AGAINST THE LAW

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AGAINST THE LAW

CONSTITUTIONAL CONFLICTS

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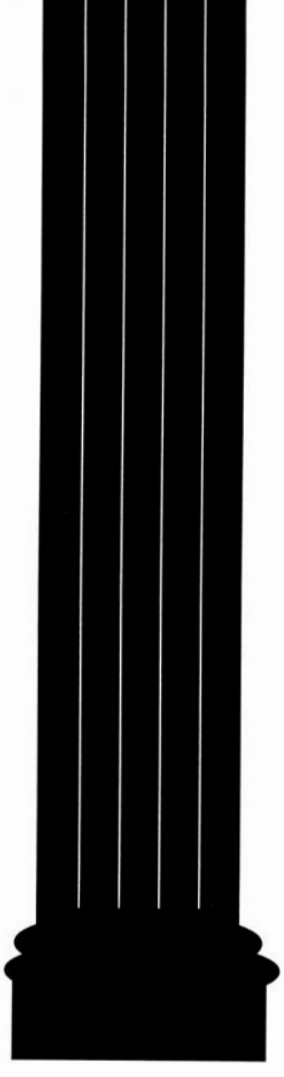

Paul F. Campos • Pierre Schlag • Steven D. Smith

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PREFACE

IT WAS STEVE'S idea. It was Pierre's organization. It was Paul's passion. And so this book—a product of a rather odd and improbable combination of authors—came together.

There were doubts throughout.

Steve was concerned that the relentlessly critical tone of the book would be damaging. He worried half seriously, half in jest, that a conservative thinker would become associated in a joint enterprise with one of the most irreverent and intellectually radical (if not nihilistic) thinkers on the contemporary American legal scene. Indeed, he had already received negative and cautionary reactions from older, wiser colleagues at another law school: "Stay away from those street toughs."

Pierre too was concerned. He had been told not to publish with the other two. Yet here he was publishing with one of the most conservative (if not reactionary) constitutional thinkers in American legal thought. He was told that this would be deeply confusing to readers. And he worried that the book would simply be exhibit A in the usual left or liberal charge that ultra-intellectualism is simply neoconservatism by any other name.

Paul, who refused to divulge his political orientation to anyone (including the other two authors), didn't worry at all.

And all three of us decided to go forward with the book.

One reason, of course, was a shared sense of the deadening quality of contemporary political orthodoxies and their disputes. In some sense, each of us has been unwilling to simply toe the line of *any* political orthodoxy—reactionary, conservative, liberal, or radical. None of us seems to be very good at being a foot soldier. And being in Colorado, we are much too far away from anywhere to feel the civilizing effects of the great institutions.

A second, perhaps more profound reason is that despite our widely different political visions, there are certain things we share in common—certain understandings of the shortcomings of American legalism. We all think that legalism is aesthetically, ethically, and intellectually lacking in rather profound ways.

And we all think that it is important to point this out in the most ecumenical manner possible.

Hence, this book.

Oddly, perhaps—and certainly against the odds—we have looked on our widely disparate political and intellectual inclinations as an advantage. We very much hope that we are not the only ones.

Paul F. Campos
Pierre Schlag
Steven D. Smith
Boulder, Colorado
November 1, 1995

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We wish to thank the many friends and colleagues who have contributed to this book. We give special thanks to Sandy Levinson for suggesting and conducting the interview, "Waiting for Langdell," and to Leonard Levy for graciously acquiescing in our use of the same title he used in his book, *Against the Law.*

Different versions of the essays in this book have appeared in various law reviews and are published here with their permission. Pierre Schlag, "Normativity and the Politics of Form," 133 *U. Pa. L. Rev.* 801 (1991); Paul Campos, "Against Constitutional Theory," 4 *Yale J. L. & Human.* 279 (1992); Steven Smith, "Idolatry in Constitutional Interpretation," 79 *U. Va. L. Rev.* 583 (1993); Pierre Schlag, "Clerks in the Maze," 91 *Mich. L. Rev.* 2053 (1993); Paul Campos, "A Heterodox Catechism," 11 *Const. Comm.* 65 (1994); Paul Campos, "Secular Fundamentalism," 94 *Colum. L. Rev.* 1814 (1994); Steven D. Smith, "Nonsense and Natural Rights," *S. Cal. Interdisciplinary L. Rev.* 000 (1995).

INTRODUCTION

THE PAST THIRTY years have witnessed a curious development in the American legal academy. Thirty years ago almost all legal academics were engaged in something that could be called "doing law." They were writing articles identifying true and correct rules of law. They were working with the official legal materials put out by courts, legislatures, and agencies. They paid respectful attention to new judicial opinions, tried to make sense of them, and tried to integrate them into their own understanding of the law.

Generations of legal academics—and not a few lawyers—have looked to law not merely as a way to coordinate transactions and resolve disputes, but as a source of moral or ethical guidance. They have sought to conduct their lives in accordance not only with particular laws but with "the law"—with a lawlike aesthetic, a lawlike frame. They have taken cognizance of ethical and political issues in a lawlike way. They have used lawlike techniques to identify and define problems. And they have employed lawlike arguments to achieve lawlike solutions: norms, prescriptions, recommendations, and so on.

It was easy for the legally trained to fall into such habits. It was alluring as well, for the law promises to its practitioners all manner of good things. It promises a solid form of analysis (called "thinking like a lawyer"). And it promises that if its practitioners live by its spirit, they will act according to the fundamental authoritative principles of their culture, including, but not limited to, justice, fairness, order, due process, notice, neutrality, and impartiality.

But something has happened.

Indeed, a great many leading American legal thinkers have now mostly abandoned "doing law." Instead, they are pursuing enterprises that they might call "legal theory" or "interdisciplinary studies" or some such thing. These legal thinkers are no longer "doing law" in the sense that they are no longer devoting their professional lives to canvassing and systemizing the sundry acts of American officialdom. On the contrary, leading legal thinkers now try to distance themselves from the uninspiring world of bureaucratic decision making. They do so in various ways. For some the flight is into abstraction. The details of official bureaucracy are left behind in the course of an ethereal abstraction of law—one that renders it much more pristine and elegant. For others the flight is

in the opposite direction. They find comfort in the familiar formal and aesthetic qualities of classic legal artifacts: they celebrate the craft of the judicial opinion. For all, the flight is accomplished through a profound idealization and romanticization of what they still think of as "the law." These are people who have to a certain extent recognized the legalist maze for what it is and have tried, as best they can, to get out.

We understand very well the motivations that would lead such legal thinkers to avoid that maze. Indeed, there is little that is appealing—intellectually, ethically, or aesthetically—in sifting through the bureaucratic morass produced by the various agencies of officialdom. Yet one thing puzzles us: These legal thinkers, who exhibit so little interest in doing law themselves, nonetheless continue to dedicate much of their scholarly enterprise to the justification, the celebration, and the idealization of an enterprise they have to a large degree abandoned.

This is a troubling inconsistency. It does not rise to the level of a logical contradiction (and in any case, such a contradiction could be easily explained away). Rather, we suspect a certain dissonance of character here. These leading legal thinkers seem to want to avoid doing law. But their strategy to avoid doing law lies, ironically, in producing normatively pleasing and aesthetically elegant representations of law that serve, whether intentionally or not, to celebrate doing what they themselves have abandoned. It thus seems that there is a certain tension between the constative and the performative dimensions of their enterprise. That is, if one looks at what these scholars are *doing* (and, more to the point, *not doing* anymore), it seems they have lost much of their faith and even their interest in law. Yet, if one listens to what these scholars are *saying*, they seem bent on trying to maintain a vigorous belief in that same law. To put it another way, they seem to think that while doing law is not good for them, it is nonetheless good for others.

Another very large group of legal academics has also, to a great extent, abandoned the task of doing law. This is the group of legal scholars who remain committed to the reverential and meticulous study of the sundry decisions of officialdom. This is the group that dutifully continues to read the advance sheets as if these documents will inform them of what "the law" is. This is the group that pays close attention to minor doctrinal changes, to technical statutory reforms, to the minutiae of rules and regulations.

This group of legal thinkers is still on line. They are still absorbing, in massive doses, some part of the almost limitless quantity of legalism that issues daily from the capitals of officialdom. They are still on line, but they are no longer on the phone. The great silent majority of the law professoriat no longer has any

influential connection with the decision-making agencies of law. Felix Frankfurter (and the revolving door between Harvard and Washington, D.C.) is now a distant memory—and the image of what he and those like him represented grows increasingly irrelevant. The phone has gone dead.

And so, not surprisingly, many members of this silent majority have given up on doing law as well. That is why they are silent. They do not write. They do not speak. Once again, we think we understand why this group has become silent, why these people have abandoned doing law. Doing law, after all, is not a rewarding hobby; it is not the sort of thing people undertake because they find the activity itself intellectually stimulating or morally edifying. We do not know any lawyers who are so impressed with the aesthetic qualities or the ethical insights of contemporary American law that they write briefs in their spare time. There is no reason to do law unless one is forced to do so, or unless one hopes to achieve certain instrumental results. No one, we believe, could mistake the current practices of our hypertrophied legal system for an appealing form of life, or a desirable mode of human association.

We understand very well why the silent majority of doctrinal thinkers has become silent. But once again, we detect a certain inconsistency. For like their more theoretically inclined brethren, many of these thinkers have plainly given up on doing law themselves, and yet they nonetheless continue—in the classroom, in the faculty lounge, at the bar convention—to insist on what they still see as law's almost limitless virtues. Once again, we are inclined to wonder: If these legal thinkers do not believe that doing law is good for them, why do they continue to celebrate this law as good or ennobling for others? Here too there is a certain dissonance. No doubt, with the help of a few distinctions, it could be rationalized away.

In this book we too make no attempt to "do law." Rather, we present the reader with three interrelated accounts of how the American academic study of law is in certain respects becoming a disillusioned and demoralized discipline, and we point toward the intellectual possibilities that this same disenchantment is helping to create.

Consider that most typical product of what Pierre Schlag has identified as normative legal thought: the one-hundred-page, five-hundred-footnote law review article advocating the "extension," or the "reform," or even the "transformation" of some large sector of American legality. It is becoming more and more evident that this amicus brief to no one in particular—this judicial opinion-in-waiting—has almost no chance of effecting any of its carefully crafted recommendations. How could it? For, as Schlag points out,

> [while] the legal brief is almost invariably addressed to some agent who has the jurisdiction and the power to grant the relief requested, normative legal thought is almost invariably not. That too explains why the conclusion in normative legal thought is such an anxious moment. In the borderlands of consciousness, there is a sense in which normative legal thinkers know their prescriptions and recommendations are not going anywhere. In the borderlands of consciousness, legal thinkers know that within the tens of thousands of pages of volume 1 to 103 of the *Harvard Law Review*—for instance—there is an abundance of prescriptions and recommendations that have gone nowhere and do nothing but serve as an occasion for repeating argument structures and forms we now look back on with an odd mixture of amusement, disdain, and humbling self-recognition.[1]

Still, tenure must be granted, panels at scholarly conferences must be filled, student editors must be kept busy, and the normative legal thinker must have something to do. The peculiar enterprise of telling complex social practices how to reform themselves in jargon-ridden articles published in unread legal journals rolls on like some great unstoppable machine, full of almost comically grandiose statements of the type "the interpretive principles suggested here are intended for the President, regulatory agencies, and Congress, as well as for the courts."[2]

And yet the suspicion arises that, given the probability of success for such suggestions, normative legal thinkers are now to a great extent just going through the motions. All that rhetorical passion, all that display of reformist zeal or revolutionary ardor, is being spent on the production of prescriptions whose contents remain almost completely sealed off from the corridors of power. What are the social and psychological consequences of devoting one's professional life to such an instrumentally dubious and intellectually truncated enterprise? What sort of discipline could we expect to find organized around such a set of practices? These are among the questions that animate Schlag's essays, "Normativity and the Politics of Form" and "Clerks in the Maze."

Or consider the academic cottage industry devoted to the production of theories of legal interpretation. Paul Campos suggests that these theories routinely overlook the ontologically deficient character of the texts on which such lavish interpretive efforts are expended. The textual products of legal bureaucratic practice are often empty or impoverished receptacles exhibiting little or none of the semantic richness imputed to them by interpretive theorists. A very few legal texts can become sites for a modern brand of theological hermeneutics, where the sacral impulses of an essentially secular culture can be projected onto the detritus of the past. "The protean mutability of such texts blends with

the imperishable marks of the writing within which they are encoded to create a cultural icon whose meaning is always changing but whose essence is mystically felt to remain the same. . . . A text—any text—is subject to the caducity and corruption of all mortal endeavors: the Constitution is not. The constitutional text might be the work of malevolent demiurgi or mere men, but the Constitution itself—protean, unchanging, responsive to our endless needs—could only be the work of a god."[3] Such interpretive practices may work well enough when manifested within the rather special context created by our ritualistic invocations of an essentially mythologized cultural artifact, but what relevance do they have to the work of almost all lawyers—and for that matter, of the great bulk of legal academics? What kind of interpretive practice will flourish under conditions in which essentially mindless bureaucratic texts are treated as if they were repositories of rich semantic meaning? What effects, psychological and social, are to be expected from attempts to deploy the equivalent of a theological hermeneutics on contemporary Supreme Court opinions, or on administrative agency regulations, or the arcane provisions of the tax code, or the bureaucratized verbal mazes of the Congressional Record? Campos presents and explores these themes in "Against Constitutional Theory" and "A Heterodox Catechism."

The story is told of a Baptist farmer who, when asked if he believed in baptism by total immersion, replied, "Believe in it? Hell, I've seen it done." In Steve Smith's work, the sense of emptiness and futility that haunts both much of normative legal thought and its offspring, legal interpretive theory, is linked explicitly to nothing less than the metaphysical crisis that generates the dark humor of the farmer's comment. His essays "Nonsense and Natural Law" and "Idolatry in Constitutional Interpretation" endeavor to show that normative legal interpreters have for the most part lost their faith in the metaphysical presuppositions necessary for a belief in a sufficiently transcendent law, and even for a belief in such crucial jurisprudential artifacts as "principles." Smith argues that if certain legal texts are to be taken as worthy of the respect that conventional legal ideology demands we give them, then nothing less is demanded of the interpreter than a belief that those texts were authored by some superhuman agency—a demand to which, of course, the modern interpreter cannot consciously accede. Here, the idolatrous character of many of the practices described in Schlag's and Campos's essays is made explicit, and is explicitly problematized:

> The modern idolater still must do what idolaters have always had to do—endow a mundane object with supernatural attributes and then forget or deny the human source and imaginary quality of those attributes. But the

> secular idolater must do more: he must deny not only the idol-making process but also its conclusion. In a legal world that aspires to be secular, no appeal to transcendent authority and no Kierkegaardian leap of faith are permissible. Consequently, the legal idolater must at the same time tacitly affirm and explicitly deny (even to himself) the qualities that he imaginatively ascribes to law in order to make it worthy of being "interpreted" and obeyed.[4]

What are the consequences for legal thought of engaging in a theological enterprise without an enabling deity—of practicing what Campos calls a kind of secular fundamentalism? What sort of "reasoned dialogue" will take place under such conditions?

These essays, then, present our diagnoses of the present situation in American legal thought. For the many normative legal thinkers who engage in a variety of essentially idolatrous interpretive practices, law has become a substitute for, or a continuation of, other kinds of faith. Understandably, perhaps, these thinkers would prefer not to ask certain questions—questions whose answers might lead to the death of yet another god. But that is not a state of mind that lends itself to critical inquiry. It is, as one of us has written, part of a perspective "that knows how to question its gods, its values, but dares not do so for fear of confronting a loss it knows, on some level, has already occurred."[5]

"In heaven," wrote Grant Gilmore, "there will be no law. . . . In Hell there will be nothing but law, and due process will be meticulously observed."[6] We have written this book partly out of the conviction that the present moment is crucial for American law and for American legal thought. We believe that "the law" has become so hypertrophied, so inauthentic, so lacking in any sense of its own limits, so totalizing in its claim to rule all human relations, so fraught with transaction costs, and so laden with possibilities for harassment, intimidation, leverage, coercion, and bad faith that it has become necessary to speak against that law. This is, of course, disturbing, but it also presents legal thinkers with a tremendous opportunity. Any attempt to study a complex ideological system for what it is, rather than simply accepting that system's prelapsarian understanding of itself, is best undertaken at moments of profound crisis, alienation, and doubt. American legal thinkers are being cast out of their garden, but the world is all before them; and out of what once seemed Eden we must make our solitary ways.

A HETERODOX CATECHISM

Paul F. Campos

Let me try to state in a nutshell how I view the work of judging—my approach, I believe, is neither liberal nor conservative. . . . As Justice Oliver Wendell Holmes counseled, one of the most sacred duties of a judge is not to read her convictions into the Constitution. I have tried and I will continue to try to follow the model Justice Holmes set in holding that duty sacred.
—Ruth Bader Ginsburg

WHAT DID JUDGE GINSBURG promise the assembled multitudes? That she would judge rather than legislate; that her views on all matters pertaining to the meaning of the Constitution would not affect her views concerning the Constitution's meaning; that this paradoxical task was not only possible but indeed a sacred trust best illustrated by the restrained judicial activism manifested in the constitutional jurisprudence of that Nietzschean Christian, that pacific warrior, Oliver Wendell Holmes; and that she was neither liberal nor conservative but would be both and neither, as her oath of service to the law required.

What reaction did these promises elicit?

Universal cries of hallelujah, unto us a judge is given.

Is it possible to enumerate the sources of this splendid unanimity?

Such sources included, but were not limited to, the judge's gender, which elicited from that mostly male consortium a chivalrous reserve reminiscent of bygone days of errantry; the still fresh recollection of similar proceedings involving then Judge, now Justice Clarence Thomas and then Professor, now Saint Anita Hill, and the concomitant unhappiness which resulted from that less than optimal display of what might charitably be characterized as the tangled passions of a human heart, as well as the feminine reticence or even revulsion with which that display was met; the even more distasteful memories of the unforgettable auto-da-fé featuring then Judge, now iconic victim of an unscrupulous smear campaign Robert Bork; the tedium which any examination of questions of constitutional practice and theory naturally generates in everyone associated with or subjected to such questions; the certain knowledge that the principled distinction between law and politics was fully appreciated by

the guest of honor; and (not least) the power that wishful thinking always exercises over the affairs of men.

Did certain questions germane to the issues at hand then go unasked?

They did.

What examples come most readily to mind?

First, some inquiry into the ontological status of that object of veneration yclept The Constitution, to which everyone (senators, judges, presidents, popes, emperors, Antichrists) must swear a most solemn oath to uphold, come hell or high water (subject, it goes without saying, to those procedures for amendment exhaustively described in Article 5 of that self-same document), and to no other earthly or infernal power world without end amen.

What makes such an inquiry desirable?

The confusion resulting from an inability or unwillingness to identify the meaning of that document with some set of semantic intentions emanating from an identifiable agent.

Does not the text of the document provide an adequate source of emanating signification?

No.

Why not?

Because of the perverse semantic plurality of natural languages, which provide an infinite play of signifiers to which more than one meaning may always be attached.

Does the attribution of meaning through the act of identifying that meaning with the semantic intentions of a particular author or group of authors adequately specify the meaning of the text in question?

Yes. However, the functional inadequacy of intentionalist accounts of constitutional interpretation are too well known to suffer repetition.

What assertions will be made in the course of suffering that repetition?

That among the innumerable sins of originalism might be counted the epistemological breakdown almost certain to occur when future generations attempt to determine just what someone meant or did not mean when employing human speech across the unbridgeable chasm of the obscuring centuries; the interpretive crisis occasioned by the ineluctable modality of human experience—to wit, the unimpeachable fact that the authors of that cryptic document failed to consider such cultural and technological wonders as wiretaps, interstate telephone lines, facsimile machines, condoms, the inflammable nature of national symbols, and the secularization of Christian holidays via the implacable logic of consumerism, not to mention the unforeseen consequences flowing out of an ever-broadening stream of interstate commerce that would come to

include (among other things) cows, wheat, lottery tickets, slaves, compact disc players, certificates of deposit, greeting cards, treasures from furthest Araby, financial quotations, photographs of naked women engaged in crimes against nature, electronic signals bearing discrete parcels of information amenable to interpretation via a binary code as first envisioned by that enigmatic genius of the cryptographic art Alan Turing, baseball gloves, Japanese ceramics, sheet music, the unwritten history of the future, and the tangled passions of a human heart (see infra); the conceptual impossibility of reconciling the various conflicting intentions of the Framers, the Ratifiers, and the People Themselves; the natural repugnance felt by all at being forever within the clammy grasp of the past's dead hand; the obvious reluctance of the contemporary American public to accept what would then be the inescapable truth that the state of Connecticut is not constitutionally prohibited from violating the sacred precincts of the marital bedroom; and the simple yet embarrassing fact that no one whose opinion in these matters counted had given sustained attention to what the problematic authors of the Constitution, however defined, had meant by the words of that document since *Marbury v. Madison* or time immemorial, whichever came first.

Do the previous decisions of the United States Supreme Court, ennobled by the ineffable dignity that the principle of stare decisis lends to these fragments we have shored against our ruin, provide, in and of themselves, an authoritative source of constitutional meaning?

No, because this Court always stands ready to correct its errors, even though of long standing, those errors being all but incorrigible to legislative remedy.

To what additional sources of signification did Judge Ginsburg allude, given the evident failure of constitutional text, authorial intention, and judicial precedent to provide adequate sources of contemporary constitutional meaning?

She alluded to a jurisprudential method.

How will this method affect her constitutional practice?

Evidence can be adduced from the judge's own opinions, produced via the Federal Circuit Court for the District of Columbia.

What evidence does a cursory examination of this jurisprudential product yield?

That the then judge, now justice will employ the procrustean methods of her generation's jurisprudential mentors, Henry Hart and Albert Sacks, progenitors of *The Legal Process* (tentative draft, 1958), in order to better achieve the aspirational goals of our constitutional order through a scrupulous interpretation of an infinite variety of ambiguous legislative acts, conflicting lower court rulings, and (especially) the complex directives of administrative agencies, so as

to lend formal certainty to social interactions of every kind, do what substantial justice requires, and, in general, make the world safe for bureaucracy.

What judicial procedures do these methods involve?

They involve, first, a careful, not to say exhaustive, review of all the relevant legal materials whose meaning, properly interpreted, might throw light on the proper resolution of the sorts of cases and controversies that courts display a special institutional competence toward resolving; second, the formulation of various complex, interlocking directives by means of which the properly interpreted meaning of the materials may be made synonymous with those interpretations that flow from the proper deployment of those interpretive methods which give the meaning of those materials a public and formal character, thereby making that meaning accessible to everyone who has undergone a socialization process resembling that to which students at elite American law schools were subjected circa 1958; third, the acceptance of the pragmatic yet principled dictum that law is a purposive activity which continually strives to solve the basic problems of social living; fourth, the full recognition of the indispensable role played by that most lawyerly virtue, procedure, in assuring a kind of objectivity to what would otherwise degenerate into an unconstrained act of judicial fiat; fifth, the establishment of the principle or public norm that decisions which are the duly arrived at result of duly established procedures for making decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed; and, sixth, the sobering realization that the only alternative to regularized and peaceable methods of decision is a disintegrating resort to violence.

Can an example be given of a methodological directive that these methods presume to compel?

Yes. That a statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably.

What does the substance of this particular conclusion indicate?

That the methods propounded by *The Legal Process* (tentative draft, 1958) depend on the tautological or even shamanistic invocation of the signifier "reasonable"; that reasonable men will seem reasonably reasonable only under conditions that generate sufficient ideological consensus as to what reason requires; that the elite American law school circa 1958 was indeed such a place; that the now mind of the then student Ruth Ginsburg appears to represent a paradigmatic product of that environment; and that this mind's subsequent legal career provides a performative demonstration of the almost fanatical worship of technocratic rationality which that environment apparently induced.

What is the central tenet of this form of worship?

That law is a rational and self-conscious activity.

What heretical suspicion must then be suppressed at all subsequent costs, intellectual, psychological, and economic?

That we have no idea what we are talking about.

How is this suppression achieved?

Through the painful evocation of those fine and careful distinctions that mark the work of the legal craftswoman as she pursues with an almost Sapphic passion a jealous mistress along those well-trodden paths formed by the thrilling tradition of Anglo-American law, as this law strives to fulfill that glorious destiny foreordained by its place in the structure of American institutions as a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law.

What other phrase describes this activity?

Boring your audience into submission.

What jurisprudential virtues did Judge Ginsburg's testimony exemplify?

Powerful intelligence, as demonstrated by her manipulation of many a Solomonic puzzle prepared for her by the Judiciary Committee staff; great patience, as manifested by her willingness to endure stoically the torrent of verbal nonsense issuing forth from the committee's chair, the Honorable Joseph Biden of Delaware; surprising candor, in regard to her answers concerning the constitutional status of abortion rights, whether located, as we feel they are, in the general vicinity of the Fourth, Ninth, and Nineteenth Amendments, or alternatively, as suggested by the judge herself, in a dynamic reinterpretation of the equal protection clause; and political acumen, as illustrated by her deft deflection of various potentially problematic questions regarding the practice of judicial review.

What jurisprudential vices did that same testimony point toward?

A certain rigidity of intellect, displayed, for example, in Judge Ginsburg's willingness to assert that her personal views on capital punishment would not influence her judicial evaluation of that practice; a powerful ability to tolerate cognitive dissonance, as evidenced by such assertions; an evident failure to comprehend that the sacred text of her generation of academic lawyers, *The Legal Process* (tentative draft, 1958), signaled the arrival of the characteristic crisis of modernism into the cathedral of American legal thought; and a resultant uncritical manifestation of the cognitive style exemplified by the substance of that text.

In what way does Judge Ginsburg's jurisprudential Ur-text, *The Legal Process* (tentative draft, 1958), indicate the arrival of the characteristic crisis of modernism in the history of American legal thought?

In its eternal status as a tentative draft rather than a published text.

What does this tentative status signify?

That God is dead.

How does the failure to publish one's work in any way indicate the necrotic condition of the erstwhile Almighty Creator of heaven and earth?

By signaling a sudden realization on the part of various erstwhile subcreators, including, but not limited to, novelists (Kafka), philosophers (Wittgenstein), architects (Gaudi), and legal process scholars (Hart and Sacks) that this (their work) is as good as it is going to get, and that the sudden exaltation of human creative labor into the sphere of the quasi- or pseudodivine implicitly requires of that work nothing less than perfection, despite the overwhelming evidence that perfection is not, has not been, and never will be a human attribute, and that therefore their appointed task is impossible, absurd, and yet absolutely necessary.

What does this realization generate?

A kind of paralysis.

What is the source of this paralysis?

A neurotic compulsion to devote one's life to the attainment of an unattainable goal.

Such as?

Creating sacred texts in an irremediably secular world, solving the fundamental mysteries of human existence, designing places of worship that will adequately honor a being who does not exist, and discovering the meaning of the Constitution.

With the help of?

The best minds of my generation.

Including?

Ackerman's paradigms, Bollinger's tolerance, Chemerinsky's anger, Dellinger's doctrines, Ely's democracy, Freeman's delusions, Grey's pragmatism, Halberstam's sister, Idolatry's cousin, Jacob's ladder, Komesar's politics, Levinson's theory, MacKinnon's machismo, Nagel's unhappiness, Omnipotence's blessing, Peller's critiques, Q's weapons, Regan's philosophy, Sandalow's skepticism, Tushnet's diatribes, Unger's priesthood, Van Alstyne's disease, Weschler's principles, Xerxes' divisions, Yudof's lucre, and Zeno's last paradox.

What, then, does the practically unanimous ascension of Judge Ginsburg portend for the next decade of constitutional commentators?

That the more it changes the more it will stay the same.

What emotions attend this realization?

Anger, frustration, resignation.

Why anger?

Because an increasingly meaningless bureaucratized discourse will continue to become ever more obscure, complex, and indeterminate.

Why frustration?

Because a surfeit of cultural angst will impel lawyers and, especially, legal academics to proclaim with increasing fervor and decreasing conviction that everything is for the best in this, the best of all possible jurisprudential worlds.

Why resignation?

Because of the evident absence of that instrumental power of reason over the course of human events which an age of reason believes rationality by its very nature must manifest.

Why is this instrumental power absent?

Because the falcon cannot hear the falconer.

What, then, is the answer?

To begin to question the instrumental power of rationality.

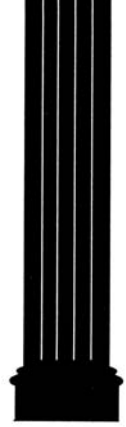
How well has this particular attempt succeeded?

Less than hope allowed, more than fear permitted.

What parable sums up the essence of our present constitutional condition?

This one:

> They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other—since there are no kings—messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service.—Franz Kafka



Interview of the Authors by Sandy Levinson

LEVINSON. I should explain the background for this. I had the great pleasure of reading a slightly earlier version in manuscript for the Duke University Press, and I very enthusiastically recommended publication because I thought all the essays were extremely interesting. This is an unusual book in the sense of three people coming together and writing essays. I think readers will have some curiosity as to what extent you actually agree or disagree with each other. Also, in reading it I was brought back to some questions I had thought about earlier in regard to my own work and, in particular, a controversy that raged about ten years ago or so in regard to an article that Paul Carrington wrote in the *Journal for Legal Education.* Roughly, the question would go like this: To what extent can the issues you raise or the positions you take easily be conveyed to law students without undercutting the basic enterprise of legal education? This comes to the question of the title, *Against the Law,* because certainly one of the questions raised by Carrington in his article was that if one is against the law, why teach it? Or, what does it mean to teach it?

I should say that I tried to suggest an answer to this because, generally speaking, I would identify myself as sympathetic with the enterprise that Carrington was attacking—a certain skepticism toward the standard pictures of legal analysis and the legal system. Indeed, in a book that I published in 1988 called *Constitutional Faith* I tried to present the defense for my continuing to teach, in a law school, much the same thing I had previously taught in a department of politics. Now, it was an important feature of Carrington's argument that he didn't say that people like me, or people like us, ought not be welcome within the academy generally; rather, he raised very specific questions about being within the legal academy. And I would at least like to begin our conversation by exploring some of these questions.

Let me begin by asking about your relationship to this title, and why don't we follow the famous alphabetic principle and begin with Paul?

CAMPOS. I would like to say first off that the alphabetic principle is somewhat misleading in this regard: this is really Pierre's title; none of us wants to take responsibility for the title, but I think Pierre really has to. It's a great title, which is the one thing that everybody who has had an encounter with this manuscript has agreed upon. That's the short and somewhat trivial answer, although I would want to express my gratitude to Pierre for allowing us to ransack his title for these purposes. I think of the title of *Against the Law* as being an expression of discontent with the notion of "the law," not as a social organization mechanism or dispute resolution process, but rather with the idea of "the law"—the almost theological, basically metaphysical idea of the law that is, I think, part of the standard orthodoxy of what is taught to students in American law schools. To me the title *Against the Law* implies that it would be better if this thing were called "social coordination and dispute processing" rather than "the law."

LEVINSON. The alphabetic principle picks up Pierre next.

SCHLAG. For me the title *Against the Law* is meant to indicate a certain direction. This book is written by three legal academics in an environment in which practically all legal academics are busy celebrating the law and are essentially engaged in activities of legitimation. We have a different orientation.

With respect to Paul Carrington's question, I think that it is useful to law students—to people who are going to become lawyers, who are going to be working with law—to take a certain amount of distance from the enterprise in which they will be engaged, particularly given the character of positive law today.

LEVINSON. We'll certainly return to Carrington. Steve?

SMITH. It is probably true that in any community or any civilization, there are going to be mechanisms for resolving disputes and making collective decisions, and the people who are responsible will give their reasons for resolving the dispute the way they have done or for making the decision that they have made. These decisions and reasons will probably be collected, organized, and used in the future. If that's what we mean by "law," then it is hard to be "against the law."

But there is something else that "the law" connotes. I have sometimes tried to use the term in uppercase and lowercase (The Law and the law) to try and distinguish between these two things, although they are so intermingled that they can't really be separated. The Law would probably be what Holmes had in mind when he talked about the "brooding omnipresence in the sky." It's the notion that there is some ontologically real and objective thing that is The Law.

Of course, almost all lawyers (and certainly law professors) who confront

that notion directly would say of course they don't believe in that—they are not naive. "We're all legal realists now," and so forth. But at the same time, they may go about doing things that make no sense except on the presupposition that there *is* something like The Law. So I guess I view this book as trying in various ways to criticize that presupposition, and to point out how, whatever we may say, the presupposition does run through a lot of our activities and our writing and thinking. That's what I understand the *Against the Law* title to mean.

LEVINSON. One could imagine a book entitled *Against Morality.* This might seem like a shocking title, and yet the authors might say, "We mean to be making an ontological argument that there is no morality there. But for God's sake, don't you go thinking we are against morality. We merely have a conventionalist view of morality." So, one way of hearing you is to say that you're ontological skeptics and you want to undercut any notion of the ontological reality of law. In that sense you are "against the law." But, hey, this doesn't mean you are opposed to the legal system, to the American constitutional order; it's just that you want to emphasize that these things are practice based and convention structured rather than hooked up with some transcendental reality. Would that be a fair way of interpreting what you just said, Steve?

SMITH. I'm not sure. I think actually we're a bit ambivalent on that point. One of Paul's essays and one of mine try to develop what somebody might take to be intended as a really fundamental criticism of constitutional interpretation. But then these essays end by saying that we're not opposed to constitutional interpretation; we're arguing that it is incoherent or idolatrous, but we're not trying to get rid of it. I suspect that readers might wonder whether our disclaimer is serious. And in fact we may feel ambivalent about the question. I would say at this point, I'm agnostic in not positively trying to confine the criticism, but not necessarily being definite in extending it either.

CAMPOS. I've always found the conventionalist argument about morality to which you alluded completely unsatisfactory. It seems to me to be a sort of pragmatist cop-out to say, "Well, yeah, you thought that 'morality' referred to some kind of ontological reality, but it actually just refers to a bunch of social conventions. But there is no reason that those social conventions shouldn't have the same amount of weight or workability just because we don't happen to believe what they used to be attached to." That answer for me just doesn't work at all, and so I would, I think, go a little further than Steve in saying that if you don't believe in this metaphysic of law, a bunch of practices within the legal academy certainly don't make sense, and I think they are just the practices to which Pierre was referring. Steve actually elaborates on this theme in one of the essays, of course.

SCHLAG. If I may add one thing, there are implications in all of this for

practice. These aren't the sorts of implications that take a normative form in the sense of proposing solutions, but there are clear implications for practice, one of which is to recognize the absurdity of the situation in law. If I can elaborate on what Paul said, once you give up a certain metaphysics of law and you go to a sort of neopragmatic or conventionalist stance, there is no reason to believe anymore. I think all three of us are agreeing on that—that once the metaphysic is gone, we are indeed in deep intellectual difficulty. Once the metaphysic supporting law, once the metaphysic supporting morality, is no longer credible, one simply can't, as an intellectual matter, go on pretending that we can just use the same words to mean the same thing in pretty much the same old way. As an intellectual matter, that will not work. Now, it may well work—*work* being a technical term here—in a personal sense, in one's daily life, but as an intellectual matter, it simply won't work.

SMITH. This might be a good place, I think, to tie this discussion into your question about Carrington. Because I guess I think that you *can* say that a given community can function with the kind of discourse that presupposes certain things, even though those things are not real in the sense that the community presupposes, so long as they believe it. They may be able to carry on an enterprise, and even from an outside standpoint you might be able to say it's performing a valuable social function. I suppose anthropologists would be very used to thinking in this way about cultures that they don't participate in themselves.

In Brian Simpson's article on common law and legal theory, he argues that the common law basically was this kind of system. It works so long as you have a fairly small group of people who are socialized in the same way, who share common practices, beliefs. But as soon as you don't have that situation anymore, then it won't work.

So it seems to me that Carrington's position could be right in a given set of circumstances. I've often at least jokingly told Pierre that Carrington *was* right—Pierre *should* be drummed out of the legal academy—and I probably should be too.

LEVINSON. But you're less certain about that.

SMITH. Yes. And in reality the answer is that we don't have that kind of cohesive, uniformly socialized legal profession anyway now. So although Carrington's argument could be right in a certain context, it isn't right in our context. He's already too late.

LEVINSON. In *Constitutional Faith*, one of the things I suggested was that our era is seeing the death of constitutionalism as an informing vision in a way that, arguably, the nineteenth century, at least among intellectuals, saw the death of