HESITANT LEFT

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> *The Sunday does not sanctify the week, but compensates for it. The situation, or the engagement in existence, which is effort, is repressed, compensated for, and put to an end, instead of being repaired in its very present. Such is economic activity. . . . But this compensating time is not enough for hope. For it is not enough that tears be wiped away or death avenged; no tear is to be lost, no death be without resurrection. Hope then is not satisfied with a time composed of separate instants given to an ego that traverses them so as to gather in the following instant, as impersonal as the first one, the wages of its pain. The true object of hope is the Messiah, or salvation.*[1]

I am struck by Pierre Schlag's assessment, in the midst of the proceedings of a conference entitled "Teaching from the Left," that the aim of the academic discipline of law in our cultures, understood primarily in sociological terms, is to produce a politics of centre.[2] His was not a complaint directed against any particular "school" of legal critique; rather the gripe was of an existential kind. What is the impact of an existentialist complaint upon the economy of our conference? In a spirit of nauseating honesty, Schlag pointed out the intrinsic impossibility of teaching "from the left" as a matter of fact. No matter what the syllabus content and the pedagogical method, our discipline centres around the intellectual emptiness of judicial opinion, which consists of bits of "reasonableness, greatest common denominatorhoods, hypertrophic technicalities, . . . folk wisdom, overlapping consensus, shared belief, plundering of foreign expertise—all presented in a formal idiom that gives the impression of knowledge." In other words, the fact that the object of our teaching is not knowledge but judicial opinion is paramount irrespective of the critical thinking that takes place in the classroom. The function of teaching the law is therefore to propagate reverence for judicial "reasonableness" and this function is the indisputable backdrop of our diverse intentions to think the law critically. Schlag is not here pointing to hypocrisy. Rather, he is saying that our critical reflexions, despite their sincerity, are necessarily nondetachable from the thoughtless performance of a

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1. EMMANUEL LEVINAS, EXISTENCE & EXISTENTS 90 (Alphonso Lingis trans., 2001) (1947).

2. Unless otherwise noted, all references in this Essay to Schlag's theories draw from his remarks at the Teaching from the Left Conference. Pierre Schlag, Address at the Teaching From the Left Conference (March 11, 2006). *See also* Pierre Schlag, *The Anxiety of the Law Student at the Socratic Impasse—An Essay on Reductionism in Legal Education*, 31 N.Y.U. REV. L. & SOC. CHANGE 575 (2007).

function which takes the law seriously (*as* law) while broadcasting its shortcomings. This performative function—the review, dissection and assimilation of "10,000 cases, maybe more"—sticks to us much like the feeling of nausea in someone who has eaten too much. Critique, like vomit, liberates us in the short-term, before the next term's assimilation of an even greater volume of judicial reasonableness.

Schlag's view of law as a symptom of an indispensable political mediocrity is, for those of us who teach law but aspire to teach "from the left," an indigestible truth. We cannot accept that *there is* an indisputable backdrop to our individual pedagogical judgments and intentions; that *there is* an objective, "sociological," function to teaching the law (politically, the promotion of centrism) that exists independently of how each of us consciously takes up the task of teaching in view of our personal values and refusing to fail to live by them; or that this task or function *sticks to us* as law teachers wherever on the political spectrum we may find ourselves. Schlag's remarks are powerful, capable of, temporarily, silencing anyone who is asked to talk after him. What is there to say in relation to the *there is function to teaching/practising law* that would be fair, that is, that would not simply deny the premise of his argument by insisting on think-ing of oneself as somehow, "prior" "above" or "beyond" the *there is*. One can ruminate on how tedious and tiring it all feels. Undoubtedly, we all sense a boredom, a fatigue, endemic to legal education and to its repetitive tasks, to reading the "10,000 cases, maybe more" in the light of a growing body of "failed theories of jurisprudence" that Schlag mentions. In this complacency one can continue to be a reflective being but without hoping for her teaching to be politically rebellious or "critical." Indeed, this Schlag-ish melancholic attitude appears to be inimical to teaching from the left.

To test this incompatibility let me recall the contribution to this conference of, my dear friend Adam Gearey.[3] For him, critical legal thought is premised on authenticity, strength and the kind of anxiety associated with "taking on the tradition." Thus, he challenged us: "[I]s one crushed by the past, or are you strong enough to start anew? Critical legal thought is thus marked by an anxiety about its own strength, its own constitution; its own ability to will things differently." There are two related aspects of Gearey's call on us to put our teaching in critical gear that contrast crucially with Schlag's more sluggish approach. The first is Gearey's assurance that in the academic discipline of law *there is tradition*—"the accumulated opinions, texts and commentaries that make up jurisprudence"—before which one's choice is clear: "feel crushed in despair or take on the tradition." This contrasts to Schlag's overwhelming realization that *there is function* to teaching the law—generating a political orthodoxy of cen-

3. Unless otherwise noted, all discussions of Adam Gearey's theories refer in particular to his remarks at the Teaching from the Left Conference. Adam Gearey, Address at Teaching From the Left Conference (Mar. 11, 2006). *See also* Adam Gearey, *Anxiety and Affirmation: Critical Legal Studies and the Critical "Tradition(s)"*, 31 N.Y.U REV. L. & SOC. CHANGE 585 (2007).

trism—and, no matter what we include in our syllabi and how, our teaching takes place against the backdrop of this function. The second aspect of the Gearey-Schlag divergence is that only Gearey consciously engages in a discourse of responsibilisation. Note the pronouns in Gearey's sentence cited above: "is *one* crushed by the past, or are *you* strong enough to start anew?"[4] Suffering is capable of reducing the subject to a thing but *will,* alone, suffices to reanimate it. Contrast this with Schlag's aversion to any personal pronoun objectifying himself and his students as a "kind of human funnel, the medium that regulates the traffic between openness and closure." With Gearey the tediousness of the task of reading "ten thousand cases, maybe more" is an existential opportunity and duty to start anew, albeit with anxiety, when faced with a given "tradition." Indeed, it is *only* this authentic attitude that will be used to discriminate tradition from critique, law and critique from law and dogma, rote teaching from teaching from the left. Thus, as Gearey told us, authenticity requires the subject of legal studies "to affirm iteration, to see history as non-repetitive, as the constant tearing and repairing of a fabric," to anxiously realise the contingency of history that "could" and "will" be different.

In sum, Gearey wants to forget that legal education is primarily about getting used to breathing dusty institutional air, made up of dead bits of imported knowledge, opinions, insights etc., and invite us to constantly ventilate the classroom or the courtroom so the dust does not settle. Pronoun-prone, he addresses his responsibilising talk ("are *you* strong enough?") to us as already distinct existents, individual temporal beings, ex-statically confronting finitude. Time is given and it is on our side provided we breathe stronger and, exhaling the dead knowledge we breathe, reiterate it; and, if we fail to do it alone, the thoughts of Heidegger, through Derrida and Nancy, may serve as our assisted ventilation. These are the thinkers that, in his South African case study, come to the rescue of the exhausted post-apartheid jurisprudential subject; it is as if a gigantic "ventilation" tube of French post-structuralist thought has been set up, via London to South Africa, financed—let us not forget—by the City of London, i.e., effectively the governing elite of today's Britain. Schlag's desire, by contrast, is to intimate the nauseating sense of *having to* breathe and iterate, a timeless fatigue syndrome for which no therapy exists, a malaise that is not opposed conceptually by "health." The kind of function of the academic discipline of law that Schlag alludes to points to impersonal processes that occur *through* students/teachers or practitioners, but without need for the latter to be aware of it. Not: the result of or a limitation to subjective action but: the necessary "backdrop" to all action/inaction. Gearey, on the other hand, focuses on *Dasein,* its relation with finitude, time, and anxiety. Thus, if Schlag is right that *there is* a function to the academic discipline of law and that this function is to re-produce the legal profession as politically centrist, then *that* function cannot in turn be the object of a

4. Adam Gearey, Address at Teaching From the Left Conference (Mar. 11, 2006) (emphasis added).

critic's anxiety a la Gearey. Anxiety and temporality presuppose the subject confronted with finitude but Schlag's *centrifugal function* is not an "obstacle" to teaching law from the left but the necessary backdrop of all legal teaching of which "critical" and "doctrinal" manners of teaching are but phases. Schlag refers to something without end, without future, without time and, therefore, something which "anxious" Gearey cannot throw himself at, but rather from which he attempts to flee. Schlag, therefore, intimates not anxiety but a kind of *weariness* vis-à-vis a general state of affairs of which the alternatives of either being crushed by tradition or anxiously critiquing are but phases; he does so by emphasizing the impossibility for us as lawyers, "traditional" or "critical," of not breathing our institutions' stale air, and instead constantly recycling external values so that our work neither quite collapses into submission to tradition nor amounts to its critique. While Gearey's discourse points to a choice: will we be "inauthentic" beings or choose ex-static existence? Will we *give in* to inherited traditions of understanding of law or will we *will* them, make them our own, assume respon-sibility for them? Schlag is unimpressed. His choice of the "human funnel" metaphor indicates that for him any reference to subjectivity is misleading.

I suggest we think of these two thinkers' contributions in the light of the philosophies that inform their respective theories of existence. Gearey is consciously a "Heideggerian" but, it will become apparent, without the Heiddegerian gloom—a sort of "Heidegger light." Schlag is different. His emphasis on impersonal process and function does not at first hand qualify him as an existentialist. And yet he too exemplifies a certain take on being which I will call a pessimistic Levinasianism. Both these philosophers worked on the premise that human existence, becoming, precedes essence, being such-and-such. Heidegger thought that existence is defined by the anxious awareness of death, leading to the possibility of "authenticity"—as pop speech goes this means to live as if it today were the last day—a possibility that is less and less taken up as man is more and more concerned to use the world rather than dwell in it. Levinas thought that existence is defined by the painful awareness of the *fact* that "there is" being and nothingness and the nauseating realisation of the absolute and self-referential character of existence leading to the possibility of paralysis except for the fact that the human being is "ethically" interprelated by her neighbour into responsibility and action. When Gearey assumes that we are confronted with legal "traditions" that make us anxious and, therefore, "critique-prone" he is rehearsing Heideggerian philosophy. Heidegger, however, eventually developed an attitude of despair, not anxiety. One recalls, for instance, the Heideggerian nightmare in which our accomplishments gradually eat us up and we become exclusively outward-looking, interior-lacking (and increasingly in need of policing rather than politics). Similarly relevant is Arendt's nightmare of the aftermath of the bio-political disaster of the public-political realm in which the social perverts the political and politics degenerates into a "collective household," or "nation-wide administration of housekeeping," eliminating all

possibility of human distinction.[5] Recall also Agamben's nightmare in which, given that the exploitation of man lies in the unavoidable rise of institutionalization and industrialization, it no longer makes sense to talk of responsibility of one person for another other than in the sense of the existing moral and legal institutions of a given community (which, of course, reinforces patterns of exploitation).[6] Nightmares are not to be overlooked; they are as real as any thought if not more real. Thus, Gearey's commentary that the critical legal studies tradition is "receiving new inflexions in Brit Crit, Oz Crit and South African CLS," demands consideration against the specific history of these places as a commonwealth centering then and now in London with white and capitalist human and financial resources. Does not Gearey suffer from nightmares in which CLS planetary expansion—with its North-South direction—functions as one of Schlag's gigantic "funnels" the outcome of which is, perhaps, a much more centrist political outlook than one could imagine given the amount of suffering of the majority world by those who now sponsor critique? I wonder, too, if he is spared the nightmare wherein the critical scholars involved in such projects are inauthentically preoccupied with their place in the world (career advancement, personality worship, etc). To the extent that Gearey avoids taking nightmares seriously he is not much different from the kind of Left that, in its haste to remove the causes of human suffering, ended up overlooking suffering itself. To care for suffering surely involves addressing it at an unconscious level too. Sublimation requires transference and, as every analyzand knows, before transference can happen the subject must first be hysterisized, that is, prompted to complain and accuse; The colonised subject, for example, cannot "iterate away" her sufferings and proceed to conceive freedom alone on the basis of purely conceptual work.

There is a further problem with Gearey-style critique. Irrespectively of its merit, Gearey's attitude—"are you strong enough to iterate?"—has the disadvantage of implicitly excluding those self-effacing, melancholic, discourses in which "I" and "you" are not productively operative. Consider, for example, legal thinkers who follow Luhmann's social systems theory[7] such as Gunther Teubner, for whom *autopoiesis* alone offers an adequate view of contemporary society as an unstructured and indeterminate detotalised whole comprising communicative systems like law and their environments in which communicative events have irrevocably succeeded subjects and actions in the production of social reality.[8] Such social theorists, like today's society, are thoroughly re-

5. HANNAH ARENDT, THE HUMAN CONDITION, 28–29 (Chi. Univ. Press. 1998) (1958)

6. For an excellent account of the work of Agamben as well as Lhumann and Legendre, see Anton Schütz, *Thinking the Law With and Against Luhmann, Legendre, Agamben*, 11 LAW AND CRITIQUE 107 (2000).

7. *See* NIKLAS LUHMANN, SOCIAL SYSTEMS (John Bednarz, Jr. & Dirk Baecker trans., Stanford Univ. Press 1995).

8. GUNTHER TEUBNER, *Introduction to Autopoietic Law*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1 (Gunther Teubner ed., 1987).

flexive. That is, *there is no Nature or Tradition* to rely on; instead, every aspect of life is increasingly experienced as something to be learned and decided upon. For a more directly political discourse, consider Badiou's idea that we live in a social space which is increasingly experienced as wordless, in the sense that it is impossible to "map" one's way forward from describing the present critical situation to setting a goal and the means to achieve it.[9] Consider what Renata Salecl's calls the tyranny of free choice, the experience of the deadlock of the risk society in which, without a proper foundation in knowledge, we find ourselves having to make free decisions on ever more aspects of life.[10] Indeed, the very question of whether one can be a critical lawyer might just be an instance of such tyranny. Zygmunt Bauman's insights into the social production of hyper-individuality and the consequent human waste of institutional or psychological exclusion also bears on the present discussion, yet is barred by Gearey's assumptions:[11] what of the human waste of critical legal academia, of those of us not "strong enough" to iterate? In relation to contemporary events, such as the 2005 riots in Paris, we recall Étienne Balibar's notion of excessive, non-functional cruelty as a feature of contemporary life, violence that is grounded in no utilitarian or ideological grounding, presumably the obverse of the tyranny of choice.[12] And in relation to the riots in the same city in 2006—quickly dismissed by some as an anti-revolution of the petite bourgeoisie, demanding not change but the status quo—we think of those young demonstrators and future unemployed as demonstrating surplus humanity or human waste. And with this we recall, finally, Žižek's theory that global market mechanisms operate at the level of "truth without meaning" in which "meaningless violence" is the only suitable form of protest compared with the "hermeneutic temptation" into which both liberal and conservative critics of capitalism fall.[13] Here it is worth raising a question that cannot, however, be answered presently: can critical legal thought (understood as being structured by iterability), as much as meaningless violence, function as the symptom of this particularly traumatic encounter of contemporary being with "validity without meaning?"

Schlag's *there is function* to teaching/practicing law—that is, the function of instituting a mediocre political space can be interpreted as Levinasian, minus the assurance that ethical proximity rules are okay. As I said earlier Levinas's great break with Heideggerianism occurred by thinking of *Dasein* not in the mode of anxiety before death but of nausea in relation to the fact that *there is*. The latter expression seeks to denote a general positivity of existence, of which Being and Nothingness are phases. Much as it is the case with the insomniac person who,

9. ALAIN BADIOU, LOGIQUES DES MONDES (2006).

10. RENATA SALECL, TYRANNY OF CHOICE (forthcoming).

11. ZYGMUNT BAUMAN, WASTED LIVES: MODERNITY AND ITS OUTCASTS (2004).

12. Étienne Balibar, *Violence, Ideality and Cruelty*, *in* POLITICS AND THE OTHER SCENE 129 (Verso, 2002) (1998).

13. Slajov Žižek, Respect for Otherness? No Thanks, Lecture at the Birkbeck Institute for the Humanities, University of London, Lecture Series: Adieu Derrida (May 20, 2005).

physically alone, still feels the night's darkness staring back at her, each particular existent undergoes the feeling that she *has to* exist, that it would be impossible to extricate herself from existence, which feels like it carries all the seriousness and harshness of an irrevocable contract that was never entered into. That is, Being is deficient because "to be" *feels* like "a commitment to exist," in the absence of any such contract. Hence, each existent incarnates "weariness" concerning existence, a weariness that "must not be confused with a judgment about the pain of being" and which does not arise from lack of deliberation. Existence, then, is principally a burden that sticks to us absolutely, self-referentially and outside time and the horizon of a future. In other words, Levinas construes Heidegger's temporal existent to be nondetachable from this dark background in which the dignity, strength and courage of ek-sistence is forever already humbled. The constitutive weariness of existence lived in dead time makes us seek an impossible escape or aspire to alterity *in exteriority*. The outside and the irreducibly other, therefore, are "there" only metaphorically, as the impossible aspiration of being-for-itself, which literally and irrevocably remains stuck *there*, to "be-for-another" in care and responsibility. Being-in-the-world, then, is not a given but an excessive aspiration and uncertain hope for "an order where the enchainment to oneself involved in the present would be broken" namely for the freedom to step "out of oneself." Yet the aspiration is not exhausted simply in anxiously conceiving the *idea* of freedom, as a feature of self-consciousness, for the load of existence necessarily continues ad-nauseam. The "I," therefore, never ceases to aspire to that impossible escape from being. Unable to escape but, by the same token, able to hope to escape, the socialising consciousness takes the form of *hesitation,* rather than anxiety, *both* persevering in being *and* "pulling back" from engagement with existence.

Is it not this hesitation that is exemplified by Schlag's gesture of joining a conference entitled "Teaching from the Left" only to tell us that he cannot see how his teaching could accomplish anything other than discharge the *there is function* of the academic discipline of law, namely the production of an orthodoxy of political centrism, a comfortable zone for the neurotic subject? Does he not make his point by implicitly answering Gearey that, despite repetition and in spite of iteration, students and teachers of law ultimately *feel* themselves to be a "kind of human funnel," namely a medium that regulates the traffic between openness and closure in law's discipline, e.g., between the ten thousand cases and their re-interpretation, between legal formalism and legal realism, legal theory and anti-theory, legal dogmatism and legal rhetoric? But does not Schlag also *unmake* his melancholic point by showing up in our midst, by *presenting* himself to us, thus unintentionally showing that, because of the dreaded weariness of having to be law's "funnel" and, in his words, a generator of political centrism, he *still* hopes, *gratuitously*, to teach and be taught law from a perspective outside the centre, say, from the left? If so, is not his participation here akin to being caught in a political imbroglio of the left's desire for a better world, which is so impossibly infinite compared with the desire of conservative

politics?

Indeed, Schlag and Gearey represent two faces of the left's imbroglio. The former presents himself *here*, breathing law's dust amongst you, face-to-face, bewildered and exposed to the function that *is* law. The latter points *there*, in what was traditionally thought of as a neutral exteriority to law's historical function but which is now interiorised and thought of as historical contingency to be affirmed with the help of French philosophy. Schlag's *here I am!* breathing law's dust moderates the good conscience of Gearey's *there is light!*—deconstruction and South African critical legal studies, yes, but these are not detachable from imperial Paris and colonial London; anxiety, yes, but let us not believe that it can absolve us of the guilt attached to our already realized destiny as rich, educated, white, cultured "individuals" eating and breathing the spoils of freedom and others' colonial subjugation. Gearey's audacious *there*, in turn, reminds Schlag that his skepticism and melancholia do not really exhaust the weariness attached to the *there is function* to teaching the law. Weariness does not follow judgment about the pain of being nor is it simple indecisiveness, but rather flows immediately from the nature of being.

Responsibility is, in the words of Levinas, not Heidegger, an event of *anarchic right* that takes place *as if* outside the state; breathing and talking are connected and talking is, necessarily, a kind of promising, a pointing to a promised land, a divine violence that expels some as it offers refuge to others. Is breathing law's dust something simply to reflect on or does it engage a promise to ventilate? The task of the "left" today is to equally accommodate Schlag and Gearey, modesty and will, suffering and the desire to transcend it. The left is dead. Long live the left's imbroglio!