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.