Schlagging off:^1 social responsibility and teaching critical thinking^2

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Umongo | Abstract


Many students wonder why they need to study legal philosophy; as far as they are concerned, legal philosophy has nothing to do with legal practice. The recent debate between Dennis Davis and Johan van der Walt focused on the meaning of ‘postmodernism’ and what we should be teaching students in legal philosophy courses. In this article, the author argues that students should study legal philosophy as a critical tool to enable them to operate as lawyers in a postmodern world. Our purpose should not be to

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^2^ My thanks to André van der Walt who first gave me the idea for the paper, read the final draft and made extremely helpful comments. All viewpoints and mistakes are my own.
make legal philosophers out of our students, but to give them the skills they
need to critically assess and understand their world.

1 Introduction

Like most South Africans, I have watched a lot of cricket during the past summer.
I am not talking only about the test series in Australia; I am also referring to what
may be called informal cricket – the kind of cricket played by families on
Christmas Day on the lawn. In this type of cricket, all the cousins and aunts and
uncles participate and everybody fields all the time. If you break a window, you
get runs – but you also get into trouble! Informal cricket can also be watched and
played on beaches. There you get a six for hitting the ball into the sea, but you
have to retrieve it yourself. And you’re out even if you get caught by a passerby!

Although the rules of informal cricket are basically the same as for the
professional game, it is played for different purposes. Its goal can be anything
from killing time to working off a heavy lunch. Many play informal cricket just
for the hell of it, but you can bet that informal players watch professional
cricketers with more interest and perhaps more knowledge of the game than those
of us who have never played any sort of cricket at all.

Why am I talking about cricket? Well, first of all, there are obvious links
between cricket and jurisprudence, but that has been explained so well by David
Fraser that I need not go into those again. No, I hope to indicate something less
obvious with reference to the recent debate (or quarrel?) between Dennis Davis
and Johan van der Walt.

2 The Davis-Van der Walt debate

In a recent article Dennis Davis reviewed Duncan Kennedy’s Critique of
Adjudication\(^4\) and specifically Kennedy’s view on politics and adjudication.\(^5\)
Davis’s review was fairly positive, although he had a number of critical comments
to make. I do not wish to deal with all of these here, but I would like to comment
on two fairly minor points that he raises (almost obiter dicta, as it were).

In the first place, Davis bemoans what he calls ‘the depressing turn to
postmodernism’\(^6\) in Kennedy’s book. This postmodernism, he says, is the same

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3 See D Fraser The Man in White is Always Right: Cricket and the Law (Institute of
Criminology Monograph Series No 4) (1993) vi: ‘Law is politics, sociology and literature,
and as I hope to show here, it is also cricket.’
5 D Davis ‘Duncan Kennedy’s A Critique of Adjudication: a challenge to the “business as
6 Davis op cit (n 5) at 710.
kind of depressing approach used by Johan van der Walt\(^7\) in his discussion of the
decision in *Southern Insurance Association v Bailey*.\(^8\) This is also the depressing
postmodernism apparently evident in Pierre Schlag’s work. In fact, Davis calls
Schlag ‘the archpostmodernist’ whose soul is bare and whose pockets are full.\(^9\)

However, all is not lost. Davis says if the book is read with Heller’s analysis of
law, it does not necessarily lead to a greater acceptance of postmodernism.\(^10\) For
this reason Davis asks, perhaps a bit mischievously, whether it is ‘too much to
hope that *Critique* will at least be included in courses in legal theory’.\(^11\)

Johan van der Walt reacted to Davis’s article and the whole question of the end
of politics.\(^12\) That is not the focus of this paper. What is interesting is Van der
Walt’s reaction to Davis’s two obiter remarks referred to above. Van der Walt is at
pains to point out that he does not regard himself as a postmodernist; he refers the
reader to his own criticism of Schlag and postmodernism in his doctoral thesis.\(^13\)
Van der Walt apparently regards himself as closer to ‘classical modernist (anti-)
aesthetics: the insane pursuit of an unrepresentable reality’.\(^14\) He does nothing to
hide his scorn for postmodernists, because they think they ‘are irredeemably fated
to play out (their) language games, (they) are stuck within (their) own normative
practices’.\(^15\) There is more. Postmodernists are apparently resigned to ‘an eclectic
play (and capitalist re-production and consumption) of available styles’, which
provides an excuse for ‘capitalist self-satisfaction’. In Van der Walt’s words:

Post-modernists play around in a fake Telly Tubby world in which everything is
possible and therefore nothing (significant) is possible. They no longer have the
disruptive unconsciousness to dream.\(^16\)

Van der Walt’s lament is that ‘humanity is fast going to an existential hell in a
nihilistic handcart’.\(^17\) He argues more specifically that Schlag’s theories lack a
sense of responsibility because they show no regard for ‘the timely and
timeliness’\(^18\) – and that is the essence of Van der Walt’s objections against Schlag:

\(^7\) JWG Van der Walt ‘The language of jurisprudence from Hobbes to Derrida (the latter’s

\(^8\) *Southern Insurance Association v Bailey* NO 1984 (1) SA 98 (A).

\(^9\) Davis op cit (n 5) at 711 fn 58. Davis is quoting an unpublished paper by Peter Goodrich.

\(^10\) Davis op cit (n 5) at 712. I would suggest that Hutchinson provides a postmodern way out
of the apparent problem Davis sees here – see AC Hutchinson ‘Inessentially speaking (is
there politics after postmodernism?)’ 1991 *Michigan LR* 1549–1573. Unfortunately, Davis
does not want a postmodern solution.

\(^11\) Davis op cit (n 5) at 712.

\(^12\) Van der Walt ‘The quest for the impossible, the beginning of politics: a reply to Dennis
Davis’ (2001) *SALJ* 463–472.

\(^13\) Van der Walt op cit (n 5) at 465. See also Van der Walt *The Twilight of Legal Subjectivity:*

\(^14\) Van der Walt op cit (n 5) at 465.

\(^15\) Van der Walt op cit (n 5) at 464.

\(^16\) Van der Walt op cit (n 5) at 465–466.

\(^17\) See Hutchinson op cit (n 10) at 1150.

\(^18\) Van der Walt op cit (n 13) at 429.
This is why his articles, despite a depth of analysis rarely matched in contemporary legal theoretical writing, remain just as frivolous and pointless as those of the critical legal Sartrians he criticizes, Boyle and Kennedy.\textsuperscript{19}

But Van der Walt is also convinced that our current four-year LLB produces exactly this kind of postmodern lawyer: one whose soul is bare, but whose pockets will soon be full.\textsuperscript{20} The purpose of the new LLB is ‘to train for hierarchy’. Van der Walt says this explains why Kennedy’s book will never be prescribed for courses in legal theory. Van der Walt states that he used to prescribe two articles by Kennedy\textsuperscript{21} in the good old days of the five-year LLB. I find this very strange. If you do not want to produce postmodernist lawyers, why prescribe Kennedy’s book – or any of his articles? I thought that Kennedy, Schlag and Boyle were irresponsible, frivolous and pointless?

I would suggest that Van der Walt’s reading of Schlag and postmodernism is facile and superficial, for two reasons: in the first place the way in which postmodernism is defined determines the criticism levelled at Schlag, but a different definition might nullify this criticism. In the second place the claim that postmodernists like Schlag encourage a ‘business as usual’ approach needs to be investigated.

\textsuperscript{19} Van der Walt op cit (n 13) at 430.
\textsuperscript{20} Van der Walt op cit (n 12) at 464.
\textsuperscript{21} Kennedy ‘The structure of Blackstone’s Commentaries’ (1979) \textit{Buffalo LR} 205; Kennedy ‘Form and substance in private-law adjudication’ (1976) \textit{Harvard LR} 1685.
3 What is postmodernism anyway?

I do not intend to argue that Van der Walt is wrong or that he is a postmodernist but is yet to realise it. 'That would be an interesting but useless exercise. The point is, as Joe Singer said, who gets to decide. It seems to me that Van der Walt uses a very specific definition of postmodernism – one probably derived from Baudrillard's idea of 'conspicuous consumerism'. But not all definitions are derived from art theory and aesthetics, and others may therefore be more appropriate.

The term 'postmodernism' was originally used to characterise the rejection of modernist aesthetics in the field of architecture and art. The term is also used to indicate a new attitude to intellectual thought and theories of knowledge, science and law.\(^ {22}\) In law and legal theory 'postmodernism signals the movement away from interpretation premised upon the belief in universal truths, core essences, or foundational theories'.\(^ {23}\) Postmodernism in law generally represents a resistance to conceptualism and the 'grand systems' that are characteristic of modern liberal thinking. As such, it is an approach that follows from and reacts to modernist theories and practices. Modernism can be defined as follows:

Legal modernism, as distinguished from artistic modernism, is a term used to describe the intellectual position of jurisprudential writers who believed a lone author could discover 'right answers' for even the most difficult and controversial problems in law. They believe that they can discover the 'right answers' or 'correct interpretation' by applying a distinctive legal method based on deduction, analogy, precedent, interpretation, social policy, institutional analysis, history, sociology, economics and scientific method.\(^ {24}\)

It is virtually impossible to define postmodernism once and for all. Although postmodern writers share a number of themes such as incredulity towards metanarratives, it is simplistic to throw them all together. However, it is possible to indicate the themes common to postmodern legal writing. Singer summarises the main claims of Critical legal studies (CLS) in the following three statements:

First, we have demonstrated . . . that law varies according to time and place, and that this historical and social contingency applies to legal reasoning, legal rules, and governmental and social institutions. Second, we have shown that legal reasoning\(^ {25}\) is indeterminate and contradictory.

Third, we have argued that law is not neutral: It is a mechanism for creating and legitimating configurations of economic and political power.\(^ {26}\)

\(^ {22}\) Minda Postmodern Legal Movements: Law and Jurisprudence at Century's End (1995) 260 fn 4 points out that 'artistic modernism fails to capture the meaning of legal modernism because legal moderns conceive law as a political rather than artistic enterprise.'

\(^ {23}\) Minda op cit (n 22) 3.

\(^ {24}\) Minda op cit (n 22) 5.

\(^ {25}\) Note that the critique is aimed at the indeterminacy of legal reasoning or doctrine and not the indeterminacy of law, as Davis op cit (n 5) at 699 fn 12 seems to think.

This does not mean that all CLS scholars agree on the meaning of these claims or that they all address all the themes, but it does give an indication of how these postmodern legal writers approach the law and legal reasoning.

The definition given above is very different from the ones supplied by Davis and Van der Walt. In fact, it facilitates the argument that both these writers are, to a greater or lesser degree, postmodernists. But that is not the point. The point is that the criticism against postmodernism only works when a specific definition of postmodernism is used. Given a different definition the criticism is less convincing.

4 Nihilism (or ‘business as usual’)

Van der Walt and Davis’s criticism that postmodernism leads to nihilism (or ‘business as usual’ or ‘anything goes’) is familiar to proponents of CLS. Joe Singer has addressed this criticism quite satisfactorily\(^{27}\) and it is enough to summarise his arguments briefly.

Singer states that nihilism, as a theory of knowledge, claims that it is impossible to say anything true about the world and about law. As a theory of morality it claims that because we cannot know what to do, it doesn’t matter what we do.\(^{28}\) The basic claim of CLS (that law is a kind of politics) often leads to claims that CLS embraces nihilism in this guise. That is what Van der Walt and Davis mean when they say Schlag is someone with an empty soul. Remember, Singer claims that ‘the absence of determinacy, objectivity and neutrality does not condemn us to indifference or arbitrariness’.\(^{29}\)

Singer’s point is that this type of criticism proceeds from the assumption that you either have a moral or rational basis for law, or you have tyranny; you either have objectivity or boundless subjectivity; and either neutrality or frivolous self-interest. It remains caught within a binary system of necessarily opposing pairs of ideas. However, these are not the only alternatives.

When we give up the idea that the legal system has a foundation, a ‘rational basis’, we are not left with nothing. We are left with ourselves, and we are not nothing.\(^{30}\)

Singer therefore believes that critical theory can do what traditional theory cannot. Critical theory can free us from the idea that our current legal theories and practices are natural, and this makes it possible to create a community of shared values that can fashion new theories and new practices.

Postmodernism simply dares people to walk the highwire of life without a metaphysical safety net for the occasional loss of balance or nerve.\(^{31}\)

In conclusion, I do not believe that postmodernism is nihilistic. Nor is the

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\(^{27}\) Singer op cit (n 26) at 1–70.

\(^{28}\) Singer op cit (n 26) at 4.

\(^{29}\) Singer op cit (n 26) at 8.

\(^{30}\) Singer op cit (n 26) at 66.

\(^{31}\) Hutchinson op cit (n 10) at 1552.
purpose of their criticism merely to be critical. It is aimed at showing how limits are set and possibilities established. In other words, it shows how the law works.  

5 Teaching critical thinking

In the South African context the teaching of critical postmodern thinking to law students is not only possible, it is also necessary. In a context where constitutional adjudication seems to operate on the basis of consensus politics and within a conceptualist framework, it is part of a law teacher’s social responsibility to teach students to question certainties. Law students live in a postmodern world and for them the facile repudiation of this world is impossible. They have to deal with the breakdown in modernist intellectual practices. Postmodernism is not responsible for this breakdown – it merely reflects the breakdown. On the other hand, it does no good to expect students to be able to read Kennedy’s *Critique of Adjudication*. Despite my arguments in favour of postmodernism, I regard Kennedy’s work as simply too inaccessible and difficult to relate to the South African context. This brings me back to cricket.

It is not too far-fetched to argue that students who study legal theory are like the informal cricketers I have mentioned at the beginning. They do not play the game of legal theory in order to make the national side of philosophers. They play the game to gain a better understanding of the law and their role in the law, and sometimes they play simply to get their degrees. You do not teach your 10-year-old niece to bat by having Allan Donald bowl to her. In the same way you do not teach students (most of whom have never even heard of philosophy) about South African legal theory by expecting them to read Kennedy, but the ‘archpostmodernist’ Schlag’s work is eminently accessible. His cynicism and irony will do more to undermine certainty and stimulate debate than any number of the ‘heavies’ of current legal philosophy. Coupled with an emphasis on South African case law, I believe the teaching of Schlag’s work will ultimately help us to meet our responsibilities as teachers of the law.

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32 Minda op cit (n 22) at 240.
33 For one example of this, see the recent debates about the ‘correctness’ of the Bible in the newspaper *Beeld*.
34 Minda op cit (n 22) at 261 n 12.