OF DECKCHAIRS, ICEBERGS, AND GESTALT SHIFTS: UNGER, KAHN, AND A STUDENT ON CONTEMPORARY LEGAL THOUGHT

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REVIEW ESSAY

WHAT SHOULD LEGAL ANALYSIS BECOME?, Roberto Mangabeira Unger, London: Verso, 1996. Pp. 198. $17.00.

THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP, Paul W. Kahn, Chicago: University of Chicago Press, 1999. Pp. 169. $ 22.00.

> "The great legal civilizations have . . . been marked by more than technical virtuosity in their treatment of practical affairs, by more than elegance or rhetorical power in the composition of their texts, by more, even, than genius in the invention of new forms for new problems. A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute."[1]

INTRODUCTION

Contemporary legal thought is in a strange place. While judges argue that legal scholars should pay more attention to courts and doctrine, journalists satirically predict a Kafkaesque future ruled by a caste of technocratic lawyers and their overwrought legalism,[2] and the public continually complains about

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1. Robert Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative,* 97 HARV. L. REV. 4, 6 (1983).

2. *See* Jonathan Rauch, *The Millennium Dawns: Update From The Year 2050,* 32 NAT'L J. 78, Jan. 8, 2000, http://www.reason.com/rauch/00_01_08.html (describing a future in which eight-year-olds attend law school, lawyers sue their

law's complexity and lawyers' ethics.[3] The volume of legal scholarship continues to mushroom, despite criticisms from every direction.[4] In the pages of the law reviews, about the only thing upon which legal scholars can agree is that contemporary legal thought is problematic:

> Eminent judges complain that what they find in the law reviews is largely irrelevant to their work. Critics charge that the prevailing mode of scholarship is too normative—empty, self-referential, and full of sonorous banalities. Mainstream writers debate whether a legal canon exists, and where the new forms of narrative and storytelling scholarship fit in.[5]

In 1992, Judge Harry Edwards wrote an article denouncing theoretical and critical legal scholarship for what he saw as their role in furthering the gap between legal education and professional legal practice.[6] To say that his article struck a raw nerve in the legal academy would be an understatement.[7] Judge Edwards found fault with just about every form of scholarship emanating from the legal academy in the past two dec-

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own mothers, and the President of the United States has been replaced by a "Plaintiff-in-Chief").

3. "Q. What's wrong with lawyer jokes? A. Lawyers don't think they're funny and other people don't think they're jokes. Q. What's the skinniest book ever published? A. Legal Ethics." Lawyer Bashing: It's Not a Dying Art, *at* http://www.nolo.com/humor/jokes/38jokes.html (last visited Mar. 13, 2001).

4. *See* Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990) (noting that as of 1990, there were more than 800 legal journals); Lawrence M. Friedman, *Law Reviews and Legal Scholarship: Some Comments,* 75 DENV. U. L. REV. 661, 662–63 (1998) (noting that "Vol. 95 of the *Michigan Law Review*, for 1997, ran to 2,658 pages; and Vol. 70 of the *Tulane Law Review* attained 2749 pages. Can anybody *read* that much?"). For an entire article devoted to cataloging all the legal scholarship about legal scholarship, see Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741 (1998).

5. Jean Stefancic & Fred R. Shapiro, *Introduction* to Symposium: *Trends in Legal Citations and Scholarship: Introduction*, 71 CHI.-KENT L. REV. 743, 743 (1996). For two of the most severe indictments, see Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936) (noting the two things that are wrong with almost all legal writing: "One is its style. The other is its content."); Lasson, *supra* note 4, at 927 (describing contemporary law reviews as a "gargantuan soufflé of airy irrelevance").

6. *See* Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Judge Edwards is a Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

7. *See* sources cited *infra* at n.11.

ades except treatise-writing. He criticized everything from law and economics to critical legal studies[8] to Ronald Dworkin's interpretive works[9] to feminist jurisprudence and critical race theory—all with an implicit assumption that the needs and interests of all readers of legal thought mirror the needs of judges. He christened each of these types of scholarship "impractical" because they fail to address the needs of judges. They either fail to prescriptively address or solve a specific legal problem in a way that is immediately and concretely useful to judges, or end up being "wholly theoretical" in prescribing a solution "but ignor[ing] the applicable sources of law."[10]

Not surprisingly, Judge Edwards's criticisms provoked a firestorm of responses.[11] Richard Posner charged him with entirely ignoring the benefits of the many alternative forms of legal thought, challenging: "But where is it written that all legal scholarship shall be in the service of the legal profession?"[12]

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8. *See, e.g.*, ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983).

9. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).

10. Edwards, *supra* note 6, at 46. The former criticism applies to CLS work, which Judge Edwards calls "destructive," because it "does not demonstrate how authoritative texts constrain and guide a governmental decision." *Id.* at 47.

The latter criticism applies to fields as diverse as law and economics, feminist jurisprudence, and critical race theory, which, according to Judge Edwards, are all impractical, because they "ignore the relevant law" and focus on legally irrelevant variables such as efficiency, oppression, or racism. *Id.*

11. Judge Edwards's article has been cited in 301 (now 302) subsequent law review articles, and one judicial opinion (from the D.C. Circuit Court of Appeals, on which Judge Edwards sits), according to a LEXIS search done February 21, 2001. *See* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997). For a sample of law review articles responding in one way or another to Judge Edwards's comments, compare Edwards, *supra* note 6, with Symposium, *Legal Education*, 91 MICH. L. REV. 1929 (1993), and Symposium, *Constitutional Theory and the Practice of Judging*, 63 U. COLO. L. REV. 291 (1992), and Erwin Chemerinsky & Catherine Fisk, *In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship*, 34 TULSA L. J. 667 (1999). For a summary of the extensive comments and criticisms Edwards's essay has generated, see Michael J. Saks, et al., *Is There a Growing Gap Among Law, Law Practice and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 30 SUFFOLK L. REV. 353, 354–60 (1996). *See also* Judge Edwards's replies in Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2197 (1993); Harry T. Edwards, *Another "Postscript" to the "Growing Disjunction Between Legal Education and the Legal Profession,"* 69 WASH. L. REV. 561 (1994).

12. Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993).

Many other legal scholars point out that the judge-centered, doctrinal, appellate-brief-like form of legal thought for which Judge Edwards clamors *is* the problem. Duncan Kennedy calls it boring: "[S]ome legal scholarship is exciting and enriching and stimulating, but not very much."[13] Julius Getman calls it characterless: "Most current articles that I read are a profound form of failure because they do not change ideas or provide significant information. They are no more scholarship than those novels that lack character, image, and idea are literature."[14] James Boyd White calls it thin, lifeless, and without meaning: "We live in a world of specialized texts and discourses, which all too often seem marked by a kind of thinness, a want of life and force and meaning.... Of how many law review articles can one say, here is a mind really speaking to other minds?"[15]

Paul Kahn describes the reform-orientation of traditional legal thought as a failure of intellectual possibility: "The theoretical discourses produced in the law school are continuous with the practices of brief writing, adjudication, and legislative or regulatory reform. By accepting auto-theory as the limit of its self-construction, the law school is not *studying* law: it is *doing* it."[16] Roberto Unger describes contemporary legal thought as a case of "arrested development."[17] Pierre Schlag characterizes it as a form of "intellectual syndicalism":

> The old intellectual elites are burdened with the call of an onerous political responsibility to their followers. They regret the loss of intellectual freedom. The young intellectual elites are burdened with honoring ... conceptual systems, intellectual styles, and political stances that they do not believe and no longer find useful. In the name of scholarship, dialogue, thought, academic freedom, political responsibility, moral responsibility, and seriousness, we have an academic regime that induces massive amounts of repression

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13. DUNCAN KENNEDY, *A Cultural Pluralist Case for Affirmative Action in Legal Academia, in* SEXY DRESSING ETC. 43 (1993).

14. JULIUS GETMAN, IN THE COMPANY OF SCHOLARS: THE STRUGGLE FOR THE SOUL OF HIGHER EDUCATION 54–55 (1992).

15. James Boyd White, *Intellectual Integration*, 82 NW. U. L. REV. 1, 5–6 (1987).

16. PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP 87 (1999) (emphasis added).

17. *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 26–28 (1996).

> and compelled production. Most of contemporary legal thought is currently the outgrowth (one way or another) of bureaucratic domination.[18]

And Richard Posner argues that precisely the kind of traditional doctrinal legal thought which Judge Edwards advocates is inherently limited as an intellectual enterprise. It is a field in which legal scholars are immersed in what are "essentially, and perhaps increasingly, mediocre texts," to which they apply traditional "analytical tools of no great power—unless they are tools borrowed from another field."[19]

The above comments illustrate how legal thought has come to be in a rather strange place. On the one hand, we have Judge Edwards arguing that any move away from traditional doctrinal legal thought is of obvious detriment to legal education and to the legal profession, and Paul Carrington calling for critical legal scholars to resign from the law school.[20] On the other hand, we have numerous scholars wondering, somewhat incredulously, why we still remain captive to a tradition and a form of legal thought that can no longer speak to the diverse needs and interests of the law school, law students, and a changing legal profession. This is how Paul Brest puts it:

> Taking everything into account, a law student who fell asleep in 1963 and awoke in 1993 would not be astonished by his new surrounds. If he had fallen asleep holding a law review—the soporific power was no weaker in those days—the nature and language of some of the articles would bewilder him, but he would find much that was familiar.
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> ....
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> None of this is cause for self-congratulation. While the legal academy muddles along pretty much as it did thirty years ago, one might hope for more than muddling in a time when the work of lawyers is becoming increasingly complex; when lawyers are perceived, not without some justification, as problem-makers rather than problem-solvers;

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18. Pierre Schlag, *Normativity and the Politics of Form*, *in* AGAINST THE LAW 29, 81 (Paul F. Campos et al. eds., 1996).

19. RICHARD A. POSNER, OVERCOMING LAW 91 (1995) (noting that "[t]he force and reach of doctrinal legal scholarship are inherently limited.").

20. *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984).

> when the administration of justice often seems an oxymoron; when the bench and bar are wanting in courtesy and civility . . . .[21]

This essay offers a student's perspective on the debate. The purpose is not to resolve the debate, but to give it a different focus. Judge Edwards's central assumption is that when it comes to readers of legal thought, judges are the only ones who matter, because the needs and interests of all readers should mirror the needs and interests of judges. This essay challenges that assumption. Recent books by Professors Paul Kahn of Yale and Roberto Unger of Harvard provide the critical framework and the foundational ideas.[22] Arguments of both scholars can be seen as starting from a common point or revealing a common blind spot in contemporary legal thought: the legal scholar's self-identification with the figure of the judge.[23]

My starting point is not the judge, but the law student. My question is this: How does legal thought look when the scholar identifies himself with the law student, instead of the judge? With someone whose objective is not judging, but learning? The question is important. Law students are not only future judges; they are future advocates, planners, counselors, writers, legislators, mediators, and facilitators—most of whom will work in an environment that is increasingly removed from the expensive, time-consuming machinations of the formal legal system. Lawyers increasingly are called upon to creatively solve problems and resolve disputes outside of courtrooms and law's other formal precincts. Yet, in legal scholarship:

> Law professors, who often have a passionate interest in The Law and in judges . . . are surprisingly uninterested in *lawyers*. As an intellectual matter, this skewed interest reflects a fundamental misunderstanding of the legal system, because the overwhelming preponderance of legally significant decisions are made by lawyers, not judges, legislators, or theorists . . . .[24]

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21. Paul Brest, *Plus Ça Change*, 91 MICH. L. REV. 1945, 1950–51 (1993).

22. *See* KAHN, *supra* note 16; UNGER, *supra* note 17; discussion *infra* Part II.

23. *See infra* Part II.

24. David Luban & Michael Milleman, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 38 (1995).

There is thus some irony in Judge Edwards's cries for scholars to continue writing legal scholarship exclusively in the traditional judge-centered aesthetic form. Part I begins to explore this irony by providing a perspective from which to view the essay. Part II reviews the books of Professors Unger and Kahn, focusing primarily on their criticisms of contemporary legal thought. Part III builds on this foundation to describe, from a student's perspective, the role of alternative legal thought in legal education.

I. THE PERSPECTIVE

As a discussion about the role of legal thought in legal education, this essay appropriately begins with a story about the classroom. Last year, a student in one of my classes asked a professor for her sense of the importance of the Supreme Court's then-pending decision on the continued viability of *Miranda*.[25] The questioning student opined that it was "undoubtedly" the single-most important decision for the future of the entire U.S. criminal justice system. After a moment, the professor replied by analogizing the Court's pending decision—whichever direction the Court might take—to the process of adjusting a deckchair on the Titanic. When one is, quite appropriately, concerned with the soundness of the criminal justice system as a whole, she said, to maintain one's focus solely on appellate court decisions and their narrow doctrinal solutions, to focus exclusively on proposing and refining ever more detailed multi-part doctrinal tests, or to fixate on the notion that all will be well if only we can just "get the words right"—is to ensure that the real problems, the icebergs, are *never even seen*.

At first it seemed like a simple metaphor: do not conflate the deckchair of the single appellate opinion with social reality; do not mistake the part for the whole. Yet as I watched the student's puzzled face, it became a much more complicated metaphor. It is a metaphor whose imagery permeates Unger's book.[26] It is a metaphor which is present in Kahn's criticisms.[27]

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25. *See* Dickerson v. U.S., 120 S. Ct. 2326, 2000 U.S. LEXIS 4305 (2000) (upholding *Miranda v. Arizona*, 384 U.S. 436 (1966) on stare decisis grounds).

26. Where, for instance, Unger could be characterized as describing the "arrested development" of legal thought as a case of institutional deckchair-adjusting. *See* UNGER, *supra* note 17, at 26–28; *infra* Part II.A.

It is a metaphor which is present (though running in the opposite direction) in Judge Harry Edwards's arguments.[28] It runs through the legal classroom, and into the bar review course, and into the ways in which law students learn to interact with clients.[29] It is even present in works of more than half a century ago.[30]

Had I been this puzzled, questioning student, I would have wanted to reply: Hold on a minute. I just spent the last two years reshaping my mind into a finely honed legal machine, a machine that can expertly sever doctrine, rules, cases, authority, and precedent from their social and ethical contexts; a machine that analyzes legal problems coldly and rationally, and sets aside the relevance of everything non-legal. I no longer ask questions about the big picture, about "icebergs," about the system, about justice or fairness, without reference to some specific doctrinal deckchair. That is what I have been constructed to do. And now you tell me that my focus is wrong? That the deckchairs themselves are sometimes irrelevant? That myopic instrumentalism and mechanical jurisprudence are bad things (except, of course, when it comes to passing exams, or the bar)? How am I supposed to tell the deckchairs from the icebergs? To be able to tell when I am *properly* focused on the deckchairs or *lost* in them? To know when I am mistaking the part for the whole?

The student did not ask these questions, of course.[31] But what the professor said at the end of class, almost as an after-

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27. Where Kahn's description of the insufficiency of the reform orientation could be seen as the intellectual equivalent of deckchair-adjusting. *See* KAHN, *supra* note 16, at 5. "The point is not to advocate different, extreme notions of reform, but entirely to abandon questions of reform for as long as the inquiry lasts." *Id.*; *see infra* Part II.B.

28. Where the *only* proper focus for legal thought is apparently the adjustment of doctrinal deckchairs: "Theory is superfluous if doctrine already prescribes an outcome: it is inapposite if doctrine allows several outcomes but the theorist recommends yet another." Edwards, *supra* note 6, at 54.

29. *See* discussion *infra* Part III.A.

30. *See* Rodell, *supra* note 5, at 43 (arguing that "the articulate among the clan of lawyers might, in their writings, be more pointedly aware of [the world's myriad social problems] . . . instead of blithely continuing to make mountain after mountain out of tiresome technical molehills").

31. But scholars do ask their jurisprudential counterparts—questions like: Does anyone have a good account of what the ship (the law) actually *is*? Or what the ship and the deckchairs *mean* to real people? Indeed, if we are all constituted to do nothing but adjust deckchairs, what are the possibilities that anyone can

thought, would have answered all of them. She said that it was in this way that legal education "robs you of your common sense."[32]

And she was right.

Judge Edwards began his article by quoting Felix Frankfurter's statement that "the law is what the lawyers are," and "the lawyers are what the law schools make them."[33] The statement is quite true—though not in the sense in which Judge Edwards intended. If the process of law school imparts to students more than legal knowledge, but imprints them with its own *nomos*[34]—its own normative universe—exactly what kind of *nomos* is being imprinted? An imitation of the *nomos* of the judiciary?[35] Is this the kind of rich, varied, *nomos* that is

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indeed captain the ship? Where are all the ordinary people (citizens) in this metaphor?

On the (im)possibility of giving one comprehensive account of the ontological identity of the ship, see Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1681–82 (1996) (inquiring into the identity of the Constitution). On the need to inquire phenomenologically into the meanings of legal events and belief structures, see KAHN, *infra* Part II.B. On the plausibility of the notion that legal thinkers can captain the ship, compare DWORKIN, *supra* note 9 (entirely plausible: the fantasy judge Hercules) and Carrington, *supra* note 20 (entirely plausible: Mark Twain's riverboat pilot) with Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991) (highly implausible: showing how all manner of legal thought depends on and yet elides its problematic assumptions about individually autonomous, choosing legal subjects). On the need, in a democracy, to return control of the ship to the citizens—the missing people, see UNGER, *infra* Part II.A.

32. Comments of Marianne Wesson, Professor of Law, University of Colorado School of Law, in Boulder, Colo. (Feb. 2000).

33. Edwards, *supra* note 6, at 34 (quoting letter from Felix Frankfurter to Mr. Rosenwald 3 (May 13, 1927) *in* RAND JACK & DANA C. JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989)).

34. *See* Cover, *supra* note 1, at 4. Cover describes a *nomos* as a particular normative universe, a world that we inhabit, a "world of right and wrong, of lawful and unlawful, of valid and void." *Id.*

35. This is how one scholar describes legal academia's obsession with the narrow, doctrinal world of appellate opinions:

> Imagine a volcanic island whose base is thirty miles wide, and rises out of waters 35,000 feet deep. The portion of the island above is only 200 feet in diameter, and the highest patch of this ground is but 20 feet above sea level . . . . On this patch of ground lies a single stone, about the size of a baseball. The submerged portion of this island represents the invisible workings of the law when it functions as a successful medium of social coordination. The portion above the water represents the visible world of formal legal action. The stone represents the universe of appellate court cases. Lawyers, law students, and especially legal aca-

the mark of a "great legal civilization?"[36] Or is it the *nomos* of the deckchair?

II. UNGER, KAHN, AND THE PROBLEMS OF CONTEMPORARY LEGAL THOUGHT

The figure of the judge has always dominated traditional legal thought, literally and symbolically.[37] Within the aesthetic and formal conventions of traditional legal thought, legal scholars were to act as "judge of judges," to advocate reform of the law. The scholar's task was to answer a single set of questions: "What should the law be?" or "How should judges decide cases?". The form, voice, and method of legal thought developed around this standard—a standard of serviceability to judges. The scholar's skills of reasoned argument and doctrinal syntheses were privileged and appreciated by judges in their decision making.[38] Normative prescription seemed to work because the judges seemed to be (and perhaps were) listening.

Whether or not judges are still listening is highly debatable. Researchers who have measured citation counts in judicial opinions have found that law review articles are not frequently cited.[39] Among reasons for the drop in citations, one commentator suggests:

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demics routinely *mistake that stone for an entire island, and then name it "law."*

PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW 58–59 (1998) (emphasis added).

36. *See* Cover, *supra* note 1, at 6.

37. Though a detailed intellectual history of American legal thought is beyond the scope of this comment, all of the major jurisprudential movements share this judicial orientation. For descriptions of the major jurisprudential schools of American legal thought, from Langdellian formalism, to legal realism, law and economics, critical legal studies, and beyond, see NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1996); GARY MINDA, POSTMODERN LEGAL MOVEMENTS (1995).

38. *See* Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3, 6 (1962) (noting that if a scholar's article "persuasively sets forth what should be authoritative, it may be transmuted surreptitiously into what is [law] by those in a position to declare the law").

39. *See* Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews By the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991); *see also* Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986).

> One reason may be an increase in the docket load of courts . . . . Another possibility is that the increased numbers of law journals and articles have diluted their potency such that "on-point" articles are impossible to find. Finally, judges and practitioners may have given up reading law reviews altogether and therefore do not know what articles would or would not be of use to their practices.[40]

Many legal scholars are pessimistic as to the current possibilities for scholarly influence, particularly on the decision-making of the U.S. Supreme Court.[41] Erwin Chemerinsky concedes that "[i]t is impossible to estimate what percentage of legal scholarship" now has the impact that Charles Reich's 1963 article *The New Property* did, "but likely the number is relatively small."[42] Richard Posner puts it more forcefully: "Judges don't read law review articles. That's a myth. Anyone who thinks that judges know or care what's going on in the academy is naive."[43] Moreover, even if judges do utilize legal scholarship in making decisions, a causally prior question remains: Is a piece of legal scholarship effective because it convinces a court, or does it merely seem effective because it foreshadows (or provides a convincing post-hoc justification for) what a court would say anyway? One scholar suggests it is "at least equally plausible that judges (or clerks) deploy citations to legal scholarship in their opinions as a matter of style—in an effort to bolster already formed opinions."[44]

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40. Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 688 (1998).

41. For evidence of this pessimistic frustration, see *Law Professors Denounce Supreme Court Ruling*, http://www.the-rule-of-law.com (last visited Mar. 15, 2001) (statement of 673 law professors denouncing the Supreme Court's decision in *Bush v. Gore*, 121 S. Ct. 525, 2000 U.S. LEXIS 8430 (Dec. 12, 2000), stating that "[b]y taking power from the voters, the Supreme Court has tarnished its own legitimacy.").

42. Chemerinsky & Fisk, *supra* note 11, at 677 (referring to Charles Reich, *The New Property*, 73 YALE L.J. 733 (1963), which influenced the Supreme Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970) to consider statutory welfare entitlements as "property" within the meaning of the due process clause).

43. Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1466 (1995) (quoting Judge Posner *in* Douglas Leslie, *An Interview with Judge Richard Posner*, VA. L. WKLY., Apr. 22, 1994, at 1); *see also* POSNER, *supra* note 19, at 87 (noting that "[t]he law reviews reek of the smell of cordite from the salvos with which today's law professors bombard today's Supreme Court Justices. . . . But they have lost their principal audience, the judges. They now write for each other.").

44. Schlag, *supra* note 18, at 243 n.85.

Whether or not judges are listening, this kind of doctrinal, policy-oriented, prescriptively voiced, judging-the-judges scholarship still abounds.[45] Contrary to Judge Edwards's lament that alternative "impractical" forms of legal thought are taking over legal scholarship, the vast majority of what law students read[46] and produce[47] is precisely this type of judging-the-judges scholarship.

Unger and Kahn are certainly not the first to assert that scholars should rethink the judicial orientation and methodologies of traditional legal thought. Legal realists made similar arguments almost seventy years ago:

> That something is radically wrong with our traditional legal thought-ways has long been recognized. Holmes, Gray, Pound . . . Llewelyn, Yntema, Frank, and other leaders of modern legal thought in America, are in fundamental agreement in their disrespect for 'mechanical jurisprudence,' for legal magic and word-jugglery. But mutual agreement is less apparent when we come to the question of what to do: How are we going to get out of this tangle?[48]

Contemporary scholars have updated the realists' argument. Steven Smith challenges, for instance, that "[t]he remarkable tenacity of what we might call conventional legal dis-

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45. *See* Chemerinsky & Fisk, *supra* note 11, at 668–69 ("There is plenty of doctrinal scholarship ably addressing the issues of concern to judges . . . ."); Paul Brest, *supra* note 21, at 1949 (expressing a similar thought).

46. For just one example of the kind of judging-the-judges scholarship that students do read, see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996). There are literally thousands of others.

47. On students acting as "judges of judges," compare Richard Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1135 (1995) (arguing that students should refrain from writing about constitutional topics and write instead on lower court decisions, because "Justices of the Supreme Court are the least likely to take their cues from student-written notes. I suspect that student-written notes on constitutional topics have, with the rarest of exceptions, no readership at all.") with KENNEY HEGLAND, INTRODUCTION TO THE STUDY AND PRACTICE OF LAW IN A NUTSHELL 295 (1983) ("Who is to call judges to task for sloppy decisions and opinions? Second year barracuda! To affront the gods, it develops, is perhaps the most religious activity of all.").

48. Felix Cohen, *Transcendental Nonsense and the Functional Approach,* 35 COLUM. L. REV. 809, 821 (1935).

course is not high on the agenda of current jurisprudential issues, but it ought to be."[49] Another scholar questions:

> Why should the appellate judge—typically a passive, infrequent, thoroughly manipulated, and generally inaccessible participant in the production of law—serve not just as the main, but the *only* referent point for "the internal perspective [of legal thought]"? Why not *the lawyer, the legislator, the bureaucrat, the average citizen*? And why, for that matter, should we routinely attach so much importance to what judges think about law? Can anyone 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? [50]

Law now extends to every part of modern life.[51] In such a world, it makes little sense to limit the field of legal thought's possible inquiry to the perspective and experience of a single legal actor: the judge. Continuing to evaluate all forms of legal thought by whether they are useful to judges radically limits the possibilities for scholarly inquiry, because the "agenda" which the scholar must follow is always already predetermined before the inquiry even begins. "What should the law be?" becomes not just the objective, but also the origin of the scholar's inquiry. The origin and the orientation control the form and the substance of legal thought. What this does is put all the prior questions—questions that a first-year law student might have about the ontological identity or status of legal precepts, the values they reinforce, their histories, the sources of their authority, and the sources of their meaning—entirely beyond inquiry. Unger and Kahn take different directions in examining these themes.

A. Professor Unger and the Problem of Rationalizing Legal Analysis

The question which Unger poses is clearly not Judge Edwards's instrumentally practical and doctrinally constrained version of "What should the law be?". His question is both

49. Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041, 1042–43 (1999).
50. Schlag, *supra* note 18, at 94 (emphasis added).
51. *See* KAHN, *supra* note 16, at 123.

critical and visionary: "What should legal analysis become?" That this is the title of his book implicitly suggests both his critique and his vision: first, that there is something fundamentally wrong with contemporary legal thought, and second, that legal thought could be otherwise.

Unger's underlying concern is with effecting change in social and institutional structures.[52] His argument that the primary failure of contemporary legal analysis is its methodological and conceptual inability to recognize and talk about alternative ways of structuring social and economic life is thus unsurprising. For Unger, the legal scholar's continued identification with the judiciary renders the scholar conceptually incapable of doing anything more than adjusting deckchairs. "Until he places the relation between institutions or practices and ideals or interests at the center of his concerns, the legal analyst remains doomed to live at the surface of social phenomena, where perverse consequences overtake good intentions."[53]

Unger argues that the judicial role in legal analysis must be demoted. In doing so, he recognizes that his argument inevitably raises a standard objection:

> Any proposal for the redirection of legal analysis . . . confronts the objection that it may require measures exceeding what judges can legitimately and successfully accomplish. We cannot progress in understanding the potential of legal analysis until we expunge the idea that judges, or others like them, are the primary agents of legal thought. We must demote the judicial role, assigning it a specialized, exceptional, and secondary responsibility.[54]

To understand how Unger can view contemporary legal thought and its obsession with judges as a case of "arrested development," it is necessary to understand the method which Unger calls "rationalizing legal analysis" ("RLA").[55] RLA is a way of expressing legal doctrine and its precepts as partial expressions of a master rational plan, the "flawed but tentative

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52. *See* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 521 (1986) (referring to Unger's self-description as "someone with the 'vocation of social transformation'").

53. UNGER, *supra* note 17, at 104.

54. *Id.* at 106.

55. *Id.* at 46.

embodiment of impersonal ideals of welfare and right."[56] It is a principle-based "idealizing and generalizing discourse" which has "achieved canonical status" in contemporary academic legal thought.[57] The major objective of most academic legal thought, Unger argues, is to make law's disordered and inconsistent pieces appear to be part of a coherent, rational whole.[58] As he describes the average law review article:

> [It] typically presents an extended part of legal rule and doctrine as the expression of a connected set of policies and principles. It criticizes part of that received body of rule and doctrine as inadequate to the achievement of the ascribed ideal purposes. It concludes with a proposal for law reform resulting in a more defensible and comprehensive equilibrium between the detailed legal material and the ideal conceptions intended to make sense of that material. But why should the reform stop at one point rather than another? Why should it not advance more deeply into the stuff of social arrangements, reconstructing them for the sake of the ideal conceptions . . . redefining the ideal conceptions in the light of the actual or imagined rearrangements?[59]

RLA acts to maintain the institutional background as a constant, ensuring that "proposals for institutional tinkering [always] remain modest and marginal."[60] The problem is that this form of analysis leaves law's underlying assumptions and social ideals unexplored, unquestioned, and entirely undisturbed.

How did we arrive at this method of legal analysis? Unger describes RLA's current form as the cumulative aggregate of three periods in legal thought. The first period is that of Langdellian formalism, or "nineteenth century legal science," in which the job of the legal analyst was to constructively interpret law to bring out its hidden, predetermined, science-like legal content.[61] Law was learned from books, and scientific methods could discover the universal truths hidden in legal

56. *Id.*
57. *Id.*
58. *See id.* at 37.
59. *Id.* at 49–50.
60. *Id.* at 50.
61. *See id.* at 41.

materials.[62] As Langdell put it: "law is a science," and "all the available materials of that science are contained in printed books."[63]

This nineteenth-century scientific approach, however, quickly developed practical problems: there was no deductive way to resolve all conflicts through doctrine and scientific principles.[64] Judges, lawyers, and legislators still had to make policy judgments. Moreover, in doing so, "[t]here was never a way to distinguish beforehand, and in general, rule-bound terms, the *good* risk-bearing activities from the *bad* ones. . . . The red line was not only movable, it had to be moved all the time, and no particular way of demarcating it seemed wholly satisfactory."[65] Scholars increasingly were forced to recognize law's "unwanted indeterminacy," "irremediable conflict," and externalities.[66] In one sense, the Langdellian formalistic approach undermined itself:

> its devotees discovered that at every turn in the march from relatively greater abstraction to relatively greater concreteness in the definitions of rules and concepts there was more than one plausible turn to take. Thus, a method designed to vindicate conceptual unity and institutional necessity revealed nevertheless unimagined diversity and opportunity in established law.[67]

Yet in another sense, the Langdellian "law as science" model has never entirely gone away.[68] Few scholars will still

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62. *See* MINDA, *supra* note 37, at 13.

63. Christopher C. Langdell, *Teaching Law as a Science, in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 514–15 (Steve Sheppard ed., 1999).

64. *See* UNGER, *supra* note 17, at 42.

65. *Id.* at 43 (emphasis added).

66. *See id.* at 42.

67. *Id.*

68. *See id.* at 45–46 (discussing the myth that "American legal theory regularly congratulates itself on its rejection of 'Lochnerism'" despite the fact that a "belated and unconfessed Lochnerism" continues to organize American legal concepts like state action doctrine, which "assumes the validity of a distinction between social arrangements that are politically constituted and social arrangements that are somehow just prepolitically *there*.") (emphasis added); *see also* John Henry Schlegel, *Langdell's Legacy Or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517 (1984). Schlegel asserts that there must be "some good reason" why legal scholarship is "largely doctrinal, deficient in empirical, historical, and theoretical dimensions, and unbelievably boring." *Id.* at 1527. He suggests that the reason is the Langdellian model's continuing hold on the legal mind: "innovations [in legal scholarship] have been successful in direct proportion to how

argue that law is an entirely autonomous, objective, "value-free science,"[69] but pervasive notions still persist that the focus of "proper" legal analysis is the relationship between abstract legal concepts and principles.[70]

The second period Unger describes is the formative period of RLA itself.[71] RLA in its original form developed with the rise of the welfare state, and its emphasis on reason as a way to constrain the policy judgments of the state and of judges fit naturally with the new academic and judicial roles of an activist government.[72] Instead of nineteenth-century legal science's deduction from general principles, RLA emphasized rational deliberation, policy consideration, and reflection upon shared abstract ideals.

While RLA, which is a reasoned discourse of "impersonal policy or principle,"[73] developed as the discursive practice of the judiciary and the academy, a different discourse, what Unger calls "interest-group pluralism" ("IGP"),[74] developed to describe legislative and political processes. Where IGP is used to describe rent-seeking, conflict, and compromise among politicized, self-interested legal actors, RLA is used to describe reasoned deliberation by an educated elite upon shared universal principles.[75] RLA is to IGP what "law" is to "politics." The distinc-

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little they undercut the Langdellian legacy—the notion that law is rules to be found in books and ordered for easy reference . . . ." *Id.* at 1532 (emphasis added).

69. *See* MINDA, *supra* note 37, at 14.

70. For one scholar's tracing of the elements of Langdellian formalism to the legal process school of the 1950's and 60's, see POSNER, *supra* note 19, at 75–76:

> [R]ather little of substance separates the Harts and the Wechslers from the Langdells and the Beales. The vocabulary is different, more modern; the touchstones are reasonableness and institutional competence rather than authoritative legal texts and fundamental jural concepts. But at bottom there *is the same unspoken conviction that the relations among legal concepts are rightly the focus of legal analysis* . . . the same comfortable illusion of analytical rigor, the same intimation that the judge or Supreme Court Justice is a kind of failed law professor, the same *indifference* to the empirical world . . . .

Id. (emphasis added).

71. *See* UNGER, *supra* note 17, at 46–50. Unger distinguishes the second from the third period in terms of RLA's development and then its use. The second period is that of RLA's initial formation, while the third period is characterized by the strategic use of RLA in the service of groupist political objectives.

72. *See id.* at 47 (describing the work of RLA as to "imagine as law the regulatory and redistributive activity of an activist government").

73. *See id.* at 49.

74. *See id.* at 46.

75. *See id.* at 41.

tion is crucial, at least for the rationalizing legal analyst. The conceptual separation of RLA and IGP is what makes the method of RLA a seemingly "indispensable antidote to arbitrariness in legal reasoning,"[76] a necessary constraint on the exercise of political will. Indeed, the rationalizing style of RLA is currently considered to be essential to the preservation of the very rule of law itself, because it is a way to prevent the slide down the slippery slope into politics, into the rule of men. Its presumed indispensability rests on the assumption that it "holds the vital position between the depressive mindlessness of law as analogy and the manic irresponsibility of law as ideology."[77]

Unger's discussion of RLA and IGP provides an interesting aside when applied to the real world. The binary distinction between law/politics which drives the legal analyst's methodological framing (RLA for the judiciary, IGP for legislation and politics), is just one of many binaries on which American legal thought depends. Notice, however, that on a more fundamental level, the social reality reveals no such hard and fast binary distinction. Law is politics, and ethics, and economics, and myth, and many other things. Perhaps the only lawyer who would use a phrase like "reasoned deliberation on shared universal principles" to describe his typical daily interaction with criminal defendants, grieving widows, or even other lawyers, might be Ronald Dworkin.[78] Practitioners know that daily legal practice often more closely resembles the irrational and superstitious chaos of John Nichols's THE MILAGRO BEANFIELD WAR, rather than the harmonious workings of LAW'S EMPIRE.[79]

Returning to Unger and the second period, Unger notes that even from the beginning, there was a tension inherent in the method of RLA itself. This is the tension between the belief that law can actualize social ideals (which, in a pluralistic democracy, may not be at all rational), and the belief that law must maintain itself within a lasting, rational framework. It is

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76. *Id.* at 63.

77. *Id.* at 64.

78. Schlag, *supra* note 18, at 51 (showing how Dworkinian legal theory has no place on the set of *L.A. Law*, which, even as a television program, is "a better approximation of the world of law practice than the routine academic productions of normative legal thought").

79. *See* JOHN R. NICHOLS, THE MILAGRO BEANFIELD WAR (1974); DWORKIN, *supra* note 9.

a tension which is never adequately resolved. RLA was originally a way to use reason to overcome the arbitrariness inherent in adjudication. Yet this unresolved tension ironically generated within RLA a number of its own forms of arbitrariness,[80] forms which were nonetheless well concealed by RLA's own rationalizing methodology. Consequently, Unger suggests that any current claim that RLA and "reason" are somehow "required" as an antidote to arbitrariness, or in order to uphold a particular regime of rights, is untenable.[81]

We are now in what Unger calls the third period: a period in which we are still captive to the method of RLA, but in which it has been "tactically reinterpreted" for use as a tool to further particular political goals.[82] This third stage is what Unger calls "progressive pessimistic reformism" ("PPR").[83] PPR is conservative and pragmatic: it sees no possibilities for major institutional changes in society, at least those that could be made from within law. And it is pessimistic: it believes that "in the politics of lawmaking, the self-serving majority will regularly dump on marginalized and powerless groups."[84] Under PPR, the rationalizing legal analyst becomes "everyman's friend." Rationalizing legal analysis itself becomes an "aversive [social] therapy"[85] for the problems of contemporary democracy, whatever they may be: poverty, educational disadvantage, inequality, discrimination. RLA as PPR is seen as offering the best hope for promoting social change, even if the changes for which the scholar argues are only minuscule and incrementally reformist in nature. Thus legal method in this third stage "striv[es] to moderate disadvantage and exclusion, yet [is] prevented by its method and vision from identifying or addressing the sources of these evils in the arrangements of society."[86]

To illustrate his view of the problem, Unger uses a parable of two societies, one more open to challenge and inquiry re-

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80. *See* UNGER, *supra* note 17, at 77–78 (discussing RLA's numerous forms of arbitrariness, and comparing them to the transparent reasoning processes of the more lawyer-like analogist, who "wears his uncertainties on his sleeve, exhibiting them as part of his business").

81. *See id.* at 65.

82. *See id.* at 51.

83. *See id.*

84. *Id.*

85. *See id.* at 82.

86. *Id.*

garding its social institutions (such as the regulation of the market economy, or the structure of the tax code), and the other less so. In the more open society, the legal thinkers say:

> "Let us emphasize the diversity and the distinctiveness of the present arrangements, their accidental origins and surprising variations, the better to criticize and change them, pillaging arrangements devised for other purposes and recombining them in novel ways." The practice of such a style of legal analysis over time will result in institutions that invite practical experimentalism.[87]

But in the less open society, namely, ours, Unger describes what the legal thinkers say:

> "Let us make the best out of the situation by putting the *best plausible face* upon these arrangements, emphasizing their proximity to a rational and infinitely renewable plan. In the name of this rational reconstruction we may hope to make things better, especially for those who most need help: the people likely to be the victims of the social forces most directly in control of law-making." The sustained practice of this method will, however, help close down our opportunities . . . both by turning away from actual experiments and *by denying us a way of thinking and talking,* collectively, about our institutional fate in the powerful and irreplaceable detail of law. Such is the world rationalizing legal analysis has helped make.[88]

Thus, combining RLA's "best face" orientation with the cautious, incremental approach of PPR produces only minimally effective, and often anomalous, results. Not only does it fail to engage the social and institutional reforms that may be most needed, it has no way to devise, analyze, or even talk about alternatives.

> The central defect of [RLA] as political action lies in its failure to reach the deeper sources of disadvantage and exclusion in the institutions and practices of society. When it reaches them at all, its focus remains so narrow and its vi-

87. *Id.* at 40.
88. *Id.* (emphasis added).

> sion so superficial that the campaign for improvement often produces perverse and paradoxical results.[89]

Unger's major criticism is that RLA's version of legal thought—one in which the analyst's only job is the *recognition* of ideals embedded in legal materials and the commitment to their *improvement* through rational reconstruction—has now come to occupy all the available imaginative space in the legal academy. It prevents other conversations from occurring. And here Unger's criticism seems right. He argues that RLA, used as a vehicle for social reform, "is driven by its vision and its method to pursue aims only obliquely related to the real sources of collective anxiety and group disadvantage."[90] He describes the "rational disharmonies" of equal protection doctrine and its "failures of efficacy" quite starkly and convincingly.[91] In fact, in the context of equal protection, RLA and PPR do not even engage the relevant inquiries:

> If problems like racial and social apartheid are to be imagined and solved in the form of legal doctrines, such as substantive equal protection, it is important to probe the hidden relations between different forms of legal imagination and different practices of social reform. Having set the stage for such an inquiry, *rationalizing legal analysis turns off the lights*.[92]

Moreover, for Unger, equal protection is a metaphoric representation of the problems inherent in all of law. Unger in fact describes the whole of contemporary constitutional theory as an "extreme case" of RLA.[93] In RLA's attitude toward constitutional interpretation, there is no place for the notion "that the type of democracy the country *needs* is one that the arrangements of the American constitution cannot accommodate without comprehensive revision."[94] To this, a strict construc-

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89. *Id.* at 105.

90. *Id.* at 83.

91. *See id.* at 84–90 (describing equal protection doctrine's conceptual coherence and consistency as currently "strained . . . beyond repair"); *id.* at 91–97 (describing the characterization of suspect classes as an expression of the "politics of groupism," which in turn creates a "counterpolitics of resentment"—such as the angry white male phenomenon); *id.* at 92, 94.

92. *Id.* at 86 (emphasis added).

93. *See id.* at 58.

94. *Id.* (emphasis added).

tionist or originalist might respond: quite right, exactly so—it is not the function of the judicial branch (or a bunch of legal scholars) to engage in constitutional revisionism. Yet, at the same time he says this, the strict constructionist or originalist is always already engaged in his own form of "reconstructive rationalization." The difference is that instead of seeing "penumbras" emanating from the constitutional text,[95] the strict constructionist or originalist sees literal language,[96] or framers's intent, and subscribes to the theory that "[i]f it cannot, by hook or by crook, be found in the [C]onstitution, it must not be as good as it looks."[97] The "reconstructive rationalizing" tendency within the method of RLA has resulted in the development of what Unger calls the "cult of the constitution"[98] among legal scholars.[99]

Unger's critique goes still further, beyond the conceptual infirmities and boundaries of legal thought and into its political ideology. He describes the "two dirty little secrets of contemporary jurisprudence" in highly negative terms: its "rightwing Hegelian view of social and legal history and its discomfort with democracy."[100] The former, according to Unger, sees all of law through something called the "cunning of history"—the development of a rational scheme, or a system of increased economic efficiency, or an order of abstract principles of moral right.[101] The "discomfort with democracy" is evident everywhere, in the

> opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement . . . in the effort to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver . . . [and] in an ideal of deliberative democracy

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95. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (Douglas, J.) (finding that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance").

96. *See id.* at 530 (Stewart, J.) (noting that "I can find no such general right of privacy in the Bill of Rights, [or] in any other part of the Constitution").

97. UNGER, *supra* note 17, at 58.

98. *See id.*

99. For a fascinating description of a culture in which the law's formation depended on precisely this sort of "cultish" activity—that is, scholarly elaboration, not adjudication, see BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 7-23 (1998) (describing the development of *Shari'a* by scholarly jurists).

100. UNGER, *supra* note 17, at 72.

101. *See id.*

> as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room.[102]

Unger's stronger criticisms here are in some sense valid. There are undoubtedly elements of Hegelian systematicity in contemporary legal thought (in fact, thesis-antithesis-synthesis might loosely describe the form of many traditional law review articles). And rationalism is often not at all comfortable with the exercise of true democratic principles.

Unger's vision, however, may be somewhat misdirected. On the one hand, what he criticizes as legal method's failure to talk about alternatives is correct: after the first year of law school, the "institutional fetishism"[103] he describes is already imprinted on students.[104] The legal mind no longer sees alternative institutional structures, or, if it does, it shelves them away as implausible, impractical, irrelevant. On the other hand, there are several problems with the practical implementation of his theories. One problem is the question of determinants: the argument that class, economic, and market forces are more determinative of the structure of social institutions than is law, and thus it is utopian to expect law to be able to effect institutional or social change.[105] Another problem is the

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102. *Id.* at 74.

103. *See id.* at 20.

> The false goal of neutrality gets in the way of the real aim of experimental diversity by being harnessed to the fetishistic veneration of what should be seen as fallible and transitory arrangements. . . . We find ourselves bereft of the intellectual instruments with which to understand and reimagine the formative institutional and imaginative structures of our societies.

Id. at 19.

104. For a vivid description of the ways in which this imprinting process occurs, see DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 21–22 (1984). Kennedy describes how first-year curricula and teaching has a "bias in favor of the center-liberal program of limited reform of the market economy and pro forma gestures toward racial and sexual equality" because legal education "makes the choice of hierarchy and domination, which is implicit in the adoption of the rules of property, contract and tort, *look as though* it flows from legal reasoning, rather than from politics and economics." *Id.* The basic message imprinted on law students is that "the system is basically OK," and any "fundamental questioning . . . is relegated to the periphery of history or philosophy." *Id.* (emphasis added).

105. *See* Joseph Isenbergh, *Why Law?* 54 U. CHI. L. REV. 117 (1987) (reviewing Unger's book, THE CRITICAL LEGAL STUDIES MOVEMENT, and arguing

question of authorized actors: the fact that there are very few lawyers, judges, scholars, or even legislators, who are generally authorized to effect the kinds of experimental, imaginative institutional reforms Unger envisions.

However, there are a number of possible responses to the question of determinants. First, even if it is true that class, economic, and market forces are more determinative of institutional and social structures than is law, that does not mean that law is not important in discussing their deeper normative structure. Second, there may be no good way to tell which forces today will in fact be determinative tomorrow. Perhaps law will be one of them; we cannot know in advance. A third response is one which Unger himself gives:

> To the response that we can hope to play this internal relation out in other fields of discourse, the answer is that to play it out at all we have to do so in legal form. It is as law that the institutions and practices holding our interests and ideals hostage live in detail. It is in legal thought that we give a textured—and fateful—account of the relation between social arrangements and the conceptions of interests and ideals making sense of them. The greatest imaginative cost of the canonical style of legal reasoning is negative: it fills up the imaginative space in which another way of thinking might take root, and it does so in the crucial testing ground on which authoritative ideals meet practical realities.[106]

As for the second question, the problem of authorized actors, one response would be that this problem exists with any legal theory. To students, the value of Unger's criticisms perhaps lies more in developing a critical awareness of how law works (and fails to work), than in the concrete translation of his theories into immediate practical action.

When Unger argues that the form and method of legal thought prevents it from even being able to conceive of imaginative alternatives, about "arrangements withdrawn from the scope of choice,"[107] he is right. With its methodological attention focused on the kind of binary decisions that judges are

that legal education and practice "hardly seem . . . fertile ground for utopian political vision").

106. UNGER, *supra* note 17, at 106.

107. *Id.* at 27.

forced to make, traditional legal thought has in fact become little more than a "sustained exercise in correction."[108] When Unger argues that "[t]here is no such thing as 'legal reasoning,'"[109] and that the abstractions of contemporary legal analysis "can be stretched, more or less plausibly, in too many different ways . . . [while t]o every increment of stretching there corresponds some unacknowledged and unaccountable exercise of *power,*"[110] he is also arguably right. Law students are highly trained in the use of reason and logic to reach solutions, and in privileging the rational and deliberative character of what they do, students tend to become disabled from seeing the power and violence underlying legal interpretation. And when Unger argues that the rationalizing methodology and assumptions of RLA have become so well-entrenched that contemporary legal thinkers have lost the capacity to appreciate their contingency,[111] consider Nietzsche's warning: "When one finds it necessary to turn *reason* into a tyrant, as Socrates did, the danger cannot be slight that something else will play the tyrant."[112]

When Unger argues that RLA and PPR "confer[] a halo of reasoned authority and necessity upon the [existing] institutionalized structure of society" and *"leave[] us without a language* in which to describe and discuss the alternative futures of society,"[113] he wants people to wake up to the fact that some important things are missing in legal thought's normative universe. When Unger argues that law (and thus legal thought) in a democracy will be "messy" and "rich in compromises embodying different balances among contrasting interests and visions,"[114] he is trying to describe exactly what is missing. Law-

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108. *See id.*

109. *Id.* at 36; *cf.* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 62–100 (1998) (arguing that "analogical reasoning" is a form of reasoning unique to law).

110. UNGER, *supra* note 17, at 77 (emphasis added). For a discussion of the power and violence that is inherent in all adjudication and legal interpretation, see Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986).

111. "When the major problems of society begin to require, for their solution, experimentalism about practical arrangements, this defect proves fatal. The tactic avenges itself against the tactician." UNGER, *supra* note 17, at 52.

112. FRIEDRICH NIETZSCHE, *Twilight of the Idols, in* THE PORTABLE NIETZSCHE 478 (Walter Kauffman ed. trans., 1954). For a description of reason as the "predicament" from which contemporary legal thought cannot escape, see PIERRE SCHLAG, THE ENCHANTMENT OF REASON 61–91 (1998).

113. UNGER, *supra* note 17, at 96 (emphasis added).

114. *Id.* at 66.

yers know that law is messy and rich in compromises, yet academic legal thought often presents law as otherwise. Lawyers know that the many different pieces of law do not fit within some "developing rational scheme." For Unger, to ask the question "What should the law be?" and expect that the answer can always be deduced from existing doctrine, or from highly rationalized abstract ideals, is not only unrealistic, it is anti-democratic:

> Rather than being a problem for democracy, the absence of such a latent [rational] scheme is, in a sense, a precondition of democratic vigor, for democracy expands by opening up social life to conscious experimentation. For the same reason, the devolution of law-completing and law-reconstructive responsibility to an insulated band of experts [judges, legal scholars, and lawyers] in rational deliberation *makes no sense*. Such an expertise properly belongs to citizens.[115]

Unger's arguments undoubtedly leave him open for much criticism.[116] Nevertheless, he exposes something very disquieting about contemporary legal thought: it is systemically dedicated to the avoidance of self-critical questions, even in an educational setting.

In the end, Unger's answer is to redefine and redirect legal analysis in the direction of imagining alternatives, to a place where "social concern and relentless inquiry are viewed as natural allies."[117] Unger argues that legal analysts must try:

> [T]o develop practices of economic and legal understanding that enable us to recognize the contingency of our institutions as well as their constraining force. Then, the sterile alternation between assimilation to the established structure and secession from it in the political imagination of

115. *Id.* at 109 (emphasis added).

116. Unger has been faulted for utopianism, vagueness, and a failure to connect his political and social goals with the plausible, practical ways in which they might be achieved without undue trauma to the legal system. For one example, see Jeremy Waldron, *Dirty Little Secret* (Book Review of WHAT SHOULD LEGAL ANALYSIS BECOME), 98 COLUM. L. REV. 510 (1998).

117. UNGER, *supra* note 17, at 22 (emphasis added).

> groupist politics will give way to politics seeking to reimagine and reconstruct the structure.[118]

He states that citizens, not legal thinkers, should be the new speakers for, and the focus of, his revised method, which works by "mapping and criticism"[119] and refusing to acquiesce in the fetishizing of existing institutional structures. "Criticism," including legal criticism, Unger argues, is ultimately "about promises of happiness."[120]

B. Professor Kahn and the Problem With the Reform Orientation

Professor Kahn begins his book by arguing that the problem of contemporary legal thought is not that it is overly theoretical or "impractical," as Judge Edwards argues, but, rather, the exact opposite.[121] Kahn argues that academic legal thought is too enmeshed in the reformist ambitions of legal practice—its methods, its argumentative forms, its aesthetic—to be intellectually helpful. As he describes it:

> The professor of constitutional law spends most of her time explaining how the Supreme Court should have ruled, or should rule. Even jurisprudence falls into this pattern of critique and reform. When it is not pursuing the analytic question of the conditions of legal validity, contemporary jurisprudence is telling us how judges should rule or how regulatory regimes should work. There is remarkably little study of the culture of the rule of law itself as a distinct way of understanding and perceiving meaning in the events of our political and social life.[122]

The cultural study is a way to bring interdisciplinary styles and methods to legal thought. It is a "critical turn . . . away from the professional school and back to the disciplines of

118. *Id.* at 93–94.

119. *See id.* at 130. Mapping is a way to "describe in detail the legally defined institutional microstructure of society in relation to its legally articulated ideals." *Id.* Criticism then "explore[s] the interplay between the detailed institutional arrangements of society as represented in law, and the professed ideals or programs these arrangements frustrate and make real." *Id.*

120. *Id.* at 179.

121. *See* KAHN, *supra* note 16, at 7.

122. *Id.* at 1.

philosophy, psychology, anthropology, and history."[123] The cultural study promises not to reform the law, but to provide a better understanding of our beliefs about it and the meanings with which we invest it.[124] Kahn's is an effort to redirect some legal scholars away from the traditional judge-centered form of legal thought, to urge them to resist answering the "*incessant* question directed at legal scholarship: [W]hat should the law be?"[125]

As an alternative approach to traditional doctrinal legal thought, and to the kind of "auto-theory" that he says characterizes much of academic legal thought, Kahn encourages scholars to seek a different goal: a phenomenological and philosophical understanding of legal culture and its structures of meaning and belief.[126] An alternative question to explore is: "Who are we and what does our world look like when we find ourselves in this culture of law's rule?"[127]

Kahn argues correctly that reform is the central objective of most legal scholarship.[128] Reform-oriented scholarship is, of course, quite necessary.[129] But Kahn's point is that the reform-oriented scholar, by casting his object of inquiry in exclusively reformist terms, "becomes a participant in legal practice" and thus "a part of the very object that he or she set out to investigate."[130] This means that rather than studying law, the scholar is *practicing* it. "[T]he difference between scholarship and the writing of briefs disappears: every article becomes a proposed draft of a judicial opinion or, if proposing too extreme a reform for a court, then an explanation to be inserted in a legislative committee report."[131]

Kahn illustrates what he calls "scholarship as Legal Practice"[132] by revealing the common reformist orientation in the

123. *Id.* at 40.

124. *See id.*

125. *Id.* at 92 (emphasis added).

126. *See id.* at 91.

127. *Id.* at 30.

128. *See id.* at 7.

129. Indeed, the legal thinker's urge to reform law is sometimes hard to avoid: "The scholar is captured by law because she imagines the tasks of legal reform as the fulfillment of moral and political responsibilities." *Id.* at 9.

130. *Id.*

131. *Id.* at 19.

132. KAHN, *supra* note 16, at 18–22.

works of scholars as diverse as John Hart Ely,[133] Ronald Dworkin,[134] Catharine MacKinnon,[135] and Roberto Unger.[136] Kahn shows how each of their works might resemble, aesthetically and methodologically, long versions of the lawyer's appellate brief. He describes Ely (who emphasizes the role of Will, or consent, in law) and Dworkin (who emphasizes the role of Reason) as the "poles of mainstream scholarship, yet each is equally committed to a reformist vision of the scholar's [role]."[137] He describes Unger and MacKinnon as "offer[ing] powerful insights into the constructed character of the legal order. Both identify the partial, if not false, claims of reason and of will, in that order. Yet, in the end, both take up the traditional project of law *reform* . . . a true science is to inform the will of the community."[138] Indeed, Kahn uncovers the same reformist ambition even in the abstract Rawlsian or Dworkinian normative critique of existing judicial practices in terms of universal ideals. The goal of this kind of auto-theory is interpretive but still reformist: it seeks to make law itself the "best" it can be.[139]

To all of these scholars, he argues not that their reformist ambitions are wrong-headed; rather, they are confusing the *study* of law with its practice. The reform orientation leaves legal scholarship intellectually insufficient, and his cultural study provides a necessary supplement.[140] The traditional form of legal thought in which the scholar identifies himself with the judge is a case of role-conflation and confusion which makes the legal scholar's work seem to be either schizophrenic, or "oddly naive."[141] An analogy to the field of political science clarifies the problem which Kahn sees: "Political scientists can study government without confusing their activity with the

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133. *See* JOHN ELY, DEMOCRACY AND DISTRUST (1980).

134. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

135. *See* CATHARINE MACKINNON, ONLY WORDS (1993).

136. *See* UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME (1996).

137. KAHN, *supra* note 16, at 22.

138. *Id.* at 26 (emphasis added).

139. *See* DWORKIN, *supra* note 9, at 413 (stating that law aims "to lay principle over practice to show the best route to a better future").

140. Kahn argues that for legal scholars to continue to assume that "reform" is the only proper goal of legal thought represents a "failure of analytic possibility." *See* KAHN, *supra* note 16, at 7.

141. *See id.* at 29.

object of their study. They do not think that because they *study* authoritative institutions, *their own work* makes a claim to authority."[142]

His cultural study is thus "an effort to move scholarship . . . away from normative inquiries into particular reforms and toward thick description of the world of *meaning* that is the rule of law."[143] To do this, we must "start looking at the legal imagination."[144]

> [A] cultural study of law cannot narrowly limit itself to "legal" phenomena. *There is no such subset of experience. . . .* We need to know as much about the appearance of God under the rule of law as about the use of precedents. We need to study the microdynamics of the family, as well as the practice of dissent on the Supreme Court. We need to study the prison, but also the circulation of ideas. We cannot know in advance which of these experiences will be most fruitful to the study. The cultural study of law investigates a way of life in all its diversity, not just those objects and practices positively labeled "law."[145]

As with Unger, Kahn's proposal raises standard objections. Judge Edwards, for one, would argue that legal scholars should be paying attention to what they know: legal doctrine.[146] The subtext of this objection is that responsible legal thought will focus only on the analytical validity of legal rules and on the legal "correctness" of the judicial decision.

Yet living under law's rule is not a matter of getting something "right."[147] Questions of analytical validity and conceptual order have little to do with law in its actual operation. And focusing solely on the judicial decision's legal "correctness" leaves out entire lines of alternative inquiry:

> If we are confident that we are better off after the judicial pronouncement, this is only because we are already commit-

142. *Id.* at 27 (emphasis added).

143. *Id.* at 91 (emphasis added). "Thick description" comes from the work of cultural anthropologist Clifford Geertz. *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973) (describing people as suspended in "webs of significance" that they themselves spin).

144. KAHN, *supra* note 16, at 135.

145. *Id.* at 125 (emphasis added).

146. *See* Edwards, *supra* note 6, at 54.

147. *See* KAHN, *supra* note 16, at 24.

> ted to a *court-centered world* in which we evaluate power by looking to the quality of authoritative decisions. If we believe that there are right answers under law and that law has a value in and of itself, then we will argue about the legally correct answers that the Court should reach. This is what most legal scholarship is about. But if judicial decisions do not translate into effective results in the larger political order, then legal *correctness* may not be much of a value. Getting the law right may not tell us much about the character of the political order.[148]

As an aside, this commitment to a "court-centered world" reinforces legal thought's focus on the transformative capacities of the judiciary—something which political scientist Gerald Rosenberg has argued is a case of inflated judicial self-importance.[149]

What is the origin of this reform orientation, and why is it so prevalent? Kahn traces its origin to the intersection of the concepts of Reason and Will. The achievement of progress through the application of Reason is still "the central Enlightenment project for both community and individual."[150] To be legitimate, law must always appear to satisfy a certain level of rationality (without which it would appear to be arbitrary), as well as a certain level of popular consent, or Will (without which it would appear as the lawless imposition of rules by force). But legal rules do not easily fulfill both conditions at once. And to make it more complex, Kahn suggests there are really two senses of Will at work in legal thought. One sense refers to Will as the irrational passions or subjective preferences of the legal actor (historically the judge)—passions which

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148. *Id.* at 135 (emphasis added).

149. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 2–3 (1991):

> Could it be that the self-understanding of the judiciary and legal profession leads to an overstatement of the role of the courts, a "mystification" of the judiciary? If judges see themselves as powerful; if the Bar views itself as influential, and insulated; if professional training in law schools inculcates students with such beliefs, might these factors inflate the self-importance of the judiciary? The Dynamic Court view [that the courts can bring about social change] may be supported . . . because it offers psychological payoffs to key actors *by confirming self-images*, not because it is correct.

Id. at 2–3 (emphasis added).

150. KAHN, *supra* note16, at 8.

must be controlled by the application of rational constraints. The other sense refers to Will as popular sovereignty, the notion of the consent of the governed as the source of law's legitimacy.[151] Either one of these types of Will carries with it the specter of irrationality. Once any irrationality becomes visible, so does the need for reform. The need to subordinate and contain Will to the dictates of Reason thus makes reform of the law a constant necessity.

> To identify an irrationality in law—either in ends or means—is to establish a predicate for reform. The legislative project is continuous and unending because its task is constantly to reconsider and readjust the regulatory scheme to keep it consonant with what reason reveals. Without constant reform, regulation would become irrational as facts and context change . . . . Accordingly, there is always a place in the legal order for correction of the irrational.[152]

The subordination of Will to Reason in legal thought ensures that neither judges nor scholars are seen as "making" law. To do so would be to usurp the legislative/democratic function, to impose their own subjective preferences on the Will of the people.[153] Instead, the judge or scholar *finds* law or *recovers* it.[154] A judicial opinion that "fails to appear as a rediscovery will appear as an illegitimate construction of new law."[155] (Notice how this process resembles the same Langdellian formalism which Unger calls "nineteenth-century legal science."[156]) As Kahn puts it, "[t]he point of legal interpretation is always to recover, i.e., to make present, something that appears already to exist."[157] This objective and neutral application or "recovery" of law is accomplished through doctrine and precedent, the tools

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151. *See id.* at 12 (noting that it is the myth of consent, and not the reality, that matters).

152. *Id.* at 11.

153. As Kahn explains, "[t]he terms *reason* and *will* are themselves empty of substantive content . . . [but] they structure the debate within the polity by establishing the larger conceptual order within which we deliberate about our political life." *Id.* at 17.

154. *See id.* at 53 (discussing the "'myth of recovery' by which the post-*Lochner* Court expunged the novel acts of the *Lochner* Court and returned to the timeless law of John Marshall").

155. *Id.*

156. *See* UNGER, *supra* note 17, at 41.

157. KAHN, *supra* note 16, at 53.

for the subordination of Will to Reason. Doctrine compels outcomes in easy cases; outcomes are made to seem similarly compelled in hard cases by recourse to interpretive rationalistic concepts like "integrity" (from Ronald Dworkin) or "incompletely theorized agreements" (from Cass Sunstein), because to do otherwise would be judicial engrafting of personal preferences into the law.[158] Kahn can thus describe John Rawls's social contract theory as perhaps the "perfect philosoph[y] of the rule of law"[159] because Rawls's theoretical construct, the "veil of ignorance,"[160] acts to subordinate Will to Reason. It suppresses both the "psychological pathology of uncontrolled personal desire [and] the communal pathology of the unreason of religion."[161]

But of course, Rawls's philosophical abstractions are more difficult to apply to the actual practice of judging (or to the practice of law in general). Because prior decisions always have more than one authoritative interpretation,[162] to control the element of Will in law requires that the opinions of a judge be continually subjected to Reason's corrective force. This is the scholar's job in traditional legal thought; he is cast as a meta-judge. And because of this conflation of roles, the tension between Reason and Will yields

> a kind of schizophrenia in legal scholarship. For the scholar is constantly saying both that the last opinion of the Court was wrong—or occasionally right—and saying that as an expert in an area of the law, she can show how all of the opinions together form a *single, rational whole* that is the authoritative law.[163]

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158. *See* DWORKIN, *supra* note 9, at 228–58 (arguing that even in hard cases, judges can ascertain a "best" answer by recourse to the principled constraints placed on them by the concepts of integrity and fit); SUNSTEIN, *supra* note 109, at 35–61 (describing "incompletely theorized agreements" as a method of reconciling judicial decision-making when consensus on higher-level principles is impossible to achieve).

159. KAHN, *supra* note 16, at 20.

160. *See* JOHN RAWLS, A THEORY OF JUSTICE 136–42 (1971).

161. KAHN, *supra* note 16, at 20.

162. This is particularly true in Constitutional law, where one professor describes a scatterplot of the decisions of the Supreme Court as the reverse of Swiss cheese (a relatively small number of opinions which must constantly be stretched and pulled to cover new cases).

163. KAHN, *supra* note 16, at 29 (emphasis added).

And yet there is never a *single, rational whole* to be found. The consequence is that the uneasy existence of the Reason-Will dichotomy in legal thought "operate[s] always to make possible either an affirmation of the status quo or an effort of legal reform."[164] The choice for the traditional legal scholar is, then, a kind of intellectual straitjacket. It is a choice between court apologetics (adjusting deckchairs in favor of the court's decision) or court critique (marshalling deckchairs against the court's decision).

What is missing when legal thought orients itself solely to reform? First, this orientation lends itself to what Kahn calls the myth of progress—seeing the expansion of legal concepts like due process as a definitive, quantifiable good. "[F]ormalization, juridification and proceduralism are undoubtedly legal norms . . . . [But] it is not the case that more is always better with respect to these norms. What looks like a progressive enlargement of the legal domain can equally look like bureaucratization run amuck . . . ."[165] By contrast, legal thought that orients itself to examining competing modes of perception and meaning-making, such as the perspectives of political action, nature, or love, can reveal why the increased juridification of modern society is *not* a definitive good.

More importantly, because people have multiple belief systems, and because "[s]pecifically legal texts are committed to a normative devaluation of other forms of experience,"[166] Kahn argues it is particularly important to contrast the "legal" meaning of events with their competing, alternative meanings. Law students are trained to see only the "legal" meanings during their first year of law school; but, in fact, practicing lawyers must be sensitive to these alternative understandings all the time. Clients often imbue "legal" events with religious, political, or moral significance. For example, the extremely rigid formality with which a will-signing is conducted means one thing to the lawyer (failure of a formality probably equals malpractice), but something entirely different to the client (the contemplation of one's own death).

Kahn's version of legal thought tries to capture some of this meaning, to convey some of this sensitivity. It allows the

164. *Id.* at 15.
165. *Id.* at 108.
166. *Id.* at 126.

examination of the meanings of legal events through the lenses of love (which sees a universal order founded on forgiveness and mercy[167]), or nature (which sees an absence of order, a Hobbesian, prelegal state of nature), or political action.[168] It is able to examine law's structures of belief, law's genealogy, law's architecture, and law's historical-temporal or spatial-jurisdictional aspects, because its form and voice are not limited to making normative arguments for reform.

Second, traditional legal thought does not reveal the power of law and the constructed character of legal concepts, institutions, and societal structures. Kahn suggests viewing legal texts, including judicial decisions, as works of *fiction,* because "[c]alling them fiction allows us to see simultaneously the power of law's rule and its contingent character."[169] He argues that the traditional image of the court at the center of a hierarchy of power—an entity to whom it makes sense to address normative recommendations—no longer matches up with the realities of the bureaucratic state. The presumed power of the judicial decision

> rests on a conception of the sovereign as *the* decision maker, the person who directs how the rest of the polity will lead their lives. . . . Legal scholars are, for the most part, arguing about how this authoritative sovereign should rule. But our legal universe simply does not work this way.
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> . . . .
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> . . . Control is [now] exercised through an economy that no single institution or state manages, a public opinion formed by media operating without overall direction . . . . This is control without a single subject doing the controlling.
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> . . . If judges are telling legal scholars that they are speaking in ways that are without practical relevance, it may also be time for scholars to suggest to judges that they too suffer from a mismatch between their beliefs about their practice

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167. *See id.* at 121.

168. *See id.* at 70. Political action "locates the meaning of the event in the fact of its happening, not in its realization of a possibility already established by a rule." *Id.*

169. *Id.* at 139.

and the actual place of their decisions in the life of the polity.[170]

While legal thought plods on with the judge as the center of the legal universe, legal practice is busy avoiding courts: arbitration, negotiation, deal-brokering, insurance, planning, and plea-bargaining are increasingly used to avoid the costly machinations of the formal judicial system. Even when judicial decisions do affect social reality, the relationship is often indeterminate. Kahn illustrates this by contrasting the echoes of the judicial imperatives of *Brown v. Board of Education*[171] with the experience of continuing de facto forms of discrimination and new prohibitions on affirmative action:

> The difference is between knowing that the white community has the power to pass exclusionary laws and knowing that the white community is so powerful that it can accomplish its exclusionary ends *without even having to pass laws*. . . . Similarly, from the perspective of the woman seeking an abortion, it matters little if the service is not available because it is legally prohibited or because medical facilities and insurance programs fail to offer it. It is not that there is no difference in these cases, but the difference cannot be easily measured on [traditional legal thought's] normative scale of better and worse.[172]

Judicial orders do not come with a single set of linear, rational, predictable consequences such that they can easily be termed a *legal* victory or failure apart from the outcome of a specific case. Yet traditional legal thought's "rationalizing legal analyst" keeps missing this point. For instance, of the Supreme Court's supposed return to federalism in *United States v. Lopez*[173] and *Printz v. United States*,[174] about which hundreds of law review articles have been written, Kahn asks:

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170. *Id.* at 128–29.

171. 349 U.S. 294 (1955).

172. KAHN, *supra* note 16, at 135 (emphasis added).

173. 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act of 1990 unconstitutional as exceeding the congressional authority to regulate interstate commerce).

174. 521 U.S. 898 (1997) (holding the Brady Handgun Violence Prevention Act's requirement of background checks on prospective handgun purchasers unconstitutional as an obligation forcing state officers to execute federal laws).

> Are these decisions a victory for federalism, apart from the substantive policies at issue? It is difficult to know what that would mean. The federal government continues to grow . . . . Media are increasingly national . . . . The Court's recent decisions are not a reorganizing of the distribution of authority across this [local/national] line or even a shifting of the line.[175]

Like Unger, Kahn tries to show that the conceptual and intellectual universe of legal thought is missing some important things. Like Unger, his proposal opens him up for criticism, particularly from legal thinkers (like Judge Edwards) who are already suspicious of interdisciplinary approaches to law.

One criticism might be to ask how many legal scholars would be capable of producing the kind of first-rate cultural scholarship which Kahn envisions.[176] A different criticism might come from Stanley Fish, who has argued that any attempt to make legal thought something other than what it is, whether through cultural, interdisciplinary, or philosophical approaches, makes it no longer *legal* thought, but something else entirely:

> The cultural text, if it comes into view, will not provide a deeper apprehension of the literary text or the legal text; rather it will erase them even in the act of referring to them, for the references will always be produced from *its* angle of interest, not theirs. If cultural studies tells us to look elsewhere to find the meaning of the literary [or legal] text, I say that if you look elsewhere, you will see something else.[177]

Yet developing the ability to "see something else" is perhaps the thrust of Kahn's whole argument. Kahn's criticisms reveal disturbing solipsistic tendencies in contemporary legal

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175. KAHN, *supra* note 16, at 131.

176. Austin Sarat argues, however, that the kind of scholarship Kahn describes as missing in legal thought *is* being written in other fields. *See* Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools* (reviewing PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999)), 12 YALE J.L. & HUMAN. 129 (2000). For an example of first-rate cultural scholarship by a legal scholar in this very issue, see Rebecca R. French, *Time in the Law*, 72 U. COLO. L. REV. 663 (2001).

177. STANLEY FISH, *Looking Elsewhere: Cultural Studies and Interdisciplinarity*, *in* PROFESSIONAL CORRECTNESS, LITERARY STUDIES AND POLITICAL CHANGE 71, 79 (1995).

thought. From an educational perspective, he is right to argue that legal scholars should be asking different questions, questions about "how what we see is a function of what we do not see,"[178] and "what is the larger conceptual order that we bring to this set of facts within which it makes sense as a legal phenomenon?" What it is that we as legal thinkers are able to see *does* matter. This is how Kahn conveys why it matters:

> Standing within law, we are always in danger of allowing law to fill our entire vision. A cultural study of law reminds us not only that people have lives of meaning outside of law's rule, but also that many of our richest and deepest experiences must be protected from the imperialism of law's rule.[179]

III. CONTEMPORARY LEGAL THOUGHT AND THE LAW SCHOOL CLASSROOM

Thus far, we have three views of the proper role and orientation of the legal scholar. For Judge Edwards, the scholar is to inform and critique judges, answering "What should the law be?" in instrumentally practical and immediately useful doctrinal terms. For Professor Unger, focusing on this question and its jurisprudential companion, "How should judges decide cases?" has resulted in the perpetually arrested development of legal thought—and of the mind and vision of the legal analyst as well. For Professor Kahn, this reformist, traditional version of "What should the law be" is precisely the "incessant" question to which too much legal thought is already directed.[180] Despite the criticisms of Kahn, Unger, and other scholars, legal thought which addresses anything other than these traditional judge-centered questions is usually taken to signify a lack of commitment to improvement, progress, and reform of the law.[181] The traditional assumption is that if scholarship does not argue for doctrinal reform, or tell judges what the law should be, what good is it?

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178. KAHN, *supra* note 16, at 125.
179. *Id.* at 138.
180. *Id.* at. 92.
181. "The scholar who resists apologetics marginalizes herself." *Id.* at 29.

Yet notice that framing the problem in this way is already to remain within the judge's worldview. From a student's perspective, the problem is not that these questions are somehow *invalid*. Rather, they are not always the *only* proper questions to ask. Often they are not the most *valuable* or *helpful* of questions. In fact, there are reasons to doubt the educational commitment and intellectual integrity of a practice (academic legal thought) that is structured around a single set of questions.

Legal thought that answers these questions is functionally necessary. It is also hardly sufficient. From here, we consider the other roles and the other questions of legal thought.

A. *Roles of the Learner and the Judge*

Judge Edwards is, of course, correct in pointing out his need for solutions to practical problems. Judges have difficult jobs; they have crowded dockets and they need informative, practical answers to issues before them. Law students and lawyers sometimes need the same thing. Faced with a known problem, traditional doctrinal legal thought can give a lawyer the answer he needs, or at least an argument he can use to persuade a decision-maker that his answer is the correct one. But Judge Edwards errs in universalizing his own jurisprudential commitments to all readers of legal thought.

He assumes that everyone reads scholarship for answers to the same questions, and the same *kinds* of questions, that he asks as a judge. But while the judge looks for a pragmatic, doctrinally sound, immediately useful answer to the question of "What the law should be," the litigator or counselor is busy strategically asking, "How do I characterize this fact pattern?" or "How can I use this information?" or "What does my client want?" or "How can I keep this thing out of court?" At the same time, the first-year law student sits in class and combs through cases with a head full of questions that are of a fundamentally different nature. The questions are present, even if they are not often voiced:

What legal principle? As in: *what* are you talking about? What *is* this thing called "due process" or "consideration," such that we can talk about it and treat it as an objectively verifi-

able "thing"[182] apart from its invocation in opinions? What is this rule, or doctrine, or theory, or deckchair, *for*? What (or whose) purposes does this rule serve? How does it interact with or contradict that rule over *there* (in the next classroom)?[183] How are we, as students, supposed to know how to debate the wisdom of the policy of "freedom-of-contract" or "what the Constitution requires" when we do not yet know what they are, or what they presuppose? What do they mean when they invoke "freedom-of-contract" in *Lochner v. New York*,[184] or in modern unconscionability cases, or in the context of employment-at-will, and is it the same thing? Why do we *do* legal analysis this way? As opposed to some other way? How do they do it elsewhere? When we, even as students, know that lawyers must, on a daily basis, deal with ethical dilemmas, believe in legal fictions, pacify bureaucratic gnomes, negotiate with irrational people, and counsel the grieving and the guilty—how does this *legal* way of thinking fit with the ways people really think, feel, and behave? What implicit background assumptions tag along with this form of legal analysis, without us even realizing it? Isn't *anybody* considering these things?!"

To the legal academic, or even the seasoned third-year law student, these questions might seem silly, their answers obvious. But to the beginning first-year student, the questions were not at all silly. Their answers were not at all obvious. They were perplexing and frustrating, questions we could *see*, almost tangibly *feel*, implicitly embedded in the judicial opinions we read day after day, and yet they were questions the opinions never explicitly addressed.

Take the question of "What is this rule *for*, or what purposes does it serve?" There are at least three possible modes

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182. On the "thingification" of legal concepts, see Cohen, *supra* note 48, at 809, 811.

183. One fellow student likened the first year of law school to the way medical schools historically trained doctors: the student masters a mass of excruciatingly detailed knowledge about each body part, but each part remains entirely segregated—physically and conceptually—from its neighboring body parts. The first-year student has so much material to master, and he is required to master it in such intricate detail, that very little time can be devoted to any prolonged discussion of how the various body parts relate to and affect each other in practice. Comment of Kirsten Pederson, University of Colorado School of Law, in Boulder, Colo. (Oct. 10, 1999).

184. 198 U.S. 45 (1905).

from which students view its relevance. First is the student who views the question as entirely irrelevant to his course of legal study. He responds to this question with something along the lines of, "Look, professor, I just want to know what time it is—not how the clock works."[185] From this largely doctrinal mode, there is no need even to ask the question.

Next is the student who asks the question all the time, expressing her frustration with Supreme Court opinions with which she does not agree. She argues "Why don't the justices *see* it? Why don't they see that this rule will just make it worse? That it will just *obscure and exacerbate* the nature of the [racist, or sexist, or class-based] problem?" When the professor inquires as to what this student would have law professors "do" about it, her demand is plaintive and exasperated, even as she realizes its probable futility: "We want you to *fix it.*"[186] From this reformist mode, this question becomes almost the only important question to pursue.

Then there is a third student, one whose comments reflect an odd feeling of loss, a kind of inexpressible sadness: "I thought law school would be an intellectual experience. I guess I should have looked into it further before I came."[187] This is one of the many students for whom the experience of first year is at once intellectually passivizing[188] and jurisprudentially be-

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185. Anonymous student comment University of Colorado School of Law, in Boulder, Colo. (Sept. 15, 2000). For the academic counterpart of this perspective, see Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 767 (1998) (arguing that it was wrong for his professors to engage in deconstruction in the classroom, particularly before he had eaten breakfast).

186. Anonymous student comment, in Constitutional Law, University of Colorado School of Law, in Boulder, Colo. (Nov. 13, 1999). For the academic counterpart of this perspective, see Ann C. Scales, *Surviving Legal De-Education: An Outsiders' Guide,* 15 VT. L. REV. 139, 142–48 (1990) (describing legal education as the "sensation of acid slowly dripping on [one's] soul[]" and arguing that students must continually challenge the dominant political paradigm by asking the question: "TOWARD WHAT END IS THIS ACTIVITY DIRECTED?").

187. Anonymous student comment, University of Colorado School of Law, in Boulder, Colo. (Nov. 15, 1999).

188. *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 594 (1982). "The actual intellectual content of the law seems to consist of learning rules, what they are and why they have to be the way they are, while rooting for the occasional judge who seems willing to make them marginally more humane." *Id.*

wildering,[189] one in which the first-year "law faculty's desire to narrow the scope of student attention . . . conflicted with the students' search for answers to broad jurisprudential questions."[190] From this intellectually curious (but frustrated) mode, this question is just one of many which the traditional doctrinal approach to legal thought continually elides.

Whatever the mode, as the first year of law school continues, each of these three types of students is being imprinted, cognitively and normatively, with the *nomos* of the deckchair. Indeed, watching first-year students, one commentator noted how quickly they learned to "narrow[] their questions to those issues that fit the truncated scope of the typical law course," and that by the second semester, "their basic concern for [broader] jurisprudential issues was dead. The ordinary religion had completed its indoctrination. It had its converts."[191]

The result was that the students now possessed something they worked very hard to attain, something that is quite valuable: the highly trained legal mind. Yet, along with valuable skills—basic case analysis, the balancing of policy arguments (flexibility versus certainty), the art of legal characterization (rules versus standards, acts versus omissions), and the knowledge of the elements of statutory construction and interpretation—came something else, almost unnoticed. The legal mind—and the student herself—became "shaped by law."[192]

For the first-year student who is even dimly aware of this, the experience is Ungerian: she sees "the conflict between . . . [her] commitment to defining ideals and . . . [her growing] *acquiescence* in arrangements that frustrate the realization of those ideals or impoverish their meaning."[193] It is an experience, as Duncan Kennedy puts it, of "double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system."[194] This "shaping" is the source of what journalists will later satirically describe as the

189. *See* Thomas P. Huff, *A Heresy in the Ordinary Religion: Jurisprudence in the First Year Curriculum*, 36 J. LEGAL EDUC. 108 (1986).

190. *Id.* at 109.

191. *Id.*

192. *See* UNGER, *supra* note 17, at 187 (noting that "people may begin to believe that if only they follow the rules to the hilt, they will be spiritually as well as socially safe").

193. UNGER, *supra* note 17, at 129 (emphasis added).

194. Kennedy, *supra* note 188, at 594.

lawyer's overwrought legalism.[195] It is also the origin of what one scholar describes as "restatement consciousness":

> Sometime in the future the ALI will publish the Third Restatement on Everything. It will be a comprehensive compilation of four-part balancing tests all based on key terms that will themselves be defined in terms of four-part balancing tests, and so on in such a way that the Third Restatement on Everything will have achieved the first totally comprehensive, totally closed system of totally self-referential four-part balancing tests. It will be great. Then it will turn to mud.
>
> Law has apparently transformed itself into a bizarre bureaucratic [form of life] that reproduces itself, not just without consulting us or our wishes but *by shaping us and our wishes.*[196]

How does this shaping occur? Law students learn not only what the legal precepts *are*, but also how to *orient* themselves toward those legal precepts, which is with a degree of deference and reverence akin to that of a religious believer.[197] At the same time, law and legal thought are structured to disallow and deflect inquiry into the tenets of this faith. The referents of the legal faith—the legal precepts and principles—are posited and assumed into existence, often without inquiry. Even the student who notices the missing referents will learn not to voice the questions. Ontological questions about the "identity of the authoritative legal sources" are not often asked because legal thinkers "have been trained to believe that the *question does not matter* and that the answer is already clear."[198]

Notice what this training means. It means that students stop asking questions. It means that the legal scholar who persists in asking questions that "do not matter" is marginalized; this is precisely Kahn's point. It means that the inquiry into whether legal tenets and precepts adequately reflect contemporary social realities, much less any possible collective social

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195. *See* Rauch, *supra* note 2.

196. Schlag, *supra* note 18, at 98 (emphasis added).

197. "*Legal concepts* (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith." Cohen, *supra* note 48, at 821.

198. Schlag, *Hiding the Ball, supra* note 31, at 1683 (emphasis added).

goals or ideals, is entirely deflected; this is precisely Unger's point. It portends disciplinary solipsism.[199]

This failure of inquiry is what Steven Smith describes when he writes that modern law "present[s] a peculiar spectacle of an activity grounded in an *orientation* of faith but lacking the support or guidance of any *formulation* of faith, much less any conscious *commitment* of faith."[200] It is what Pierre Schlag captures when he describes American law as "organized in a rhetorical hierarchy that channels inquiry away from the ontological to the epistemic, away from the epistemic to the normative, and away from the normative to the technical."[201] This is a fundamentally bizarre combination: an orientation of faith, combined with a structure which continually redirects the legal thinker away from ontological or epistemological questions and back to the technicalities. As a student, the experience is of being told: "You must *believe,*" and when the reply is "in what?" the answer is: "in the deckchairs, of course. That's all that is important for your purposes."

To make it more concrete, try it this way. Replace the words "Sanctifying Grace" in the passage below with "freedom of contract" or "the Constitution":

> Brendan Quigley raises his hand. We call him Question Quigley because he's always asking questions. He can't help himself. Sir, he says, what's Sanctifying Grace?
>
> The master rolls his eyes to heaven. . . . Never mind what's Sanctifying Grace, Quigley. *That's none of your business.* You're here to *learn the catechism* and *do what you're told.* You're not here to be asking questions. . . . Do you hear me, Quigley?[202]

Students are not judges, they are learners. When students' attention is devoted to learning, understanding, and developing problem-*seeing* and problem-*setting* capacities, being

199. *See* Smith, *supra* note 49, at 1092 (noting that "Holmes's *Path* seems to have become a jurisprudential cul-de-sac, in which theorists travel around and around in the same tedious circles while the main traffic of the law flows along other avenues").

200. Smith, *supra* note 49, at 1137.

201. Schlag, *Hiding the Ball, supra* note 31, at 1685.

202. FRANK MCCOURT, ANGELA'S ASHES, A MEMOIR 118 (1996) (emphasis added).

constantly redirected to the deckchairs is not exactly a big help. The prescriptive voice of traditional legal thought, that voice which continually asks what the law "should be," acts to control, even in the classroom, which problems are even perceived *as problems*, in addition to which problems are seen as worthy of inquiry. And yet:

> Problems are not given, nor are they reducible to arbitrary choices which lie beyond inquiry. We *set* social problems through the stories we tell.... We should reflect on the problem-setting processes which are usually kept tacit, so that we may consciously select and criticize the frames which shape our responses.[203]

The role of the student-learner differs from that of the judge. First-year students do not yet understand law's authority, the meaning of precedent, the permissible forms of argument—in short, all of the things that the judge always already takes for granted. Moreover, the student, "in order to understand any legal civilization ... must know not only what the precepts *prescribe*, but also how they are *charged*;"[204] that is, their normative status and history, as well as "their connections to possible and plausible states of affairs."[205] When students will be "future lawyers, judges, policymakers, legislators, and academics whose views of the possibilities and limits of the law are profoundly shaped by what they learn in law school,"[206] there is more for legal thought to do than devote itself solely to addressing judges.

B. The "Other Questions" of Legal Thought

What other questions is it necessary for legal thought to ask? In framing his argument in binary practical-versus-impractical terms, Judge Edwards entirely misses the educational value of reading legal thought that explores other questions. Practicality and reform are not requirements for the

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203. Donald A. Schon, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy, in* METAPHOR AND THOUGHT 137, 148 (Andrew Ortony ed., 1993)(emphasis added).

204. Robert Cover, *supra* note 1, at 21 (emphasis added).

205. *Id.* at 10.

206. Chemerinsky & Fisk, *supra* note 11, at 671 (emphasis added).

reader who simply wants to understand. In fact, as a learning tool, critical legal thought can, at times, be considerably more helpful than doctrinal analysis. More importantly, the student who comes to law school curious, open, and inspired to change the world might find in critical legal thought, perhaps even in the work of Unger, a haven in which to maintain at least a small measure of optimistic idealism—something which is difficult to do in a profession increasingly focused on profit margins and billable hours.

Judge Edwards argues that "[t]he 'practical' scholar shows, *inter alia*, how the legal regime works."[207] Ironically, his statement captures precisely why I read *alternative* legal thought. I read it to be *reminded* of how the legal regime *really* works. I worked as a paralegal in a law firm for more than ten years before law school, and it is difficult to say that either minutely technical doctrinal analyses or abstract normative constitutional theory show, in fact, how the legal regime really works.

Legal scholarship can show how legal regimes work elsewhere,[208] or how the significance of symbols, ideology, metaphor, and the meaning of words affects law—not only from a judge's perspective, but from many different perspectives. For example, with respect to metaphor, consider Kahn's use of the metaphorical tropes of metonymy, synecdoche, and irony to uncover how legal perception displaces other forms of perception.[209] With respect to symbolism, take William Blatt's discussion of the symbolism underlying wealth taxes, the family farm, and the intricate process of drafting tax legislation.[210] With respect to ideology, one could compare Unger, who argues

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207. Edwards, *supra* note 6, at 56.

208. *See generally* REBECCA R. FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET (1994); GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT (1996).

209. *See* KAHN, *supra* note 16, at 73–77; *see also* GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987). Lakoff notes:

> Why does all this [about meaning, symbols, and metaphor] matter? It matters for our understanding of who we are as human beings . . . . It matters for what we value in ourselves and others—for education, for research, for the way we set up human institutions, and most important for what counts as a humane way to live and act.

Id. at xvi.

210. *See* William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287 (1996).

that democracy means "the power to choose the terms of social life, not to have them imposed, without our knowledge or consent, through the hidden influence of determining forces"[211] with Robert Cover, who points out that "the function of ideology is much more significant in *justifying* an order to those who principally *benefit* from it and who must defend it than it is in *hiding* the nature of the order from those who are its victims."[212]

Students can read alternative legal thought just to be educated and enlightened. And legal thought can be enlightening, relevant, and "practical" for students, irrespective of its utility for judges. Take Peter Gabel's illustration of the way in which beliefs in rights analyses and legal rules have become a sort of utopian wish-fulfillment, a need to be connected, to be part of a "democratic group":

> Look at contract law. Deadening economic routines are turned into little stories about a mythical group where everyone has freedom and is entitled to security and where you get punished if you don't act in good faith like everybody else does and so on. While people in fact are wandering around in a quasi-autistic stupor exchanging blank gazes with strangers on the street.[213]

Or take Lawrence Lokken's argument that "Subchapter K [of the Internal Revenue Code] is a mess" with a "terminal illness" resulting in "a system of unworkable complexity that still does not adequately guard against manipulative shifting of income and loss."[214] Or Elizabeth Samuels's story of the lives and motivations of the real people behind a bitter easement dispute, in which she asks: "[w]hen an incomplete or untrustworthy opinion is not a window on the story of a case, but instead is a

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211. UNGER, *supra* note 17, at 72.

212. Cover, *supra* note 110, at 1608 (emphasis added).

213. Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 36 (1984). Gabel argues that "in the pain of our isolation we become attached to the utopian content in legal imagery." *Id.*

214. Lawrence Lokken, *Taxation of Private Business Firms: Imagining a Future Without Subchapter K*, 4 FLA. TAX. REV. 249, 250, 285 (1999). As an illustration of Lokken's point, one might question the coherence of *any* set of legal rules that force the interpreter to engage in the forms of self-referential parenthetical gyrations required by even a brief foray into the Section 704 Regulations. *See, e.g.*, Treas. Reg. § 1.704-3(b)(2), Ex. 2(ii)(B) (2000) ("The traditional method is not unreasonable under paragraph (a)(10) of this section because . . . .").

drawn, opaque curtain, can *school* interfere with *education*?"[215] Or Neil Gotanda's description of how "[a] color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans."[216] Or even Leonard J. Long's suggested reading list for the liberally educated law student, which contains authors as diverse as Alexander Solzhenitsyn, Garry Trudeau, Alasdair MacIntyre, and Malcolm X.[217]

Alternative articles can enhance students' understanding of legal reasoning processes.[218] They can provide the generative history behind a particular doctrine that law school teaches us to value.[219] They can focus attention on a disturbing or controversial aspect of law.[220] They can explain the practicing attorney's frustration with a system he feels powerless to fix:

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215. Elizabeth J. Samuels, *Stories Out of School: Teaching the Case of* Brown v. Voss, 16 CARDOZO L. REV. 1445, 1449 (1995) (emphasis added).

216. Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind'*, 44 STAN. L. REV. 1, 2–3 (1991).

217. *See* Leonard J. Long, *Liberally Educating Law Students: Suggested Readings*, 18 QUINNIPIAC L. REV. 237 (1998).

218. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985) (applying Carol Gilligan's psychological development theories to women lawyers); Peter Gabel, *Reification in Legal Reasoning*, 3 J.L. & SOC. 25 (1980) (arguing that "[l]egal reasoning is an inherently repressive form of interpretive thought which limits our comprehension of the social world and its possibilities"); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989), refuting the objectivist theory of cognitive processes, which:

> treats the world as filled with determinate, mind-independent objects with inherent characteristics unrelated to human interactions . . . [and] treats reasoning as about propositions and principles that are capable of "mirroring" those objects and accurately describing their properties and relations. This is the paradigm that animates most of our conscious thinking as we go about our daily business in the world. It is, however, mistaken. . . . [S]urprisingly little of human rationality actually fits this paradigm.

Id. at 1108.

219. *See* Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. Q. 161 (1965); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form,'* 100 COLUM. L. REV. 94 (2000).

220. *See* Ahmed A. White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357, 358 (1999) (arguing that such "apparently reasonable ideas as victim-impact testimony, sex-offender registration, and victim restitution . . . [have] thrust upon contemporary jurisprudence and criminal justice irrational, illiberal doctrines disturbingly common to Nazi jurisprudence"); *see also* Robert Weisberg, *Private Violence as Moral Action: The Law as Inspiration*

> I think it is a real tragedy in the United States that we have all these smart tax lawyers devoting all this fabulous energy and ingenuity into saving taxes. Can you imagine how wonderful it would be if we could somehow shift all this brilliant creative energy over to the other side of the equation and had these clever people trying to figure out how to spend the money we raise from taxes instead of the professional lobbyists, bureaucrats, and idiots who get themselves elected to Congress . . . .[221]

Alternative articles can *even* provide comic relief.[222] Or realistic assessments of the legal profession and its problems.[223] Perhaps the doctrinalists fail to see how the very forms of legal thought which they consider to be most "impractical" are, for some students, a mental reprieve from the *nomos* of the deckchair, a way to fight the process of passivization, a way to develop some sense of navigational awareness from within the restatement-consciousness maze.[224]

Articles can address the questions that the first-year law student might form, but fail to fully articulate, in trying to understand concepts of legal "authority," legal "argument," and

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and Example, *in* LAW'S VIOLENCE 175 (Austin Sarat & Thomas R. Kearns eds., 1992), in which Weisberg describes the "fearful symmetry" of the "violent self-help analogy":

> On the one hand, law commits violence in the disturbing sense that public authoritative force reminds us of the abrupt, gratuitous violence associated with private and legally unjustified individuals. On the other hand, we also observe that private individuals who, on commonsense observation, typify this form of gratuitous private violence are often subjectively, and even sometimes objectively, engaging in acts of lawmaking or law enforcement disturbingly analogous to public legal authority.

Id. at 178.

221. Wayne M. Gazur, *Muddling along with the Federal Wealth Transfer Tax: A Survey of Practitioners and Law School Professors*, 34 REAL PROP. PROB. & TR. J. 517, 583 (1999) (quoting the anonymous comments of an estate planning practitioner).

222. *See* Gretchen Craft Rubin & Jamie G. Heller, *Restatement of Love*, 104 YALE L.J. 707 (1994); J.T. Knight, Comment, *Humor and the Law*, 1993 WIS. L. REV. 897 (1993) (describing his profusely-footnoted caricature of a typical law review article as "a protracted non sequitur").

223. *Compare* ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993), *with* LAWRENCE JOSEPH, LAWYERLAND: WHAT LAWYERS REALLY TALK ABOUT WHEN THEY TALK ABOUT LAW (1998).

224. *See* Schlag, *Clerks in the Maze*, *in* AGAINST THE LAW, *supra* note 18, at 226 (noting that "[i]t does not augur well for an intellectual discipline if its constitutive disposition is basically to avoid learning anything new").

legal "analysis." For example, on law's authority, a common first-year question is "why?":

> Why should this [legal] form of thinking and arguing have the authority that it appears to carry in our political culture? Why is this curious and self-consciously "artificial" dialectic a *helpful* way to address important questions? Why should the most central issues in our society—issues of life and death, issues of politics at the highest level—be resolved by resorting to this peculiar mode of thought?[225]

Or "what authority?":

> You are not supposed to be there, says authority. *What is that word "supposed"?* You are not supposed to be there . . . not because some big person outside told you not to be there, as a child might hear the words, but because in the contemplation of order and the way things are supposed to be *you* are not there, and your being there is not what you would suppose either if you sat down to work it out. That of course is a challenge, and the beginning of argument, *about what you would suppose.*[226]

And with legal analysis, another common first-year question is "how did we come to do it this way?" For example, how is it that we came to "the nearly universal elite legal academic view that we could indeed resolve all situations where there is a choice of norm by *balancing* conflicting considerations of one kind or another?"[227] Or on the patterns of legal argumentation, how is it that the rules-versus-standards form of argument is not seen for what it is: a formalistic, repetitive exercise such that "[t]he point of further study ought to be to ascertain why and how it is that we allow such silly games to have such serious consequences?"[228]

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225. Smith, *supra* note 49, at 1051 (emphasis added).

226. JOSEPH VINING, FROM NEWTON'S SLEEP 121 (1995) (first and third emphasis added).

227. Kennedy, *supra* note 188, at 96 (emphasis omitted) (emphasis added).

228. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 430 (1985).

C. Consequences

The debate over the direction of legal thought is not likely to be resolved in the near future. While Unger's criticisms are valid, Kahn points out that apparently no one takes Unger's alternative vision of legal thought seriously.[229] One reviewer of Kahn's book acknowledged the hopeful force behind Kahn's proposal. He asked pointedly, "who among us wants students so rule-oriented that they care nothing for the policy behind the rule, the historic and sociologic forces which shaped the rule, and the mechanisms by which the rule continues to evolve?"[230] Yet the reviewer concluded that given all the forces working against intellectual change,[231] and even though "[i]n our hearts, we may well know Kahn is right,"[232] alternative approaches to academic legal thought are doomed to fail. There is a sad irony in this kind of intellectual resignation.

The irony is that it is this very same resignation that occurs in the classroom. It is this resignation of students' intellectual curiosities and capabilities that "*knowingly dispirits* students,"[233] that makes them cynical, and that leaves them ethically disoriented.[234] This is the dispiritedness: The overheard comments of second-year students on the absolutely "mind-deadening" quality of first-year. This is the cynicism: The third-year student who vows that, as hiring partner, he will interview only law students in the *bottom* half of their class, because "I don't need people to brilliantly recite every technicality of the Uniform Commercial Code to me. That's *useless*. I need people who know how to get things *done*." And this is the ethical disorientation: the utter trivialization of personal ethical standards that students experience when they are advised that the surest way to flunk the Multistate Profes-

229. *See, e.g.*, KAHN, *supra* note 16, at 29. "No one seriously reads Unger in order to develop an actual agenda of legal reform." *Id.*

230. Michael L. Richmond, *The Cultural Study of Law: Reconstructing Legal Scholarship*, 23 LEGAL STUD. FORUM 561, 566 (1999) (book review).

231. *See id.* at 563 (listing forces such as The MacCrate Report, tenure processes, and political pressures).

232. Richmond, *supra* note 230, at 563.

233. *See* Carrington, *supra* note 20, at 227 (noting that when the law school "accepted responsibility for training professionals, it also accepted a duty to constrain teaching that *knowingly dispirits students*") (emphasis added).

234. *See* KRONMAN, *supra* note 223, at 115.

sional Responsibility Exam is to answer every question with the *most* ethical response.[235]

Anthony Kronman makes an interesting argument about this ethical disorientation. He (accurately) describes legal education as doing "more than impart[ing] knowledge and promot[ing] new perceptual habits" but in addition, "bring[ing] with it the dulling or displacement of earlier convictions and a growing appreciation of the incommensurability of values."[236] He argues that "[i]t is this unsettling experience that underlies the law student's concern that his professional education threatens to *rob him of his soul*."[237] Kronman then argues that the adoption of the judicial point of view provides a counterweight to this experience. Not entirely: the lawyer's role is not the same as the judge's. In a society where values are pluralistic and incommensurable, the lawyer needs *expanded* moral sensitivities—not sensitivities that have been artificially replaced by doctrine and Reason. Under Kronman's educational model, students come to law school to be emptied of all of their prior moral commitments, "refilled" with the ideals of judge-like rationality and scrupulous neutrality, and then set loose to advise their clients about some of life's most intense moral and ethical dilemmas. But they are left without their own internal reservoir of moral commitments and insights on which to draw. This is a rather weird ideal.

Judge Edwards and others may be right to question much contemporary scholarship. Much of it is mediocre. Yet who reads the truly mediocre articles? Judges apparently do not. Law students certainly do not. Practitioners do not have the time. That leaves . . . tenure committees?

And of course Judge Edwards is correct to argue that students need to learn the mechanics of rules and get a "rich doctrinal education."[238] But censoring educators for taking alternative approaches to legal thought condemns them, and their

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235. *See* Richard Delgado, *Norms and Social Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 953 (1991) (arguing that professional responsibility rules "often function affirmatively to encourage a sort of minimal-ethicality, according to which actors are rewarded for being as 'minimally ethical' as possible. Students preparing to take the MPRE . . . often conclude that the correct answer is almost always the third least ethical one.").

236. KRONMAN, *supra* note 223, at 115.

237. *Id.* (emphasis added).

238. *See* Edwards, *supra* note 6, at 57.

curious and intellectually engaged students, to the world of deckchair myopia.

Judge Edwards argues that legal education which applies "the social sciences and social theory to criticize legal analysis and the legal system" is "utterly specious."[239] But the notion that law students cannot, and should not, utilize the social sciences and social theory as a means to *understand* legal analysis and the legal system is what is, in fact, "specious."[240] Part of learning to think like a real, practicing lawyer—like the highly professional practitioners for whom I was an apprentice—is developing the ability to critically engage in many different kinds of analyses simultaneously. Lawyers work in the stuff of "social theory" every day. Law is itself an amalgamation of economics, the humanities, and social sciences. It does not perform its work outside of its cultural, philosophical, or historical context. It is thus more than strange for Edwards to universally question whether legal scholars can contribute to law and legal thought through anthropology, economic theory, sociology, science, postmodernism, literature,[241] Hegel,[242] or Wittgenstein.[243] Many scholars can and do contribute in these ways. Moreover, many law professors have no special training in moral philosophy or formal logic, and yet no one ever questions their abilities to engage in the kind of normative legal thought, induction, or deduction required for doctrinal analysis. Legal

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239. *Id.* at 76 (citations omitted).

240. *See* George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929, 1939 (1993) (arguing that as "members of a broader legal establishment, theoreticians, and practitioners have different responsibilities and must refine different skills in order to contribute most effectively to the success of the legal system").

241. *See* Elizabeth Tobin, *Imagining the Mother's Text: Toni Morrison's* Beloved *and Contemporary Law, in* BEYOND PORTIA: WOMEN LAW & LITERATURE IN THE UNITED STATES 140, 140 (Jacqueline St. Joan & Annette Bennington McElhiney eds., 1997) (showing how "[t]he language that attorneys and judges employ and the definitions that they construct to represent maternal experience significantly influence women's lives as mothers").

242. *See* POSNER, *supra* note 19, at 299 (discussing Drucilla Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575 (1989)).

243. *See* Thomas D. Eisele, *'Our Real Need': Not Explanation, But Education, in* WITTGENSTEIN AND LEGAL THEORY 29, 31 (Dennis M. Patterson ed., 1992) (arguing that Wittgenstein "wants and encourages us to [wonder] just what exactly our construction of theories and reductive explanations is *in service of*") (emphasis added).

thinkers can hardly engage in serious and helpful discussions about law without recourse to ideas that sound in some outside discipline such as philosophy, ethics, political science, anthropology, economics or psychology.[244] Indeed, one of the two most-cited law review articles[245] of all time, Ronald Coase's analysis of economic externalities,[246] was not written by a "legal" scholar, did not concern a "legal" problem, and was not published in a traditional law review.[247] As Jack Balkin and Sanford Levinson observe:

> [I]t's not surprising that the two most-cited articles of all time represent two central and diametrically opposed visions of the study of law.... Coase is an economist who symbolizes the interdisciplinary invasion of law and the rejection of legal autonomy, while [Herbert] Wechsler is the consummate insider, the high priest of legal craft, the champion of law's internal operation.... Having [Coase's article] be the most-cited law review article of all time is a little like discovering that the most-cited passage in the New Testament turns out to be Pontius Pilate's question "What is truth?"[248]

Even one of Judge Edwards's surveyed clerks argued that law is really no more than "applied social science"[249] and thus we should have *more* interdisciplinary study, not less. And J. Cunyon Gordon's response to Judge Edwards is entirely on target when she perceptively points out that the consequence of a

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244. Richard Posner has noted that "[t]he main premises from which the legal reasoner proceeds are ethical, political, or ideological, and in a pluralistic society this spells trouble for anyone who insists on objectivity in law." POSNER, *supra* note 19, at 88. However, "we should not mourn the decline in the objectivity of academic law any more than we should mourn the increased heterodoxy of religious opinion that followed the abolition of the Inquisition." *Id.* at 101–02.

245. *See* Fred Shapiro, *The Most Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751 (1996). Shapiro's study focused on the articles most cited by other writers of law review articles, not articles most cited by courts.

246. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

247. *See* J.M. Balkin & Sanford Levinson, *Symposium on the Trends in Legal Citations and Scholarship: How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 863 (1996).

248. Balkin & Levinson, *supra* note 247, at 863. Herbert Wechsler's article is the second "most-cited" piece of legal scholarship according to Shapiro's study. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 75 HARV. L. REV. 1 (1959).

249. Edwards, *supra* note 6, at 48 (citations omitted).

legal education which places an "overemphasis on 'pure doctrine,' when combined with traditional pedagogical methods, instills an *intellectual arrogance* that students blithely take with them, whether to practice or back to academia."[250] She argues that alternative legal scholars provide some antidote to this indoctrinated arrogance by "import[ing] their interdisciplinary arts and sciences and mak[ing] us realize that *law is not insulated from the rest of society*."[251]

One practitioner describes this intellectual arrogance in a particularly apt manner. He notes that when we, as lawyers, see clients as merely a package of doctrinal claims and defenses:

> [W]e fail to acknowledge that behind the interview, the research, the evaluation of liability and damages, and all the jargon and methodology, there is a voice that seeks to be heard.... [The layman's primary complaint is] 'Nobody would listen to me.'
>
> ....
>
> ... From the moment a client enters our office, we apply the sword of deductive analysis to slice him into component parts we can recognize, evaluate, and for which we can provide a legalistic solution. The rest is discarded and we stop the clock....
>
> ... The message? How smart I am, of course, and how very much I deserve the handsome fees I am being paid.
>
> This is wonderful for my ego, but of dubious help to the client.... I have used my powers of analysis to listen selectively to those parts of his story that I felt were important. In my arrogance, I have not only muted the client's voice but may have missed a nuance or clue vital to understanding the big picture. Instead of being a professional listener, I have been a professional talker.[252]

250. J. Cunyon Gordon, *A Response from the Visitor from Another Planet*, 91 MICH. L. REV. 1953, 1961 (1993) (emphasis added).

251. *Id.* at 1962 (emphasis added).

252. David Willis, *The Professional Listener*, 35 Houston Lawyer 16, 17 (Sept./Oct. 1997).

Rather than listening, from a perspective not of doctrine, but of "What is it that is really important to this person?" or "What is this client telling me in a non-obvious way?"—the lawyer can fail to pay attention to the client's *non*-legal needs. She can miss the opportunity to steer the client out of the formal legal system. She can miss the opportunity to effectively engage the client in his own representation. She can become so absorbed in her mastery of the intricate interpretational mazes of the Internal Revenue Code that she counsels a client to buy insurance he does not (economically) need, to part with assets he does not (psychologically) want to give up, to fund trusts he does not understand, to benefit people he is not sure he wants to benefit. And not even see that she has *created* a legal problem.

Nevertheless, Anthony Kronman insists that "[e]ven in the most non-traditional fields lawyers still get by, for the most part, with a repertoire of unscientific techniques that continue to seem adequate to the task at hand."[253] Not entirely: in many areas, lawyers without a familiarity with science, technology, economics, finance, or psychology are at quite a disadvantage.[254] Kronman argues that surrendering to interdisciplinarianism "obscures the nature of the lawyer's role and hence professional identity. It leaves in doubt whether lawyers possess a valuable expertise, different from that of those in other fields, and thus fails to provide a foundation on which the professional pride of lawyers may be rebuilt."[255] But is this a fear born of vanity? Lawyers already possess a "valuable exper-

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253. KRONMAN, LOST LAWYER, *supra* note 223, at 357.

254. Kronman gives the example of a securities lawyer, who must pay some attention to economics, to the "whole" of his field, but whose main energy, he argues, is devoted to the "more demanding and important" in depth knowledge of statutes. "[T]he broad knowledge of his subject that he requires to do his own work well depends more on the practitioner's traditional techniques of analogy and distinction than on the scientific methods of his academic counterparts." *Id.* Yet in many fields, analogy and distinction are absolutely necessary, but hardly sufficient. For example, estate planners who don't bother to learn the economics of a client's business can do their clients a serious disservice. The farmer's cash flow, the way in which changes in the economy and interest rates affect him, how crop insurance and government subsidies work, the state of the market for beef, the going rate for dry or irrigated farmland—all these have to be considered before recommending any plan, especially the plan the client wants: the one that will preserve his child's ability to carry on his parents' livelihood. Economic theory, accounting, business acumen, and psychology play a bigger role here than Kronman might think.

255. *Id.*

tise." What experienced practitioners (my mentors, at least) worry about is not preserving abstract ideals of professional identity. Rather, they worry about doing their best to competently, efficiently and professionally serve the needs of their clients and community.

Practitioners know that the functions of lawyers are more than merely doctrinal. As Duncan Kennedy describes:

> [L]awyers are . . . more than just legal technicians. They shape deals and they make law. They invent new forms of social life, they fill gaps, resolve conflicts and ambiguities. They mold the law, through the process of legal argument, in court, in briefs, in negotiations. . . . .
>
> [The lawyer's activity] is not neutral, and the better your legal skills, the less neutral you become.[256]

Lawyers do more than adjust doctrinal deckchairs; they counsel people in the midst of intensely personal moral dilemmas, violence, pain, grief, and death.[257]

When the lawyer's role consumes the lawyer's life, many simply blame the lawyer.[258] But the potential spillover effect of an overly narrow doctrinal education is that your professional skills *become you.* There is a link between the lawyer's role-consumption and the learned primacy of a rationalistic mentality that excludes whatever it perceives to be *non-legal* as entirely irrelevant. Pierre Schlag describes it aptly:

> [B]ecause the rationalist framework becomes cognitively and rhetorically embedded as a discursive formation, those in whom it has become embedded *lose the ability to understand the social field in any other way.* For legal thinkers, the rationalist aesthetic soon *becomes all there is. . . .*

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256. Duncan Kennedy, *The Responsibility of Lawyers for the Justice of Their Causes*, 18 TEX. TECH L. REV. 1157 (1987).

257. *See* Cover, *supra* note 110 (pointing out that legal interpretation *is* the infliction of violence, pain and death).

258. *See* Robert F. Nagel, *Lies and Law*, 22 HARV. J.L. & PUB. POL'Y 605, 614 (1998). Nagel points out that society tolerates, even encourages, in some circumstances, a certain amount of "legal lying" by lawyers, but recognizes that "[b]oth the endlessly argumentative lawyer and the hopelessly self-assured judge are, like the frenzied oral advocate, in a sense depleted individuals because their roles have consumed them."

> . . . To think as a rationalist is not just to *think* in a particular abstracted way, it is to *be* one who deals with others in a particular abstracted way. . . .
>
> . . . [I]n the end, it is the rationalist character of normative legal argument and its self-satisfied distancing from the complexities [of social reality] that enable the lawyer on the eightieth floor . . . to *save or ruin* barely known lives with magisterial detachment. . . .
>
> If the eightieth floor of the Wall Street law firm does not seem in some sense an outrage, a grotesque episode, it is because the eightieth floor is itself a resonance . . . of the *same rationalist form of thought, cognition, and rhetoric practiced in the law school classroom.*[259]

Is the traditional form of legal thought and the sufficiency of our existing doctrines and rules so far beyond question that even students must be shielded from exploring helpful alternatives to understanding them? Richard Delgado notes that in *San Antonio Independent School District v. Rodriguez*,[260] the Supreme Court "*sham[ed]* the attorneys and litigants who had brought the novel claim"[261] on behalf of the children in tax-poor areas. Should we not question whether imprinting legal thinkers with the *nomos* of the deckchair—a *delimited intellectual and normative universe* which stamps out original thought and, among other things, encourages intellectual arrogance toward clients, and endorses *shame* as the appropriate judicial response to novel legal claims—is really a good thing, for the legal thinker, or for the future of society?

CONCLUSION

We have seen the deckchairs, and the arguments for looking beyond them to the icebergs—but where is the gestalt shift?

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259. Schlag, *supra* note 18, at 85–86 (emphasis added).

260. 411 U.S. 1, 28 (1973) (holding that the right to education is not a fundamental right entitled to protection under the Fourteenth Amendment's Equal Protection Clause, and that the City of San Antonio's inequitable school finance scheme thus did not deny children in tax-poor districts the right to an education).

261. Delgado, *supra* note 235, at 955 (emphasis added). Delgado continues: "[The Court] declined to apply strict scrutiny, *ridiculed* the idea that money can be equated with a good education and held that the plaintiffs were complaining, at most, of a relative deprivation." *Id.* (emphasis added).

This essay *is* the gestalt shift. It is an attempt to shift our current perceptions about the proper audience, aesthetic form, and purposes of legal thought. Legal thought can be more than a service to judges. It can be a place to describe, explain, test doctrines, question structures, and understand law and its operation in society.

Whether the direction for alternative legal thought is intellectual, as in Kahn's cultural study, or explicitly political, as with Unger's revised method,[262] or some other direction, is perhaps not an answerable question. There is no single direction. But when Duncan Kennedy argues that "there is something irrelevant about doctrine,"[263] perhaps the increasing need is to focus on the "something." To prevent legal thought from doing so, and from changing to meet the needs of other audiences, is to maintain a state of disciplinary solipsism in a legal landscape that is already changed.

> When the environment to which a species has become adapted changes, the species must change, or eventually die out. The student-edited law review arose in and became adapted to one environment, that of law conceived as an autonomous discipline centered on the attainment of logical consistency of legal doctrine—what Max Weber called formal rationality. The environment has changed. Preoccupation with the formal rationality of legal doctrine has given way . . . to preoccupation with the relation between those doctrines and *the larger society that law is supposed to serve.*[264]

Species that do not adapt eventually become extinct.

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262. As Unger puts it:

> [I]t matters whether the main focus of imaginative and practical energy lies in the effort to make the best out of the established institutional order or in the attempt to generalize and extend an experimentalist tinkering with this structure. It matters to the future of democracy and therefore to hopes for freedom and prosperity.

UNGER, *supra* note 17, at 79–80.

263. Duncan Kennedy, *The Political Significance of the Structure of the Law School Curriculum*, 14 SETON HALL L. REV. 1, 11 (1983).

264. Posner, *supra* note 47, at 1138 (emphasis added).