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Without Privilege

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In footnote 74, just about halfway into their commentary, Margaret Jane Radin and Frank Michelman quote Robert Cover's caution that: "To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs."¹ It is just here, I think, that the critique of normative legal thought should begin. But, as pragmatists, Radin and Michelman deploy Cover's statement in a significantly different fashion. To them, it speaks of law's instrumental value and of how well law fits in the circumstances. They would have us evaluate rights discourse by asking how it *works*. If universalist rights discourse has structural flaws, they suggest, it is a function of "its working interface with surrounding cultural dispositions"²; it is a consequence of "reflection's traffic with its contingent context, its socio-cultural environment."³ What the pragmatist considers—and it is just here that they cite Cover—is whether "the discourse is salvageable by work on those dispositions."⁴

Something quite similar occurs in the next paragraph. Sometimes, they explain, the problem with rights discourse is a matter of "incomplete commitment to go all the way down the emancipatory path that the discourse opens."⁵ Here, Radin and Michelman graciously cite my own efforts to build on Cover's insights.⁶ Yet, believing that I wrote something a little different, I am left wondering whether as pragmatists they haven't misread Cover, misread me, and misread the critique of normative legal thought. And I wonder

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† Professor, University of Miami School of Law; Visiting Professor, Yale Law School. Bruce Ackerman, Jeremy Paul, Pierre Schlag, and Lynn Winter made helpful comments and suggestions. I want also to acknowledge my profound debt to Robert Cover, whose writings continue to teach on each and every rereading.

¹ Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 10 (1983).

² Radin & Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1037 (1991).

³ *Id.* at 1037 n.73.

⁴ *Id.* at 1037 (citing Cover, *supra* note 1, at 10).

⁵ *Id.* at 1038.

⁶ *Id.* at 1038 n.77 (citing Winter, *Transcendental Nonsense, Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1232 (1989) ("Rights are about the course of the future, and that future is made only through the commitments of real people.")).

whether it isn't a misreading that might have been avoided by closer attention to Cover's caution.

Cover writes not about how (or whether) legal precepts work, but rather what (and how) legal precepts *mean*. "The community that writes law review articles has created a law—a law under which officialdom may maintain its interpretation merely by suffering the protest of the articles."⁷ In contrast, he explains, "the act of civil disobedience changes the *meaning* of the law articulated by officialdom."⁸ It was this passage that I took up and elaborated.⁹ In this view, it is not discourse that paves the way for rights, but committed action.¹⁰ In Cover's own words: "Precepts must 'have meaning,' but they necessarily borrow it from materials created by social activity"¹¹ Part of that "material" is, of course, prospective. Nevertheless, it is only in the context of that action that the meaning of legal interpretation can be read:

The judicial word is a mandate for the deeds of others. . . . The context of a judicial utterance is institutional behavior in which others, occupying preexisting roles, can be expected to act, to implement, or otherwise to respond in a specified way to the judge's interpretation. . . . These interpretations, then, are not only "practical," they are, themselves, practices.¹²

⁷ Cover, *supra* note 1, at 47. This, we might say, is the original critique of normative legal thought.

⁸ *Id.* (emphasis added); see also Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606-07 (1986) ("[I]t is precisely this embedding of an understanding of political text in institutional modes of action that distinguishes *legal* interpretation Legal interpretation is either played out on the field of pain and death or it is something less (or more) than law.").

⁹ See Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1231 (1989) [hereinafter Winter, *Transcendental Nonsense*] ("For us, the production and maintenance of legal meaning is dependent upon lived human experience. To *make* meaning, one must *do* meaning") For further explanation of this point, see Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1476-78, 1494-1500 (1990).

¹⁰ Winter, *Transcendental Nonsense*, *supra* note 9, at 1223-37.

¹¹ Cover, *supra* note 1, at 18. For Cover, a *nomos* consists in "not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it." *Id.* at 6. Consequently, no system of thought can truly be understood apart from its context: "History and literature cannot escape their location in a normative universe, nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations." *Id.* at 5 (footnotes omitted).

¹² Cover, *supra* note 8, at 1611; see also *id.* at 1613 (noting that "legal interpretation is as a practice incomplete without violence").

All meaning is meaning in a context, and that meaning-conferring context is the field of human action.

Radin and Michelman mistake the critique of normative legal thought because they think of it as a critique of a certain kind of *thought* that is identifiable by the *properties* it bears. Thus, they chide: "We do not agree . . . that it is especially helpful . . . to name 'normativity' as legal thought's crucially problematic characteristic" ¹³ But this is a reduction, and a surprising one for self-styled pragmatists. ¹⁴ Normative legal thought is not the name of an utterance that bears certain characteristics. It is the name of a *practice*. To identify that practice as corresponding to its products is to make the mistake of reification. ¹⁵ A practice is not a unitary, static, or invariable "thing," but a dynamic pattern of performance.

But it is just this reduction and reification that Radin and Michelman perform. "'We should talk more normatively' (WSTMN, for short) is the name of a certain sentence—the one that says we should talk more normatively."¹⁶ For Pierre Schlag, however, WSTMN is the name of a certain practice that takes place—and therefore has meaning—only in the context in which it says. So when Schlag contends—or, rather, is (mis)understood to contend—that uttering WSTMN is contemptible as normative *talk*, he is not engaged in argument and certainly not in normative legal argument. Rather, he is engaged in an inquiry into the meaning and implications of normative talk when performed in the context of bureaucratization, commodification, commercialization, consumer-orientation, and social fragmentation in which we currently find ourselves.

"But," Radin and Michelman ask, "if this utterance of Schlag's is not argument, then what is it?"¹⁷ Perhaps it is satire; perhaps it is deconstruction; perhaps it is merely reality testing. But it certainly is not the "lapse of logic or consistency" that Radin and Michelman simultaneously suggest and disclaim,¹⁸ because this

¹³ Radin & Michelman, *supra* note 2, at 1020.

¹⁴ *Cf. id.* at 1043 ("When we evaluate styles of argument in a pragmatist frame of mind, we look for salient features *in use* . . ." (emphasis added)).

¹⁵ See Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 992-95 (1991).

¹⁶ Radin & Michelman, *supra* note 2, at 1021 (quoting Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 171 (1990)) (emphasis added by Radin and Michelman).

¹⁷ *Id.*

¹⁸ *Id.* at 1021-22. The question of "logic and consistency" is a red herring that would have better been avoided altogether. Pragmatists/postmoderns like Radin and Michelman surely recognize that logic is paradigm-dependent. What looks like "logic"

“utterance of Schlag’s” is not about what Radin and Michelman seem to think. It is not about “legal scholarship’s . . . undeniable, but seemingly inexpungible, trait of normativity.”¹⁹ It is neither about “traits” of discourse nor about a characteristic of utterances called “normativity.” It is, rather, about how we practice that normativity and about the context of that practice.

If, as pragmatists, we were to reify the concept of “Normative Legal Thought,” it would make better sense to look in the other direction and identify it with its animating *conventions*.²⁰ That focus, at least, would have the advantage of alerting us to the way in which our intellectual productions are structured by the practices and conventions in which we are situated—the very practices and conventions that are the subject of the critique. That alternative focus, moreover, might help us understand the capacity of normative legal thought to transform all thought in its own image.

What is that image? It is the image of the object-form, in which everything is reduced to an object upon which the subject can act. This reduction plagues Radin and Michelman throughout. It appears in its most obvious and most symbolic form when they take a sentence and reduce it to WSTMN, a meaningless object-like entity. But the unconscious need for the object-form appears even in their conception of practice. “To argue,” they say, “is to invoke the practice of argument, and *that* practice consists of normative talk.”²¹ It is as if argument were *something*—consisting in its essential character of normative talk, no less—that could be *invoked*. No, a real pragmatist might say, to argue is to *engage* in the practice of argument, and the meaning of that practice consists in its features *in use*. It can be normative (as when it attempts to prescribe behavior) or rhetorical (as when it is engaged for its own sake, as at a high school debate) or a power game (as when an appointment, promotion, or curriculum change may alter one’s status on a faculty).

in one paradigm, may seem more like hypocrisy when viewed from the perspective of another. Conversely, what looks like “contradiction” given one set of premises, may be obvious entailment from within another. It is not, as Radin and Michelman seem to suggest, that Schlag recognizes “the delicacy of his position” and is “attentive” to it. *Id.* Rather, he is offering an understanding of these issues in which this particular question of logic and consistency simply is not pertinent.

¹⁹ *Id.* at 1022.

²⁰ *Cf. id.* at 1047-48.

²¹ *Id.* at 1021.

This image of the object-form is not an isolated conception, but part of a rationalist schema that systematically plagues Radin and Michelman's commentary. The object of thought entails a separate, thinking subject, which in turn entails the need for a place to stand. Subject/object/context is the organizing schema of their thought, which is why they can speak of "reflection's *traffic with its contingent context, its socio-cultural environment.*"²² It animates their concern with framework and stance, the question of "position." "From where do you speak," they repeatedly ask, "and what privileges your position?"²³ So too, Radin and Michelman claim that: "When we are practicing pragmatically, we notice differences in philosophical temperament, try to take them seriously, try to hold them apart for long enough to ask what ramifications they have for our lives."²⁴ To which, one might reply, there is no *thing to take*, to *hold apart*, and no moment in which to do so. There are only ways of seeing and being in the world, and never a safe and stable space in which to stand and choose to mediate—even temporarily.

Which brings us directly to the questions of nihilism and privilege. Nihilism, I would suggest, is the peculiar product of this rationalist schema. When there is no secure place to stand, no foundation free from dislodgement, no separation of subject-from-object-from-context, then chaos seems obviously to threaten. And by the same token, any particular scheme that carves these fast-blurring categories into separate entities is necessarily a contingent artifact that claims for itself a covert privilege. Thus, in what is perhaps the most curious and peculiar moment in their paper, they speculate whether they will "be charged with failing to privilege poststructuralism."²⁵ And they respond with the only answer possible: There is no stance, no privilege, that is not vulnerable to dislodgement.²⁶

The problem with this passage may be characterized in a number of ways, but let me suggest two. First, it marks a failure of what I would call empathy²⁷ or what Radin and Michelman extol as a "watchful receptiveness to redescription."²⁸ Second, and con-

²² *Id.* at 1037 n.73 (emphasis added).

²³ See Schlag, *Stances*, 139 U. PA. L. REV. 1059 (1991).

²⁴ Radin & Michelman, *supra* note 2, at 1043-44 (emphasis omitted).

²⁵ *Id.* at 1029.

²⁶ *Id.* at 1029-30.

²⁷ See Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2276-79 (1989).

²⁸ Radin & Michelman, *supra* note 2, at 1051.

versely, it manifests a kind of conceptual imperialism that pragmatists should most be on guard to avoid. For this question of "privilege" is a pragmatist's question, one that makes little or no sense within the redescription that they identify as "poststructuralism."²⁹ When, for example, they write that to accept the contingency of all frameworks is to recognize that the deconstructibility of any "no longer works as a foundational objection,"³⁰ they are, of course, correct. Except that they talk a talk which is simply incommensurable with the understandings of their poststructuralist discussant.

For the poststructuralist or phenomenologist, the question of a foundation (however temporary) or position (however privileged) is already a falsification, a misrepresentation, and a reification of our condition. The problem is not that there are no foundations, but that there are too many.³¹ There is no way to get outside of time and existence, no way to escape the field of social interaction that is the self and that the action of the self maintains, no way to transcend—even for a moment—the constitutive action in which the self is already situated and in which the self is always implicated.³² Sometimes, we can relax the particular scheme by which we separate subject-from-object-from-context long enough to attend to the ways in which it constructs our world. But there is never a moment of privilege because there is never a moment outside a process of construction. What is possible—and all that is possible—are studied acts of situated self-consciousness.³³

²⁹ I am not certain that this the best label for the style of redescription under discussion; I would prefer the more generic "postmodernism." But, then, almost any label will be equally problematic. See *supra* text accompanying notes 14-15 & 21. I am, therefore, content to follow Radin and Michelman here—at least for the purposes of this exchange.

³⁰ *Id.* at 1057.

³¹ Cf. Cover, *supra* note 1, at 16 ("It is the problem of the multiplicity of meaning—the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis—that leads at once to the imperial virtues and the imperial mode of world maintenance.").

³² See Winter, *supra* note 15, at 987-91 (describing the ecological system in which self, role, and community are mutually constitutive); see also Cover, *supra* note 1, at 5 ("This *nomos* is as much 'our world' as is the physical universe of mass, energy, and momentum. Indeed, our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world.").

³³ See Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 681-91 (1990). In these attempts, we take advantage of the fact that there is more than one scheme, metaphor, or redescription. For an example, see *id.* at 682-84. This, too, is an advantage of what Radin and Michelman call "epistemic pluralism." Radin & Michelman, *supra* note 2, at 1042.

Radin and Michelman acknowledge this constraint, but not its implications. “[S]o the poststructuralist critic is limited to detailed observation, from within a form of life, of practices embedded in that form of life.”³⁴ But this necessarily means that there can be no question of privileging poststructuralism. Rather, poststructuralism is a practice of deprivileging by redescription.³⁵ The poststructuralist critique of normative legal thought is a matter of redescribing and deprivileging the practice that assumes and constitutes a sovereign self—*our* selves—in charge of its own normative practices. If normativity seems everywhere and unavoidable, if there appears to be no utterance that is not normative, it is because that is the practice, the convention, the institution, and the form of life in which we participate and which *we* reproduce.

Radin and Michelman confess that: “Sometimes it is the habitually most taken-for-granted cultural landscape features that most cry out for redescription.”³⁶ It does not help to reify and reduce that redescription, treating it as just another object-form to be placed in the foreground for examination by a self. To the contrary, this interpretive act merely reproduces the problem and confirms the cogency of the critique. If Schlag’s critique of normativity produces this paradoxical substantiation, then the most appropriate response may be that of George Bernard Shaw: “This man is not challenging the fact of science; he is challenging the action of science. Not only is he challenging the action of science, but the action of science has surrendered to his challenge.”³⁷

³⁴ Radin & Michelman, *supra* note 2, at 1043. Since Radin and Michelman identify this exercise with pragmatist critical practice, one can only wish that they had begun their comment here.

³⁵ Of which, the reversal of conceptual hierarchies is only the crudest, most stubbornly logocentric form.

³⁶ Radin & Michelman, *supra* note 2, at 1048. For an effort that takes this observation so seriously that it implements it both literally and figuratively, see my forthcoming article *An Upside/Down View of the Countermajoritarian Difficulty* (forthcoming 69 TEX. L. REV. (1991)) (discussing parks, Native American land claims, and the countermajoritarian difficulty).

³⁷ *Albert Einstein, Universe Maker*, N.Y. Times, Mar. 14, 1991, at A25, col. 4 (toast by G.B. Shaw in honor of Albert Einstein).

And, as for agency, well . . . of course. It lies in that very capacity for imagination and redescription, a capacity that is contingent rather than originary.³⁸ But, then, that makes it all very *complicated*.³⁹

³⁸ By this I mean that, while the input does not determine the output, it does shape and constrain the forms that output can take. *See, e.g.,* Winter, *supra* note 27, at 2244-55; *see also* Cover, *supra* note 1, at 9 ("These myths establish a repertoire of moves—a lexicon of normative action—that may be combined into meaningful patterns culled from the meaningful patterns of the past.").

³⁹ *See* Winter, *supra* note 15, at 991-97; *see also* Radin & Michelman, *supra* note 2, at 1041-43.