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# Pierre the Anomalist: An Epistemology of the Legal Closet

PETER GOODRICH\*

The upwardly mobile autodidact Pierre Schlag self-designates in many ways.<sup>1</sup> In a relatively early article that famously attacked the figure of the “Normativo,” he begins by describing himself as having started out as a cabby in New York City. Borrowing from his most recent contribution to *Harvard Law Review* on the aesthetics of American law, Schlag was back then a guerilla representative of the “energy aesthetic.”<sup>2</sup> He was driving a vehicle and taking people places, engaged in the real world of movement, not inseminating but disseminating. Happily or sadly—the tone is ambivalent—at the end of the second paragraph, we learn that Pierre did not make it as a cabby; he quit and became a legal academic. He admits to a failure, and that radical acknowledgement, the originary wound or loss at the root of a scholarly life, will prove important in his work’s later politics.<sup>3</sup>

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1. Contrary to the usual law review protocols, I will use the footnotes for a divergent text or commentary rather than for the usual prolixity of references. I may well not get away with this, but I will begin anyway by commenting that neither upward-mobility nor autodidacticism are negative epithets. As for upward mobility, I want to point to the obvious fact that Pierre has been successful. He started at the University of Puget Sound School of Law and moved to a first tier law school at University of Colorado. He has been brilliant at persuading law students to accept his articles for publication in top law reviews. He has been published in *Stanford Law Review* at least three times and in *Harvard Law Review* three times, maybe more. He has published prolifically, and in virtually all of the top reviews. That is one of the signal measures of success in the United States legal academy. It may be that I do not have time to come back to this point, but I do wish to call attention to the fact that Schlag’s critique has been effective in the sense of persuading the most important audience in the academy, that of the students on the law reviews. In this very simple perspective he has been a radical and has done much to mobilize the working class of law schools, its masses, its nascent legal subjects. As to being an autodidact, that is true of the vast majority of law professors in the United States. They have a law degree. They have neither had research training nor experience outside of the highly restrictive J.D. program. In Sartre’s novel, *Nausea*, the autodidact started in the library with the letter A. Schlag started elsewhere, but with his most recent essay on aesthetics he has either come to or started with A. I like that attention to detail—the simplicity of the co-existence of a knowledge of the alphabet and law, aesthetics and rules, grammar and norms.

2. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051-52 (2002) [hereinafter Schlag, *Aesthetics*].

3. In Freudian terms the fiction of failing as a cabby is both originary and probably traumatic. The point about trauma is that the subject returns to it endlessly. We keep revisiting it in the form of repetition and so it is a good hypothesis that Schlag will return to this site or meaning many times; he will want to act it out or to recuperate and work it through.

In subsequent work, Pierre's self-identification moves from the radical but purposive bent of the cab driver to the figure of the symposiast, the host at an imaginary elite dinner party. In a footnote in his most recent essay he "imagine[s] Kathleen Sullivan, Dean of Stanford Law School, hosting a dinner party in Palo Alto." This reference to Plato's banquet sees Christopher Langdell arriving with Bruce Ackerman. Jerome Frank is shunned, while Duncan Kennedy implausibly hangs out solo with a cigar on the porch. Sandra Day O'Connor is the guest of honor, and finally, "Lord Coke apparently refused to show, miffed that Blackstone had been invited."<sup>4</sup> Although Schlag designates this scene as an instance of the "associative aesthetic," it is also a searing depiction of perspectivism in which contrary figures sit down together, hosted by Kathleen Sullivan but invited and compèred by Pierre. Let me here simply note that Schlag's self-image has shifted from the cabby driving people to meetings to the symposiast who organizes meetings as thought experiments, exercises in time travel, or perhaps most likely of all, as amiable hospitality and conversation, the *mise-en-scène* of oratorical community.

If the first two self-images seem both modest and deceptively unthreatening, that is probably because they are but preludes to another figure, Pierre the contrarian.<sup>5</sup> Here we encounter the associative aesthetic and a scholarly subject who generates wild lists, graphs, and tables of oppositions. In this most visual mode of argument, Schlag is against law, normativos, interpellation, theology, emptiness, and ghosts. This is the chaos theory of cab driving in the academy: the author races between disciplines and departments and in the process generates a pellucid account of the portentous vacuity of academic lawyering. His discovery is first that jurists do not understand anything of what exists outside of law school, and second that there is no good reason for this beyond complacency and its attendant *amour propre*. Here Schlag is vested in the role of the contrarian, and is at his most withering and dismissive. He admits to confusing even his followers—his "readers"—and incensing his critics.<sup>6</sup> The role of the contrarian, and the project of the antinomian, however, is precisely that of arguing against orthodoxy or common sense, and in this paradoxical role Pierre has excelled.

But that is not all. The antinomian who draws up Borgesian lists of liberalism's vicious circles, of the myopia of filing clerks in the mazes of doctrinalism, of "happy talk jurisprudence," of the legal theory of the

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4. Schlag, *Aesthetics*, *supra* note 2, at 48 n.169.

5. ANTHONY MUNDAY, *THE DEFENCE OF CONTRARIES* (1969) (1593) (providing the best instance of this contrarian rhetoric within the common law tradition).

6. PAUL CAMPOS ET AL., *AGAINST THE LAW* vii-viii (Rodney A. Smolla & Neal Devins eds., 1996) [hereinafter *AGAINST THE LAW*].

“holding pattern,” and of the idolatry of the academy, is also engaging with reason, with the aesthetic of “the grid.” In his book on *The Enchantment of Reason*, Pierre starts with Poe’s well-worn fable *The Purloined Letter*. Here, chastising the academy in just the same way that the protagonists of Poe’s tale laugh endlessly at the stupidity of the police, Pierre gets to play the fictional hero. Schlag is Auguste Dupin, and although he does not directly find the missing letter, he does solve the mystery of legal education: it is shallow or, more technically, it is sclerotic. Donning Dupin’s mask, Schlag laughs at the “very *simplicity* of the affair”: the legal academy clings to an outmoded grid, it worships *rei mortui*—images that refer to dead things—it has substituted a simulacrum for its real object of desire.<sup>7</sup> The case is solved, but something still has to be done about desire. Even for Schlag in his associative mode, acknowledgement of the existence of the letter, the fact of law’s misrecognized desire, leaves open the issue of how to relate to this object, how to go on living ethically as academic lawyers. Dupin, however, respects the grid and returns the letter to its owner. Schlag faces a harder task, that of persuading the owner that the letter—the lost object of desire—belongs to them.

Pierre argues that the legal academy is more haunted than inhabited or, in Freudian jargon, that the academic jurist is in denial. Schlag, who is often a paradoxical operator, is not of the school that says “don’t take away someone’s denial.” He may not be a *normativo*, but he is, I will argue, a *politico* and his politics is both paradoxical and paradoxically successful. In what follows I will trace the political trajectory of Pierre’s work. It is a complicated story, and it is one that charts a path through several polemics and numerous projections in which Schlag is vilified and labeled in hostile and often undermining ways. His self-images are matched and indeed outnumbered by the epithets with which his name has been tarnished. There is a dispute, in other words, about the nomination of Schlag, a controversy over the proper image or figure that will account his protean political status. It is a debate that has to be read

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7. Edgar Allan Poe, *The Purloined Letter*, in EDGAR ALLAN POE: TALES & SKETCHES 975 (Thomas Ollive Mabbot ed., 1978) (“Perhaps it is the very simplicity of the thing which puts you at fault.”). Schlag, it should be pointed out immediately, pays little attention to the other readings of the purloined letter that constituted or contributed to the debate between Lacan and Derrida. He sides, I think, with Derrida who argues in “Le Facteur de Vérité,”

On this border, which is negligible for the hermeneut interested in the center of the picture and in what is within the representation, one could already read that all of this was an affair of writing, and of writing adrift, in a place of writing open without end to its grafting onto other writings.

JACQUES DERRIDA, *THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND* 484 (Alan Bass trans., 1987).

symptomatically; it is a rare glimpse of passion in the legal academy, and a curiously explicit insight into the politics of legal theory.

At the same time, Pierre's texts deserve a similarly structural reading. I will address their margins and unpick a politics of the excluded. Borrowing from gender theory, I will argue that Schlag's critique of legal reason is most productively understood as an attempt to confront the legal academy with desires that it cannot name, with insights that it excludes, with the material supports of its abstract and often unthinking norms. Through a re-reading of *The Purloined Letter*, I will elicit from Schlag's work an epistemology of the legal closet, an attempt to unsettle norms and "to out" the desire that connects justice and law.<sup>8</sup> In this sense, Schlag offers a political critique of academic lawyering in the displaced form of an erotics of legal reason and specifically of the jurist's desire for normativity. In more ordinary terms, he diagnoses an ethical nihilism and understandably adopts a different style to that of most academic legal writing.

In Part I of this article I will look to a seemingly incidental feature of Schlag's critique of legal reason, namely his use of fiction, and in particular his cunning reference to the closet and its literary over-determination of law. Reference to the legal closet, however veiled or guarded, is likely to be threatening to the orthodox legal academy, and this threat produces reactions. In Part II, therefore, I review and analyze the responses that his critique of academic legal reason has generated. Their rhetoric is frequently intemperate and their exposition, especially when conducted in the name of reason or truth, is indicatively vehement or impassioned. In Part III, I endeavor to place Schlag's work within the tradition of critiques of reason and offer a political reading of his work. Schlag offers a broadly materialist account of legal reason's utopianism. His challenge to the normativist and to the doctrinalist comes in the form of an ethical demand that they address neither the "beyond" nor the "ideal" that exist either not here or not yet. Schlag rather incites legal scholars to attend to what comes before the law in the here and now. Part IV of these divagations seeks the structural motif of Schlag's attempt to be against or to be done with law. Here I will trace the roots of Schlag's radicalism to an antique position in linguistics and law. Pierre is an anomalist. The roots of his desire to be an anti-lawyer lie in an antipathy toward the analogist, the Alexandrian linguist, the grammarian obsessed with Homer, to whom Schlag opposes the figure of the

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8. EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1990). See further Lauren Berlant, *Two Girls: One Fat, One Thin*, who provides a wonderful description of Sedgwick's method as being to "deshame fantasmatic attachment so as to encounter its operations as knowledge." (Manuscript on file with author.)

Stoic linguist, Crates of Pergamum, who argued that anomaly, not rule, marked the essence of language and of law.

### I. THE SKELETONS IN THE LEGAL CLOSET

*The Enchantment of Reason* begins with a mystery, the loss of the real object of legal desire. Justice as a practice or judgement has been replaced by myriad normative abstractions that relate primarily to academic protocols, to the status ambitions and wish fulfillments of jurists who write so as to better themselves and specifically to advance their positions in the hierarchy of law schools.<sup>9</sup> The mystery to be solved, the loss or wound that requires detection and diagnosis is the question of how the academic discourse of law came to its current state of emptiness: who killed legal reason and so impoverished law? If this is the question, then it provides good reason for Schlag's recourse to the figure of the august Dupin as the literary device that will help unravel the conundrum of the lost reason of law.

Schlag the detective is in search of a wrongdoer—that is the nature of the genre—and it is the unveiling of the miscreant, the normativo or grid-monger, that will provide the dénouement of the project. The devices of detective fiction are called immediately into service in the analysis of the maladies of law, most probably because it would be impossible to judge law in any significant manner from within the discourse of a lifeless legal reason. Whether the starting point is necessary or not, Poe's tale provides the alpha and omega of Schlag's detective fiction and requires revisiting as the *mise-en-scène* both of the critique of legal reason and of academic responses to that critique.

If Schlag offers something new in his manipulation of the story of the purloined letter, it comes in the form of a slip. Poe's story begins with a scene in a library. It is immediately marked, as Derrida delights in pointing out, as an affair of texts. What is less remarked is that the scene is staged not as one of reading or of light and visibility contributing to the utility of texts, but rather it is a scene of enigma and darkness. The architectural setting is that of "a little back library, or book-closet." The reference to the closet suggests things hidden, dark secrets, desires that cannot be named. That connotation of the unknown and unnamable is further accentuated by the fact that Dupin and his immediate interlocutor have been engrossed "in profound silence," in an "exclusive occup[ation]" with "the curling eddies of smoke" that oppress the atmosphere of the chamber. The context in which the mystery is analyzed is that of meditation and meerschams in a darkened closet.

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9. See PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 8-9 (1990) [hereinafter SCHLAG, *ENCHANTMENT*].

Schlag's initial slip, and it is a brilliant strategy, is that he makes no express reference to the epistemology of the closet. The connotations of the closet are, however, well enough known to allow some relatively straightforward inferences. Desire lurks in the closet. It is relegated to the back library by law. By the same token, desire—as gender performance, fiction, narcosis, or play—seeks continuously to break out of its confinement. In an explicit move against law, the epistemology of the closet is directed towards drawing out the eros that is hidden in the dark backroom. Exposure will name or render visible and accountable the desires that fuel the subjects and the norms of academic law. Again by reference to a seemingly casual metaphor, Schlag states in an earlier work that his project is that of asking questions “that . . . no one has yet dared to ask.”<sup>10</sup> The closet or bower, in other words, is a secret place, a hidden performance, a question or skeleton that lurks from view and from norms alike. The fault line that the critique of reason houses in the legal closet is that of the violence of law's norms to the eccentric, or simply differently oriented, subjects of law. To “out” these closeted figures, these juristic relationships and desires, thus has the dual function of acknowledging the eros that underpins the norm and of announcing the limitations of the jurists' performance of identity and desire.

Schlag is ambivalent. His designation of the closet's content is at best partial and muted. The closet is depicted in structural terms as a trance or enchantment that lawyers fear to address. The nature of that fear or the charms that the closet continues to house are somehow left untouched by the critique of legal reason. In Sedgwick's argument, the legal closet must necessarily contain the history of male-male pedagogic and pederastic relations.<sup>11</sup> As Schlag is fond of pointing out, legal science inhabits a social and epistemic world that is still largely lodged in the nineteenth century and so forms a displaced yet coincident version of the classic literature of the closet that Sedgwick discusses. Much of the critique of legal reason is therefore addressed to the imperialistic subject or performance of identity that law promulgates and perpetuates. Beyond the exposure of the draconian limitations upon the legal concept of the subject, Schlag offers an implicit yet positive connotation to “outing” the desiring subjects that inhabit the closet. The legal subject is a fiction, and fiction—even if it is “jurisprudence noire”—can “lead away from the ways in which academic legal thought frames and represents law.”<sup>12</sup> Literature, which for Sedgwick was the subject matter of the

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10. Pierre Schlag, *Clerks in the Maze*, in *AGAINST THE LAW*, *supra* note 6, at 236.

11. SEDGWICK, *supra* note 8, at 55.

12. Pierre Schlag, *Jurisprudence Noire*, 101 COLUM. L. REV. 1733, 1739 (2001).

elaboration of the epistemology of the closet, is for Schlag the form that radical jurisprudence must take.

In many respects it is symptomatic that Schlag does not directly address the epistemology of the legal closet. Nor does he offer any detailed specification of the questions that lawyers dare not ask. Equally paradoxical or anomalous, he is embarked upon a pursuit of the repressed desire of law, but he makes no mention of the team that is going to solve this mystery, three men in a closet, in the dark, one of them—the foil of the others' laughter—is a policeman to boot. The structural antinomy that Schlag's use of the story sets up is only apparently between enlightenment and a baroque or postmodern reason. The comparison between the candleless theatre of the closet and the enlightened stupidity of the world is but a pretext for what I will expound upon later as the gnosis of the closet: a homosocially embodied epistemology of things unseen and unsaid. The logic of *The Purloined Letter*, its simplicity or poetry, opens up the possibility of a critique of the closeted nature of legal reason, but it does not designate or prescribe what is to come. In a sense Dupin acts out the anger or even the revenge of the closet; the outsider, the inspector, the representative of legal reason is constantly laughed at, put down, and overtaken. He does not understand that the solution lies with the men in the closet and not in the world of law. He does not realize that it is legal reason that is failing him and that the solution inheres precisely in the back library, and specifically in an understanding of poetics.

There is another slip. It is not as significant as the erasure of the homosocial scene in the closet, but it is also significant. Schlag, like most of us, is against smoking, thus he does not remark upon the fact that the closet is being used both as a library and as a fummy sanctuary or smoking chamber. We tend today to look upon smoking as an unmitigated harm. That is a very recent perspective. We need to acknowledge that in Poe's tale, the insistent presence of meerschaums—even the inspector is handed a pipe—and the curls and eddies of smoke is a dual reference. The detective, Dupin the mastermind, is doing drugs in the closet or, more liberally, is engaging in a very physical (narcotic) pleasure. The activity in the closet is charged. Whether it is the proximity of three men in the darkened space of the "little back library," or the intense and intensely silent narcosis of a tobacco trance, the key lies in the erotic function of detection, the pleasure of literature, of text and poetry, that Dupin will unveil.

Schlag does not mention the smoke or the smoking. He ignores the reference to the narcosis, the hedonism or reeky eros of the closet. In a later discussion of Hart's concept of legal reason, Schlag interestingly



talks about reading Hart's article "very closely," but at the same time he substitutes periphery for penumbra in discussing Herbert's distinction between easy and hard cases, the core and penumbra of legal concepts.<sup>13</sup> The penumbra is again a reference to umbra, to shadows, shades, and smoke. Even here, in other words, discussing the most abstract of theorems about law, Pierre erases the question of smoke, of the curls and eddies that signify the scene in the closet and the eros of critique. Schlag keeps something in reserve. He is acting out the epistemology of the closet—the logic of the penumbra—by hiding the originary scene of reason and by refusing to disclose its erotic or simply narcotic implications. He writes not only against law but also against himself, the subject who would "lay down the law," and so leaves open the nature of the fiction that will become law.

The epistemology of the legal closet raises questions that are both long-term and obscure. The penumbra, the unlit room, the noire or anti-norm that Schlag's work seeks to inhabit is specifically a space of the incomplete or of the unfinished. It was the injunction of the final lines of *Laying Down the Law* that the academic jurist quit legislating "the good," "the rational," or any other variant of the angel on a pinhead because the legal system neither listened nor cared.<sup>14</sup> A different politics was necessary, and it is the search for that difference that drives Pierre to the closet. While the politics of the legal closet are yet to be specified in any substantial way, the preliminary virtue of this critical revision of legal reason is simply that it confronts the abstractions of academic law with questions of eros and corporeality, of sex and pleasure, as somehow intertwined with the reason of law. It suggests a politics that is aesthetic as well as personal, literary, and legal. The paradox is that of a politics that cannot but succeed in failing. One aspect of successful failure is the response to Schlag's work. The theory of the critique of legal reason has to be measured against its practice, the public discourse in which it has participated, by which it has been marked, and against which it has been engaged. Schlag's success lies principally in the surety or certainty with which he has been told that he has failed. The response to his work has come primarily in the form of invectives that question either his sanity or his ethics. It is with such responses, specifically with the rhetoric of those (ironically) rationalist rebuttals, that I will begin.

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13. Schlag, *Aesthetics*, *supra* note 2, at 1078-79 (referring to H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958)).

14. PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* 163-66 (1996).

My argument is that the most interesting facet of the debate about the rationality of law, in this context, lies in the apocalyptic tone of the discussion. Consonant with the theorem of the backroom or closet, each of Schlag's purportedly rationalist opponents chastises him with physical or emotional deficits. The vehemence of response is significant both as a symptom of the core values that the critique of legal reason questions and as a representation of the desire that is usually unnamed and unseen—locked, as it were, in the closet. Most signally, Schlag's work is simply dismissed in terms so laconic as necessarily to imply defects in his logic that are forms of illness or organic malfunction. This requires therapy or medical intervention rather than reason or discourse that, by virtue of his malady, he would not and could not understand.<sup>15</sup>

When it is a question of addressing discourse framed in terms of smoke and the erotic, darkness and closets, laughter and drugs, the physical and affective dimension of reason can hardly be concealed. It raises a series of paradoxes that the representatives of enlightenment or of philosophical rigor dismiss with a cold, yet nonetheless affective, fury. Here, quite briefly, pursuing a trajectory from aspersions of incompetence to diagnoses of madness, is what they say.<sup>16</sup>

## II. ACADEMIC LEGAL DISCOURSE OR THE STATE WE'RE IN

It begins mildly enough in Texas and amidst footnotes. Brian Leiter is not at all in favor of the epistemology of the closet. He likes things to be manfully in the open and so is unstinting even in his footnotes where he swipes Schlag away like a puff of unwanted smoke. First off, Schlag is treated generically. He belongs to a school that would "seem to eschew philosophy as traditionally conceived."<sup>17</sup> Balkin and Schlag are the named culprits of this lapse in standards. Their positions, "[a]s shall become clear below . . . are not so much *postmodern* as *pre-Platonic*."<sup>18</sup> To this Leiter adds an ironic parenthetical: "(I should hasten to add that this relabeling is not meant to constitute any objection to these positions)."<sup>19</sup> That may sound fair and kind but for anyone who has studied logic the pre-Platonic is ante-diluvian. It assumes a world in which

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15. For analysis of a similar phenomenon in reaction to critical race theory, see Peter Goodrich & Linda Mills, *The Law of White Spaces: Race, Culture, and Legal Education*, 51 J. LEGAL EDUC. 15, 22-26 (2001).

16. I will be brief, in part because I deal with this question of the rhetoric of rational apologetics in Peter Goodrich, *Law Induced Anxiety: Legists, Anti-Lawyers, and the Boredom of Legality*, 9 SOC. & LEGAL STUD. 143 (2000).

17. Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187, 187 (1993) (book review).

18. *Id.* at 187 n.4 (emphasis added).

19. *Id.*

logic in its modern sense, which derives from Aristotle, had not yet been invented. Leiter says as much because he goes on to assert that “[w]riters like Balkin and Schlag seem keen to deny this affinity with the tradition, though they are not very clear about why. . . .”<sup>20</sup> The dismissal ends with a classical *meiosis*: “There is never any explanation, however, of why Schlagian postmodernism is really *incommensurable* with rationalism, rather than simply irrational.”<sup>21</sup>

Three years later, in 1996, Brian Leiter is less patient. Schlag represents work that is “based on misunderstandings of Continental thinkers . . . .”<sup>22</sup> By this point in time, Leiter has no place for discussions of Schlag and he simply states: “contrast Schlag’s misguided comments on Nietzsche with Brian Leiter, *The Paradox of Fatalism and Self-Creation in Nietzsche* . . . .”<sup>23</sup> Despite the definitive nature of this dismissal, Leiter still feels the need to return to Schlag and to repeat his dictum. There is a peculiar uncertainty or insecurity in both the form and the fact of these repeated aspersions. Writing in *The Green Bag* on the paucity of philosophy in law schools, and with no apparent sense of the irony of his position, Leiter offers the apparently empirical opinion that “more than half of what appears in top law reviews purporting to deal with philosophy or philosophical topics is sophomoric, the kind of writing that would prevent an undergraduate from getting into a PhD program.”<sup>24</sup> The footnote proof of this point consists simply of a reference to two articles, one by James Boyle, the other by yours truly, Pierre Schlag.<sup>25</sup> Neither argument nor evidence is proffered for this last in a series of acerbic and laconic dismissals. There is seemingly a self-evidence to the truth that renders demonstration unnecessary. Nor does it seem to occur to Leiter that the lack of professional robustness that he deems so “lamentable” and “worrisome” might relate in part to his ailing definition of the discipline or his obsessive desire to match scholarly worth to the “top” law reviews and the top schools.

Whatever the motives for Leiter’s attribution of “sophomoric nonsense”<sup>26</sup> to authors whose interests he neither shares nor comprehends, it is reasonably obvious that an analytic legal philosopher is unlikely to admire a dadaist theory of law. The literary and anomalist project that Schlag elaborates is to be outlawed or banished, ideally without being read. There is no time for engagement with this tradition or position and

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20. *Id.*

21. *Id.* (emphasis added).

22. Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 *YALE L.J.* 253, 253 (1996).

23. *Id.* at 253 n.2.

24. Brian Leiter, *The Law School Observer*, 5 *GREEN BAG* 2d 101 (2001) (footnote omitted).

25. *Id.* at 101 n.1.

26. *Id.* at 101.

by fairly direct implication it is improper, frivolous, and silly. In Schlag's terms Leiter plays the traffic cop. He is exercising the policing function of philosophy rather than deigning to engage with an incommensurate or explicitly anti-normative discourse. In academic terms, the most interesting feature of the dismissal is its illocutionary force. To call a colleague ignorant, irrational, and misguided is intemperate. To state that an established and successful colleague is sophomoric and would not be admitted into a graduate program suggests rank intolerance and considerable over-investment in a very narrow conception of philosophy as a discipline. Such derisive dismissal is charged. It is both intoxicating and combative, but much more importantly it suggests a hook or proximity to the object of this negative desire. Leiter does not ignore Schlag; he chooses to mock him. Schlag—like the eros of the legal closet that he invokes—creates anxiety. I suggest that this is best described as a classic phobia of the seduction of the closet and a fear of its accompanying and all too physical pleasures—the euphoria of the narcotic and the seduction of homosocial desire itself.

A similar theme of negative desire can be found in most of the other responses to Schlag's work that are authored by analytic legal philosophers. Neil Duxbury, in a sweet chain of reviews, offers a benign frustration at the unsettling message of the books that Schlag has authored.<sup>27</sup> Duxbury is at times generous, as in acknowledging that "Schlag delivers good polemic," "and he can be funny." Underlying the faint praise, however, is a repetition. Duxbury is unwilling to address Schlag's thesis that academic legal writing is moribund because normative legal thought falls on deaf judicial ears. Duxbury responds to this thesis both by asserting defensively that normative legal thought has not withered away in Britain and by demanding that Schlag answer the question: "What, then, are normative legal scholars to do?" The paradox of Duxbury's position is that if, as he argues, Schlag is wrong in his diagnosis that normative legal scholarship is unread by the judges and so of no effect, then Schlag's failure to prescribe alternative modes of normative scholarship would be of no significance. Duxbury, whose main discussion of this weakness in Schlag's position comes in a book on lotteries as a mode of legal decision-making—Rabelais without the humor and, I suspect, without the audience—cannot let go Schlag's failure to offer a positive message.<sup>28</sup> He keeps returning to it; he does not

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27. See Neil Duxbury, *Reviews*, 60 MOD. L. REV. 874 (1997); see also Neil Duxbury, *Legal Dons in the Dock*, TIMES HIGHER EDUC. SUPP., Mar. 27, 1998, at 25 [hereinafter *Legal Dons*]; NEIL DUXBURY, *RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING* 142-45 (1999).

28. "Notwithstanding the title of their book [*Against the Law*], the authors have a problem not with law, but with law as presented by law professors writing about the law that gets taught in the classroom and discussed in law reviews. So what are they against? Themselves?" Duxbury, *Legal*

like it; and in the end he finds it “somewhat infuriating,” not least because he suspects “that fury is just what Schlag hoped to provoke.”<sup>29</sup>

It is striking that Duxbury finds Schlag’s criticisms of normative legal thought so engaging and so maddening. Duxbury, who has never written a word on what lawyers ought to do, but has rather chronicled the history and activities of legal scholars, is neither the immediate target audience for Schlag’s critique nor very obviously invested in the project that is criticized.<sup>30</sup> The fury, the visceral reaction, would seem to relate to more distant and opaque, or at least undisclosed, roots of his defense of what his fellow legal scholars do. My suspicion is that Duxbury identifies with Schlag’s diagnosis but is committed to denying its significance. At the end of one of his three reviews—he has reviewed each and every one of Schlag’s books, like Peter he has cried “no” three times—he lets slip what is likely the root of his attraction to Schlag’s work and he does so in uncharacteristically hedonistic terms. Normative legal thought “may be otiose” but it continues to appeal because “people depend upon legal systems and want to be happy with the way that they operate.”<sup>31</sup>

Legal academic writing is a placebo, a comfort for the anxieties of the legal subject, and here it is part of the very English project of making people vacuously happy. Even more paradoxically, Duxbury has in fact confirmed a great deal of Schlag’s thesis in a brief book on the influence of academics upon the judiciary.<sup>32</sup> The citation of law reviews does not reflect any actual influence upon judicial decisions, and indeed citation is increasingly separate from reading of the items cited. Interestingly, Duxbury’s fury does not take into account the commonalities of his positions and those of Schlag. He simply keeps asking, “what should we do?” Finding that there is no answer to that question in Schlag’s work, he dismisses the project as infuriating. It has failed the Anglican test of contributing to the greatest happiness of the greatest number. It unsettles and infuriates not because it is irrational—Duxbury admits that it is empirically accurate—but because it is not happy enough. Unhappiness is an evil and has to be vitiated. In a culture that is radically resistant to psychoanalysis, unhappiness is treated not as a symptom of something to

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*Dons*, *supra* note 27, at 25. This sublime expression of juristic antipathy to self-reflection, I would argue, stages the same repetition. If self-reflection is not a useful form of thought, then it can hardly be action and so the frustration with Schlag being “against himself” is that he is failing to contribute, he is again falling down by not telling us what to do.

29. Duxbury, *Reviews*, *supra* note 27, at 877.

30. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1998), and articles too numerous to cite. The book on lotteries is addressed to the theory of decision-making and not to decision-makers.

31. Duxbury, *Legal Dons*, *supra* note 27, at 25.

32. See NEIL DUXBURY, *JURISTS AND JUDGES: AN ESSAY ON INFLUENCE* (2000).

be worked through but as grounds for dismissal or denial.<sup>33</sup>

At the risk of laboring the point, the surprising passion, the fury that Duxbury feels at Schlag's failure to guide his readers is a sign of ambivalence, of a hidden commonality or attachment, and of a decisive shift in the form of the analytic thinker's discourse. There is a move from the rhetoric of reason to that of passion; a shift from polemic to fury that leaves Schlag's work not so much refuted as dismissed for being irrationally unhappy, and more broadly for daring to question the value of the forward march, the progress of reason and law. The affective and corporeal figures of dismissal—the unease, the malaise, and the infuriation—suggest that beneath the vagaries of academic review there is a whiff of danger, the threat of evisceration, of the debility of unhappiness. It is that proximity, that subtle though furious identification with Schlag's thesis, that most immediately explains the attraction and subsequent negation of his position. In a seemingly very personal vein, Duxbury has to create a distance from Schlag; he has to expunge his attraction to the critic's views, and in the process he feels infuriated. The thesis can be confirmed by looking to other dismissals of the anti-lawyer.<sup>34</sup> These are equally visceral and affective. David Carlson, whose frame of reference is a mixture of Hegel and Lacan, offers what is in many ways the most extended and deliberative of dismissals.

Carlson is explicit that what is at issue is a matter of honor: Schlag has challenged the legal academy to a duel.<sup>35</sup> As with any affair of honor, the issue, Carlson believes, and he cites Slavoj Žižek at length as his guide on this point,<sup>36</sup> is that of class. Schlag, we will learn over the next forty-five pages of the review essay, lacks class because he lacks “‘*l'object petit a*’ . . . the unfathomable object-cause of desire.”<sup>37</sup> Two

33. See Peter Goodrich, *The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction*, 10 *LAW & CRITIQUE* 343 (1999) (giving a brief analysis of this tendency).

34. Other examples of analytic dismissal include Matthew Kramer's, *Review*, *CAMBRIDGE L.J.* 649 (1997), which begins a review of *Laying Down the Law* as follows: “Exactly why Pierre Schlag chose to publish this collection of essays is unclear. *Laying Down the Law* is slight in several respects: in length, page size, and analytic rigor.” He goes on to opine that “one cannot help feeling puzzled by his decision to put together a book made up of several jejune essays.” *Id.* at 649. Guyora Binder and Robert Weisberg argue that Schlag contradicts himself, and end with a flourish from Molière: “this deconstructive reader turns out to be none other than His Honor, the normative deliberator, who was speaking French literary theory all along and never knew it.” GUYORA BINDER & ROBERT WEISBERG, *LITERARY CRITICISMS OF LAW* 414-15 (2000). Douglas Litowitz states that Schlag is the “leader” of a group of scholars, which is nice if implausible, but that “he comes up short,” he “fails” to offer a program, is self-contradictory—the critique of normativity presupposes normativity—and finally, his theory is “somewhat useless,” all of which is presumably bad. DOUGLAS LITOWITZ, *POSTMODERN PHILOSOPHY OF LAW* 39-41 (1997).

35. David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 *COLUM. L. REV.* 1908, 1909 (1999).

36. See, e.g., *id.*

37. *Id.* at 1909 (quoting Slavoj Žižek, *Why Does the Law Need an Obscene Supplement?*, in

things can be said about this diagnosis. The first is that although the essay is sometimes elliptical in its depiction of the legal object of desire, it does attempt to address the substantive thesis that Schlag has argued. The second is that the essay is again an instance of ambivalence, of attraction and disapproval lodged at a highly abstract level but underpinned by a most personal and affective rejection of Schlag's thesis.

In refutation of Schlag's work, Carlson makes the substantive argument that he does not offer an Hegelian account of reason. Carlson wants to go back to Hegel, and he wants to do so through the lens or terminology of the Lacanian revision of Hegel contemporarily associated with the work of Slavoj Žižek. This theoretical lexicon allows Carlson to describe Schlag's work as directed more against language, or against the symbolic order as such, than against law. The thesis is highly persuasive for those who believe in Hegel or wish to apply a Lacanian frame to the order of law. In these terms, Schlag is a lawyer on the edge of a nervous breakdown.<sup>38</sup> He is a romantic who "regrets the corruptions of modern times," and inscribes his "false autobiography" in nostalgic imaginings of "an uncastrated subject in a state of nature—fully formed and replete with benevolence for and from their fellow creatures."<sup>39</sup> In Lacanian terms, Schlag yearns for what he cannot have; he seeks the Real that necessarily escapes consciousness, the impossibility or lack that founds desire, a justice that "always *necessarily* fails."<sup>40</sup>

Schlag exhibits the symptoms of paranoia. While Carlson, whose office is next to mine, does not hesitate to depict Schlag as being in danger of mental illness, he does hurry to state that this should not be understood as suggesting "that Professor Schlag is mentally ill or unable to function."<sup>41</sup> Schlag's paranoia, we are told, "is a strategy [Schlag] adopts to ward off breakdown." In one sense Carlson is offering Schlag high-end analysis, practical tips for warding off madness. In practical terms, the notion that criticizing Hegel's conception of reason is a sign of madness would probably go a long way to proving Schlag's thesis that the legal academic normative project should be abandoned for fear of generalized insanity. My concern, however, is a slightly different one. Carlson inverts Schlag's critique of reason and in doing so exposes the

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LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE 75, 88-89 (Peter Goodrich & David Gray Carlson eds., 1998)).

38. Carlson, *supra* note 35, at 1946-48. For a further elaboration of the thesis that Schlag exhibits the symptoms of paranoia, see Francis Jay Mootz, *The Paranoid Style in Contemporary Legal Scholarship*, 31 Hous. L. Rev. 873, 874-75 (1994).

39. Carlson, *supra* note 35, at 1915, 1940.

40. *Id.* at 1917.

41. *Id.* at 1947.

theological roots of the debate, the fluctuation of faith and heresy, belief and apostasy, that mark the controversy.

The notion that the critic of reason necessarily displays the symptoms of paranoia is probably the most explicit depiction of the irrationality manifested physically as well as mentally by the opponent of contemporary law. It is a strong claim to make, and again it suggests a powerful yet less than explicit attraction to or investment in the dismissal of the critic. In Carlson's case, the fury to which Duxbury refers manifests not only in his explicit thesis that Schlag is bordering on madness, if not actually mad, but also in a curiously repetitive motif to his essay. It comes in the opening sentence. Schlag is depicted as being "[p]erhaps the most brilliant and certainly the angriest iconoclast working in jurisprudence today."<sup>42</sup> I will return to the iconoclasm and its buried reference to theology, reason, and law. What is most immediately striking is the assertion that Schlag, rather than Carlson, is angry.

Throughout the essay, the theme of anger and its accompanying irrationality, lesions, and bitter failures recurs frequently. For example: Schlag is engaged in nothing other than "logomachy—a tirade against the symbolic order;"<sup>43</sup> Schlag "angrily challenges the legal establishment;"<sup>44</sup> he "bitterly regrets" the symbolic order;<sup>45</sup> Schlag is "angry at law;"<sup>46</sup> he is "angry about judicial failure;"<sup>47</sup> he engages in "an angry tirade against law;"<sup>48</sup> he is "bitterly critical of the subject that has submitted to law;"<sup>49</sup> there is "an angry tone" to his work, and so on.<sup>50</sup> Finally, just to add the requisite gravamen to the peroration of his case, we learn that Schlag will not go down in history as "an academic hero."<sup>51</sup> Time will leave his writings untouched and his juristic grave unmarked.

The irony, the telling point, is that whether or not one views Schlag as ill, irrational, paranoid, or psychotic, it is hard to describe him or his writings as angry. Binder and Weisberg, I think correctly, describe Schlag as "cheerfully" self-contradictory and no less an authority on the irrelevance of theory than Stanley Fish has said that he is "a great (and serious) comic," confessing at the same time, and somewhat self-referentially, that "reading Schlag on me is a lot more fun than reading me.

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42. *Id.* at 1909.

43. *Id.*

44. *Id.* at 1911.

45. *Id.*

46. *Id.* at 1917.

47. *Id.* at 1918.

48. *Id.* at 1919.

49. *Id.* at 1939.

50. *Id.* at 1910.

51. *Id.* at 1954.



You can count on it.”<sup>52</sup> It would be perfectly reasonable for Schlag to be angry; it just so happens that he is not. Humor rather than fury is the most apparent trait of Schlag’s highly readable style, and it is at most a breezy boredom, a jovial incomprehension, rather than bitterness that marks his critique of normativity. While Schlag could be accused of repetition or of the prolixity of academic success, the vehemence of the “tirade” is simply not a feature of his style. It seems more probable, in other words, to view the designation of anger as a projection. It is Carlson who is worried about anger, and it seems plausible to infer that it is most likely he that is angry with Schlag and with those who criticize law. If that hypothesis is in some measure sound, then he joins Lieter and Duxbury (and all the others) both in dismissing the critique of reason as irrational or paranoid and in viewing Schlag as “infuriating,” or more profoundly, as dangerous to their projects and to the order that honors and perpetuates the hierarchy they wish to climb.

What is most immediately common to the critiques of Schlag that I have cited is a sense of the personal investment in defending reason and the associated criteria of excellence in the legal academy. Carlson is again most explicit, and in a passage that depicts Pierre as suffering the “romantic modernist illusion of the Napoleonic duelist” he goes on to state that “the elite legal academic establishment never took the missing piece and cannot possibly restore it.”<sup>53</sup> The elite legal academic establishment makes only a cursory appearance, but I would suggest that it is a very significant one.

Immediately after this reference, Carlson talks about “imagined insult[s],” and by association it would seem that Schlag has insulted the elite that constitutes the order within which the academic jurist, here the Hegelian normativist, seeks to make a mark and thereby find a place in history and heroism. Why the reference to the elite legal academy if not to signal either aspiration to join or actual membership and an accompanying policing function? Schlag’s questions, cheery satire, and good humored pillorying of academic norms reminds and undermines. It reminds the jurist of other projects and diverse traditions that are not theirs and do not necessarily fit the mold of who they have become. It reminds them of a past, present, and perhaps future aspiring to or rising within the elite legal academy. It also undermines their self-confidence, their plan, and their heroic projects within that little part of history that is occupied by the legal academy. That can be pretty annoying but it is not

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52. BINDER & WEISBERG, *supra* note 34, at 414; Stanley Fish, *in* SCHLAG, *supra* note 14 (listing comment on back cover).

53. Carlson, *supra* note 35, at 1910.

necessarily a sign of a struggle with lunacy. Neither is it the whole story.

### III. AGAINST PROGRAMS

There is a politics of reason, and while Pierre Schlag may not be the best informed or the most consistent exponent of that politics, his work does address plausible issues in the methodology and practice of legal scholarship.<sup>54</sup> If it is politicization of the academic legal hierarchy that is threatening to his respondents, it can even be pointed out that Schlag is, in the main, less political than he is philosophical. His temerity has been that of questioning whether it makes sense to theorize law as if there were only one proper method of legal analysis and only one set of criteria by which to judge the reason or the justice of legal practices. Hegel did not simply “get it right” for all time. He was followed not only by Marx, Nietzsche, and Freud, but he has to be understood partly in the context of his Christian faith and the tradition within which he wrote. Those may seem simple points but they already suggest certain radical limitations to the Hegelian concept of rationality and the possibility of alternative traditions and forms of reasoning.

The most radical contemporary theory of the limits of Western reason can be found in Paul Feyerabend’s classic essay *Against Method*, in which he outlines an anarchistic theory of knowledge.<sup>55</sup> His thesis was a simple one: The history of science showed that accident, self-contradiction, and counterinduction have been of much greater significance in the discoveries of science than conformity to rules or methodologies that prescribe law and order as the only mode of access to truth. Diversity rather than uniformity was the creative basis of scientific revolution. At the level of theory, Feyerabend argued for a view of creativity and imagination as being essential to science and to the fostering of scientific communities in which the only fundamental methodological precept was

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54. Of the works that would seem most directly relevant to Schlag’s project but that do not seem to figure directly, I would think PETER SLOTERDIJK, *CRITIQUE OF CYNICAL REASON* (Michael Eldred trans., 1983), REGIS DEBRAY, *CRITIQUE OF POLITICAL REASON* (David Macy trans., 1983), as well as JEAN-PAUL SARTRE, *CRITIQUE OF DIALECTICAL REASON* (Jonathan Rée ed., Alan Sheridan-Smith trans., NLB 1976) (1960), would be good candidates for discussion or at least location of his project. GREGOR LUKACS, *THE DESTRUCTION OF REASON* (1978), is also an important Marxist critique of the position that Schlag seemingly adopts. It is ironic and perhaps also unfortunate that someone who is committed to challenging the putative autonomy of the pseudo discipline of law reproduces that autonomy, that lack of scholarly cross-reference or context, in his own work. In the law review, the footnotes are a largely self-referential exercise in which collegiality, the roll call of other legal scholars and of other law review articles, are the mandated form of tabulation. Schlag, nevertheless, is a critic of the law review and has chosen, if briefly, to write books rather than law review articles.

55. PAUL FEYERABEND, *AGAINST METHOD* (3d ed. 1993) [hereinafter FEYERABEND, *AGAINST METHOD*].

that anything goes. A free society would practice a science of freedom in which, as he later put it, "rational discourse is only one way of presenting and examining an issue and by no means the best."<sup>56</sup> At a political level Feyerabend argued that the rise of Western science coincided with Christianity's suppression of non-Western traditions and cultures. Among other things, that argument suggests that territorial aggression allowed for the concealment of the fact that Western science was much closer to myth than it would usually be prepared to admit.

*Against Method* is also fairly self-evidently an attack upon law, specifically the "stultifying effects of the Laws of Reason."<sup>57</sup> The task of the methodological anarchist, or as Feyerabend would prefer, the Dadaist, is similarly depicted as being that of "an undercover agent who plays the game of Reason in order to undercut the authority of Reason (Truth, Honesty, Justice, and so on)."<sup>58</sup>

Feyerabend's attack on conformism and the laws of Reason was pluralistic, hedonistic, and humanist. He favored lightness—"distrust any serious enterprise"—and humor. He promoted the importance of "confusionism," the value of counter-rules, and he argued against all programs. The methodologist's task, he concluded, is "to make the weaker case the stronger" and to promote disharmony more generally. His work, needless to say, produced a debate that dominated much of the methodological discussion of the 1970s and that now, thirty years later, has trickled down by law.

Feyerabend's work was savagely attacked as irrational, reactionary, and immoral. In *Science in a Free Society*, Feyerabend replied at length and instructively to these critics in a section titled "Conversations with Illiterates." There he expressed amazement at the reviews of his work, specifically "the disregard for argument, the violence of the reaction, the general impression I seem to make on my readers," and especially on "rationalists."<sup>59</sup> Freedom of method was anathema to the academic community responsible for formulating the protocols of scientific reason, and they responded with piety rather than argument, injunctions rather than discussion. It is a debate that offers instructive precedents for understanding the nature of the response to Pierre Schlag's account of *The Enchantment of Reason*, and equally evidences the possibility that his critique of academic legal reason can be situated within a political

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56. PAUL FEYERABEND, *SCIENCE IN A FREE SOCIETY* 184 (1978) [hereinafter FEYERABEND, *SCIENCE*].

57. FEYERABEND, *AGAINST METHOD*, *supra* note 55, at 20.

58. *Id.* at 23.

59. FEYERABEND, *SCIENCE*, *supra* note 56, at 125.

trajectory—a history and tradition that he has not always explored or acknowledged.

Feyerabend's work developed out of a European tradition of philosophy of science and specifically out of the Vienna school. It was marked both by irreverence and passion, by political as well as philosophical commitments. It attracted ire but was not itself irate. Maybe he should have been angry and perhaps he became so. In the final chapter of his "Conversations with Illiterates," he expanded his critique of his critics into a more general observation on the professionalization of incompetence:

When I wrote these replies I thought I was confronted with individual incompetence: the learned gentlemen (and the one lady who joined the dance) were not too bright and rather badly informed and so they quite naturally made fools of themselves. Since then I have realized that this is a rather superficial way of looking at things. For the mistakes I noticed and criticized do not merely occur in this or that review, they are fairly widespread.<sup>60</sup>

He goes on to offer the thesis that "their frequency is not merely an accident of history, a temporary loss of intellect, it shows a pattern. Speaking paradoxically we may say that incompetence, having been standardized, has now become an essential part of professional excellence. We no longer have incompetent professionals, we have professionalized incompetence."<sup>61</sup>

Feyerabend wrote within a European tradition of philosophical as well as political anarchism. He was careful to distinguish political anarchism from anarchy—from *an-archos*, lack of origin or truth—at the level of the material practices, the reason or method of Western science. Pierre Schlag's critique of reason is best understood in these same terms. *The Enchantment of Reason* is not a directly political work, it is a loosely materialist critique of legal method, an account of the history of legal scholarship in the United States and a judgment of the theory of legal reason set against the materiality of its practices. He offers two principal observations on the patterns of practice within the legal academy. The first is that the claim of law to scholarly autonomy—to the status of a discipline or even a science—is at root political rather than theoretical. "[I]t is a serious question whether American law is indeed a discipline or instead an admixture of thinking habits, jargons, ideals, anxieties, and canonical materials that are reproduced with sufficient regularity (hence 'the grid') to produce the appearance of an intellectual

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60. *Id.* at 183.

61. *Id.* For a powerful recent expression of this position, see DOMINIQUE LECOURT, *THE MEDIOCRACY: FRENCH PHILOSOPHY SINCE THE MID-70s 67-75* (2001). In the United States, see DEREK JACOBY, *THE LAST INTELLECTUALS* (1987).

discipline.”<sup>62</sup> It follows from this, in Schlag’s analysis, that it makes little sense to view law as a unitary form of reason or, for that matter, of symbolic rite. It has to be understood in its materiality, a history and tradition of diverse practices, a complex of communities, and a series of linguistic practices established over time.

The designation of legal scholarship as a pseudo-discipline provides one explanation for the vehemence of the refutations that Schlag’s work elicits. In his own account, the claim that there is no singular reason of law generates anxiety: “This fear of losing reason is a fear of loss of control. This is in part why the prospect of reason running out is such a dread moment.”<sup>63</sup> It also has another consequence. Legal academics base their claim to status and utility upon a practice of rationalizing legal norms. They render legal decisions uniform; they fit judgments into the grid; they explain the reason and the analogies that act as the law of law. That is the basis of the legal academics’ claim to status and success. Observation of the culture of the legal academy, however, indicates that this arch dream of professionally generated uniformity and order is simply that—a fantasy, a wish-fulfillment. In the domain of legal practice, and equally upon the bench, law reviews are little read and even less respected.

When an institutional practice arrives at an impasse, when it becomes boring, impoverished, sclerotic, or simply repetitive and increasingly solipsistic, then it is both peculiarly vulnerable to critique and tends also to be radically hostile to the practitioners of such critique and their message. As I suggested earlier, this hostility relates both to the concept of excellence that underpins their status or status aspirations and also correlatively engages with or unsettles the subject, the professional identity or persona of the jurist who expends useless productivity upon unread texts. The fury that Schlag generates is here directed towards what is perceived to be the negative quality of his attack upon faith in legal reason: even if he is right, what next, what does he suggest? In the view of those who used to believe or want to believe in legal reason, he is an imposter because he has forgotten that the function of law at the level of identity is to provide a measure, standard, or grid. Schlag is seen here to have failed or at least forgotten that law should tell us what to do and how to behave. It is not enough, in other words, that Schlag has his own project; he needs to prescribe a project for others and then the new program can substitute for the old, a new order can provide the criteria of excellence that will underpin the hierarchy that will determine who we become. It is at this point that one can glimpse most directly the

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62. SCHLAG, ENCHANTMENT, *supra* note 9, at 12.

63. *Id.* at 21.

academic back room, the legal closet, the desire and the fear that are named law.

Before unpacking the constituents of the juristic closet, I wish briefly to conclude my attempt to provide a political context for Schlag's critique by reference to earlier debates around the methodology of science and of the disciplines more generally. In one sense it is not so terrible to describe the academy—legal or other—as academic. It is terrible only in the sense of a commitment to a Christian life or a Marxist project, to the unity of the *vita activa* or the dialectic of class struggle. Pierre's gnosis, his resistance to programs, his refusal to dictate the norm, as well as his laughter, modeled upon Dupin's exposure of the inspector's incompetence, is a challenge precisely to faith, to belief in a hierarchy, a politics, a law of laws. To be against method or against programs is to juxtapose freedom and reason, and it will generate both fear of freedom and its accompanying defense of the faith. The icons do not go down lightly, and as Nietzsche put it, the best instrument for such foundational work is a hammer.

My claim is that Schlag writes within a leftist tradition that has changed radically by virtue of material circumstances and not least the collapse of the institutional left. Back in the seventies, Perry Anderson charted the course of the left in terms of three stages:

Firstly, there was a marked predominance of epistemological work, focussed essentially on problems of method. Secondly, the major substantive field in which method was applied became aesthetics—or cultural superstructures in a broader sense. Finally the main theoretical departures outside this field, which developed new themes absent from classical Marxism—mostly in a speculative manner—revealed a consistent pessimism.<sup>64</sup>

Later retrospectives on the New Left have shared Anderson's perspective and have simply supplemented the subject domain of methodism by tracing the postmodern turn of the left into a hyperinflated discourse of ethics—ethical nihilism<sup>65</sup>—and philosophies of hedonism and love.<sup>66</sup> These trajectories underpin Schlag's work but they do not, I believe, dictate it. Schlag, who comes after this history, is neither reducible to it nor limited by it. Schlag is, in the best of senses and in a Dadaist conception, a shallow thinker. He moves on while the ponderous or deep stay stuck where they are.

In the Christian tradition, laughter, deep and lengthy laughter, is the sign of the gnostic, of the one who knows that she does not know. Such

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64. PERRY ANDERSON, *CONSIDERATIONS ON WESTERN MARXISM* 93 (1976).

65. On ethical nihilism, see ALAIN BADIOU, *ETHICS* (Peter Hallward trans., 2001).

66. DOMINIQUE LECOURT, *THE MEDIOCRACY* 98-112 (Gregory Elliot trans., 2001).

laughter offends the faithful, is deemed iconoclastic, and is heretical because it paradoxically marks the abyss of being. At the level of method, Schlag follows Feyerabend by pointing to the anthropology of the legal academy and explicating its Christian and thoroughly monotheistic roots. It is not that Schlag is against Christianity; he simply points out that there are other traditions, religions, sciences, and myths. His first move at the level of subject formation is to point out and question the sanctity of law. The discourses that extol the virtue of state and law, that praise the sovereign subject, the overlapping of consensus, the justice of big capitalist arrangements, and the universality of rights are both theologically rooted and culturally specific. They do not mix well with the carpet bombing of Iraq or Afghanistan, with the bombing of Serbia, or with the massacres in Rwanda. There is, at the very least, room to question the absolute reference of the categories of state and justice, as also the encomia of reason and the reverence that is paid to the procedures of a bureaucratized rule of law.<sup>67</sup>

A conservative identity underpins and maintains the universalism of the rule of law. To hold it sacred is simply to deny its particularity, its local history, and its imperialist practices. The same argument, made both by Schlag and by the French philosopher Badiou, can be elaborated in relation to the universalism of rights discourse that is now so popular amongst the liberal left. The contemporary universalism of rights masks a refusal to address the singularity and the locality of the event. This “immense return to Kant,” to the architectonic of reason and morality, puts in circulation a coinage of Christian immortal rights for immortal subjects, for non-beings.<sup>68</sup> These rights do not seem to stand in the way of imperialist enterprises, massacres, radical non-intervention, and other forms of selective recognition. What the rule of law demands as an absolute is not practice but piety; it preaches the sanctity of identity and difference, provided only that the different becomes the same. The logic of the rule of law, in other words, becomes that of integration rather than respect for difference. As Badiou puts it, the ethics of human rights does not extend beyond the religiously revealed identity of the imperialist West: “become like me and I will respect your difference.”<sup>69</sup>

In Badiou’s account, the ethics of the rule of law is nihilist in a dual sense. It is nihilist because it deals in universals that apply only to non-beings: “the only thing that can really happen to someone is death.”<sup>70</sup> It

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67. For a recent and succinct account of the inequalities that call for engagement, or simply reasons to be disenchanted, on the domestic front, see Gene Nichol, *Law’s Disengaged Left*, 50 J. LEGAL EDUC. 547 (2000).

68. BADIOU, *supra* note 65, at 8, 12.

69. *Id.* at 24.

70. *Id.* at 35.

is nihilist—a smug nihilism—in practice because it counsels doing nothing in relation to the “coming to be” of events. Against such nihilism, Badiou asserts that the singularity of the event demands that the subject change in relation to the event, that the situation be explored faithfully: “And this, of course—since the event was excluded by all the regular laws of the situation—compels the subject to invent a new way of being and acting in the situation.”<sup>71</sup> Ethics, in other words, is particular. It requires the suspension of the prior laws of reason, justice, and thought. It requires that we make or write ourselves anew. It is that questioning of identity, that passion or fidelity to the uniqueness of the situation, that faith or love of the particular and different that both frightens and attracts the liberal scholar who wishes to deny the enchantment of reason or the poverty of legalism.

The final example that plays across the political and status themes that I have charted is also an instance of a literary coincidence. How would Robinson, the fictive lawyer who is the protagonist of Lawrence Joseph’s *Lawyerland*, the book about which Schlag wrote *Jurisprudence Noire*, respond to Schlag’s critique of legal reason?<sup>72</sup> Curiously enough, Robinson did respond. Where has Schlag been used, and indeed how would one use this discourse against legal method? Take a low status but distinctive law review and an article that has received very little citation or reference. Reginald Leamon Robinson, an Associate Professor at Howard Law School, in 1996 published a lengthy article entitled *Race, Myth, and Narrative in the Social Construction of the Black Self*.<sup>73</sup> It is the lead article in that year’s volume and it runs to 144 pages, the length of a book. Using a frame of theoretical reference that is close to that of the New Left, Robinson cites Schlag with enthusiasm and complicity in making the argument that law professors refuse to acknowledge “that a white male perspective has shaped legal academe in a manner which still invades, wounds, and destroys their colleagues of color.”<sup>74</sup> The identity of the law professor and the professional persona that they reproduce in law students may be tacit or inexplicit but it is fundamentally local in origin and specific in culture and norms. More than that, Robinson beautifully reconstructs both the method of law school and its interpretative practices, its theory of narrative, in terms of the subject that is instituted by and narrated through the academic tests of lawyering.

The textual object of Robinson’s extended critique is the work of liberal scholars Daniel Farber and Suzanna Sherry on legal narrative.

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71. *Id.* at 42.

72. See Symposium, *The Lawyerland Essays*, 101 COLUM. L. REV. 1730-96 (2001).

73. Reginald Robinson, *Race, Myth, and Narrative in the Social Construction of the Black Self*, 40 How. L.J. 1 (1996).

74. *Id.* at 7.



Explicitly using Pierre Schlag's account of the "immaculate conception" of legal thought, his theory of the virulent yet hidden subject who evaluates and judges the narratives of law, Robinson proceeds to expand upon the manner in which this hidden identity, this unworldly yet all too worldly ghost structures the persona of the lawyer and the criteria of excellence.<sup>75</sup> Any narrative, in other words, constitutes either expressly or impliedly, a subject position, a voice and a biography, that dominate and determine both how we should be and what is to come. Interestingly, Robinson does not argue for any program or product, but rather he simply suggests the value of freedom, a freedom of the text and a freeing of the legal subject.

Put it like this, the absence of a program or the lack of a normative project makes Schlag's work less than useful for the useless purposes of the conventional or legalistic academic. Robinson does not offer normative insights or policy prescriptions for law in general. He does not add symbolic capital to the accumulation of abstractions that accounts for much of the liberal legal academy's output. It makes perfect sense that the elite legal academy, the white male bastions of privilege, would revile Pierre's work as failing to govern, as opting out of the legislative role of the normative scholar who wields the universals of cultural excellence and symbolic power. At the same time, it is equally logical that a scholar inhabiting a concrete and local situation, someone seeking not to be integrated into the universal and concerned, therefore, with the events of their life and the ethics of their own situation, will find the critique of legal reason both insightful and useful. Robinson did not need a manual on how to use Schlag's work. He did not need normative prescriptions or the pieties of a program. He simply found the work useful for thinking through the politics of an institution at a particular moment in time. That is, I suspect, because he was not in search of more of the same—the voice of the father, the holy word of law.

#### IV. ENCHANTMENT AND ANOMALISM

The legal closet is full of fury and desire. It is here that abstraction comes face to face with corporeality, the rule meets the exception, and wisdom encounters passion. The reference to the closet, to "the back library or book-closet," in the opening pages of *The Purloined Letter* is no accident. It sets up a counter-rule, a space where the defenses of the normative order run out, a laughter that embodies critique in the doubts and differences that constitute subjectivity. Here, in other words, is the domain of the enchantment of reason, the other scene or back library of

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75. *Id.* at 11, 15-16. For a further discussion of this point, see Goodrich & Mills, *supra* note 15.

law in which the longer term structures, measures, or values of legality are acted out in the “pre-schematization” or pre-judgments (the prejudices) of juristic thought.

While it is my argument that there is a logic to the legal closet, it is neither easy to discern nor is it a welcome object of discussion. All of the authors whose hostile responses to the critique of reason I tabulated above were concerned to discount and discard the anti-lawyer. The normative legal closet was hardly opened but, rather, the articles of faith were reasserted or norms of excellence were loftily stated. Brian Leiter dismissed Schlag for what he could not say, Neil Duxbury criticized him for what he should have said, and David Carlson expounded at length upon what he did not say. Other critics viewed his style as paranoid, jejune, negative, or useless. Each of these responses counseled, either directly or indirectly, that Schlag’s work be jettisoned, that the candleless theater of the closet be abandoned in favor of established norms and the discourse of positive or even pure jurisprudence.

In Poe’s account of the closet, it is laughter and smoke that most obviously dominate the back library. The narrator and the heroic detective sit silently for hours, they think their way to solutions, they act by means of cerebration. The scene, however, is a very physical and masculine one. It enacts a homosocial pleasure, a hedonism that is aimed at returning to the Queen, the emblematic feminine, the lost object of her desire. The men compete with each other to chart the path of a heterosexual love letter between two aristocrats. While the competition to please authority—the Crown—is fairly unexceptional, the fact that it is a competition between men to impress or gain the unspoken approval of a feminine authority suggests that even here, in the legal closet, it is the ambivalent differentiation of homosexual and heterosexual desire that is at issue. The men seek to impress each other and so, in the Freudian interpretation of this scene, the semantic trajectory of the communication is that of a message sent by a man to a man across the empty space of the feminine. It is a homosexual message even if, or perhaps especially because, its epistolary trajectory moves through the heterosexual.

In Poe’s tale it is poetry that determines the return of the object of desire to its proper, which is to say lawful, place. Poetry in this sense marks the propriety or proper place of the feminine. It also signals the opaque relation of judgment to the norms of law. The inspector got nowhere because he ignored the identity of the subject, specifically that the minister was a poet. The poem, and here I will borrow again from Poe, is marked most critically by being without design. It is an excitation. It is anomalous, minor, transient, and yet also our best entry into

metaphysics.<sup>76</sup> The depiction of poetry as excitement tied to beauty confirms the erotic basis of the scene in the closet. Whether the closet offers excitement or despair, love as transgression or as metaphysical satisfaction, it ties law irrevocably to the corporeal routines and drives that are connoted by and confined to the closet. Whether it is mortification of the flesh or a diaphanous caress between men, the closet signals an erotic play, a competition or attraction that gets acted out most usually in the rather drier terms of law review dismissals, hostile footnotes, or charges of delusion or insanity.

Schlag uses the term enchantment. He uses it primarily in the sense of magical thinking, a sense that is familiar from the work of the Scandinavian legal realists but that has had little airtime in the United States.<sup>77</sup> The world of law depends upon the magic of concepts that refer to nothing, or at least nothing other than further concepts. While this could be taken to mean that the legal academy is in thrall to concepts, a more interesting and serious accounting of enchantment needs to look also to the closet and hence the undisclosed dimensions of enchantment.

No less an authority than Sir Edward Coke, who by interesting coincidence did not attend the imaginary dinner party that Schlag compered at Stanford, discusses the writ of enchantment both in the *Institutes* and in his book of writs or *Entries*. Writing from a position firmly outside the closet, Coke records a writ of abjuration, and legislation from the reign of King James against the heresy of invocation or conjuration. According to the writ of abjuration, the defendant had to swear never to "practice, devise, or put in use or exercise any invocations or conjurations of spirits, witchcrafts, inchantments, or sorceries . . . to the intent to find any money or treasure, or to waste, consume, or destroy any person in his members, body, or goods, or to provoke any person to unlawful love . . . ," and so on.<sup>78</sup> For the sake of completeness, in Part III of the *Institutes*, Coke returns to this theme in a discussion of heresies and offers a definition of the enchanter: "An inchantor, incantator, is he or she *qui carminibus, aut cantinculis Daemonum adjurat*. They were of ancient called *carmina*, because in these days their charms were in

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76. See Edgar Allan Poe, *The Poetic Principle*, in 5 THE WORKS OF EDGAR ALLAN POE 245-76 (1908) (1895).

77. For a classic statement of this position, which sees legal concepts such as duty or right as expressing imaginary powers closer to magic than to science, see KARL OLIVECRONA, *LAW AS FACT* 99-103, 112-16 (1939). For an overview, see INTRODUCTION TO JURISPRUDENCE (Lord Lloyd of Hampstead & M.D.A. Freeman eds., 5th ed. 1985). There are hints at a similar thesis to be found in Thurman Arnold and in Jerome Frank.

78. EDWARD COKE, *A BOOK OF ENTRIES CONTAINING PERFECT AND APPROVED PRESIDENTS OF COURTS, DECLARATIONS—AND ALL OTHER MATTERS AND PROCEEDINGS (IN EFFECT) CONCERNING THE PRACTICK PART OF THE LAWS OF ENGLAND* fol. (B)(i)(a) (1617/1671).

verse.”<sup>79</sup>

The writs against enchantment clearly indicate that it was a highly specific and different form of reasoning. It was, first off, a covert mode of reasoning, a logic of the closet that was often specified as taking place after dark. What is most fascinating to a contemporary reader is that enchantments or spells dealt with hidden, but real, causes.<sup>80</sup> The writ against enchantment discusses the verses or songs of the incantator with respect to their effects in the real: they allowed lost things to be found, absent bodies to be harmed, and most provocative of all, they intended “to provoke persons to unlawful loves.”<sup>81</sup> These were all manifest consequences, thus proof of a hidden and illicit causality. The enchanter could see the operation of divine or diabolical causes. They had knowledge of what we would likely call unconscious patterns, unseen and generally unknown motives or triggers of action. These were deemed dangerous not because they dealt in unreal or phantasmatic things but because they provided access to an order of causes or justifications that were not those of Christian theology and its monotheistic rule of law.

Enchantment is discussed by Coke under the rubric of heresy. That context provides an initial clue as to the proximity of enchantment to lawful practices. Reason and enchantment share a common territory: they both deal in hidden causes—the unseen connections between words and things in the world. They differ not so much in their method as in their legitimacy; the licit order of reason is defined by the existence of a singular God and a correspondingly singular order of reasons and laws. It is not remiss to recall that the modern common law was an order that developed out of the Reformation and that explicitly governed a polity that was both civil and ecclesiastical, an order that was both secular and spiritual. The reason of law refers historically to a spiritual order and a governance of souls that was deemed to require, amongst other things, an exclusion of images and a correlative and exclusive love of the one God.<sup>82</sup> The enchanter’s crime was that of pursuing other images, other Gods. Once the singular order of Christian reason had been abandoned, the path was open to poetry, verse, hedonism, the body, and the worldly loves that the writ sought so stridently to outlaw.

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79. COKE’S INSTITUTES PART III (1648) at fol. (G)(4)(b). The (medieval) Latin translates as “he who by songs or chants summons the devil.”

80. On the Roman legal concept of fascination (*fascinum*), see PIERRE LEGENDRE, L’EMPIRE DE LA VÉRITÉ 14-23 (1983), partially translated in LAW AND THE UNCONSCIOUS: A LEGENDRE READER 95-97 (Peter Goodrich trans. & ed., 1997).

81. COKE, *supra* note 78, at fol. (B)(i)(a).

82. I belabor this point in many works. See, e.g., PETER GOODRICH, OEDIPUS LEX 108-43 (1995); PETER GOODRICH, LAW IN THE COURTS OF LOVE 9-28 (1996).

There is a dual fascination to the thesis of *The Enchantment of Reason*. It well describes, as Schlag points out, the wonder—the imagery and poetry of unseen causes from which the order of legal reason derives and upon which it depends. Pointing out and laughing at the occasional and harried trips that the law makes into the closet and ridiculing the pretence that reason does not have need of the charms or spells or simple poetry of the closet is only one portion of the story. The enchantment of reason itself implies the reason of enchantment, the logic and the power of alternative frames of thought or the freedom of method that Feyerabend so eloquently espoused.

The writ of enchantment made a point of referring to the style or genre of the enchanter: he, or more frequently she, used verse, poetry, song, and spells or images. Verse charms. It is effective. It is a primary or antique form of law.<sup>83</sup> In the closet, we should also recollect, it was a poetic logic that resolved the case of the purloined letter: the minister who had stolen the letter was also a poet, and he secreted the letter according to a poetic logic: he hid it by not hiding it. It was the simplicity of the affair that kept causing Dupin to laugh, it was the poetry of the very visibility of the thing desired. Put differently, the law's lack of appreciation for the power of the poetic led to the inspector literally overlooking the love letter that he so desired:

This functionary, however, has been thoroughly mystified; and the remote source of his defeat lies in the supposition that the Minister is a fool, because he has acquired renown as a poet. All fools are poets; this the Prefect *feels*; and he is merely guilty of a *non distributio medii* in thence inferring that all poets are fools.<sup>84</sup>

The most interesting interpretation of Schlag's discourse on the enchantment of reason is not that it exposes the failings of law but that it argues for a poetics, for an unlawful love, that lawyers harbor yet deny.<sup>85</sup> The poet enters the closet of law to see what it is that attracts and repels the legal mind, what causes or reasons it has hidden from view. And there, as Schlag has lengthily detailed, we find the sources of the emptiness or boredom of the normativo—the Western concept of a singular God, a circle game, an aesthetics, *amour propre* to be sure, dreams, idols, fetishes, and disenchantment, but also poetics, spells, and songs. The enchantment of reason is after all a wonder, a dance, a song, and reference to it can still generate fury, pleasure, fear, attraction and revulsion, but excitations all.

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83. See Peter Goodrich, *Officium Poetae*, 26 LIVERPOOL L. REV. 17 (2002).

84. Poe, *supra* note 7, at 986.

85. Borrowing from DERRIDA, *supra* note 7, this hidden love is literally “an affair of writing.” It is an affair—an illicit love—with writ and script, and it is this that binds Pierre and his critics, while also placing them in hostile opposition, as “noire” to blankness.

In prosaic terms, the enchantment of reason as perceived from the closet implies diversity, the simple admission of disparate desires, of the presence of the body and the singularity of events, of cases and judgments. This leads Schlag to write about literature, about aesthetics, about the affective states of law that gain their only and limited juristic expression in boredom, ennui, or negation. Those at least the lawyer can admit to on occasion, but they mask a horde of other loves—a closet, a back library, a beyond of law. And in his way, Pierre has written of literature and aesthetics, of cab driving and imaginary dinner parties, to express, I suspect, a little of the desire that lies in the closet of law. It would be possible to take that analysis further. The closet, as I argued earlier, appealed particularly to Reginald Robinson, to a critical race theorist seeking to make sense of the subject positions or norms of identity that are instituted by law and most particularly by the legal academy. In a disciplinary context, this also makes complete sense: the closet still houses the questions of race and gender, of the body and the image, fiction and fantasy, as they are played out failingly in the reason of law.

Borrowing another terminology, Schlag is a situationist and the situation he finds himself in is the legal closet. He has tried to air the closet, to make explicit what lingers in the past, in the history and the smoke of the back room. That recourse to other disciplines, combined with the resurrection (or rather, the invention) of a novel aesthetics of law, a particular practice of law and literature, and an accounting of the existential failings of the legal subject form a coherent and politically interesting project. They are a start, and although there are undoubtedly lacunae and failures of courage in his sociological and historical accounts of law school and scholarship, his *oeuvre* is one of the jewels of the United States legal academy. If one were to use the etymology of his name, which in German means cream, his work rises to the top. That said, his contribution is not really at the level of a concrete politics of law—he largely ignores feminism, gender preference, and race theory—and, as his critics undoubtedly sense, he is ambivalent about laying down the law: he is simply against it. His most important interventions are theoretical and specifically methodological. In conclusion, I will return to the question of method and freedom from the norm that defines Schlag most profoundly as an anomalist.

As I depicted earlier, Schlag is engaged in a gnostic project. It does not bow to one norm, to the holiness of the rule of law, or to the universality of legal rights. That is not to say it is lacking in spiritual acumen or recursive insights. It is rather that Pierre, like Dupin, is committed to the simplicity of the affair, to the innocence of the fool, and the insight of the poet. It is time to address the enchantment of the anti-lawyer, the

desire of the contrarian, and the pleasures of antinomianism. To make the point most directly, Schlag's enchantment is not with reason but, rather, with language. His affair is with words and it is words—a letter perhaps—that he feels that lawyers have lost and need to return to the closet to find.

The love of language is a significant juristic theme and traditionally has tended to accompany disenchantment with the verbiage and the inelegance of law.<sup>86</sup> Historically, the common lawyer believed that the language of the law contained secrets or treasures, an interior of words that marked an interior of law and was accessible only to the professional reader or to the skills of the legal rhetorician. The Renaissance jurist William Fulbeck thus observes: "The words of the law may be compared to certain images called *Sileni Alcibiades*, whose outward feature was deformed and ugly, but within they were full of jewels and precious stones: so the words of the law, though they be rude in sound, yet are they pregnant in sense."<sup>87</sup> The words mask or harbor something more, a *plus ultra*, a possibility of justice that resides in a felicity or meaning that, for Schlag, only the occasion—the unique situation or event—can reveal. This is precisely because the word is like an image; it is a sign, a potential, a difference. It is also because, as Nietzsche put it, one cannot claim to have killed God if one still believes in grammar.

The position that Pierre adopts is an antique and venerable one. It is that of the anomalist, of a school of anti-grammarians that originated in the work of Crates of Pergamum and was carried on most notably by Aristarchus.<sup>88</sup> The controversy was between two schools and two places: Alexandria and Pergamum. For the analogists, language was inherently orderly and governed by regularity. The analogist grammarian undertook to submit language to principles or rules that were predicated upon likeness or analogy. Nouns and verbs could be grouped and classified into declensions and conjugations on the basis of similarity of form. The verbal similarities that the analogists sought to find were not only grammatical but also congruent with the semantic reference of the

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86. PETER GOODRICH, *LANGUAGES OF LAW: FROM LOGICS OF MEMORY TO NOMADIC MASKS* 91-100 (1992). For discussion of the contemporary context, see RICHARD WEISBERG, *POETHICS: STRATEGIES OF LAW AND LITERATURE* (1995).

87. WILLIAM FULBECK, *DIRECTION OR PREPARATIVE TO THE STUDY OF LAW WHEREIN IS SHEWED WHAT THINGS OUGHT TO BE OBSERVED AND USED OF THEM THAT ARE ADDICTED TO THE STUDY OF THE LAW, AND WHAT ON THE CONTRARY PART, OUGHT TO BE AVOIDED* 55-56 (1599).

88. The standard account is that of R.H. ROBBINS, *A SHORT HISTORY OF LINGUISTICS* 25-29 (4th ed. 1997). A more technical account can be found in F.H. COLSON, *The Analogist and Anomalist Controversy*, 13 *CLASSICAL Q.* 33 (1919). The most important surviving source on this debate is MARCUS TERENTIUS VARRO, *DE LINGUA LATINA* (1951) (1938), books V, VIII, and X.

word, the context or denotation of the sign.<sup>89</sup> The analogist thus believed that the order that they found in language was an order that corresponded to the rules, the measures, or laws, of the external world. Finally, it should be noted that the analogists, based in Alexandria while the great library, the *Museion*, still stood, were primarily interested in the study of language as a part of the study of literature or texts. The orderliness that they coveted and projected was that of the library, of the stacks.

The anomalists were more radical, and stressed difference rather than similarity of form. Their argument was that language was far from orderly and that likeness of form, the rules and regularities that the grammarians sought to impose, were shot through with exceptions. The irregularities, disharmonies, and anomalies found throughout language use were as essential and originary to the nature of language as were the regularities and rules of analogy that the analogists imposed. In Varro's description of the debate, the anomalist was focused upon usage, the situation, its modes of expression, and its difference rather than its conformity to a rule: "it is our practice to seek utility and not to seek resemblance; thus in the matter of clothing, although a man's *toga* is very unlike his tunic, and a woman's *stola* is very unlike a *pallium*, we make no objection to the difference." The rooms of a house, he goes on to explain, are again unlike each other, but that lack of resemblance is not an obstacle but a virtue. He concludes: "Therefore, since difference prevails not only in clothing and in buildings, but also in furniture, in food, and in all the other things which have been taken into daily life for use, the principle of difference should not be rejected in human speech either."<sup>90</sup>

As Varro's examples indicate, the anomalist viewed the idiosyncrasies of language as an empirical feature of their contexts of use, that of the event of utterance. One can interpolate further to argue that irregularity—or difference—was also the key feature of dialogue—or speech—by means of which language entered social life. For the anomalist, the exception, the uniqueness or history of usage, disproved the rule. Etymology was thus the method of the anomalist, and the context or differences of use were the focus of their studies. It was this aspect of the anomalist position that appealed to early jurists and lay at the basis of the anomalist school of Roman jurists during the Principate. Where Crates and Aristarchus accused the grammarians of arbitrarily imposing general rules upon disparate practices, the Sabinian jurists attacked the

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89. See R.H. ROBBINS, *Dionysius Thrax and the Western Grammatical Tradition*, TRANSACTIONS OF THE PHILOLOGICAL SOCIETY 72 (1957).

90. VARRO, *supra* note 88, at 28-30.



abstraction and rigidity of the analogist school, that of the Proculians, who sought, primarily under the influence of Labeo, to introduce analogy into law.<sup>91</sup>

The early debates are long forgotten and their details do not greatly matter. Nevertheless, they point to an epistemology of language that underpins the radical tradition within law. According to the anomalist, words are what they are by virtue of how they have been used. Etymology and morphology trace the history and fields of meaning that can be found in the philology or transmission of a word from past to future. All we have, in this view, are the words and the subtle and different contexts in which they have been used and, on occasion, abandoned. The enchantment of the word is its difference, the history or images that it contains and transmits. To understand these is to understand the life of language and the complexity or plenitude of the words that we use. As Freud pointed out, and as Saussure also observed, language comes with a social history, a politics, and an array of choices or particularities that are available only through attention to etymology and the variations and exceptions of history and usage.

The anomalist as jurist simply combats the grammar of law. In the Sabinians' view, the truth of law lies not in grammar but in the specific contexts of its use. The analogist, in other words, imposed regularity, order, and rules upon the chaos of law's actual use and failing historical practices. The project of the legal grammarian was that of integrating difference and legislating *Latinitas* or abstract proper forms. The juristic anomalist argued that this obsessive desire to impose regularity upon the life of law was a misrecognition of the uniqueness and the difference of the interpretative practices of legal decision makers. The analogist's impulse to find or to impose consistency threatened to erase the difference of the actual case—the uniqueness or exception that is law for us.

Aristarchus and Schlag would get on well. In political terms they both argue for the logic of the exception. Schlag thus taunts the legal academy with a critique of its analogist desires, its obsession with consistency, and its dull and abstract reduction of life to formal rules. He advocates the logic of the exception and addresses attention to the words that are actually used. It is the practice and not the theory or normative grid that attracts and repels. He is against law because its analogist or Proculian practices erase actual use in favor of an otherworldly norm. The epistemology of the legal closet turns out to be that of anomalies,

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91. On the two schools, see Peter Stein, *Two Schools of Jurists in the Early Roman Principate*, 31 *CAMBRIDGE L.J.* 8-31 (1972). See also Peter Stein, *The Relations between Grammar and Law*, in *THE EARLY PRINCIPATE: THE BEGINNINGS OF ANALOGY* 75 (1975), and PETER STEIN, *REGULAE IURIS* 49-67 (1966).

that of the apprehension and critical appreciation of difference. It is equally, as Agamben has so forcefully argued, the politics of the exception, which in essence means the way in which the norm constitutes the excluded which marks the internal logic of the norm in an ineradicable manner.<sup>92</sup> Hence the necessity of recourse to the closet to attempt to understand the exception, which for Agamben means the logic of the concentration camp that so marked and marred the twentieth century.

#### ENVOI: ANOMALOUS DESIRES

In a tobacco trance in a closet with a male friend, Auguste Dupin, the hero of Poe's story and the exemplar of reason according to Schlag, sought to do better than the asinine inspector. He laughed and then with unerring simplicity deduced from the fact of poetry a solution that returned the object of desire to the Queen from whom it had been stolen. I have tried to suggest that the attraction of this story as a metaphor for the inadequacy of legal reason lies in certain very simple and apparent features: the fact of the closet, the smoke, the homosociality of the protagonists and the feminine object of their desire—the hedonism and the laughter. I have tried, in other words, to interpret the narrative according to its own anomalies, its exceptions, the singularities or unique circumstances that make up its specific attraction. I have also suggested that it offers a method and proposes a specific politics, that of the exception, that of making the weaker case the stronger.

Eve Kosofsky Sedgwick, the literary theorist who coined the wonderful phrase "the epistemology of the closet," suggested that its logic is marked by axiomatics and structured by antinomies.<sup>93</sup> The logic of the closet is that of the undisclosed, and it befits an analysis of an anomalist such as Schlag to end by pushing further into the terrain of what he himself desires. The question could also be formulated in terms of the underpinnings of his antinomian reversals of scholarly norms. Schlag pulls literature, poetry, image, and aesthetic out of the closet of law in the name, most recently, of jurisprudence *noire*. He challenges the legal academy to debate the practices of scholarship, the material and style, the figures and other signs of affect, in what legal scholars produce. Ignoring intentions and other external legitimations of utility or function, he rests his case upon what legal scholars actually say—their words, their prolix texts, their interminable law reviews, and their all too solid casebooks. These are the material practices of academic lawyering and they are found to be wanting.

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92. This thesis is expounded in *GIORGIO AGAMBEN, HOMO SACER* (1998).

93. *SEDGWICK, supra* note 8, 1-63.

What they want is somewhat less clear. It could be argued that the object of desire, the lost letter, is always obscure or absent. That is, in Lacanian terms it is lacking and should never be disclosed. Nevertheless, Schlag does, perhaps inadvertently, give certain clues as to what he desires. In his early self-depiction as a cab driver he admits that he “had these incredible utopian visions and these absolutely uncontrollable yearnings to prescribe these normative visions to large numbers of strangers.”<sup>94</sup> So he joined the academy. There he has exercised commendable normative restraint in his middle years. He in some sense abstained: he spared the world so as to taunt his colleagues. Abandoning the site or practice that is associated with a failure does not resolve or work the failure through. It will repeat, and Schlag is certainly not immune to repetition. What gets repeated is the impossibility of the normative vision, and it is that impossibility, that desire, with which I will conclude.

For the anomalist, language is the object of desire, or, in a more modern idiom, it is the linguist’s love.<sup>95</sup> What I wish to suggest is that the legal anomalist pursues the irregularities of language for good political reasons. The materiality of language is its history. To engage with distinct ethnic groups, with different gender performances, across the barriers of class, tradition, or culture means learning the exceptions, the irregularities and the anomalous usages that mark individual and collective difference. Speech, discourse, even scholarship, is in this sense an initiatory exercise, an adventure in self-reflection that allows some limited degree of apprehension of differences. The recourse to the closet has a double function. It serves to reveal our own homosociality, the biographical identity that excludes difference, the disciplinary past that has integrated the unlike or exceptional. At the same time, the trip to the closet allows for an apprehension of the commonality of desire, an exposure of our difference to ourselves being the only mechanism that can facilitate appreciation of the difference of others.

Varro concluded of the anomalists that they were not entirely right; language contained both regularities and exceptions. Unlike Stanley Fish, I think we can conclude that Schlag does not “just wanna be right,” he wants to keep the impossible open and the anomalous visible. The focus of the legal anomalist is upon the juristic exception, the unique situation, the judgement or case. The impossibility takes the form of the unbridgeable gap between the rule, the calculable or similar, and the contemporary instance—the unique subject or event. What Pierre the anomalist consistently seeks to do is to hold up the process of judgment,

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

95. Most notably analysed in JEAN-CLAUDE MILNER, *FOR THE LOVE OF LANGUAGE* (1978).

the determination of an outcome, the normative or abstract restatement of what we should do. The reason for this is to draw attention precisely to desire in the form of an impossibility. He stares unflinchingly at the love that the lawyer and the linguist share, that of “the phantasmatic bridging of the unjoinable.”<sup>96</sup> That, according to the anomalist, is the moment of desire, the occasion of an unrepresentable real—purity and danger conjoined.

In *The Purloined Letter*, it was neither the theft of the letter nor its return to its original owner that was the focus of the narrative. The story was rather about the transmission or passage of the letter: what route did it take, where did it lodge, what did it look like? For the anomalist, too, the issue of politics is about history, passage, transmission, or bridging. It is less about what we should do than it is about how we should do it because method determines both object and outcome. The impatient, the infuriated, the angry, or simply legalistic do not like the attention to method, that patient back game, that stillness of the closet. They have their reasons and they are not necessarily discountable; they are simply engaged in a different politics with other goals. For the anomalist, it is passage that counts and transmission that determines the longer term outcome, the patterning of fantasies, the trajectory of desire. It is a political project lodged at the level of structures. It is also a poetic project, a recognition of transience, limitation, and change, which Horace captured well in the *Ars Poetica*:

Dead words shall live  
And live words shall die  
And only the mouths of men can decide.<sup>97</sup>

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96. *Id.* at 121; Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* 11 *CARDOZO L. REV.* 919 (1990), makes the same point in terms of the theory of justice.

97. JACOB FUCHS, *HORACE’S SATIRES AND EPISTLES* 86 (1977).