inquiry here? Very simply, it is an inquiry into the character of the law review article *qua* formal artifact. Formal as in “of form,” formal as in “formative,” and formal as in “formalism.” The basic idea is that *the very form* of the law review article is stylized and thus ineluctably enacts, narrows, and channels what can be said and thought.⁴

Notice that in and of itself, this is not a terribly interesting insight. Of course, that’s what the law review article does! So do the dissertation, the picaresque novel, and the comic book. What else is to be expected? The thing that is of interest isn’t that the law review article *qua* artifact is constraining, channeling, or enabling. The interesting thing lies in *the how* of it all—how and in what ways does the law review article enact, narrow, and channel thought? That is the inquiry we will pursue here.

Begin by considering what sort of overarching structure is appropriate for a law review article. The genre furnishes the answer.⁵ Indeed, genres always furnish their own answers. That is both the virtue and vice of genres. To give an example, it is commonly said that in novels there are only two kinds of stories to tell: “A Stranger Comes to Town” and “Someone Goes on a Journey.”⁶ The same is true of a law review article, except

4. It also, of course, opens up and sets forth the pathways for deviation and subversion. A close study of the law review text/footnote law interactions across the last 100 years would be worth its own empirical study. An analysis of the changing hierarchies implicit in the Bluebook across the last 100 years would also warrant attention. These kinds of micro-phenomena are hugely important as both indicia and regulators of legal form—not the least reason being they go generally unnoticed.

5. Genre studies is a vital field of study crossing a number of disciplines (literary criticism, rhetoric, political theory, etc.). In my very preliminary effort here, I will not get into the many interesting internecine disputes that comprise the field. For a very useful cross-cutting introduction to genre studies, see ANIS S. BAWARSHI & MARY JO REIF, *GENRE: AN INTRODUCTION TO HISTORY, THEORY, RESEARCH AND PEDAGOGY* (2010). It should be recognized that a “law review article” is not just a genre, but simultaneously an artifact, a disciplinary mechanism, a triage and certification device, a marketing tool, a All these other matters—the political economy of legal scholarship—I leave aside here.

6. The number 2 can be taken as a first approximation of the number 64—as in 64 stories to tell.

that with a law review article, it's not much of a journey (the starting point and the end point are rarely all that far apart) and strangers—at least real strangers—rarely come to town.⁷

In the event real strangers do come to town, they are quickly sent packing and enjoined never to come by again. All in all, in a law review article, there is only one story to tell, and the variants are almost always the same: “There is a problem, a conflict, an issue, a puzzle, a contradiction, a paradox, an aporia in the law. This Article will resolve it using the approved m.o.’s of juridical discourse.”

Notice that we are fast reaching the limits of the average attention span for an introduction. The reader is likely to become impatient. If an oral presentation is at stake (faculty workshop?), listeners even more so. This is the point where the author should relieve the tension created by offering up a joke. Preferably something subtle. Failing that, something rude and abrupt.

PART I

Here in Part I, the author seeks to elaborate, fortify, and cement the frames already activated in the Introduction. This is called *scope-setting* and it involves a formalization and specification of the entry-frame evoked and activated in the Introduction. Scope-setting involves carving out of Maitland’s seamless web of history (or by implication, law) some relatively discrete something amenable to investigation or analysis or argument—call it, the object of inquiry. Again, it is best, rhetorically speaking, not to be too obvious about the whole thing. But that is hard to do—particularly if we attend to what we are doing—as indeed Maitland does:

Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web The web must be rent; but as we rend it, we may watch the whence and whither of a few of the severed and ravelling threads which have been making a

7. On the law review article as a prototypical example of the “hero’s journey,” see Omri Ben-Zvi & Eden Sarid, *Legal Scholarship as Spectacular Failure* (forthcoming 2017) (on file with University of Colorado Law Review).

pattern too large for any man's eye.⁸

It's hard to detach from the beauty and violence of Maitland's lyrical touch. Still, pay no mind. We are called to move on. This is a law review article. Capitals followed by periods. Periods followed by capitals. Footnote. Footnote. Footnote. Just keep moving.

The next step is to stabilize the putative object of inquiry in one or a few, but certainly *not* many, disciplinary contexts. The reason we want a few (and not many) contexts is so that it becomes possible to say something about the object of inquiry, as opposed to . . . having to say everything about it. (You people who do cultural legal studies, pay no attention here.)

The most interesting thing about scope-setting is that it is utterly impossible. Indeed, of all the perfectly preposterous moments in a law review article, scope-setting is among the most outrageous and improbable of them all. It cannot be done. It cannot succeed.⁹ And yet—like petitionary prayer or the claim of Supreme Court nominees that they will follow the law, not make it—it is done all the time.¹⁰

Scope-setting is the point where, if we had a lucid author, he would close his laptop, dim the lights, reach for the scotch, and brood various gloomy thoughts about his ill-chosen career. A person of real integrity would think seriously about taking up writer's block.

Obviously, that does not include anyone here.

Why is scope-setting impossible? I refuse to go into it. If I go into it, you and I will be wandering this text for hours, possibly days. O.K. Never mind, here it is really quickly: Everything we, as moderns, think we know about law and

8. Frederic William Maitland, *A Prologue to a History of English Law*, 14 L. QTRLY REV. 13 (1898).

9. For elaboration, see Pierre Schlag, *The Knowledge Bubble—Something Amiss in Expertopia*, in IN SEARCH OF CONTEMPORARY LEGAL THOUGHT (Chris Tomlins & Justin Desautels-Stein eds., Cambridge University Press) (forthcoming 2016) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2741144 [<https://perm1.a.cc/JYB6-PAYN>] [hereinafter, Schlag, *The Knowledge Bubble*].

10. Now here I should caution that many writings in law reviews are not law review articles at all. That is to say, that they deviate so substantially from the genre that they might be classified as something else. I point this out because these other writings may not have a scope-setting problem. They may have other problems, but they could well evade this one.

world—Maitland’s “seamless web,” the butterfly effect,¹¹ Piaget’s nesting,¹² Thomas Reed Powell’s “legal mind,”¹³ Sartre’s “worm at the heart of being,”¹⁴ Derrida’s “Differance,”¹⁵ Lyotard’s Differend,¹⁶—all of this and so much more tell us incontrovertibly that scope-setting in law (as in so much of social life generally) is an illusory act. It is, to put it all too simply, an attempt by *force of text* to impose a static frame on matters we know or at least strongly believe will not stay put and almost always exceed any and all efforts at conceptual containment.¹⁷ (You people who do analytical jurisprudence and are still into necessary and sufficient conditions, pay no attention here.)

Now, I am not actually going to offer up an argument for this view, but will instead offer a quote from Bakhtin that I have been saving on several succeeding generations of laptops. As it’s beginning to look (given the track record) that the quote has a good chance of going entirely unused, I have decided to use it now. Here goes:

The word, directed toward its object, enters a dialogically agitated and tension-filled environment of alien words, value judgments and accents, weaves in and out of complex interrelationships, merges with some, recoils from others, intersects with yet a third group: and this may crucially

11. JAMES GLEICK, *CHAOS THEORY: MAKING A NEW SCIENCE* 8 (1988) (the metaphorical notion “that a butterfly stirring the air today in Peking can transform storm systems next month in New York”).

12. JEAN PIAGET, *STRUCTURALISM*, 28–29 (Chaninah Maschler trans., 1970) (the notion that there is no form or content *per se*, but rather that the two are relations such that a given form is content for some other form and so on and so forth).

13. Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 *YALE L.J.* 53, 58 (1930) (quoting Thomas Reed Powell: “If you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind.”).

14. JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 21 (Hazel E. Barnes trans., 1956) (“Nothingness lies coiled like a worm at the heart of being.”).

15. JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., 1978) (explaining differance as a neological “non-concept” for the structural incapacity of any meaning to coincide with itself—it is thus always different and always deferred (hence, Derrida’s coinage of the neologism differance)).

16. JEAN-FRANCOIS LYOTARD, *THE DIFFEREND: PHRASES IN DISPUTE* xi (Georges Van Den Abbeele trans., 2002) (conceptualizing a differend as a conflict between two parties that cannot be equitably resolved because of the absence of a rule or principle fairly applicable to both arguments).

17. I go into it here. Schlag, *The Knowledge Bubble*, *supra* note 9.

2017]

THE LAW REVIEW ARTICLE

1051

shape discourse, may leave a trace in all its semantic layers, may complicate its expression and influence its entire stylistic profile.¹⁸

There.

Perhaps the quote is worth a second read? No? Just a thought. Bakhtin really does trigger the right sort of confusion. It is important to be confused sometimes. If you are doing law and you are not ever (ever) confused, then you are simply not paying attention. So come on, a second look? No?

O.K. Moving on then.

PART II

This would be the literature review and methodology section.

O.K. Well, enough of that.¹⁹

PART III

Here we get to the theory part of the law review article. This is the part that could well be nearly unintelligible to law review editors† and might well lead one or more (or possibly all of them) to question whether the article should be published at all. The disturbing question will loom for the editors—does this

18. M. M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 276 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981).

19. It is possible that in this section, the reader will be apprised that while the issues have been discussed before in enlightening ways, prior discussions have been less than satisfactory. (Here “less than satisfactory” is a technical phrase meaning roughly, “not even worth a glance after *my* Article.”) The reader will then be told that prior discussions very likely have miscast or misprised the crucial issues. Or that they have failed to plumb the full depths of the dilemma. Or that there is some new learning, as yet untapped. Or yet again that prior work may have deployed the wrong methods or proceeded from the wrong vantages or . . . (and so on). After this recitation of past failures, the author must announce that, in sharp (and wholly improbable) contrast to all prior discussions, the instant Article will take a different approach. Specifically: where countless other articles have failed (body counts are still being tabulated) the present Article will succeed. Yes!

† Editors’ note: No, we totally get it.

author actually know his or her stuff or is the law review about to embarrass itself in print . . . from here to eternity? It is at this point that credentialism can help. Indeed, the right email address, the right zip code, the right authorial name, the extensive listing of notable names in the first vetting footnote—all of these things are extremely useful to allay fears or concerns. I mean, if the author has the right provenance and certifications and still the article crashes . . . I mean, who would have thought—right?

Let's dig in.

Notice that all the difficulties that throttle the possibility of scope-setting—let's give them a name: let's call them agencies of flux and disturbance—are not matters that we can fix by addressing them explicitly. That will not do because, of course, when we address these agencies of flux and disturbance (“AFAD”) *explicitly in our texts*, we do so by first trying to stabilize them—which is to say, we try to do the very thing that Bakhtin, and later Derrida, describe as impossible.

Still, many of our readers do not read Bakhtin (“Who?”) or Derrida (“Oh yeah, that guy”) and so there is some possibility that when AFAD is mentioned in our texts, AFAD will stay put. AFAD is AFAD. Perhaps the best way to establish that AFAD can be stabilized is to break it down into its constituent elements. Like this. There are four parts to AFAD:

A
F
A
D

See—it works. Justice Scalia famously used the same m.o. in the case of *District of Columbia v. Heller* to decipher the meaning of the Second Amendment's right “to keep and bear arms.”²⁰ According to Justice Scalia, there are four parts to the right to keep and bear arms:

R
K

20. 554 U.S. 570 (2008).

2017]

THE LAW REVIEW ARTICLE

1053

B
A

Justice Scalia's approach was in stark opposition to Justice Stevens who in dissent analyzed the thing as follows:

R
KBA

This made for thrilling disagreement: Which is it? Is it . . .

R
K
B
A

or is it . . .

R
KBA?

The important thing here is to try to keep a straight face through it all.

The eyes of the law review article editor are glazing over. The mind wanders. Images come into focus: a drop of condensation sliding down a cold glass of Sauvignon Blanc, the liquid gold of a rye on the rocks. Steam swirling upward from a cup of espresso on a cold white marble table. The rain outside has stopped. The streetlights and the puddles sparkle. All right. Everybody take a break.

O.K. Break over.

Remember AFAD and the quote from Bakhtin above?

Imagine now that we treat AFAD—the “agencies of flux and disturbance”—seriously. If we start delving seriously into AFAD, things will likely get dynamic, mutable, and uncontainable. That in turn would be antithetical to the obvious aims of the law review article—namely, to present an identifiable, stabilized, stand-alone, portable, off-the-shelf, bit

of knowledge—supported by a massive and eminently forgettable substructure of documents, data, and other such artifacts.²¹

If that is the desired endpoint, then it is desirable to minimize the flux and disturbance at inception. Indeed, the genre of the law review article is a performative confirmation that the best way to reach the end of an argument successfully is, well . . . to begin very close to the end while claiming nonetheless to start very far away.²²

PART IV

This part is generally the *pièce de resistance*—the place where the argument kicks in. This is the place where things are really going to happen. Picking up the thread in Part I, the crucial question is whether there is something entrenched in the genre we know as the law review article that effectively contributes to its stabilizing effects.

Uhm—yes. Emphatically so. Notice that one way of thinking about the law review article is that it is itself at the level of form a precipitation, a freezing of the state of the art of legal thought and legal knowledge. More vexingly, it may be a freezing at the level of form of the state of art *circa* fifty or a hundred years ago.

Where intellectual life (or indeed, any kind of life) is concerned, *freezing* is seldom an auspicious metaphor. In law, we are supposedly beyond the freeze-dried forms of formalism. And yet in the highly stylized character of the law review article, its stock of stereotyped gestures, its relentless pretense to knowledge, its predictable (and predictably inconclusive) policy and principle analysis, we repeatedly comply with the form . . . which, when you think about it is all that formalism really needs to survive.²³

21. See Schlag, *The Knowledge Bubble*, supra note 9.

22. See generally the work of

23. This brings us oddly to the Bluebook, which, in its 524-page crystallization of space-saving abbreviations and stylized citation rules, regulates the hierarchies, reductions, equations, contraries, negations, etc., that comprise the organization of contemporary legal knowledge. The Bluebook, in all its hypertrophic glory, is an extraordinary accomplishment: It is an important regulatory protocol of contemporary legal knowledge. (This is not entirely a compliment.) For an eminently justifiable critical assessment, see Richard A. Posner, *The Bluebook Blues*, 120 YALE L.J. 850 (2011).

A question now: Why do we honor such a dated and possibly archaic form? Why is it that legal academics don't break out more often? Why do they, for instance, repeatedly seek out the protective shelter and over-used pathways of a sub-disciplinary genre (e.g., ELS) or a *grand maître* (e.g., Foucault) and try so (so) hard to conform to its methodologies or his protocols, respectively? What is the draw of compliance and submission for academics? What is it that appeals in this quest for *paradigm-compliance*? Why are they doing this?

The little homunculus on my shoulder is already whispering an answer in my ear: "Because they're academics, dude. Focus! This is academia. It's what they do. It's who they are. Pay attention, dude!" The aspiration, the affect, and the ideal may be intellectual achievement. But the practice and the reality is academia. "Forget it Jake, it's"

But I do not listen to the homunculus. And instead, I ask again:

Why do this? Why paradigm-compliance?

This calls for explanation. And I would try my hand at it, but for the fact that in the post-postness of our post-millennial moment, explanation of social phenomena is either way too facile or, if one has real standards, insuperably difficult.

Here I want to refer to an anonymous speaker who at a recent colloquium presciently asked, referring to the phenomenon he was busily describing, "Why is this happening?"

Yes, indeed, why? I wondered. In fact, why is this colloquium happening? Why are you happening? Why am I? Hell, why is anything happening? Point being, of course, that the question (why is this happening?) immediately points to the impossibility of the answer. The "why?" in question will only be answered *within a frame* that everyone pretends is already stabilized (when, of course, it is not) *for a subject* presumed to be universal (but who could not possibly be) from a limited set of vantages and specified orientations (which, of course, are neither).

"Why is this happening?" Really? You dare ask that? This late in the game?

Here I want to refer to the work of Professor Max Stein who in my recently published novel, *American Absurd* (currently available at competitive prices on Amazon and elsewhere), tries to do what he calls “the structures of the meaningless.” Fighting off what could be a bad case of writer’s block, Max Stein has been striving to figure out why the other human beings around him are persistently pursuing meaningless human activities—going from A to B over and over again, without, it seems, actually getting anywhere. Or at least, that’s the way it seems. In any event, Professor Stein has made a list—a preliminary inventory of the possible permutations:

- A to B (progression)
- A to A (stasis)
- A to B which becomes an A for another B, etc. (serial repetition—neurosis)
- A to B followed by B to A (circularity)
- A never get to B (futility)
- A to nowhere (nihilism)
- Why B? (skepticism)
- What B? (radical skepticism)
- B to A (contrarianism)
- A/B (Gnosticism)
- ABABABAB (schizophrenia)²⁴

But why go from A to B? Yes, why indeed? Here too Professor Stein has compiled a preliminary list:

- Because B is better than A (progress)
- Because we’re fated (destiny)
- Because we’re hardwired (human nature)
- Because we so choose (existentialism)
- Because that’s what our people do (sociology)
- Because we have false consciousness (Marxism)
- Because no one has yet thought of anything else.²⁵

After compiling these lists, Professor Max Stein notes that the

24. PIERRE SCHLAG, *AMERICAN ABSURD* 124–25 (2016).

25. *Id.* at 125.

patterns and the explanations are all too facile.

Indeed. As the Charles M. Fairmont Chair in Cognitive and Rhetorical Studies at Berkeley (and a fictional character), Max Stein only occasionally writes about law.²⁶ But his points are no less applicable to our field. In law, if we are seeking explanation, we might ask, “Why is *this* particular law the way it is?” Well, consider *the classic forms* of the available answers: Because of *this* law’s object. Because of *this* law’s context. Because other laws are the way they are and not something else. Torts is torts because it is not busy being property. That’s because property is busy being property.²⁷ Because our sentence structures always have subjects doing things by way of verbs to direct objects thus secreting entailment (e.g., causal) links right and left.²⁸ Because

Max Stein is hardly a nihilist, but he does appreciate that the explanations he catalogues are academic fictions that work in part because they track not only language, but the folk-logic of cultural myths. When we, as academics, track these fictions, they cannot help but resonate with the myths.

But, as Max Stein notes, our trouble is that we have lots of myths. And so there are lots and lots of resonances. And everything is overdetermined (lots of resonance) and underdetermined (pay attention to the entry-frame setting that artificially narrows the range of possibilities).

Oh, it’s all so complicated!

Well, uh, no, actually—it’s not. Not complicated at all if you’ve been following what I am saying. It’s just that accepting what I am saying is not going to make your life as an academic any easier. On the contrary, accepting what I am saying is going to make your life as an academic considerably more

26. Pierre Schlag, *The Faculty Workshop*, 60 BUFF. L. REV. 807, 821–22 (2012) (comments of Max Stein on “stage 4” and “gaming”).

27. If property were not busy doing its property thing, then torts might have to step in and do some of this property work. (Then property would look different.)

28. See FRIEDRICH NIETZSCHE, *THE WILL TO POWER* (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., 1967). Nietzsche observed:

Our bad habit of taking a mnemonic, an abbreviative formula, to be an entity, finally as a cause, e.g., to say of lightning “it flashes.” Or the little word “I.” To make a kind of perspective in seeing the cause of seeing: that was what happened in the invention of the “subject,” the “I”

Id. at 294, § 548.

difficult. It will certainly be harder for you to write that next law review article. I actually think that's a good thing and will make things a whole lot more fun for the rest of us, but I totally get it if you are tired or otherwise don't agree.

From my admittedly idiosyncratic perspective, it does not help entirely here (though it does help some) that when we academics meet together across the mediation of a screen or a text or a podium, we spend our time testing our respective fictions against each other to see which fiction will resonate more emphatically than the others. Most of us focus on the contestation—the points of disagreement, dissonance, and disjuncture. We are natural born critics. And if we are not, then training or occupation will make us so.

One could reasonably think then, what with all this criticism and reciprocal scrutiny of each others' work, that we are getting somewhere. Well, maybe. And then again, maybe not: it is important to recognize that amidst the sometimes acute reciprocal criticism, there is a congenial symbiosis and at least a weak unity underlying our particular contest of faculties. Indeed, the expression of our differences performatively re-enforces a shared form, aesthetics, narrative structure, style—one which at a fundamental level affirms the cheery sense that law and world are ultimately understandable in terms of *entailments within webs of intelligibility*.

We make the connections the best we can. We differ to be sure in our preferred verbs. Here I offer a typology (always a good move in a law review article and very much appreciated by the reader).

TABLE 1: A TYPOLOGY

Linear Entailment. For those predisposed to one-way *linear entailment*, it can be said that X causes, constitutes, structures, performs, logically determines, reflects, shapes, and/or justifies Y. (Viewed grammatically, and with due attention to “lumpiness” and “indivisibilities,” the choices here are not endless.)²⁹

Reciprocal Entailment. For those predisposed to *reciprocal*

29. On lumpiness, see generally Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955 (2012). On indivisibilities, see Pierre Schlag, *The Problem of Transaction Costs*, 62 S. CAL. L. REV. 1661, 1669–71 & nn.20–21 (1989).

entailment, one adds adjectives that morph the one-way relation into much more problematic two-way relations: hence the relations are dialectical, dynamic, interactive, cyclical, looped, and so on.

Dedifferentiation. For those willing to consider even more unsettling understandings in which the identities collapse into each other (thus making relations impossible) concepts such as *dedifferentiation* beckon.³⁰

Are these three types of entailment fictions? Well, maybe so. But even then, they are *plotted* fictions. And many of them are plotted in ways sufficiently enduring (social construction) that they become the plots of our thinking and our lives. These illusions are made real through collective action (*inter alia*, law) and realized as institutional practice (*inter alia*, law again) which is to say that they are, at least, in part true. Or more accurately, they are *made* true.

Is this something to complain about? Well, no, not obviously. Look at it this way: it may well be that repeating these fictions are all we can hope for from our academic forays. And maybe that's just fine. Why would it be just fine? Because describing law and world in tried-and-true fictional forms of entailment and webs of cultural intelligibility *is what* explanation and understanding mean (even if entailments and the webs of intelligibility are themselves fictions). Perhaps this is all there is—and until someone comes up with something else, all there is is just fine.

Or at least, it will have to do. Maybe.

Two nagging thoughts remain.

Thought One. The more we awaken, the more we will find that our intellectual efforts are haunted by the possibility that we are not really thinking at all, but simply rehearsing conventional narratives of entailment. We think we are explaining and understanding, but in point of fact, maybe legal academic work is just an extraordinarily intense version of

30. See generally Pierre Schlag, *The Dedifferentiation Problem*, 42 CONTINENTAL PHIL. REV. 35 (2009).

connect the dots—a kind of ratiocinative compulsion prefigured for us by forces and structures whose identity and workings we do not (yet) appreciate or fully understand.

Or in Niels Bohr's admonition, "No, no, you're not thinking; you're just being logical."³¹ Coming to this realization could be kind of dispiriting. Consider: for all our careful collection and painstaking assembly of evidence and our elaborate presentation of argument in the law review article, it would all nonetheless be only one more repetition of the master patterns of our disciplines. Even the most innovative moments might be seen as rehearsal and repetition. Hence, for instance, Bruce Ackerman's distinction between "higher lawmaking" and "normal politics," could be seen as law's approximation of Thomas Kuhn's "revolutionary" versus "normal" science.³² Ackerman's famous "constitutional moments" might be seen as a juridical mimesis of Kuhnian "paradigm shifts"? Dworkin's Hercules could be seen as³³

No, I have to stop this. It's not nice. And it's cheap. Everyone would fall here. You, me. Everyone. And even if it is right, so what? Surely we've known all along that to be creative *in a good way* means precisely this—the new, unexpected, and previously unremarked enactment of a possible permutation within the allowed structural possibilities?

O.K. But what if we are not Ackerman or Dworkin? (Note, there is considerable evidence that we are not.) What if the patterns we're enacting are more pedestrian, more routine? Or to say it outright: what if the patterns are banal? Are we really needed? Are you? Am I? All right, enough! This is not Paris 1938. This is not beer spilling from the glass onto the table. This is a law review article. I apologize. I got carried away. Let's move on.

Well, not yet. Perhaps the genre really is irredeemable—an effort to please judges, students, lawyers, law professors that in the end pleases no one? Perhaps it is time for it to go down and to be replaced by a more creative, thought-inspiring type of legal writing. True—the genre as it stands has *exchange value*

31. Attributed to Niels Bohr in William Glen, *How Science Works in The Mass-Extinction Debates*, in *THE MASS-EXTINCTION DEBATES: HOW SCIENCE WORKS IN A CRISIS* 62 (1994).

32. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6, 21–22 (1993); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 7, 50 (2012).

33. RONALD DWORKIN, *LAW'S EMPIRE* 242 (1986).

for authors and law schools (triage, certification, and branding). The question is, does the genre have any *use value* in its present incarnation? Or is it instead the remains of an archaic jurisprudence sustained in a kind of intellectual Chapter 11 because neither legal academics nor law review editors have the chutzpah to break out of the collective mimesis problem and actually say what they think?

Ahem.

Thought Two. The mutually re-enforcing aspect of the contest of fictions seems to yield a discourse in which we (you and I) try not merely to make truth, but to evaluate whether and to what degree truth has indeed been made (or, in an older idiom, found). This evaluation procedure (conducted in articles, workshops, conferences, etc.) is a kind of academic meta-fiction organized into what might be called “rightness disputes.”

Rightness disputes are not the same thing as a quest for rightness (in the same sense that OCD is not the same thing as checking the stove before you go out). The pursuit of rightness (like checking the stove) are generally good things to do. By contrast, rightness disputes (like OCD) seem to be sustained forays into the repetitive and the overwrought.

In rightness disputes, the little homunculus on your shoulder is on speed. He is constantly asking you (even as you are writing your article or giving your talk), “Is this right?” “What arguments support your views?” “What establishes the validity of your argument?” “Is this claim consistent with your priors?” “Didn’t you say that . . . and now you say that . . .” And here you are trying to write your article or give your talk, but still the little speed-addled homunculus interrupts to ask, “Do you have a warrant for that?” “Where is the empirical corroboration?” “On what authority?” “This needs to be more precise—there are at least four subdivisions you need to make and address here.”

And the little homunculus seems to have a Greek chorus as backup: “Subdivide and subsume!” “Specify and distinguish!” “Justify and redeem!” “Corroborate and confirm!”

And sooner or later, you might realize (if so, it would come to you with the force of revelation) that the little homunculus

and the Greek correctness chorus do not care a wit—not one wit—whether you are right or not. What they care about—the only thing they care about—is playing rightness disputes. And then it might dawn on you that so do all the other people in the room. And at that point it might dawn on you that rightness disputes are no more about rightness than OCD is about turning off the stove.

And then yet another realization arrives—this one truly upsetting: It turns out that the topic of your talk, the very object of your legal passion, the very focus of your jural *raison d'être*, does not matter to the people in the room either. They are just using *your* article and your talk—hell, they are using *you* (yes, you!)—as the terrain on which to play out their rightness disputes. *Your* article, *your* talk, you could be about anything—anything at all!

And as you come to recognize this, you have this deep sense of déjà vu. You've experienced this before. And then finally it hits you: Oh, my god, you are a junior associate again! Totally generic. Totally replaceable. Totally formalized into an abstraction of yourself. You are back to the place you tried so hard to escape from. How did it come to this? Why is this happening?

And then yet another realization breaks through: there *is* such a thing as rightness disputes. Rightness disputes are the trans-disciplinary or sur-disciplinary structure of academic knowledge production. It's the *lingua franca* of academia! Thirty years ago, it was “where's your epistemic warrant—where do *you stand* to say that?” Twenty years ago, it was, “where's your methodology?” Ten years ago, it was, “where's your empirical backup?” Today, it's There's kind of odd sameness to it all isn't there? I mean if you allow for slight shifts in semantics and orientation, it's basically the same rightness grammar at work, isn't it? From the grave, from the grave.

Zombie-law?

Of course, notice it would all be O.K. if one were convinced that the frames that enable the rightness disputes to get off the ground were not themselves so contestable, so compromised.

But they are compromised—aren't they?³⁴

PART V

There is a real irony in rightness disputes. The irony is that with rightness disputes, there is no reason a law review article should ever end. In the same way that checking the stove one more time (please note the marginal cost is low) couldn't possibly hurt ("I'm gonna make *doubly sure this time*"), asking one more rightness question is relatively costless as well. Come on, just one more.

No? O.K. Good for you.

This then brings us to what I call *exit-framing* and *abandonment*. Exit-framing as its name implies is the frame the author leaves the reader.

There is the *explicit* exit-frame. This could be an edict. Or a balancing test or a nexus test or a default regime or a totality of circumstances test or an injunction to prove effect by reference to intent or intent by reference to effect. Or In short, any of the usual legal formulae can serve as exit framing.

There is also the *implicit* exit-frame. We won't go into the complexities on this one except to note that No. We just won't.

With explicit *exit-framing*, there is a choice to be made by the author here: an edict is not a balancing test is not a default regime (though we could combine all three). And so the question is not just how did we get here (why balancing?). Presumably, I've got that covered.³⁵ Actually, the really interesting question is *how we stop*. This is the moment I call

34. This is the gist of the overarching set of inquiries pursued more intensively in *The Knowledge Bubble*. Schlag, *The Knowledge Bubble*, *supra* note 9; Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997).

35. Well, actually, no I don't. You and I generally know, of course, from the tone of any given law review article which way it's heading. When we get to the exit-frame, it's hardly a surprise. In fact, very often we know from the entry-frame what the exit-frame will look like. And yet I have to say, I am always a bit jolted when the edict, the test, is actually delivered there on page whatever. Jolted as in—really? You, the author, are actually going to do this to me (to us) again? Do you have any idea (of course, you do) how many times this particular stylized solution has been presented in similar circumstances before? I mean, couldn't you have thought of doing something else? Why is this happening?

abandonment. In order to have an exit-framing, you need to have abandonment.

If you're a judge, you need to decide that you've addressed the arguments by the parties sufficiently and that you must now simply decide. If you're a law review writer, you need to determine that enough is enough, that the argument must cease and the rightness disputes stop. But how do you do that? How do you let go? Why not another question? Come on, just one more. How could it hurt?

See: It's hard to stop.

How then do you do it?

CONCLUSION

Right. Exactly.

Now among the several sections of the law review article vying for most preposterous, the Conclusion is undoubtedly the most stone cold absurd of them all. The Conclusion is just simply preposterous.

Interestingly, it is often the place where readers will turn to first. If that happens to be you right now, things are probably not working out so well. In fact my guess is that you're probably wondering what's going on here? How in the hell is this a conclusion? Why is this happening?

What to do? My advice—go read the Introduction.

For all you others, well, here we are again. You and I. On different sides of the text that is supposed to yield a conclusion.

The Conclusion is supposed to be the wrap. Almost always it will be a normative wrap. Perhaps not so much because we are committed normative thinkers (this is 2000-something not 1990) but rather because law review editors want some normative payoff and law review authors comply. The normative wrap is the academic equivalent of the legal brief's prayer for relief. It all comes down to this—a few paragraphs, a string of sentences—the takeaway.

The author, of course, has reason to feel pretty good about

reaching this point. Not only is an arduous law review journey coming to an end, but this is the moment where the author hands off responsibility to the reader. It's as if the author were telling the reader, "O.K., reader, my work is done now. You take it from here. You should . . . the court should . . . the agency should . . . somebody should . . ." That's quite a responsibility to place on the reader. It could cause anxiety if not properly handled.

In truth, this should be a moment of high anxiety for everyone involved (not just the reader). The author, too. In fact, the legal academic community generally. Why? Well, because it is almost never clear, not clear at all, just what mechanism is supposed to bridge the yawning gap between the words on the page and the enactment of the recommended action.³⁶ And that is because, just possibly, there may be none. Or maybe it's because . . .

36. Cf. Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610–11 (1986) (on the persistent chasm in law between thought and action). I have made much of such chasms in the critiques of normativity. One of the variants is contained in an essay called "Values," which describes how legal actors appropriate values and value-talk to service the imperatives of bureaucratic law. See generally Pierre Schlag, *Values*, 6 YALE J.L. & HUM. 219 (1994).