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Smoking in Bed

Tamara Piety

In the morning when you rise unwillingly, let this thought be present—I am rising to the work of a human being. Why then am I dissatisfied if I am going to do the things for which I exist and for which I was brought into the world? Or have I been made for this, to lie in the bedclothes and keep myself warm?[1]

—Marcus Aurelius

Watch out you might get what you're after
Cool babies strange but not a stranger
I'm an ordinary guy
Burning down the house.[2]

—Talking Heads

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TAMARA R. PIETY*

In *The Enchantment of Reason*,[3] Pierre Schlag appears to indict what might be called a pathological over-reliance on Reason. We ask too much of reason, he claims, and mistake Reason for Right. Moreover, he seems to say we should stop fooling ourselves that advocating progressive legal change in law review articles is the same as advancing progressive legal change. One might go so far as to think that he is suggesting we should stop writing law review articles! Is the man mad?! Isn't he biting the hand that feeds him?! Doesn't he know that this sort of talk could get us all thrown out of work?!

Well, not so fast. If you read Schlag as advocating abandoning the project of writing law review articles, this is advice he is pretty clearly not inclined to take himself. While it is *possible* that he harbors some sort of mania along the lines of *après moi le déluge*, I think it hardly

* Assistant Professor, University of Tulsa College of Law. Thanks to my colleagues Barbara Bucholtz and Madeleine Plasencia who, on very short notice, read drafts of this piece and made thoughtful comments at the crucial early stages. Thanks also to Brian Foley, M.G. Piety, Patricia Piety, Robert Chapman, Michael Fischl, Joanne Conaghan, Gerald Torres, and Peter Goodrich for their readings, suggestions, and encouraging words; and to Pierre Schlag for his generosity and sense of humor. As usual, any shortcomings that remain in this piece are wholly mine.

1. THE MEDITATIONS OF MARCUS AURELIUS 77-78 (adapted from translation by George Long 1993) [hereinafter AURELIUS]. I did think that perhaps I should use a more "scholarly" source for this quote than a pocket meditation book. I sought out another source but found it unsatisfactory as it lacked the lyricism of this version. Judge for yourself: "At day's first light have in readiness, against the disinclination to leave your bed, the thought that 'I am rising for the work of man.'" MARCUS AURELIUS, MEDITATIONS 77 (Maxwell Staniforth trans., 1996).

2. TALKING HEADS, *Burning Down the House*, *on* SPEAKING IN TONGUES (WEA/Warner Bros. 1983).

3. PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998) [hereinafter ENCHANTMENT].

likely. To the contrary, I find his work marvelously grounded, refreshingly real and clear-eyed, and, for the most part, mercifully free of the impenetrable language that mars too many such works.[4] No, grandiosity is not his problem. Indeed, one of his principal complaints is of the tendency to grandiose thinking among legal academics. So what is it that inspires this apparently self-destructive theme of his?

There are many theories. As Peter Goodrich points out, some attribute Schlag's point of view to ignorance,[5] others to something verging on mania.[6] But no matter the reason, Schlag appears to arouse strong emotions in many. These critics find his work alarming, threatening, nihilistic, and/or dangerous.[7] Because I wondered why that was, I approached this review of Schlag's work, focusing primarily on *The Enchantment of Reason*, as an opportunity to explore what was so threatening about his work. Here, I offer my views about both why I think many find Schlag's work threatening and why I find it liberating, as well as tamer than its critics claim it to be.

In this essay I argue that Schlag's work is neither so rejecting of Reason,[8] writ large, nor of normative thought, as many of his critics seem to think. Rather, it is (ironically) informed with much of the same sensibility that he appears to critique in *The Enchantment of Reason*.[9] What the book represents instead is an exposé of the empty rituals or false pieties (if I may say so) of much legal scholarship. Schlag is the boy crying out that the emperor has no clothes. Yet even at this, his message is not as subversive as it might be. He does not challenge nearly as much as he might that it is wrong, disingenuous, or just plain fantasy in the academy. Instead, he is rather elliptical. His challenge is still within conventional boundaries, dangerous only to those so obsessed with Reason that, like the policemen in *The Purloined Letter*,[10]

4. When I say "such works," I mean law review articles.

5. Peter Goodrich, *Pierre the Anomalist: An Epistemeology of the Legal Closet*, 57 U. MIAMI L. REV. 791, 799 (2003) (referring to Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187 (1993) (book review)).

6. *Id.* at 804.

7. *Id.* at 799-806.

8. Throughout this essay I will capitalize Reason to symbolize the Enlightenment vision of reason that I take is the principal target of Schlag's argument in *The Enchantment of Reason*. The word reason used in other ways will not be capitalized.

Other candidates are values. *See* Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219, 225 (1994) ("'[V]alues' are the secular equivalent of God—they are the continuation of theology by other means."). From one perspective, Reason is just another "value." However, I take Schlag's point in *The Enchantment of Reason* to be that Reason is a sort of "meta-value" by which all other statements of value are tested.

9. Many others in this Symposium make the same observation.

10. EDGAR ALLAN POE, *The Purloined Letter*, *in* EDGAR ALLAN POE: TALES AND SKETCHES 972 (Thomas Ollive Mabbott ed., 2000).

they cannot imagine finding the object of their desire located in some other place.

There are, however, a number of complications raised by this assertion. Is Schlag right in his description of the object of desire for most legal thinkers as "justice"?[11] And even if he is right, do most legal thinkers *know* what they want? That is, are they mistaken about what they want? I suggest that perhaps academics, just like so many other people, may not know what they want. To the extent that they want what Schlag claims they do, to make meaningful contributions to the law, it is perfectly understandable why Schlag outrages so many. Schlag appears to claim that not only is it not possible to make a contribution in the manner in which law professors have traditionally attempted to do so, but that it is intellectually dishonest to continue to pretend otherwise. Even if one were to assume that most academics really want rather less lofty goals than to change law, goals such as tenure and so forth, I suspect few are flattered by the picture of the academic endeavor that Schlag presents. The strength of the reaction though, suggests that there is more than a grain of truth in the picture Schlag paints. Painful truths, even half-truths, often inspire heated denials.

I propose a way out of that pain of denial and confrontation that Schlag's work does not clearly advocate but nevertheless makes possible. A way out where we stop making "sense" of law, stop talking so much, and do more. I think that what most really want is a sense of purpose. (Doesn't everyone, for that matter?) It is this sense of purpose that Schlag's thesis apparently attacks. I propose, however, that Schlag's work actually makes seeking a sense of purpose in a different place intellectually respectable. It frees those who care to look along a different grid to find that the object of their desire may be right under their noses. These are, perhaps, presumptuous assumptions.

There has got to be a way[12]

"The Question"

In the second century, Roman Emperor and philosopher Marcus Aurelius observed that one should not hesitate to rise to "the work of a human being."[13] The work of a human being, he argued, did not consist of "l[ying] in the bedclothes"[14] and keeping oneself warm—no matter how pleasant that option might seem. In this and his other meditations,

11. ENCHANTMENT, *supra* note 3, at 9.
12. *See* TALKING HEADS, *supra* note 2.
13. AURELIUS, *supra* note 1, at 77.
14. *Id.*

Aurelius was wrestling with the problem of how to live, the meaning of life, how to achieve peace and happiness in the midst of a reality for which a purpose, if any, seemed remote. Of course, for human beings, never to get out of bed, if it were an option, would not make for much of a life. But it is in getting out of bed each morning that the "trouble" begins.[15] What to do? What *is* "the work of a human being?"

When presented with the question of whether the purpose of one's life is to lie in bed and keep warm, it seems obvious that simply existing does not make a life. Living consists of taking action. But the rub is—what action? Life appears to require action, choices,[16] steps laid out one after the other. Even a failure to act is, in a manner of speaking, an action. How can we be sure that we are taking the right action? In this question is revealed a fundamental human dilemma—the need to act in the face of the absolute certainty that some actions will be wrong,[17] and the impossibility of ever knowing with certainty beforehand which is which. One response to this dilemma, the absence of certainty combined with an intense desire for certainty, is paralysis—lying in the bedclothes.

It seems a good bet that the vast part of humanity has never had to waste too much time on this question because the exigencies of survival have provided the answer as quickly as the question appeared. Rising above day-to-day subsistence, however, results in some dissatisfaction with mere survival as an end in itself. Historically, it seems the most obvious source of guidance of an answer to the question of "what are we here for?" was provided by religion. But in the last century we have lived in a culture in which the principal source of legitimate guidance has been, and continues to be, Reason. This is not really though a new development. Aurelius himself chose Reason.[18] "[W]hat," he wrote, "is

15. Well. All right. A goodly number of us manage to get into trouble getting *into* bed as well. But that is another story.

16. To say that life consists of choices or actions is not to say that those choices necessarily have the significance with which they are invested by some thinkers. There is, I think, no denying that we are not as "free" in our choices as we like to believe ourselves to be. That does not relieve us, however, of the responsibility (necessity?) of choosing or acting. It is interesting to note that this is a question that appeared to have preoccupied William James and for which he received some comfort in the work of French philosopher Charles Renouvier. *See* LOUIS MENAND, THE METAPHYSICAL CLUB 218-20 (2001).

17. This is "wrong" however you care to define it—personally wrong, morally wrong, practically wrong, instrumentally wrong, etc. But perhaps I would do better to just say, "knowing that someday you'll regret some of these actions."

18. This is paradoxical since much of the advice contained in *Meditations* can be summarized it seems by B.B. King: "Better not look down if you want to keep on flying. Put the hammer down, keep it full speed ahead." B.B. KING, *Better Not Look Down, on* LUCILLE AND FRIENDS (MCA Records 1995). In other words, in *Meditations* Aurelius seems to be telling the reader not to think too much. But it seems he does not take his own advice. His own observations are obviously arrived at through a fair amount of reflection. It is probably more accurate to say,

more agreeable than wisdom itself, when you think of the security and happy course of all things which *depend* on the faculty of understanding and knowledge?"[19] Here surely was someone for whom the "fear of losing reason [was] a fear of loss of control."[20]

In *The Enchantment of Reason*, Pierre Schlag discusses modern devotees of Reason writing about law[21] who similarly ask Reason to do the work of carrying us to the place of security and "the happy course of all things." Of course, even mainstream legal academics don't *really* think Reason can do that much work. Or do they? Schlag makes a brilliant and convincing argument that they really *do* but that this belief is not founded on much more than a sort of blind faith or magical thinking that its adherents cling to tenaciously, not only because they do not want to let go, but because they dare not. Therefore, Schlag's book can be seen as a fundamental assault on the basic structure of American law, which is, to Reason's adherents as identified by Schlag, self-evidently co-extensive with normative constructs such as "truth" and "justice" that Schlag claims are mere simulacra.[22] From this perspective Schlag is "burning down the house," that is, destroying the grid everyone is working from and depending upon.[23]

Whether or not you agree with my claim about the nature of the object of desire, what Schlag does is convincingly illustrate the difficulty of breaking out of Reason's realm to imagine any other way of approaching law. Schlag himself illustrates this difficulty in operating from within the same closed system by using reason to indict Reason.[24]

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though, that Aurelius advises not spending time thinking the *wrong* way, and a lot of time thinking the *right* way.

19. AURELIUS, *supra* note 1, at 87 (emphasis added).

20. ENCHANTMENT, *supra* note 3, at 21. Of course, as a Stoic, Marcus Aurelius may have been speaking metaphorically. That is, if one controlled one's thoughts and reactions to the movements of others and the events of the outside world, then one could retain inner "security" in the midst of chaos. Indeed, this reading is probably largely correct. That reading is in something of a conflict, however, with his injunction in the earlier passage to go out and do "the work of a human being."

21. Although Schlag does not claim to limit his critique to academics, they (we?) seem to be the principal offenders. I am not convinced that what he says applies in quite the same way to practicing lawyers (including judges), but that is another paper. In this discussion, I will deal with the work as a communication to academics.

22. ENCHANTMENT, *supra* note 3, at 8.

23. Certainly, this involves all the academics that Schlag refers to in *The Enchantment of Reason*. *See generally* ENCHANTMENT, *supra* note 3. These academics appear to be working from a set of assumptions that Schlag challenges. Whether or not this set of assumptions is the same one from which most practicing lawyers work is another question. I am not sure that practicing lawyers and academics share a common grid to the degree Schlag suggests they do.

24. There may be a corrollary here with Gödel's proof. *See* ERNEST NAGEL ET AL., GÖDEL'S PROOF (2001). Gödel revealed a paradox that any system contains the tools for its own undermining. Or, as the authors put it, "[i]t does mean that the resources of the human intellect have not been, and cannot be, fully formalized . . . ." *Id.* at 112.

This matters because the focus on the unreasonableness of Reason diverts from the claim that the source of *ennui* and despair in academia is not so much a failure or enchantment of Reason but the dissonance between the rhetoric and reality.[25] Even on Reason's own terms there are many articles of faith in the law as a practice or an institution[26] that seem to me a failure of recognition, not reason.

I propose, however, that Schlag's observations may not be "burning down the house," but simply opening the door to a different type of commitment to legal thought and action, one that does not demand as much consistency as heart, not so much rigor as vigor. While that may seem to some like a prescription for disaster because it threatens to cut the rope that ties law to a rational anchor, it is merely a call to break the spell of certainty that Reason seems to wield.[27] Nonetheless, there is little cause for the anxious to be overly concerned because, to paraphrase Schlag, *promoting* legal change is not the same as *advancing* it.

Close enough but not too far, Maybe you know where you are[28]

Rules of Reason

Before I go any further with these observations, it is worthwhile to set out a few definitions. The difficulty of talking about "Reason" is that everyone thinks that they know what it is and more particulars are needed to uncover the gaping holes in miscommunication when all sides claim to be allied with Reason. Moreover, Reason is almost invariably employed by a speaker to signify what is "right" about his own argument and to encompass all that his opponent's argument is not.

This tendency is further exacerbated by the fact that "reason" has many different meanings—all of which are related to each other and overlapping to some degree, but which nevertheless convey slightly different things. There is "reason" as the "because," the cause of some-

25. There are all sorts of problems with making this claim related to the ontological and epistemological problems. Let me just leave it here by saying that I believe people *experience* a sense of disconnect between their perceptions of the meaning of the rhetoric of law and the law as it is acted out. This is an old problem. To some extent, questions going to foundation and frame represent a detour from the project of describing that dissonance.

26. As with so many other terms in this essay it is not clear what "law" is. Is it a practice? An institution? A society? A bureaucracy? A thing? A process? A way of life? And why can it not be all these things at once, at least a little bit?

27. I think that this would correspond to what Sabina Lovibond calls the "counter-teleological" position. *See* SABINA LOVIBOND, ETHICAL FORMATION 183 (2002) ("[T]he main function performed by counter teleological thinking—albeit under the misleading banner of hostility to the universal as such—may be to give expression to an unexceptional sense of the *limits* marked out for 'reason' in the lives of embodied creatures."). I think this passage may represent a restatement of Schlag's thesis in *The Enchantment of Reason*.

28. *See* TALKING HEADS, *supra* note 2.

thing. (Note that this meaning is itself the product of a particular ontological orientation that sees a "because" or a "cause" that can be uncovered for everything that exists or can be imagined.)[29] Then there is "reason" as purposive, that is, something's meaning. There is "reason" as "logic" or cognitive processes that are typically (and erroneously I think) envisioned as something different than "emotion," "passion," and so forth.[30] This definition is the principal meaning of reason as it is used in Schlag's book. But he also discusses "reason" as "moderation," as in "the soul of reason." "Reason" in this sense is a temperament or state of mind that is guided by no extremes. Finally, there is "reason" as "sanity" or "normalcy," which stands in contrast to mental functioning marking one out as an outsider: peculiar, delusional, and disordered. In other words, to be tautological about it—"insane."

It is easy to get these definitions confused. But all these definitions are important to Schlag's enterprise. Although Schlag's primary targets in *The Enchantment of Reason* seem to be reason as "logic" and reason as "moderation," the others are implicated as well. He indicts Reason as an inadequate source of *a* reason (i.e., purpose/justification) for actions in the law—either the law in action or academic writing. And he attributes to academics a reason for being, a reason for running the mazes that may be mistaken, or at least significantly impact his evaluation and diagnosis of the current situation.[31] Moreover, he may be putting too much weight, attributing too much causal connection, between the situation as he sees it and the spell he claims is cast by Reason.

Shakedown dreams walking in broad daylight[32]

Obsession with Reason

The degree of danger in Schlag's collected works, including *The Enchantment of Reason*, depends on whether or not you think that this structure, the grid, is largely a house of cards. If, as Schlag has argued elsewhere, the law is dominated by aesthetics that have pretensions to

29. For more discussion of this point, see ENCHANTMENT, *supra* note 3, at 53-58. Also, note how this multiplicity of definitions is reflected in the parallel Greek work *logos*, of which "logic" is a derivative. *Logos* is translated as *both* "reason" and as "speech." *See* AM. HERITAGE DICTIONARY 498 (4th ed. 2001) (referring to the definitions of "logic" and "-logy"). Note this is also the source of the word "logo" meaning "sign" or "symbol" in a commercial context. *Id.*

30. For arguments that this traditional dichotomy is erroneous, see for example, AARON BEN-ZE'EV, THE SUBTLETY OF EMOTIONS (2000), and ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994).

31. *See, e.g.*, ENCHANTMENT, *supra* note 3, at 9, 36 (describing goals and pursuits of legal academics or intellectuals).

32. *See* TALKING HEADS, *supra* note 2.

offering right answers,[33] it seems it is *because* of these aesthetics' pretensions to "rightness." This is consistent with a construction of the world as one where the reason for this or that phenomena can be uncovered. Reason will find "the reason." If there are true reasons and untrue reasons, then it stands to reason that rightness matters. Rightness *is* Reason and Reason is right.

To a large extent the legitimacy of law rests on a claim to rightness. Taken in conjunction with the fact that the operation of law demands closure or resolution of all questions brought before a court,[34] the legitimacy of law resting on the claim to rightness seems to ensure a particular urgency for certainty on the part of those called to make decisions. Indeed, as Schlag and others[35] have persuasively set out, rightness is often the *raison d'être* of those writing about law; they look for it everywhere.

One example of this tendency, and it is only one of perhaps thousands of examples which could be offered (we all have our favorites), is the attempt in the advisory committee notes to the Federal Rules of Evidence to rationalize all the various exceptions to the hearsay rule.[36] An aspect of the Rules of Evidence familiar to all those teaching them is the tension between the attempt to simultaneously create a bright line rule and to accommodate various categories of exceptions, both those arising from anticipated circumstances and those which have not yet been observed.[37] The hearsay rule and its exceptions present a perfect example of this tension.

The received wisdom is that hearsay should generally *not* be admitted because it is unreliable.[38] Thus, the advisory committee notes on the hearsay exceptions reflect the attempt by that body to render the excep-

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33. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1107 (2002) [hereinafter Schlag, *Aesthetics*]. He actually seems to give all of the four aesthetics he discusses, the grid aesthetic, the energy aesthetic, the perspectivist aesthetic, and the dissociative aesthetic, equal roles. *Id.* Because he notes that the dissociative perspective is not one that can easily be reproduced in a legal opinion, *id.* at 1099, however, and that the perspectivist aesthetic's resistance to "an" answer must give way to a decision, *id.* at 1089, it seems fair to say that the first two aesthetics dominate American law.

34. This feature, the need to make a decision, even if you do not feel there is an adequate basis for one, explains much of the attractiveness of judicial evasions of this problem embodied in concepts such as abstention, prudence, standing, and jurisdiction—to name only a few.

35. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} 364 (1997) ("[W]e learn rightness as a way to deal with despair . . . .").

36. *See* FED. R. EVID. 801-807 and accompanying advisory committee notes.

37. *See, e.g.*, FED. R. EVID. 807 (defining the residual exception).

38. *See, e.g.*, RONALD J. ALLEN ET AL., EVIDENCE 464-66 (3rd ed. 2002); ERIC GREEN ET AL., PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 405-07 (3rd ed. 2000); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 124-27 (4th ed. 2000) (describing hearsay risks and reasons to exclude).

tions consistent with this understanding by claiming for these various exceptions indicia of reliability that purport to justify their existence. But the truth is that some of the exceptions appear to be simply accretions of the past practice for which no rationalization of reliability can be found.

For example, in explaining why Federal Rule of Evidence 801 (defining "hearsay") requires a "statement," and why the definition of "statement" will most often *not* include non-verbal conduct unless it is intended as an assertion (even though such conduct may suffer from the same sorts of infirmities that supposedly make hearsay unreliable) the committee notes offer the following observation: "No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct."[39] This is simply a bald assertion offered without any attempt to support why that might be so to those who do not agree that it is self-evidently true. But in other cases the committee apparently found itself incapable of overlooking the reliability problem and simply had to throw in the towel. For example, no rational "harmonization" is offered for why admissions are not included in the definition of "hearsay." The committee simply states that "[no] guarantee of trustworthiness is required in the case of an admission."[40] Ultimately, as anyone teaching evidence can attest, the attempt to prove a rational basis for all of the hearsay exceptions *does* prove "more than the institutional materials can bear."[41]

Schlag's account is corroborated by the fact that this preoccupation with "finding" Reason as "the reason" for the law is evident in so many places within the law. Less clear is why scholars persist in so many contexts in which such attempts seem at best unconvincing and at worst disingenuous. According to Schlag, one of the reasons legal actors cling to a grid that claims to rationalize their enterprise when reason itself demonstrates otherwise is that "it is less than pleasant to actually consider the emptiness of a discipline when it is one's own."[42] Whether we call this willful blindness, self-deception, or denial—it sounds like the product of an obsession with rightness.

> An obsessed person lives in a totalitarian world, constructed on a system of rules, values, and agreements, which he regards as absolute. That is why he can never admit the slightest breath of criticism, since it might show him that there was the possibility of a loophole

39. FED. R. EVID. 801 advisory committee's note. Many other examples of this sort of assessment of reliability of a particular type of hearsay can be found in the advisory committee notes to Rules 803 and 804.

40. *Id.* (referring to subsection (d)(2)).

41. ENCHANTMENT, *supra* note 3, at 116.

42. *Id.* at 10-11.

> existing in the system. This would call in question its entire *raison d'être*, and the whole edifice would collapse in ruins. No obsession can justify its continued existence *except by perpetual and repeated self-affirmation.*[43]

If one is obsessed with rightness, then what Schlag has to say is profoundly threatening to the extent it exposes that Reason is not always right.[44]

Fightin' fire with fire[45]

"Rigor" Mortis?

It is possible, however, to critique the critique of reason by claiming that Schlag himself falls prey to the enchantment. Consistent with his observation that heretics may be more "passionate in their beliefs"[46] than believers, Schlag's text suggests he may harbor a certain romanticism about Reason that leads him to indict Reason as unreasonable. The giveaway may be on found on the last two pages of *The Enchantment of Reason*:

> What is called reason these days is very often not. Very often "reason" is little more than a pleasant name for faith, dogma, prejudice, and company. This rather *sinister* development comes from precisely the partisans of reason—those who claim to be its champions.[47]

"Sinister"? Well, okay, maybe as to "prejudice," although one person's "prejudice" is another person's "tradition." There is a little deck stacking there. But "faith"? Having made a convincing argument that faith in Reason has a lot in common with faiths of other kinds,[48] it seems that Schlag is saying that we ought to be more "reasonable" about Reason.

Of course, this is precisely what we cannot do because reason cannot do the work that we ask of Reason. Nevertheless, it seems that Schlag thinks we can. And there are lots of little clues scattered throughout *The Enchantment of Reason* (and other works) that he thinks we can do so in spite of his impressive assault on the unreasonableness of Reason. Perhaps this is because Schlag, like the rest of us, is on the "inside," so any other criteria are simply unimaginable. Whatever the reason, it is there when Schlag writes of the "intellectual dormancy" of

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43. SIMONE DE BEAUVOIR, THE PRIME OF LIFE 79 (Peter Green trans., 1962) (second emphasis added).

44. *See also* Goodrich, *supra* note 5.

45. *See* TALKING HEADS, *supra* note 2.

46. ENCHANTMENT, *supra* note 3, at 142.

47. *Id.* at 144-45 (emphasis added).

48. *Id.* at 91.

neopragmatism.[49] It appears in the rebuke that an argument is "underthought."[50] The suspicion that Schlag harbors some lingering attachment to Reason himself creeps in at the beginning of *The Enchantment of Reason* when he writes that "academic disciplines *go wrong*,"[51] and seems confirmed by the time one reaches one of the last observations in the book—"Shallowness is particularly troublesome for those intellectuals whose ambition is to perfect thinking."[52] Go wrong how? What is right? More "perfect" thinking?

Alas, herein lies one of the difficulties some readers have with Schlag's work. The ambition of some academics is not to perfect "thinking" but to perfect the law, or perhaps the country, or maybe even the world! Of course, the observation that perfection in any endeavor is impossible is not the same as saying it is not worth trying to achieve. But I think it is fair to say that perfecting thinking and perfecting the law or the world or even some little corner of it (of course to your own notions of "perfection") are rather different things.

If it is perfecting thinking that one is concerned with, then one might be interested in "savor[ing] the encounter of reason with incommensurability as an interesting intellectual problem . . . ."[53] However, if you are trying to do something else altogether, then this incommensurability problem may be an annoying obstacle that you feel you must sweep under the rug on the way to a convincing argument. In the latter case you may not be very concerned about the intellectual sleight of hand or metaphysical leaps if it gets you where you want to go. It may also be that one should not take all academics at their word when they claim to want to advance progressive legal change, justice, or to perfect thinking. It may be that they simply want tenure, television appearances, acclaim, or public office, or maybe just speaking fees. Critical reflexivity may not get them where they want to go if the wider culture, or at least the culture bestowing these rewards, does not reward critical reflexivity.

However, Schlag knows all this. Indeed, he writes, "[c]ritical reflexivity is *not* invariably or even intrinsically liberating or empancipatory. On the contrary, pushed to its limits, it is single-minded and formalistic."[54] Exactly. And critical reflexivity can not tell you when you are onto a good thing versus a bad one,[55] or in a "good prac-

49. *Id.* at 17.
50. *Id.* at 16.
51. *Id.* at 2 (emphasis added).
52. *Id.* at 144.
53. *Id.* at 42.
54. *Id.* at 66.
55. *Id.* at 65.

tice" versus a "bad one." So? Why so hard on the proponents of Reason? After all, they are just trying to get somewhere. For them, reason is the means to the end. Yet Schlag suggests they want more. The proponents of Reason, he claims, want to have their cake and eat it too.[56] He indicts this fantasy and says that the pretense that one can have it both ways is what keeps academics focusing on the wrong questions. This can lead to the question, "Why is critical reflexivity so unrewarded?" Well, it could be because if belief in Reason is a faith that we believe can answer "the big question," and that belief simultaneously rejects faith as an answer, critical reflexivity will expose the very thing rejected by the faithful—the inadequacy of their "answer" by the dictates of their faith. In other words, Schlag uses reason to expose unreason in Reason.[57]

By using reason to expose unreason, however, Schlag too arguably asks the "wrong" questions, making the case of "what is a legal academic to do?" seem more desperate than it is. The questions he appears to think are the ones worth pursuing seem to me to be precisely the ones that can not be answered. At least not with any more reliability than the questions he claims are the wrong questions. Moreover, the difference between those questions that Schlag claims are the "wrong" questions and the ones he claims are the "right" questions is that the "wrong" ones are a prelude to or a call to action (even if no real action follows). That is, even if "advocating 'progressive legal change' ≠ advancing progressive legal change"[58] the question of how to do so appears to be one about what actions to take.

In contrast, the right questions, according to Schlag, do not necessarily imply any action at all, but rather call for a descriptive response that could pose as objective and neutral (note, these are responsive to normative values in Reason's realm.) For example, in *Normativity and the Politics of Form*,[59] Schlag analogized the situation in the legal academy to a walk on a road.[60] If in the course of this walk you get lost, it does not make any sense, he claims, to keep asking what road to take or which direction to go, because you do not know enough (your location) to make these questions meaningful. Instead of asking "Which way do we go?," Schlag proposes that we ask "Where are we?" and "What are

56. *Id.* at 110.

57. *See also* LOVIBOND, *supra* note 27, at 144-50 (discussing the apparent difficulties posed when critiquing reason while conforming to certain contextual standards of what reason *should* be).

58. ENCHANTMENT, *supra* note 3, at 9.

59. Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991) [hereinafter Schlag, *Normativity*].

60. *Id.* at 805-06.

we doing?" In other words, Schlag can be read as claiming that it is the ontological question that needs to be answered. This is a reading supported by his claim that a critical failure of the "enchanted world of jurisprudence"[61] is "the failure to pursue any sort of critical ontological inquiry into the identity or status of law."[62]

The analogy, however, is not that close, although it sounds good. If you are *really* lost on a walk in the woods (as opposed to metaphorical woods), the question "where am I?" is one that (hypothetically speaking) is capable of being answered. Perhaps not by someone like me, untrained in reading the stars or the use of a compass, but it *is* a question that falls within the range of human knowledge. Thus, it makes sense to ask, "Where am I?" as a precursor to asking, "Which way should I go?" But even there, the question "Where should I go?" is itself pointless and empty if the seeker doesn't have a goal in mind. "Which way should you go for what?" To get gas? To get home? To get help? To get away? Which way to go is dependent upon what your goal is. The difficulty one faces then is trying to ensure instrumental accuracy between the goal and the movement to the goal. With our walkers in the woods, each may have in mind a different goal. Or they may have in mind the same goal and be convinced that different routes will take them where they want to go. Or they may be mistaken as to the routes. All those issues inform the questions and make it important to know, as a threshold matter, where one is starting from when one is in the *real* woods.

In contrast, the sorts of questions that Schlag says ought to occupy legal academics are not the sorts of questions that can be answered. At least they cannot be answered in a way that satisfies the demands of Reason. Thus, it is not surprising that many academics would rather not dwell on them. But why does Schlag do so and what does he mean to propose? To stop writing law review articles? To write *better* law review articles? To do organizing work in the trenches? Foment revolution? Or perhaps he has no "proposal," no suggestions about alternative ways to spend one's time, and asking this question is as futile as asking what is Picasso's "proposal" in *Guernica*.[63]

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61. ENCHANTMENT, *supra* note 3, at 97.

62. *Id.*

63. To some extent this is misleading. Surely Picasso did have a "statement" of sorts that he was intending to make with *Guernica*. Moreover, in the world of art criticism there is undoubtedly believed to be a defined universe of appropriate interpretations. Similarly, with this work in particular, the "meaning" seems fairly obvious to any ordinary viewer. Nevertheless, were one to combine all of these sources, one would undoubtedly find that these meanings did not perfectly overlap, even if, remarkably, they were all similar. For these purposes, even the artist's intent is (arguably) not the last word because part of the meaning of art is what it means to those who are its audience.

No visible means of support[64]

Enquiring Minds Want to Know—Is there a Program in this Text?

In examining what is going on in *The Enchantment of Reason* it is hard to figure out exactly what Schlag *is* saying. On the one hand, he appears to be announcing the futility of seeking safety in values or in reason and claiming that normativity has nowhere to go.[65] On the other, he both uses reason to critique the excesses of Reason and appears to have in mind a particular "thing-edness" of values such as that he is criticizing. After all, how can we tell whether "justice" is merely a "simulacrum"[66] if we are not comparing the word as it is used to some *real* justice that is "out there"?

This problem arises with respect to Schlag's discussion of the "ontologically deep" and the "ontologically shallow" problem. Values are ontologically deep to the extent that they constitute the dominant forms of being of an individual or a group. Conversely, values are ontologically superficial to the extent that they are relegated to subordinate or derivative forms of being for an individual or a group.[67]

How do we judge whether a commitment is deep or shallow? Let us say for purposes of argument that the drafters of the Constitution were committed to "equality" very deeply, but that (for some) all manner of people (slaves, women, and those without sufficient property) were, in their view, simply excluded from the definition of "men."[68] Does that mean that their commitment was "deep" or "shallow"?

Moreover, is the kind of knowledge one would need to answer the questions posed by law the kind of knowledge that human beings are ever likely to have? Is it possible to know "where we are" when we are in the inside? As a theoretical matter it would seem not. This is what I understand Schlag to be saying in the following passage:

> [T]his gap between the thought and the unthought can never be bridged—neither through critical reflexivity nor through rational frame construction. Thus not only are the projects of critical reflexivity and rational frame construction in uneasy (and indeterminable) opposition, but each is in important (not all) senses doomed to fail . . . .

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64. *See* TALKING HEADS, *supra* note 2.

65. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

66. ENCHANTMENT, *supra* note 3, at 8-9 (discussing legal academics pursuit of a simulacrum, "justice," rather than (presumably) the real thing).

67. Schlag, *Values*, *supra* note 8, at 225.

68. I do not intend to make any statement as to what the Framers thought or did not think in fact.

> There is, in the end, no way to take a final inventory of the contexts within which one is operating.[69]

Although we may experience moments of detachment from our own context where we feel as if we are evaluating it, the question must be asked, "according to what criteria?" And of course the criteria are also and inevitably a product of the context. Thus, can Schlag really be advocating that we ask the questions "where are we?" and "what are we doing?" in the deep ontological or theoretical sense?

The questions of how we know what we think we know, how valid that belief is, and so forth—these are the deep questions. "So deep and profound that the law essentially ignores them . . . . If the law were then to require justified human knowledge, it would be paralyzed."[70] Precisely. So how do we know which questions are the "helpful" ones[71] without some notions of "good" and "bad," of which goals we are aiming at and so which approaches are likely to further those goals ("helpful") or not ("unhelpful")? The answer appears to be that we will never really know. Not knowing where one is in the world is the human condition. Yet, despite floating loosely in space, we must make decisions or choices,[72] we must take action—all in the most appalling ignorance. It is horrible. But the alternative is the paralysis generated by focusing on the infinite regress of foundational questions. No one could keep doing "turtles all the way down"[73] and live in hope of finding a fixed point on the legal compass.

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69. ENCHANTMENT, *supra* note 3, at 71.

70. RONALD J. ALLEN ET AL., *supra* note 38, at 139.

71. Schlag, *Normativity*, *supra* note 59, at 807.

72. When I say "choice," I most emphatically do not intend to invest this word with the traditional liberal humanist notion of the autonomous human subject "freely" choosing. Without diving into the whole free will mess, let me say that I think the idea of "choice" as I use it in this essay is consistent with the idea of actions generated by emotional or mental processes that the "chooser" does not necessarily experience as "free," although she may. What I mean "choice" to stand for is action or inaction in the context of time.

73. Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 937 (1988). In *Cannibal Moves*, Schlag discusses analytical approaches to law that "bite the hand that feeds them," and thus constitute "cannibal moves." *Id.* The first is infinite regress, illustrated by the following tale:

> A prominent scientist had just given a brilliant lecture on the foundations of the universe. During the question period an elderly woman suggested that there was a problem with the professor's analysis. "What is that?" asked the professor cautiously. "It's all wrong," the woman replied, "because the universe actually rests on the back of a giant turtle." The professor, taken aback, forced a smile and then countered: "If that's the case there is still the question, what is that turtle standing on?" The audience tittered, but the woman, undaunted, replied: "Another, much larger turtle." "But. . . ." objected the professor. "I'm sorry, Professor, it's turtles all the way down."

Id. (citing Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 1-2 (1986)).

Perhaps what Schlag is saying is that law professors need more humility. We are always more confident that we know what all of these deep questions are than we really ought reasonably to be. No doubt there are costs to complacency. But while complacency can be ameliorated, the condition of imperfect knowledge cannot. It is said the wise are those who know how little they know. But even the wise, knowing they know little, need to make choices and need to act. Some of the questions Schlag appears to think we ought to be concerned with do not appear to offer much direction on how to choose in this regard.

That sense of "turtles all the way down," when looking at the turtles, causes vertigo. It is not a very helpful place to direct one's gaze if, for instance, one is trying to solve the concrete problem of how to save a client from execution, eviction, or conviction of tax fraud. It is no better if you are trying to take a company public and comply with the laws as best you understand them and to predict how they will be interpreted by others who have the power to make your life, and that of your client, intensely unpleasant; and so forth and so on for the many mundane, and not so mundane, tasks of lawyers. It is especially troublesome when one is trying to answer a student's question, "Which is the right answer?"[74]

Hypothetically speaking, it is not that reason could not be used to resolve such questions. It is that there is not enough material from which to work. No one seeking answers has infinite time, complete information, and all the equipment to make use of that information. We do not know as much as we pretend to know. I suggest that will never change. My point is that the need for action in the face of incomplete knowledge is a dilemma that not only cannot be solved by Reason alone, but that the application of too much Reason to such questions inspires paralysis and solipsism, a point on which Schlag and I agree. However, paralysis is also one reaction to Schlag's assault on too much reason—the despair of possibility. From this perspective, Schlag is not merely destroying some particular grids. He is destroying all there is. It is possible, though, that he does not mean for us to answer the deep ontological problem, but rather that his indictment of Reason is meant to focus our gaze on the disconnect between what we say and what we do in the law.

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74. Notwithstanding the trouble it causes me and them, I almost always direct my students to "the turtle problem" in answer to questions like this. I do so because (with my own normative commitments) I think it is good for them to open their minds to other viewpoints—if for no other reason than it will prove a good mental exercise for improving mental agility and flexibility because I view anticipating the other side's arguments as a big part of what it means to be a good (that is to say "adept," not "virtuous") lawyer. Note too that gazing into the abyss may be a good place to look for tenure and other academic plums if you are able to describe the view as powerfully and as vividly as Pierre Schlag does.

Here's your ticket pack your bag: time for jumpin' overboard[75]

Reason for Despair—Cognitive Dissonance

Another source of despair and boredom in the law is that whatever Reason legal academics seek to find or put in the law is so often inconsistent with what our experience of the world, our observations, and our moral commitments suggest to us that reason requires. I must confess that while I, like any other member of this profession, am probably obsessed with rightness, I do not find Schlag's work particularly shocking. I have difficulty even grasping the "radical" nature of Schlag's assault on Reason because, to me, it seems so . . . *reasonable.*

From the first day of my legal education, some of what I was told was the product of Reason seemed manifestly and transparently *un*reasonable. It has always seemed to me that a good deal of legal education consists in conditioning students to believe in and recite allegiance to the most absurd fictions and act as if they were real, on pain of humiliation, rejection, or professional suicide.[76] As Schlag puts it, law students are asked to "suspend disbelief."[77] Those who cannot, who tenaciously cling to the attachments they brought into law school that provided them with a frame or a reference point, are the survivors of a process to which most are ruthlessly and relentlessly[78] pressured to conform by giving up all such attachments.

Many people come into law school feeling that there is a lot wrong in the world and feeling secure in their own moral commitments and ideas about how to improve those ills. It is in that first year that those moral commitments are unsettled. Students are given the message that it is unseemly and unlawyerly to have feelings or commitments. Detachment is lawyerly. Passion is not. This message is conveyed in a variety of ways. We tell students in legal writing to subtract themselves from their writing by deleting personal pronouns and to subtract ambiguity by

75. *See* TALKING HEADS, *supra* note 2.

76. Not to mention that law school serves as an initiation to, and a means of reproducing, the existing hierarchies within the legal profession. *See generally* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF THE HIERARCHY: A POLEMIC AGAINST THE SYSTEM (1983). Of course this implies that if you really want to effect a change in legal culture, legal education is where you should start. On this point see also Joanne Conaghan, *Schlag in Wonderland*, 57 U. MIAMI L. REV. 543 (2003).

77. Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1686 (1996).

78. This is not an indictment of legal education as undertaken in bad faith. I think (without offering any proof whatsoever, but I am a law professor, who needs it?) that most of this pressure is brought to bear unconsciously and often with the best of motives. It is just that the grid is bigger than any one individual. Because it is the only grid we know, we can hardly be expected to always be aware of how it channels our thoughts, behaviors, advice, and teaching.

using declarative sentence structure that says what the law "is."[79] Students in moot court are told to delete phrases like "I believe" because the court is not interested in what they believe but only in what the law requires. We demonstrate to them in Property, Contracts, and Torts that the result they think is "right" is "wrong," and encourage them to employ what I call the empirically ungrounded empirical argument—the slippery slope, the floodgates, and other such arguments with promiscuous abandon. Never mind pesky things like data. Further, we tell them all of this in the context of the message that the law is the embodiment of Reason and that there is a reason for everything in the law. (Is it any wonder then that some students react with hostility when we appear to turn the tables on them to describe the indeterminacy of the law?)

Similarly, Schlag is right that it is remarkable that among legal academics there is "nearly universal assent"[80] for the proposition that when "reason speaks, law listens."[81] It is the faith in this proposition that has caused legal academics to be perhaps the only group in America caught by surprise by the Supreme Court's decision in *Bush v. Gore*,[82] a decision I think many journalists, politicians, and ordinary people viewed as relatively predictable on its outcome, if not on its reasoning.[83] The frenzy of post-mortems following that decision are, to some extent, a measure of both the unreason of the decision and the degree to which I suspect the academy felt betrayed. I confess I find some (not all) of these outpourings uninteresting because I have difficulty working up the measure of indignation that arises when one was expecting something entirely different.

But there is a "there there" (if you mean that law, whatever its ontological status, affects people). And all too often what is there is not too pretty. For it is not only Reason which we must learn to see where none can be seen, but also all manner of other ritual and community beliefs that not only seem to lack substance but which, in some cases, are manifestly not true. The following are just a few of the mythologies of late twentieth century America in which we are supposed to believe:

1) Disparity of economic resources is irrelevant to equality;
2) Jurors understand jury instructions;

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79. *See, e.g.*, LINDA HOLDEMAN EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 226 (2nd ed. 1999) ("Avoid unnecessary references to yourself, your firm, or opposing counsel. In legal matters, the focus is on the parties and the law rather than on the lawyers."); *see also* PETER M. TIERSMA, LEGAL LANGUAGE 67-69 (1999) (discussing the popularity of impersonal constructions of legal language to "promote[ ] an aura of objectivity").

80. ENCHANTMENT, *supra* note 3, at 22.

81. *Id.*

82. 531 U.S. 98 (2000).

83. The irony seems to be that what arouses the most indignation is that the Court lacked either the skill or the will to do a better job at making its reasoning less transparent.

3) Judges in federal court are, in the main, the ones writing their opinions;[84]
4) Publication in elite law journals is a reliable and irrefutable badge of the merit of scholarship;[85]
5) Jurors can disregard evidence they've already heard, or use it for one purpose without using it for another, when told to do so;[86]
6) The National Labor Relations Act protects "concerted activity" on the part of labor;[87]
7) Phrases like "beyond a reasonable doubt" or "probable cause" have some concrete essence; and
8) People read contracts or the backs of dry cleaning tickets.

I could go on and on. The point is, when one begins to plumb the depths of the "transcendental nonsense,"[88] one is expected to swallow whole and unblinkingly, it is not surprising that some alienation and despair abound in law schools.[89] And this is before one encounters the inevitable shortfall between theory and practice, aspiration and life, that is a part of the world—not just of the practice of law, but of everything. Still, just because law may not always listen when Reason speaks does

84. In one of his most recent works Schlag perpetuates this trope when he claims that the success and failures of that ubiquitous tool of Reason as moderation, the balancing test, "depend crucially upon the intelligence and sensitivity of the particular judge who actually does the balancing work." *See* Schlag, *Aesthetics*, *supra* note 33, at 1073. While I do not dispute that judges bear the responsibility for their decisions, that is not the same thing as saying that they are the sources of the *reasoning* for their decisions in all, or even most cases.

85. This is quite remarkable when you think about it since it makes the second and third year law students at the elite law schools the arbiters and supreme judges of what is best in American legal thought. Indeed, it is amazing that there is relatively little discussion of the degree of influence held by upper level law students and recent graduates (as law clerks). To a large extent it seems they are the ghosts in the machine of American law. Everyone (all the "insiders" that is) knows they are there and what they are doing, but hardly anyone acknowledges it. Instead, we continue to speak as if judges were invariably the authors of their opinions and as if the Harvard Law Review, for instance, had some essential essence, a magisterial and authoritative "is-ness," distinct from the ever-changing body of students who make up its board.

86. *See* FED. R. EVID. 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

87. As Michael Fischl so cogently points out, the judicial exceptions that the courts have carved out of the definition of "concerted activity" (e.g., "sit down strikes" and "slowdowns") are enough to make you "lose your religion." *See* Richard Michael Fischl, *'A Domain into which the King's Writ Does Not Seek to Run': Workplace Justice in the Shadow of Employment-at-Will*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 253 (Joanne Conaghan et al. eds., 2002).

88. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

89. *See, e.g.*, Peter Goodrich, *Law Induced Anxiety: Legalists, Anti-Lawyers, and the Boredom of Legality*, 9 SOC. & LEGAL STUD. 143, 143-45 (2000); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657 (1994); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233 (1990).

not mean that the recitations of or invocations to Reason are entirely empty.

It is all very well to debate the ontological nature of law (or the Constitution or any other artifact or manifestation of that "ball" we call law); but it seems nonsensical to debate law's existence or to propose that its content is empty to someone condemned to death by the law's operations. It may be that it was all just what everyone had for breakfast that morning, but it sure sounds like they are talking the language of law on the way to the executioner's table. You will tell that fellow that the law is vacant in vain because he knows its content—it is his life that it has swallowed up.

I think that it is these sorts of manifestations, and myriad others, that induce despair. Moreover, I think these sorts of conditions are the frame in which Schlag is placing his criticism, that many legal academics are asking the wrong questions or working the "wrong" grids. They are "wrong" because they are not calculated to get the analyzer to the point Schlag wants to go. (I will not presume to know exactly what that is, but you can bet that it is normative. And, by the way, that makes them irrational as well.) It is "wrong," according to Schlag, because we ought to be doing something else. I am not sure exactly what that something else is for Schlag. One could read some of the above to conclude that he is suggesting that we continue with what I view as more of the same. On the other hand, some of what he says suggests that it could be that the "something else" is not asking "Where are we?" in the deep theoretical sense, but rather asking, in a more prosaic concrete sense, "Does our rhetoric match the reality?" In other words, does "advocating progressive legal change" equal advancing progressive legal change? This is not so much a failure of reason; rather it is that our rhetoric does not align with our experience.[90]

The practice of suspending disbelief can work tolerably well when by doing so you are only trying to avoid turtle vertigo. It works less well when you are looking at a specific circumstance and asked to accept that a person ought to be held to the "bargain" they made when they signed a pre-printed contract in a circumstance where (experientially) you know that no "bargaining," as you understand the word, would be allowed.

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90. There is an interesting parallel to Holmes's famous aphorism, "The life of the law has not been logic: it has been experience." O.W. HOLMES, JR., THE COMMON LAW 1 (Little, Brown and Co. 1946) (1881). It has been argued that it was Holmes's experiences in the battle fields of the Civil War that led him to place this value on experience over logic, or indeed principles or morals. *See* MENAND, *supra* note 16, at 61-67.

Nonetheless, it is very hard work to point out the things about which people apparently do not want to talk. It is uncomfortable. It might require asking ourselves to take risks, to "put our money where our mouths are." It is not too surprising that the vast majority find themselves neither inclined to do so, nor to confront directly how empty their work is in Schlagian terms. But it might be easier to do so if our goals as academics were slightly more modest than those that Schlag describes.

It was once upon a place, sometimes I listen to myself.
Gonna come in first place[91]

Looking for Reason in All the Wrong Places— The Object of Desire

In the opening of *The Enchantment of Reason*, Schlag recounts Edgar Allen Poe's story *The Purloined Letter*, in which the police cannot find the letter they are searching for, despite the meticulousness of their search, because they are looking for the wrong letter.[92] The letter as it was described to the police no longer exists because its physical characteristics have been changed.[93] Schlag analogizes the predicament of the police in the Poe story to that of legal academics.[94] Academics, Schlag argues, claim that their object is "justice" and that the means to justice is through Reason.[95] But he claims that the "justice" described by Reason is "a term whose meaning and appropriate modes of use are largely a function of academic fashions, protocols, anxieties, ambitions, wish fulfillment, and other formations that often have very little relation to justice."[96]

Schlag makes a convincing case that there is a disconnect between "justice" and the attempt to find the *content* of "justice" through Reason. For those that believe that Reason, whether as logic or moderation or both, is an essential component of Justice, this is bad news.

> [W]hat we have is a group of thinkers and actors who no longer respect their grid, who no longer believe in its operations, but who also have not the slightest idea what else to do. They have very nice positions—both morally and professionally—and they are incapable of giving them up.

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91. *See* TALKING HEADS, *supra* note 2.

92. ENCHANTMENT, *supra* note 3, at 2-30.

93. *Id.* at 3-4.

94. *Id.* at 4-17.

95. *Id.* at 8-9.

96. *Id.* at 9. Notice at this point that the analogy assumes that, just as there is a *real* letter that the police miss because they are looking for the wrong characteristics, there is a *real* "justice."

> And so they continue to say nice things to power. They police the grid; they run the mazes. After a while, it is the other way around.[97]

Life running in the grid, according to Schlag, is "dreary," "boring," and requires an "impoverished imagination."[98] That is pretty strong language. Nevertheless, without having taken a survey I think it fairly accurately captures how many legal academics see their jobs.[99] If it is true that many feel this way, it seems predictable that some people would feel fairly defensive about it and react with some degree of outraged denial to Schlag's claims. I gather this has been one fairly common response to Schlag's work. Similarly, it is not surprising that some might react with despair.[100]

But despair may be premature. That is, if one re-defines the object of desire it may be that academics can find a reason for being other than Reason. I propose that the object of desire, however named, is a sense of purpose or meaning to one's life.[101] If it seems that law is boring or pointless it may be because the picture Schlag paints of legal academia is *itself* one shaped by the aesthetic of Reason and the cultural milieu which dictates the appropriate goals—law review articles that represent a "substantial contribution to the field" as opposed to teaching or mentoring accomplishments; employment at a top twenty law school regardless of one's personal, family, or community commitments; interaction with a community of like-minded scholars worldwide, instead of

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97. *Id.* at 142.

98. *Id.* at 141. Of course, it is possible that this is only the view from the perspective of those who share Schlag's description of the object of desire. What if the object of desire for most academics is not "justice" but tenure, maintenance of status, the approval of one's colleagues, public acclaim, television appearances, or any combination of these or other goals I have not mentioned? In this case it is possible that the grid seems neither futile nor boring.

99. Again, I am not sure how many academics would see themselves in this description. It may be that Schlag is describing the predicament of academics that share a particular perspective. For example, is it not possible that many find "just" teaching deeply satisfying and meaningful, in spite of the threat to their job security and the prestige they enjoy (or not) within their own institutions for adopting such a position?

100. This feels like *déjà vu*. I believe I said much the same thing in response to *A Critique of Adjudication*. Tamara R. Piety, A Critique of Adjudication: Fin de Siècle: *Confession Without Avoidance*, 22 CARDOZO L. REV. 947, 965-67 (2001). Perhaps I am a hopeless optimist. If so, it is undoubtedly related to Schlag's observations about heretics being the most passionate believers. In a way I feel like despair is heartening because it may indicate a certain desire to "do good." Cynics do not admit to despair, although they may actually be the most despairing of all.

101. Of course my suggestion, that people do not know what they really want, is infected with paternalism (or, because I am a woman, should I say "maternalism," or is the content of that term not dictated by sex, and does the question say more about our notions or the appropriate role of Mom and Dad—an example of "Dad-ism"?) and thus suspect to many on that ground. Nevertheless, I will stand by it. Does anyone really doubt that we often do not know what we want or have difficulty discerning what would really make us happy?

interaction with the community in which you live. And so forth and so on.

Like the police in the *Purloined Letter*, those who feel despair may feel this way because they are moving across the wrong grids, asking the wrong questions. The source of meaningful work may be right in front of their noses—their communities, their students. It is often only when one's gaze is fixed upward on the "big picture" or "downward" to the turtle problem that it is impossible to know what to do. When one focuses on what is right in front of you, the problem is not so much knowing what you need to do or what the right thing is—I think we very often know what to do. The problem is that it is hard to summon the will or the courage to do so because it almost always presents itself as a risky choice. In the end, the risk may not be the obvious one of doing what is in front of you but in not doing it and reaping the bitterness that is so often the product of failing to honor one's moral commitments.

CONCLUSION—STOP MAKING SENSE

Just as the police work their grids, many academics continue to work theirs, and miss the (an?) object of desire precisely because it does not fit their grid. Perhaps aims less grandiose than sitting on the right hand of God—or the Supreme Court (one might think that some confuse the two)—are the answer to *ennui* and angst. In pursuing smaller aims, such as mentoring students, calling it as we see it rather than as we think is safe, becoming involved in the issues in our communities rather than only those in the nation, we can find an antidote to the overdose of Reason; although it is not really reason *per se* that has let us down, but our reporting. In short, there is for many of us too great a gap between law's rhetoric and reality as we perceive it. The problem is that the rhetoric of Reason in law often asks us to accept the manifestly "unreasonable." Perhaps that is what Schlag is attempting to direct attention to in *The Enchantment of Reason*. Maybe that is the "where are we?" that we *can* answer. Bad things are happening in the land and perhaps we ought to be concerned about this whether or *not* we can say that this is so as a matter of consistency, logic, or Reason. Some are afraid to do so lest they be labeled less than rigorous.[102] But as Schlag says, "[t]here is no great virtue in being 'rigorously' wrong."[103] Our feelings and judgments are no less real, no less entitled to our attention, no less grounded, simply because they cannot always be "rationalized" or sanitized into the neutral detachment that the enchantment of Reason appears to

102. For a similar observation of a different work, see Richard Delgado, *Where Is My Body? Stanley Fish's Long Goodbye to Law*, 99 MICH. L. REV. 1370 (2001).

103. ENCHANTMENT, *supra* note 3, at 7.

require. We ignore these elements of ourselves, so often relegated to the realm of "the personal" (and thus not a proper subject for our attention), at our peril.

In another context, Dr. Oliver Sachs, the noted neurologist, could have been speaking about the law when he made the following observation about the role played by emotions and feelings in the cognitive process.

> Our mental processes, which constitute our being and life, are not just abstract and mechanical, but personal, as well—and, as such, involve not just classifying and categorising, but continual judging and feeling also. If this is missing, we become computer-like, as Dr. P. was.
> . . .
> . . . .
> . . . Dr. P. may therefore serve as a warning and a parable—of what happens to a science which eschews the judgmental, the particular, the personal, and becomes entirely abstract and computational.[104]

The constraint of Reason, unmediated by that which Reason cannot verify, results in an aesthetic, not to mention a material world, that is missing some essential significance. Perhaps Schlag is opening a door, issuing an invitation to "stop making sense"—or at least to stop pretending to have all the answers. And perhaps it is possible to do this and "do law" or legal scholarship, whatever that means. The only way to do it, though, may be to abandon the fantasy that all our commitments and values can be successfully submitted to the scrutiny of Reason. They will be mediated and triggered by emotions as well as by intellectual processes—and more emotions than logic if the truth be known.[105]

In this regard it is perhaps significant that "disenchantment" is not really the opposite of "enchantment." While the word "enchantment" includes the negative connotation of being under a spell, of failing to perceive reality accurately (and Schlag surely uses it in this sense), it

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104. OLIVER SACHS, THE MAN WHO MISTOOK HIS WIFE FOR A HAT AND OTHER CLINICAL TALES 20 (Touchstone ed. 1998) (1985) (emphasis added). Sachs was describing one of his patients who could not recognize whole faces or people because he apparently could not go beyond the observation of some specific characteristics to integrate them into a whole. *Id.* at 8-22. The sciences Sachs is indicting are neurology and psychology. Perhaps it is no accident in all of this that the legal formalists, as well as their critics the legal realists, both held to a view that law could be or should be more "scientific" with all that this meant at the time.

105. That is most emphatically *not* some sort of admission that as a woman I am guided more by my emotions. Rather, I think *everyone* is moved primarily (or at the least equally) by their emotions, however much they would like to pretend otherwise. The intellect, and whatever store of ethical and practical constraints it imposes, are (I think) little more than an overlay on this "engine" that is the prime mover for actions even if we do not *act on all* of our emotions *all* of the time. For an account that emotions are an essential part of the equipment that we have to sort out the material world and react to it, see generally ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTIONS IN THE MAKING OF CONSCIOUSNESS (1999).

also connotes joy, delight, and enthusiasm. Disenchantment, on the other hand, does *not* mean being relieved of a spell, being free of distorting influences, being in full possession of one's faculties—free to be happily rigorous. Instead, the word conveys the special sort of unhappiness that arises from disappointed hope, from failed expectations. It implies the absence of a certain spark or enthusiasm that makes life precious. The disenchanted are disappointed. They may be wiser, but they are sadder too. Is it any wonder that the enchanted may not welcome their liberation? Probably not; but is this a reason to stay huddled in the warmth of the blanket of Reason? Schlag thinks not, and I agree with him. That is not, however, an indictment of enchantment *or* of reason, only of Reason and Reason's wrongs.