2009

Daniel Arises: Notes (Such as 30 and 31) from the Schlagaground*

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I. APOLOGY

I am a sick man; I am a spiteful man. I am an unpleasant man.1 You can deal with me, however, because I am your creature. And with Ishmael taken,2 I (through you) have called me Daniel.3 Unlike my namesake, the interpreter of dreams at around the time of Nebuchadnezzar,4 I have become a poor poet.5 Like my namesake, the fictional stand-in for the Rosenberg sons,6 I am an orphan, willed to become so by baleful authorities such as yourself. You have authored me into this underground status by disconnecting me from what I was. In return, or so you tell me, you have offered me “excellence in mediocrity.”7 Well, thanks a helluva lot! From the cellargage beneath your complaints, Daniel

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1. Dostoevsky, supra note *, at 3.
2. See Herman Melville, Moby Dick (1850).
5. See Schlag, supra note 3, at 813 n.31; infra Part II.
6. See Sam Roberts, Figure in Rosenberg Case Admits to Soviet Spying, N.Y. TIMES, Sept. 12, 2008, at A1. See generally E.L. Doctorow, The Book of Daniel (1970). Daniel is the youthful protagonist of this story, which is a fictional recreation of the still controversial Rosenberg espionage case of the McCarthy period; when his parents are both found guilty and executed, Daniel becomes an orphan.
7. Schlag, supra note 3, Part I and passim.
takes his revenge.\(^8\) You having squelched his genius, what is left of yours will be stifled by his resentment. In a few years time, the Court behind him, Daniel will pick up where you left off, severing the young from the best they were while at the same time airing crazy tunes heard only by the deaf.

No sea story here, you have given me instead a "see-story." Like his Biblical namesake, Daniel will finally SEE. SEE what a mistake it was to choose this mediocre discourse as my lifework! SEE that the seemingly "real and consequential\(^9\) is in fact "sound and fury."

SEE how my law professors bait and trap! SEE how they avoid everything that signifies—even if merely on the level of intellectual rigor\(^11\)—while promising that we will be THE BEST AND THE BRIGHTEST.\(^12\) SEE how their mediocre work product has spread underground, its weeds rankly corrupting those who must edit it or listen to the classroom variation of the same rot.

Daniel did not want to miss the big kahuna. Herewith the spiteful account of the ways you drove Daniel from the sun-splashed surface to the indeterminate depths.

II. \textit{SEE DANIEL AS A POOR POET}

But perhaps you glean only my resentment. You don't understand how much I admire you, count on you, set you up as a model for my future actions and thoughts. From my underground, sub-textual camp, I have read you evoke the days of glory. Like the creature in Kafka's burrow,\(^13\) I scurry subterraneously, longing for those days of yore. You tell me they are gone forever, yet my own work for you sent me on dizzying voyages to Holmes and Llewellyn,\(^14\) Robert Cover,\(^15\) and—not once but twice—James Boyd White.\(^16\) Why are these people lost to you? And thus to me? You mention Samuel Beckett, your only specifically literary reference;\(^17\) like his characters, you wait for something.\(^18\) No: you want something, in every sense, and I love you for that desire and for that concurrent lack.

But the Godot you await and the thing that you want are already inside you. So why have you kept them there, even in your ramblings about the lost wave

\(^8\) \textit{See id.} at 813 n.30.
\(^9\) \textit{Id.} at 835.
\(^11\) Schlag, \textit{supra} note 3, at 810 n.21.
\(^12\) \textit{Id.} at 830 n.61.
\(^14\) Schlag, \textit{supra} note 3, at 805 n.7.
\(^15\) \textit{Id.} at 817 n.38.
\(^16\) \textit{Id.} at 813 n.30, 825 n.48.
\(^17\) \textit{Id.} at 826 n.51. You also mention the great "past" of Law and Literature and the other subgenres of the "law and . . ." movement. \textit{See id.} at Part III.
\(^18\) \textit{Id.} at 826 & n.51.
and the "swamper"? By repressing them even now, you have willfully robbed me of the poetic within me and consequentially of the poetic within the subject you teach and write. Your nostalgia substitutes lost glories for present possibilities, and those who must reckon with your sentimentality lack the power you have to regain the moments only you can recall, the liquefied majesty of the ocean wave and the grand rapids.

On my first day of law school, I realized that you and your colleagues primarily had in mind a training that would stifle the poetic within your students. Whatever you were writing about it for your peers in those halcyon 1980s, law for your groundlings had to be the narrow and unimaginative logic that had been there for a century or more but whose only justification was its longevity. Or maybe also its place in procuring for you thrice the salary of those teaching English Lit. across the midway.

The lack of pedagogical imagination that locked Langdell in place for thirteen decades or so, while all about him was moving on, cost me and my classmates dearly. Did you read the doggerel they let me add underneath one of your absurd ruminations? "Mist-filled gardens across the sky./Jurisprudence in my teeth/Where does New York?" I can almost hear the Biblical Daniel grieving for his twenty-first century namesake: "How hath he strayed from the beautiful verses of his college years!" It's law-school, my prophetic friend, law-school, with its "mist-filled" logic, its "in my teeth" sophistry, its deliberate severing of the student from "New York" and everything varied, zesty, eloquent, and humane.

But you, you, you were our shepherd, our best hope, our Jeremiah. You blame the fates and I guess your colleagues for your sad conclusion: "[N]othing's happening." Like Justice Brennan losing control over the progeny of New York Times v. Sullivan, however, you must take responsibility for this falling off. I was in swaddling clothes, ready to mature into a poetic (or should I say "poethic") lawyer while you were abandoning the front to your more conventional, more cautious colleagues. Woe unto me and my impoverished words! Woe unto the profession you have bequeathed to me!

19. Id. at 831 & n.63.
20. Id. at 822 n.45.
21. I take this to be Judge Posner’s main analytical caution to those law professors he fears may become overly enthused about Law and Literature. See generally Richard A. Posner, Law and Literature (2d ed. 1998).
22. Schlag, supra note 3, at 813 n.31.
23. Id. at 805.
III. SEE DANIEL AS A NARROWMAN

Maybe I am being too harsh. You are a good person. THE LAST OF THE JUST.26 My resentment blinds me to your accuracy and good faith and makes me lump you together with those you criticize. Your complaint has merit: your colleagues have reverted to a scholarly mode that guarantees its own mediocrity. You expected more of them. Spitefully, I have made you responsible for what they see as the simple healing of a fissure you briefly imposed on them twenty years ago. Your scholarship split from your own humdrum pedagogy. You divided the field (and yourself) by creating a law-review discourse that was challenging, or in your words (decidedly not mine27): “something intellectually edifying, politically admirable, or aesthetically enlivening.”28 Your schizophrenia presented itself almost each time you stood before a law school class because you failed to map your scholarly excellence onto the Langdellian curricular duties your dean imposed on you. The first-year courses stayed right where the Great Discoverer of Legal Science conceived them, not as you were playing with them in your critical theory. And the law reviews were also divided, because many of your colleagues, although fascinated by your writings, continued to do the boring doctrinal work. Sooner or later everything went back to normal, and the pages of the law reviews again reflected the discourse of the classroom.

You are not guilty. But you are also not innocent. (I just can’t stop being spiteful.) The critical wave of the 1980s that you still like so much failed to wash over those of your colleagues who were training the very scholars now producing all of this mediocrity. Your twinned schizophrenia—the scholarly self so different from other scholars but also so different from your classroom persona—has “come home to roost.”29 That great critical scholarship left everyone high and dry, maybe because it denied the very idea of justice and so in its own way gave the professors more of the same stuff they’d been getting since Holmes.

Still, you are a fine fellow. After all, your essay—assisted perhaps by my underground moaning—pleads for breadth of vision in law. It’s just that you assume away the most fertile path to the wide horizon you seek, to the waves of energy you seem to find now only in your nostalgia. “You guys reeeeee-aaaaaaally missed it,”30 you say. But did we? Or did you, with your extended analysis of the impoverishment of judicial prose,31 miss it for us?

27. Schlag, supra note 3, at 806 n.9.
28. Id. at 806.
29. The Reverend Jeremiah Wright, most recently.
30. I’m not sure I got all those repetitive vowels you used in your first four paragraphs completely right, and no one’s been demoted to check for me, so this will have to do.
31. Schlag, supra note 3, at Part II.
IV. SEE DANIEL AS AN ORPHAN

You are to me as the Rosenberg children’s prosecutors were to them.\(^{32}\) You orphaned me, orphaned us, really, orphaned all of the children born to a certain ideal, however flawed. You and your colleagues made sure that whatever reformist ideas we brought with us into Law School would be quashed completely by the end of the first week of studies. So from my underground perch here, I am not surprised to find you writing about judges but offering nothing in your article about *justice*. Small wonder that a guy like you who gets to teach law—"one of the last truly great jobs on earth"\(^{33}\)—feels uncomfortable talking about justice: you don’t get the grades in Law School needed to lead the comfortable professorial life of "high-end mediocrity"\(^{34}\) by ruminating about justice, now, do you? Many a wave propelled by justice has broken over your professional beach-head and then been forgotten, while the ocean of justice-antipathy just keeps rolling along.

The closest you come to the idea of justice\(^ {35} \)—even in these complaints of yours—is Robert Cover.\(^ {36}\) But you don’t “get” Robert Cover. Yes, he was into judges as “jurispathic actors.”\(^ {37}\) Judges do destroy as they make law. They destroy other narratives as they elevate their own. They can also destroy people. Cover knew that. But he was also obsessed, until the day he died,\(^ {38}\) with the affirmative idea of justice. He liked to read stories, to read Midrash and Melville, to ponder Dostoevsky—and he had the idea that judges can actually do justice and that the stories they tell do not have to be destructive, do not have to be violent. The Crits didn’t want to see that part of Robert Cover.

So like most people who knew him, you miss Cover in two senses, and that’s par for the course. The Yale Law School didn’t get Prof. Cover, either. When they memorialized him formally a few months after his death, the only mention of his interest in stories was an ironic (if truthful) anecdote about Bob saying he never read an English novel he liked.\(^ {39}\) (But this of course was an exception to his immersion in stories. Bob just didn’t go for Dickens and the Victorian novelists.) Stories lead us to an affirmative idea of justice. Cover linked stories

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32. *See supra* note 6 and accompanying text.
34. *Id.* at 828.
35. Maybe I missed something—though I’m pretty careful—but your actual use of the word seems to be a sort of put-down: “Judges work with and within a discourse that has for centuries subordinated truth and edification ... to the dispensation of justice . . .” *Id.* at 816.
36. *Id.* at 816–17.
37. *Id.*
38. Personal account of Richard Weisberg, who spent the afternoon with him in New Haven on July 17, 1986, the day before he died. Among other stories discussed that afternoon, *Billy Budd, Sailor* and *The Brothers Karamazov* (as they often had in their conversations) took pride of place. Cover loved those stories and was haunted by the judicial errors in both. However, these two late-nineteenth century narratives did not strike him as signaling the inevitability of injustice but—on the contrary—the possibility of just outcomes where just judges preside. *See generally* Milner Ball et al., 8 *CARDozo Stud. L. & Literature* i, i–252 (1996) (a commemorative volume for Robert M. Cover).
to law, of course. The combination had its wave, as you mention, and he rode it magnificently. It broke—also in two senses—upon the idea of justice.

For you, legal academic discourse fatally tracks the discourse of judges, and “[j]udicial discourse is not intellectually edifying. It is not designed to be. Quite the contrary: judicial discourse is in many ways intellectually arrested and arresting.” Talk about circularity! Your syllogism about the law reviews proves your point, I guess, at least once you posit, as you do repetitively, the universality of banal judicial speech. Yes, you hedge on this: “in many ways” just above might mean that in some other ways judges do speak edifyingly and truthfully. And your chronology seems to imply (as Cover would have emphasized) that in a time even before The Endless Summer, judges did justice through their words and deeds; Solomon comes to mind, especially because Daniel has been thinking biblically since I got my name under yours. So several things follow: first, judicial discourse, if it indeed controls academic discourse in all periods besides the ones I “reaaaaally [sic] missed,” might still be edifying and truthful instead of banal; and second, academic discourse would then itself be interesting instead of mediocre. Or, to avoid the circularity of the reasoning altogether, academic discourse might collaborate with judicial discourse, encourage it, for example, less to embrace (say) indeterminacy or micro-economic theory than to re-engage the idea of justice itself.

Before you orphaned me, I thought law professors would guide me towards some notion or another of justice. This fatuous idea in part came from those “popular understandings” you so deride. Most folks interested in medicine want to cure people. Most folks interested in the law want to do justice. (You’re right; they also might want to make money in the process or from time to time.) My upbringing inspired me to think our legal system would do more than create the unholy mess it is in now, a system currently uninterested in economic disparities, outsiders, history, the Constitution, etc.

In the beginning there was light. Even in law school, I found ties to my umbilical cord while you and your colleagues were busy severing it, busy launching me to float free in the “real world” where justice has no place. The sources of these connections to my true self were the very judges you deride! (Thankfully, you did not make me read your articles until I went underground as a second-year law review member, destined as clerk and perhaps professor for the very void you now bemoan.) I asked a friend of mine in Torts to pursue the

40. See Schlag, supra note 3, at 821.
42. Schlag, supra note 3, at 813.
43. The exact same, unproven thought ends id.
44. Id. at 804 & n.1.
45. Id. at 814–15.
46. Okay, there are many exceptions. My current favorite is Judge Sterling Johnson’s opinion in Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).
thought experiment that Benjamin N. Cardozo’s opinions be made the exclusive curriculum for a first year course on “Justice.” She did not readily agree—we had already been taught not readily to agree to anything—but she sent me to Cardozo’s essays and opined that such a course should also include them.

In the 1920s and 1930s, it seems, Benjamin N. Cardozo looked to academicians and their writings because, like him, they were interested in justice. You want to be nostalgic for the 1980s? My colleague got me up to speed with the 1920s! Consider this passage from one of Benjamin N.’s essays:

Justice in this sense is a concept by far more subtle and indefinite than any that is yielded by mere [Daniel loves that “mere”!] obedience to a rule. It remains to some extent, when all is said and done, the synonym of an aspiration, a mood of exaltation, a yearning for what is fine and high.

“Justice,” says Stammler in a recent paper, “is the directing of a particular legal volition according to the conception of a pure community.”

Okay, okay, it’s a bit vague—I guess you would call it indeterminate! But why shouldn’t our teachers insist we try to make sense of that kind of indeterminacy when every other vague area of the law is thrown at us constantly? Why not justice itself? Justice is the big kahuna! So in *Hynes v. New York Central Railroad*, he built upon ideas of law expressed in the academy to find the just answer where “dryly logical” legal rules had previously rejected the plaintiff’s claim: “This case is a striking instance of the dangers of ‘a jurisprudence of conceptions,’ the extension of a maxim or a definition with relentless disregard of consequences to ‘a dryly logical extreme.’ The approximate and relative become the definite and absolute.”

Thus did the highest court in New York find its way to justice through legal scholarship. (Cardozo and the academic writers in those days also saw the effective use of the English language as integral to the doing—and the analysis—of justice.) Relegated to its own “underground” were the courts below, which had predicated their erroneous dismissal on a standing doctrinal conclusion that trespassers, like “the lad of 16” in this case, were owed no duty of care by landowner defendants, even where the negligence occurred “on public waters in the exercise of public rights.”

Your complaint falsely assumes that judicial prose is unedifying, so academic discourse falls flat as well. But even if your assumption is correct, the tail need not wag the dog. Judges and academicians have synergized in eras not so

47. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 87 (1924).
50. Id. at 900.
removed from our own. Sometimes Cardozo looked to the law reviews for a rule of law; often he looked beyond them as well:

Now, personally I prefer to give the label law to a much larger assembly of social facts than would have that label affixed to them by many of the neo-realists. I find lying around loose, and ready to be embodied into a judgment according to some process of selection to be practiced by a judge, a vast conglomeration of principles and customs and usages and moralities. If these are so established as to justify a prediction, with reasonable certainty that they will have the backing of the courts in the event that their authority is challenged, I say that they are law. 51

I SAY THAT THEY ARE LAW. This privilege—in a far more modest form—I wanted for myself when I entered law school: a small piece of the pie, a chance to add to what was there, to improve the mix, to refine the recipe for justice. I wouldn't have cared if your lesson to me after awhile was that I would be no Cardozo. Or even that you thought there were better ingredients than those he provided. Instead, the pie disappeared under your tutelage. That was a decision you all made. Even when the big wave, as you see it, was there for the finding.

You—even you!—foreclose my potential to contribute to the betterment of law, to find “according to some process of selection” 52 you could have taught to me the pathway to justice. And you—especially you!—willfully orphaned me from what I was by assuming (without real proof) that “[j]udicial discourse is not intellectually edifying.” 53 That judges deflect whatever tendency they may have towards “truth” or “edification” into “the end of reaching a decision, a holding, an order and decree.” 54

Give us our year-long course on Cardozo. Then let me decide: (a) what justice is or might be; (b) whether judicial discourse lacks interest in it or thinks of it in the reductionist way you describe in your sole use of the word “justice”; 55 or (c) what kind of academic discourse I might envision if—having successfully descended to the Law Review underground—I make the fraught decision to follow you upwards, ever upwards, “in search of the perfect wave.” 56

V. CONCLUSION

Resentment and justice are diametrically opposed. 57

52. Id.
53. Schlag, supra note 3, at 813.
54. Id. at 816.
55. See supra, note 35.
56. Schlag, supra note 3, at 804.