4-1-2003

Schlag in Wonderland

Joanne Connaghan

Follow this and additional works at: http://repository.law.miami.edu/umlr

Recommended Citation
Available at: http://repository.law.miami.edu/umlr/vol57/iss3/5
Schlag in Wonderland

JOANNE CONAGHAN*

The dreariness of déjà vu might be tolerable if one could muster the sense that the countless normative prescriptions contained in judicial opinions, statutes, regulations, and law review articles mattered. But by and large they don’t.¹

“If there’s no meaning in it,” said the King, “that saves a world of trouble, you know, as we needn’t try to find any.”²

INTRODUCTION

Pierre Schlag is taking the American legal academy by storm. He is also taking it to task. In a deluge of books and articles over the last decade, including, most recently, a lengthy article gracing the sacred pages of the Harvard Law Review,³ Schlag has exhorted legal scholars to “lay down the law”⁴ (and he does not mean legislate), to cease making normative prescriptions to policy-makers and judges,⁵ and to acknowledge that their reason has become enchanted, rendering them both delusional and cognitively impaired; trapped within “an enchanted legal world populated with magical entities linked by magical thinking.”⁶

Despite the softening effect of a wry humor and keen wit, Schlag’s admonishments to his peers are mercilessly candid and resolute. In particular, The Enchantment of Reason vividly depicts the world of American legal scholars as shallow and dissolute, replete with fear, dread, avoidance, desperation, and deceit. They have committed the worst sin imaginable: exchanging reason for faith in disguise. They have made it their collective purpose to conceal the presence of an imposter in their

* Professor, Kent Law School, University of Kent. My warm thanks to Pam and Michael Fischl for their hospitality and hard work in organizing this symposium; to Peter Goodrich, Paddy Ireland, Steve Pethick, and Erika Rackley for their helpful comments on an earlier draft of this paper; and to Pierre Schlag for his graciousness and sense of humor.

2. LEWIS CARROLL, Alice’s Adventure in Wonderland, in THE WORKS OF LEWIS CARROLL 107 (Roger Lancelyn Green ed., 1968) [hereinafter AW].
6. ER, supra note 1, at 17, 126-44.

543
midst through disingenuous appeals to truth, goodness, and fate. Bewitched and befuddled by the charms of a mere simulacrum of reason, legal scholars consequently miss much and see little; their minds closed, their gaze averted, their insights warped and stunted within the disciplinary frame they have contrived for themselves. *The Enchantment of Reason* undoubtedly poses a serious challenge to the integrity and purpose of American legal scholarship. Moreover, its tactics—involving in particular the subjection of the work of the academy’s “stars” (Dworkin, Nussbaum, and Sunstein are prime targets) to grueling and at times humiliating dissection—are devastatingly effective. The difficulty is that Schlag does the job almost too well. Indeed, one cannot help but wonder—if he is right and the American legal academy is the empty, inadequate, ineffective, fearful, and dishonest wonderland of nonsense he describes—why he bothers. Surely there are more important things to worry about than the flurries and foibles of legal academia. Why dwell at such length upon what Schlag has so skillfully revealed to be the misguided delusions of an insignificant and over-inflated few? One answer may be that Schlag believes the American legal academy is worth saving (albeit in need of a Messiah). Alternatively, he may consider his critique to have wider implications, casting his gaze beyond the (legal) academy to address, albeit indirectly, broader social, political, and cultural concerns. Neither position can be gleaned unambiguously from the pages he has penned. One is compelled either to read between the lines, probe the gaps, scan the interstices of Schlag’s work, or conclude that he devotes an enormous amount of attention to activities that are, by his own account, largely without point.

**Narrative of Omission**

“We are always within the situation, and to throw light on it is a task that is never entirely completed.”

“You should say what you mean,” the March Hare went on. “I do” Alice hastily replied; “at least—I mean what I say—that’s the same thing, you know.” “Not the same thing a bit!” said the Hatter. “You might just as well say that ‘I see what I eat’ is the same thing as ‘I eat what I see’!”

A productive route to a better understanding of Schlag’s purpose and motivation—and thereby to a fuller and more informed critical grasp of the intellectual worth and political potential of his work—may

---

7. Id. at 10, 21.
8. Id. at 69 (quoting H.G. GADAMER, TRUTH AND METHOD 269 (1975)).
9. AW, supra note 2, at 68-69.
be to attend to the silences in *The Enchantment of Reason*, to highlight what is absent as well as what is present, to seek out implicit as well as explicit agendas. There is, I would contend, as much to learn from Schlag's omissions as from his acts. As lawyers, of course we are all too familiar with the vagaries and inconsistencies that surround the act/omission distinction. We are also alert to the ideological power the dichotomy carries, particularly in the context of ascribing responsibility. To act is to be held responsible. To fail to act—to omit—is, according to conventional morality, to be without responsibility; an omission is never as morally heinous as an act. Underpinning this conventional morality is a series of assumptions about attribution of cause and consequence. An act is said to set in motion—cause—a chain of events, a set of consequences; an omission, by contrast, has no causative effect and is therefore without consequences (we can of course all cite the standard exceptions to this general assertion).

As critical lawyers, however, we recognize this to be absolute humbug. The act/omission dichotomy is a sham—in Derridean terms, it is a "logocentric hierarchy," part of a "categorical regime" that constrains, enables, and organizes the discursive practice of law. A dichotomy that is impossible to draw with any certainty, with efforts to do so inherently value-laden. In particular, the attribution of cause and consequence is almost always preceded by unarticulated, morally predetermined assumptions about responsibility. An omission can be just as morally heinous as an act (besides which, it is an act depending on how you choose to look at it), and it can certainly carry consequences, perhaps serious ones.

*The Enchantment of Reason* is a work replete with omissions. As it unpicks what is unthought, it resounds with what is unsaid. And, in the unsaid, it precisely echoes much of what it attacks. These omissions may have consequences—possibly serious consequences—both for Schlag's own project (however we understand it) and for that of critical legal studies (understood in its broadest and most encompassing sense). If so, these consequences need to be examined. What is unsaid deserves as much attention as what is unthought.


11. Meaning that they are understood to embrace critical approaches to law that draw upon but are not historically, geographically, or thematically confined to American critical legal studies (CLS). Elsewhere, Schlag identifies himself as a "deconstructionist" whose relationship to CLS is one of developing their themes "in more faithful directions." Pierre Schlag, U.S. CLS, 10 LAW & CRITIQUE 199, 208 (1999).

12. On the "unthought" in reason and in American legal scholarship, see ER, supra note 1, at 69-77.
What then does Schlag leave unsaid but that nevertheless speaks so loudly? What omissions leap from the pages of _The Enchantment of Reason_ and, carrying their consequences, scuttle away in fear of detection? Well firstly, as a feminist, I cannot help but be struck by the total lack of engagement with feminist and critical race scholarship. By virtue of its omission, this body of work is situated outside Schlag’s enquiry into reason. This is surprising, not least because American legal scholarship—about which Schlag purports to have something to say—offers more quarter than most to feminist and critical race scholarship. It is also puzzling because feminists in particular have long been preoccupied with reason; women having been pronounced bereft of it at least since the time of Aristotle. More recently, in the United States context, both feminists and critical race scholars have found themselves under attack because their scholarship is deemed to have “failed the test for rational discourse.” Reason is being deployed openly and aggressively to silence and devalue legal scholarship that departs from the conventions of the mainstream academy. Schlag’s inattention to the concrete political context in which recent debate in law has played out in the American legal academy is troubling, to say the least.

From this one is drawn not only to question the homogeneity of Schlag’s representation of American legal scholars but also to impute his apparent depiction of legal discourse as autonomous and self-generating. His default presentation of legal scholarship is one that brooks little or no intrusion from the “outside” world of politics, society, economy, or culture. Most of the boundaries within which legal discourse purports to operate remain disconcertingly unbreached. As a consequence, there is absent from _The Enchantment of Reason_ any sustained engagement with the broader social and political dimensions of the arguments Schlag makes. There are occasional oblique hints that legal discourse in general and the enchantment of reason in particular carry implications well beyond the confines of the academic community Schlag is addressing.

---

13. Because Schlag totally bypasses sex and gender issues, the perspectives of gay and lesbian legal scholars are not featured either.

14. Aristotle did not restrict his category of “defectives” to women, observing that the slave is entirely without the faculty of deliberation; the female indeed possesses it, but in a form which remains inconclusive. ARISTOTLE, _THE POLITICS OF ARISTOTLE_ I 24 (B. Jowett trans., 1885). Thus, his conception of rationality is also compatible with notions of racism.


and critiquing. But why take this on faith? Surely the significance of Schlag’s intellectual contribution stands or falls on the basis of whether or not he is berating American legal scholars for their bad habits or making arguments of weightier intellectual and political worth. Schlag’s coyness here leaves the radical scholar with a deep sense of dissatisfaction and unease. How, she might ask, does all this relate to institutions, structures, practices, and discourses beyond the legal academy (or for that matter, within it)? Moreover, does not an understanding of the current reign of reason in the academy require at least some attention to the historical, social, and political conditions from which it sprung? Or can we confidently consign such factors to the background of enquiry into reason’s seductive power and reductive effects? Most importantly, what does the enchantment of reason do to people (beyond befuddling American legal academics)?

Thus, one arrives at yet another striking omission in Schlag’s critique: it would seem that the material world and its corporeal inhabitants are missing. This is an ideational investigation unencumbered by the messiness and unpredictability of bodies or the dreary cataloguing of material disadvantage and suffering. Schlag’s concerns are of a different kind, namely to chronicle the extent of self-delusion characterizing American legal academics and question the integrity and rightness of the positions they adopt. His is a study of intellectual moves, of the “rhetorical tricks”\(^\text{17}\) and “Noble Scams”\(^\text{18}\) passed off as legal reasoning, thus leading one reviewer cynically to remark that “for [Schlag], American law is a mind-game that is not played well enough.”\(^\text{19}\)

Now, it may fairly be protested that this is a scurrilous statement, that Schlag’s work constitutes a strong challenge to those who doggedly persist in the mind games of the academy. It may also be argued that Schlag does recognize the grave implications of legal mind games: law is, he has acknowledged, a field of pain and death,\(^\text{20}\) and reason, he maintains, plays a central role in legitimizing the “ritualized forms of violence . . . incarceration, killing, plunder, extortion and so on”\(^\text{21}\) of which legal practices comprise. But, as I read on, the suspicion still lingers. Surely reason fails not just in the pages of law reviews, but also in the apologies for and rationalizations of material and social practices

\(^{17}\) ER, supra note 1, at 44 (commenting on the work of Cass Sunstein).

\(^{18}\) Id. at 34 (commenting on Dworkin).


\(^{20}\) SCHLAG, LAYING DOWN THE LAW, supra note 4, at 36 (drawing on the seminal article by Robert Cover, Violence and the Word, 95 YALE L.J. 1601 (1986)); see also ER, supra note 1, at 21.

\(^{21}\) SCHLAG, LAYING DOWN THE LAW, supra note 4, at 36; see also ER, supra note 1, at 21.
which yield inequality, deprivation, oppression, and hurt. Why does he shrink from talking with any particularity about these all too important implications of the legal mind game? And where are the voices of the unequal, deprived, oppressed, and hurt? Why are they not here? What role does reason play in suppressing them? (As it turns out, quite a lot.) And, if reason does suppress them, why does Schlag’s critique not set them free? In this article, I seek to answer some of these questions by probing the extent to which the omissions I have identified unselfconsciously reflect the discursive frames Schlag is attacking. I want to track the consequences of this reflection. My overriding concern is the extent to which Schlag’s preoccupation with the foibles of the mainstream legal academy may unduly inhibit the intellectual and political potential of his work. I believe such potential is there, and, far from counselling the jettisoning of Schlag’s work—as others, attentive to his omissions, have done—I urge progressive legal scholars to take it seriously but not to take it on faith. In particular, I consider it both appropriate and constructive to call Schlag on what appears to be a glaring lack of engagement with the implications of positionality and its relationship to power. This seems to me to be the greatest omission in The Enchantment of Reason. It does not betray sufficient consciousness of its own standpoint, let alone that of those who are cast in its shadows.

Schlag would probably acknowledge that. After all, it proves his point that whatever is sought is always in some sense a construction of the “search” instituted to find it. Nevertheless, to continue Schlag’s metaphor, it remains the case that not everyone is involved in the “search” to the same extent or, indeed, at all. Some hover on its margins, others avoid it, work to subvert it, or are precluded from joining it. From their diversely situated perspectives, the parameters of the search may be all too apparent; its effectiveness and purpose open to serious question, and the principle or set of principles that inform it (however exaggerated

22. Goodrich observes: “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. . . . Each of these responses counseled, either directly or indirectly, that Schlag’s work be jettisoned . . . .” Peter Goodrich, Pierre the Anomalist: An Epistemology of the Legal Closet, 57 U. MIAMI L. REV. 791, 815 (2003).

23. Another reason for attending to the omissions in Schlag’s work is that their elaboration offers us clues to his standpoint. More broadly, a consciousness of standpoint highlights the relativity of knowledge and the significance of silence as well as speech.

24. In The Enchantment of Reason, Schlag uses the conduct of a police search in Edgar Allan Poe’s, The Purloined Letter, allegorically to introduce the main themes of the book, particularly the idea that the framing of an issue operates to constitute and redefine it. See ER, supra note 1, at 1-17.
their application) contentious or misapplied. To put it another way, some of us may be more enchanted than others.

**THROUGH THE LOOKING GLASS**

*What is called reason these days is very often not.*

Alice explained, as well as she could, that she had lost her way.

*I don't know what you mean by your way, said the Queen: all the ways about here belong to me.*

It is perhaps an obvious question to ask but . . . enchanted by what precisely? In Schlag's case, the answer is far less apparent than one might expect. It should be stressed at the outset that this is not—nor does it purport to be—an abstract philosophical discourse on reason. Reason for Schlag's purposes is bound by the confines of the legal academy; it is *what passes for* reason among American legal scholars that concerns him. Interestingly, at no point does he define what he means by reason. This is probably a wise move. Given the variety of views—even within law—on what counts as reason, attempts to define it are invariably tricky, eliciting pronouncements that are either hopelessly vague or internally contradictory. Acts of definition also raise the risk of side tracking debate with considerable amounts of intellectual effort exhausted by interminable disputes of definition and scope. Anyway, Schlag's pointed avoidance of any definitional exercise necessarily flows from the arguments he is making. Once reason is defined, mapped, plotted, and located, it becomes not reason exactly, but whatever it is that is defined, mapped, plotted, and located. "Reason," for these purposes, becomes no more than a construction of the logic of the disciplinary frame within which the scholar/topographer is working. Schlag is not going to fall into that trap.

Nevertheless, Schlag's refusal to delineate with any precision the object of his critique is not a risk-free strategy. One difficulty arising is that reason remains deliciously ephemeral throughout, assuming a

---

25. Id. at 144.
27. Therefore to assess it in these terms, as some reviewers have done, is, frankly, to miss the point. See C.J. Summers, Distorting Reason, 11 YALE J.L. & HUMAN 529 (1999).
28. A prime example here is Susanna Sherry, The Sleep of Reason, 84 GEO. L.J. 453 (1996). After elaborating her views on what reason is, largely in terms of what it is not, id. at 455, observing in passing that reason may sometimes embrace "common human emotions," id. at 456, she then proceeds roundly to condemn feminist and critical race scholarship because of its allegedly "emotional" derivation. Id. at 476-77. This is, among other things, a classic instance of the uncritical invocation of the reason/emotion dichotomy to discredit and silence non-traditional points of view.
dream-like, shadowy quality that at times heightens its allure and triggers a desire to capture and contain it. This is of course a reflection of Schlag’s own ambivalence towards reason, signalled in particular by his use of the word “enchantment”29 to denote our (his?) affinity to it. Schlag’s portrayal of reason is that of a siren, a femme fatale, who simultaneously entices and deceives. And, while he urges us endlessly to recognize her pathological tendencies, we remain suspicious that he is still in her thrall. More importantly, however, the nebulous quality of Schlag’s invocations of reason is misleading and belies the prescriptive content of the notion(s) he deploys. Reason, for Schlag’s purposes, is bounded in ways he does not openly acknowledge. Woven within the fabric of his critique is a particular perspective from which reason’s purposes are derived and its shortcomings identified and assessed.

And Moving Thro’ a Mirror Clear . . .30

While careful to avoid definitions, even Schlag recognizes the need to give some content to the object of our enchantment. For example, he is free with his metaphors for reason and its progeny. Reason, he claims, is associated with the “maze” of doctrine that forms the daily diet of legal scholars31; it provides a “frame” that delineates the parameters of legal work.32 Sometimes, it is a “game” which only lawyers know how to play properly.33 It is also a matrix,34 a pathway,35 a web,36 and a network.37 You get the picture. Thus envisaged, reason is a way of ordering and presenting knowledge, particularly in a legal context where it is closely associated with values of coherence, comprehensiveness, and determinacy (what Schlag identifies as the “essential . . . [features of] good legal thought”38). Reason does the job of connecting diverse material in a “grid of intelligibility” by the use of “inferences, deductions, analogies, extensions, modifications, limitations, [and] nega-

31. ER, supra note 1, at 33.
32. Id. at 3, 6, 10.
33. Id. at 36.
34. Id. at 44.
35. Id. at 76.
36. Id. at 59.
37. Id. at 24.
38. Id. at 6, 15 (“Reason . . . is the formative medium through which the field of law is organized and represented.”).
tions," and American legal scholarship is a wholesale "rationalization" enterprise, entailing the endless summarizing, restating, reconstructing, and systematizing of legal materials. Reason, Schlag claims, is law’s architectural plan. What Schlag captures brilliantly in *The Enchantment of Reason* is this engineering dimension to reason, its building role in the context of knowledge formation and selection. Reason provides the structural framework for law (and for many other disciplines); it offers a range of techniques through which law’s form may be prescribed and its content developed; it is the aesthetic lens through which law is viewed and appreciated. At the same time, reason patrols the borders of law, it determines what counts and what does not and, most importantly, it renders the world upon which law operates “amenable” by screening anything that cannot be fitted within the frame that it constructs.

Such an understanding of reason’s role in law is highly appealing. It equips legal scholars with a series of intellectual maneuvers which, if they master, they can deploy to impressive effect. It renders legal material determinate, but still malleable. It also presents a pleasing image of law as uniform, consistent, and predictable, in which the job of the scholar becomes the maintenance of legal order, the preservation of internal coherence, the pursuit of perfect harmony. Yet despite, indeed because of, these attractions, reason so conceived is, as Schlag points out, highly coercive. It extends well beyond the realms of mere presentation, operating actively to proscribe disorder, invalidate incoherence, and silence dissonance. Reason is univocal. Adhering to a “monistic aesthetic,” it imposes a “unitary conceptual matrix” on a pluralistic world; it is thus inescapably hierarchical and, in substituting one for many competing visions of law, its operations, and effects, is closely implicated in the exercise and abuse of power. Schlag’s account of reason’s repressive tendencies is sharply focused on the legal conceptual regime that enables the privileging of some viewpoints over others. Yet, without some attention to the material practices from which such privileging derives and in which it concretely operates, his analysis can tell us little about who is empowered and disempowered by reason’s operations. The *systematicity* of reason’s exclusionary tendencies, its role in constituting and reinforcing *particular* hierarchies, is simply not brought into view. Instead, his

---

39. *Id.* at 24.
40. Likewise, American legal theory is a quintessentially rationalist project: “a highly abstract and systematic rendition of law as a kind of prescriptive normative discourse.” *Id.* at 26.
41. As in any inconvenient “[g]aps, paradoxes, aporia, discontinuities, disjunctions, undecidabilities, ambiguities, ambivalencies . . . .” *Id.* at 45.
42. Even radical legal scholars, recognizing that legal work comprises a fairly narrow range of discernible “moves,” are then empowered to use them to good political purpose. For further discussion, see Jane B. Baron, *Romancing the Real*, 57 U. MIA MI L. REV. 573 (2003).
43. ER, supra note 1, at 44-45.
focus shifts to the authenticity of reason; his concern becomes that of exposing the fraud that lies at the heart of its deployment, namely its claim to rule. Reason, Schlag argues, is a pretender.

For these purposes, Schlag seeks to probe the relationship between reason and belief. He asks (with some exasperation): “How is it that unexamined beliefs are parlayed into the work of reason itself?” Moreover, on what grounds, if any, can reason distinguish itself from other “sources of belief,” for example, “authority, experience, convention, tradition, ethics, and so on?” Schlag’s attitude towards these other sources of belief is not easily pinned down. Sometimes he is neutral about their virtues: the assumption is that reason and these other disparate sources of belief perform more or less the same job—they ground or purport to ground people’s beliefs. At other times, it seems clear that some sources of belief are more acceptable to Schlag than others. For example, reason is frequently compared to its ostensible opposites “faith, prejudice, dogma, and company,” and a theme running throughout the book is the tendency of reason to slip into, indeed become one or more of these undesirables—what Schlag describes as “the unthought” or “pathological forms” of reason. The thrust of Schlag’s argument is that while reason sets itself above these other sources of belief, it is, ultimately, unable to sustain its own privileging and, as often as not, is likely to emerge as those other sources of belief in disguise.

Schlag reserves his strongest disapproval, however, for sources of belief that derive from magic or faith. An anti-faith sentiment is detectable at various points in The Enchantment of Reason, along with a tendency to mock the magical and the revelatory. Thus, Schlag derides the fully “enchanted world [of American law for being] populated with

44. Id. at 38.
45. Id. at 22. He also includes perception, “dogma, bias, prejudice... revelation... custom... force, power... emotion, [and] faith...” in his catalogue of “sources of belief.” Id. at 25-26, 40.
46. Id. at 69.
47. Id. at 75.
48. For example in his references to faith/the church to ridicule the work of legal scholars, id. at 43; in his gleefully ironic deployment of “Pascal’s Wager,” id. at 53-58; in the constant association of faith with other undesirables as in “faith, dogma, prejudice, and company,” id. at 63; in the invocation of notions of divinity and deification to mock reason’s self-aggrandizement and reveal its deluded and deluding qualities, id. at 92; and, finally, in his comparison of lovelorn legal scholars for whom law is a “jealous mistress” to “Catholic nuns who understand themselves to be the brides of Jesus Christ.” Id. at 105. I seek not to condemn Schlag’s anti-faith sentiment, merely to observe that he has one.
49. Magic plays a duel and somewhat contradictory role in Schlag’s account of reason. It is, on the one hand, a metaphor for reason’s compelling grip on the American legal psyche. On the other hand, it is also a caricature, communicating the sorry extent to which reason fails to perform the tasks allotted to it. At times, this simultaneous portrayal of magic as both powerful and preposterous is more confusing than it is elucidating.
magical entities linked by magical thinking;" he is scornful of the "soothing magic words" invoked by lawyers to avoid "the moment of vertigo" that the loss of reason is likely to induce. And he attributes the lamentable state of American legal scholarship to the excessive deployment of reason by those whose bewitchment leaves them insufficiently attuned to reason's "predicaments" and their destabilizing and self-destructive tendencies. Left unchecked, this produces the "deification" of reason: reason is elevated to an object of faith and its operation in law becomes utterly compromised by reliance on a version of itself that is anything but reasoned. "Ironically, as reason becomes deified it becomes denatured—less and less capable of checking its own operations. It collapses into what it claims to oppose: faith, dogma, prejudice, and company."54

*Shadows of the World Appear...* 55

One of the difficulties here is that one is never quite clear when Schlag is inside and when he is outside the value systems that frame his account of reason as a "source of belief." Is his claim that faith and magic lack validity as sources of belief within the framework of validation instituted by reason, or is it that they are—self-evidently—inferior? It does seem to be both but, if so, on what grounds can the latter assertion be sustained? Moreover, is Schlag's objection to reason as a source of belief the fact that it more often than not becomes its "traditional enemies: faith, dogma, prejudice, and company," or is it that it is not what it purports to be? In other words, is it faith, prejudice, and so on that Schlag objects to or is it simply the con? Either way, the question is important because it sheds light on the values—dare I say norms—Schlag is invoking and within which his critique operates. This is not the view from nowhere (Schlag would hardly claim it is). So where exactly is it coming from? What is its standpoint? Why the focus on faith? Is Schlag motivated by a personal antipathy towards manifestations of faith and religion? Or is it the perpetration of a fraud that offends him, the invocation, in the name of reason, of its antagonists? Is he, perhaps,

---

50. ER, supra note 1, at 17.
51. For example, "reasonable balance, reasonableness, good judgment, careful craftsmanship, pragmatism . . .," and so on. Id. at 22.
52. Id. at 21.
53. Id. at 60-91.
54. Id. at 92.
55. See Tennyson, supra note 30, at 54.
56. ER, supra note 1, at 63.
57. See in particular Schlag's discussion of the "Noble Scam." Id. at 33-36.
beneath the fashionable garb of postmodernism, an intellectual puritan, a truth-seeker?

Leaving aside, for a moment, speculation about Schlag's personal values/antipathies and their implication in the arguments he mounts in The Enchantment of Reason, it must be recognized that his preoccupation with reason as a source of belief is both striking and pre-emptive. It prescribes a particular test for the validity of knowledge. To be valid, knowledge must ground belief. And, Schlag argues, reason can no more ground belief than magic or faith. Sometimes (often in fact) it is simply magic or faith. Suppose, however, that we consider the validity of knowledge in different terms? Suppose we reject the notion that to be valid knowledge must ground belief in favor of more open, flexible, pluralistic approaches to knowledge validation. Do magic and faith then emerge as self-evidently without value?

Take, for example, fairy tales. These are narratives positively steeped in the world of enchantment. Is there a sense in which fairy tales are "valid" knowledge? Do they perhaps offer useful, sometimes even powerful, insights that enhance understanding, foster self-knowledge, liberate the imagination, and satisfy or induce desire? Indeed. Do we have to believe in them to conclude they have some validity as forms of knowledge? Of course not. The relationship between knowledge, understanding, and belief is much more complex and often much less direct than Schlag's invocation of reason would admit.

The point is that Schlag's notion of reason is an exact reflection of that deployed by those he seeks to criticize; it mirrors the epistemological framework of the mainstream legal academy in allowing the elision of knowledge and belief to stand. Hence, for example, Susanna Sherry's shock at the use by legal scholars of stories that may not even be true! Hence, too, her misplaced comparison of feminist legal scholarship/critical race theory with the beliefs of religious fundamentalists. Sherry presupposes (rather than proves) that religious believers and radical legal scholars are making similar kinds of knowledge claims and therefore stand or fall on the same test of validity (neither can properly ground belief). Schlag's strategy is to show that whatever test of validity she is invoking, reason fails it too: "once reason is demoted to the status


59. Schlag's account of reason, for example, completely neglects the role of the unconscious in the formation of belief, once again evidencing the "looking glass" effect. In fact, psychoanalytic theory offers a powerful counternarrative to the Cartesian meta-narrative of the individual rational subject. See, e.g., ROSI BRAIDOTTI, PATTERNS OF DISSONANCE (Elizabeth Guild trans., 1991).

60. See Sherry, supra note 28, at 463.

61. Id. at 454.
of belief... it loses its claim to rule.”62 Proceeding as if reason can do what Sherry and others in the American legal academy attribute to it, he goes on to show—categorically—that it cannot.63

What, though, are the consequences of this mirroring strategy adopted by Schlag? Do the gains of immanent critique outweigh the losses that flow from remaining within the frame he is seeking to dissolve? This is probably impossible to assess and Schlag does not make it easy for himself because he never really spells out the gains beyond the satisfaction of demonstrating that Susanna Sherry’s defence of reason undoubtedly qualifies as a classic instance of “faith, prejudice, dogma, and company” in legal scholarship. In fact, the political gains are potentially great as I will endeavor to show later in this article, but there are costs too, and I am not sure that Schlag is as conscious of these as he should be.

In occupying the terrain of the opposition, there is always a risk of conceding too much and probing too little. In Schlag’s case, the concern is that too many aspects of the discursive framework within which he locates himself survive intact because of his lack of awareness of their operative significance. For example, the anti-faith stance of the champions of reason finds it way unbidden but not wholly unwelcome into Schlag’s critique. Likewise, magic is presented as ridiculous, fantasy disparaged for its own sake, and states of enchantment presumed to be malign.64 Thus, Schlag inadvertently reproduces rationalist norms of knowledge validation at the same time as he disputes them. Similarly, in drawing the boundaries of American legal scholarship in the narrowest of terms to correspond precisely with the work of the academy’s mainstream, not only does Schlag exclude “non-traditional” legal scholarship from the ambit of his consideration, but, by doing so, risks affirming that exclusion from the definitions of “proper” scholarship posited by those whose work he derides. Such an effect is exacerbated by his inclusion of and enthusiastic identification with a recognizable canon of radical white male theorists comprising Fish, Kennedy, Derrida, and Habermas (the usual suspects). While Schlag clearly considers these writers to have insights that cast light on the activities of the mundane and misguided legal mainstream (comprising Dworkin, Sunstein, Nussbaum,
Rawls, Sherry, Radin, and sometimes Hart and Raz as honorary American legal scholars), the unspoken assumption is that no similar enlightenment is found in the work of feminists and critical race scholars. Schlag may protest that such a conclusion should not properly be drawn, but by that he simply means he did not consciously intend it, that it is a mere by-product of the discursive constraints within which he locates himself. I will not argue with this.

A final concern emerging from the confines of Schlag’s selective mimicry of the mainstream lies in its resolutely legal character. American legal scholars do not, by and large, like to stray too far beyond the boundaries of what is acceptably “legal” and interestingly, neither does Schlag. He/they prefer the snug confines of traditional legal discourse and its discontents, modestly professing ignorance and lack of expertise beyond the terrain of law, narrowly understood as judicial decisions and the doctrines and theories legal scholars derive from them. Schlag bemoans this narrowness repeatedly but seems in no great hurry to escape it. Indeed, one sometimes wonders whether or not his insistence on so limited an enquiry masks a fear of his moving beyond what he has experienced as safe and steady ground. By his own admission, this is the critique of “an insider,” but does it simultaneously affirm the attractions of remaining “inside”? This dogged determination to steer clear of the complexities that an extra-legal dimension might introduce is also manifest in Schlag’s exclusive preoccupation with reason’s aesthetic appeal. While I applaud his efforts to draw attention to the coercive power of particular aesthetic forms—in the context of law, the compelling effects of grid-like manifestations of reason—his neglect of, indeed total silence in relation to, other features of law’s coerciveness puts him at risk of overstating his case. This is particularly so when what is neglected is so closely bound up with what he addresses at such length. Here, I am thinking in particular of the ideological context within which law operates and upon which reason seeks to make her mark. In my view, there is an ideological dimension to the effective deployment of reason that is not, or is only secondarily, dependent upon its aesthetic form. There is a detectable distinction (not always but sometimes) between invocations of reason that are dependent upon the political and ideological landscape for their validity and deployments of reason that

65. This includes a particular notion of the “political” which is incorporated and deployed in legal work and which Schlag, in his unguarded moments, tends unselfconsciously to reflect. For further elaboration of this legally acceptable version of the political, see Schlag, U.S. CLS, supra note 11, at 207.

66. Schlag’s own description of himself, responding to an oral presentation of this paper at the Symposium, Beyond Right and Reason: Pierre Schlag, the Critique of Normativity, and the Enchantment of Reason, held at the University of Miami School of Law Feb. 22-24, 2002.
draw upon (or seek to develop) our aesthetic inclinations, particularly our attraction to order and coherence.\textsuperscript{67} Often, what seems reasonable is inextricably related to our understanding of what is possible, and yet, it is not always the case that what is possible is determined by the boundaries of reason. The ideological landscape abounds with all of the "sources of belief" making an appearance in Schlag’s critique.

The point is that reason as a particular aesthetic does not always work to disqualify reason as a repository for widely held ideological beliefs. Although the former may contribute to understandings of the latter, it may not wholly determine (or be determined by) them. A failure to acknowledge this explicitly arguably serves to weaken the power of Schlag’s critique. There are times when he invokes a primarily ideological concept of reason—one that relies on notions of truth, self-evidence, and righteousness—and then proceeds to critique it for its failure to adhere to an aesthetic form. Sometimes, this is effective, and it is almost always amusing.\textsuperscript{68} At other times, one has a sense that the boot does not fit, that he is over-emphasizing the importance of the schematic structure of the argument in circumstances where its success has little to do with its schematic structure and everything to do with its correspondence to the ideological status quo. Put bluntly, if reason’s appeal to self-evidence (Sunstein) or virtue (Nussbaum) is dependent upon factors beyond its internal logic, it is not thereby significantly diminished by demonstrating that that logic has reached its limits.

Schlag’s account of the wonderland of American legal scholarship is undoubtedly perceptive; his dissection of the stances adopted by those who typify it both masterly and liberating, and his representation of his own alienation intensely resonant of the experiences of many who occupy the margins of the legal academy. Indeed, therein lies its appeal. But by the same token, it is at times injudicious in its forays into "hostile" terrain. It fails adequately to guard against the dangers of importation, co-option, domestication, and reproduction. It constitutes even as it deconstructs. In Schlagean terms, the power of his critique is diminished by neglect of aspects of the "rhetorical economy" with which he is engaging.\textsuperscript{69} In simpler terms, there appear to be dimensions to his enchantment of which he is unaware.

\begin{itemize}
\item \textsuperscript{67} The truly reasonable position is of course one that combines both notions of reason, as, for example, Ronald Dworkin’s elaboration of the role of the judge in \textit{Law’s Empire}, where aesthetic appeals to integrity, coherence, and wholeness nestle cosily with a highly ideological presentation of law’s purpose, content, and operation. \textsc{Ronald Dworkin, Law’s Empire} (1986).
\item \textsuperscript{68} See, \textit{e.g.}, \textsc{ER}, supra note 1, at 40-59 (discussing the work of Cass Sunstein and Martha Nussbaum).
\item \textsuperscript{69} See Schlag, \textit{Le Hors}, supra note 10, at 1650.
\end{itemize}
Where does this leave the legal self? For the legal self who is most rational and most aware of her legal environment, all this should leave her rather confused. It ought to leave her with the sense that she doesn’t know whether she is coming or going—whether she is doing things to law or instead hearing legal voices.  

Alice tried another question: “What sort of people live here?” “In that direction,” the Cat said... “lives a Hatter: and in that direction... lives a March Hare. Visit either you like; they’re both mad.” “But I don’t want to go among mad people,” Alice remarked. “Oh, you can’t help that,” said the Cat: “we’re all mad here. I’m mad. You’re mad.” “How do you know I’m mad?” said Alice. “You must be” said the Cat, “or you wouldn’t have come here.”

If Schlag is to be believed, American legal scholars hover perennially on the brink of insanity, their bifurcated selves held together by the tenuous thread of their enchantment. There is some evidence for this. Peter Goodrich, for example, has collected a range of interesting statistics on the mental health of lawyers, in and out of the academy, confirming they are more likely to suffer from mental health-related problems than the general population. Nevertheless, it would be wrong to conclude that the psychological harm that lawyers apparently sustain stems directly from their enchantment with reason or, indeed, that all are similarly enchanted. Interestingly, this question of susceptibility is not one upon which Schlag dwells; his account of the widespread cognitive impairment of lawyers says little about who is likely to succumb to it. Is it his claim that anyone exposed to legal training is vulnerable? If so, how does he know? More particularly, if some are more or less susceptible than others—if feminists and critical race scholars, for example, are less under reason’s spell than those who comprise the academy’s mainstream—is this not a matter for comment at least? This brings us round again to questions of standpoint. Schlag’s account of the wonderland of American law reflects the standpoint of the radical “insider.” This is the view of someone who sees the system from within, a resident, a citizen. This is not someone who has stumbled down a rabbit hole. But what of those who do not readily identify with this “insider” status? What of those for whom legal education was an experience of prolonged cognitive dissonance; whose identity and status within the legal academy is

---

70. ER, supra note 1, at 139.
71. AW, supra note 2, at 65.
72. See, e.g., ER, supra note 1, at 126-40.
routinely questioned; whose scholarship is frequently deprecated; whose voices are barely heard above the cacophony of sound that the citizens of legal wonderland produce. Where, in other words, is Alice and what can we learn from her?

Interestingly, Alice, for all her fascination with Wonderland, was often alienated by it. She suffered problems of identity throughout (mainly due to frequent and unexpected changes in her size), was forever losing her way, and exhibited serious signs of cognitive confusion in her novel poetry recitations. At the same time, and despite occasional expressions of longing for escape, there remained a part of her that was irrepressibly drawn to the strange world upon which she had come. Lurching between fear and fascination, indignation and awe, sense and nonsense, Alice’s experience is that of an outsider.

I want to use the image of Alice as a lens through which to revisit the legal wonderland that Schlag describes. I want to glimpse the world where reason dominates thought not from his perspective, but from hers. In other words, I want to deploy the standpoint of an “outsider/within” to flush out and disrupt those aspects of reason’s operation that Schlag’s account does not reach. The “outsider/within” for these purposes is someone who, while sympathetic to the general tenor of Schlag’s critique, nevertheless experiences herself as “other,” both to the world Schlag depicts and to the genderless, raceless content of his critical stance; someone who sees in Schlag’s account her own invisibility.

74. “‘Who are you?’ said the caterpillar. . . . Alice replied rather shyly, ‘I - I hardly know, Sir, just at present—at least I know who I was when I got up this morning, but I think I must have been changed several times since then.’” See AW, supra note 2, at 50.

75. See, e.g., supra notes 26, 71.

76. “‘That is not said right,’ said the caterpillar. ‘Not quite right, I’m afraid’ said Alice, timidly: ‘some of the words have got altered.’ ‘It is wrong from beginning to end’ said the caterpillar decidedly . . . .” AW, supra note 2, at 56.

77. “‘It was much pleasanter at home,’ thought poor Alice. ‘. . . I almost wish I hadn’t gone down that rabbit hole—and yet . . . .’” Id. at 44.

78. I guess I am Alice. In terms of the world Schlag depicts, I undoubtedly qualify as an outsider. First, I am not American. Second, I am a woman in what continues to be materially, socially, and politically, a male-dominated environment. See generally Nancy Levit, Keeping Feminism in its Place: Sex Segregation and the Domestication of Female Academics, 49 U. KAN. L. REV. 775 (2001); Celia Wells, Working Out Women in Law Schools, 21 LEGAL STUD. 116 (2001). Third, I am a feminist and as such have long since left any illusions I had about reason behind me. With reference to American feminist and critical race scholars, it might be more accurate to use the term “outsider-within,” coined by PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND EMPOWERMENT 11-12 (2d ed. 2000), to denote someone who is part of a community but occupies its margins. I will settle for “outsider/within” to cover all bases.

79. I continue to ponder whether Schlag is the White Rabbit, the Mad Hatter, or the March Hare, but tend currently to see him as the caterpillar.
Before proceeding, however, I want to say a few words about what I do and do not mean by standpoint, with a view toward dispelling any misconceptions that might otherwise arise.\textsuperscript{80} First, the idea of standpoint presupposes the impossibility of non-situated knowledge. Knowledge derives from and is constituted by social practices (including language), institutions, and engagements,\textsuperscript{81} and knowledge acquisition is inevitably a process of interaction between the knower and the context in which she knows. Thus, what is known is always, in some sense, situated or located. The concept of standpoint seeks to get at the specificity or particularity of the context in which knowledge is formed/produced.

Second, it does not follow from this insight that all perspectives are indistinguishable in terms of their authority or usefulness or that we cannot agree upon measures by which different kinds of knowledge may be evaluated.\textsuperscript{82} While recognition of the social nature of knowledge does entail a fundamental reassessment of “foundational” approaches to knowledge formation and validation, in particular, concepts of truth (in the sense of a single authentic perspective) or objectivity (understood as “the view from nowhere”), this does not preclude the development and application of epistemological approaches to knowledge that are not dependent upon notions of universalism or a belief in self-legitimating states. Standpoint epistemology is one route towards a post-foundationalist understanding of knowledge, focusing upon its relationship to context, subject-identity, and power.

\textsuperscript{80} It is hoped in particular to show that, properly deployed, standpoint methodology does not “obliterate” perspectivalism, relativism, and contextualism. See ER, supra note 1, at 84. Rather, it yields a far more complex understanding of these concepts and their role in knowledge formation and selection. For a helpful overview of feminist standpoint epistemology, elaborating on some of the issues raised below, see Alessandra Tanesini, An Introduction to Feminist Epistemology 138-57 (1999). See also Sylvia Walby, Against Epistemological Chasms: The Science Question in Feminism Revisited, 26 Signs: J. Women in Culture & Soc’y 485 (2001); and Sandra Harding, Can Democratic Values and Interests Ever Play a Rationally Justifiable Role in the Evaluation of Scientific Work?, 26 Signs: J. Women in Culture & Soc’y 511 (2001), for a recent debate on the virtues of standpoint epistemology.

\textsuperscript{81} Even “theoretical” knowledge, as the product of particular social and institutional conventions about what constitutes theory, is necessarily located in and constituted by those conventions. Likewise, The Enchantment of Reason offers a powerfully resonant account of the knowledge-producing practices of the mainstream legal academy.

\textsuperscript{82} This is one of many erroneous assumptions driving Sherry’s critique of “epistemological pluralism” and is implicit in her highly manipulative conclusion that the rejection of Enlightenment ideals leads to the legitimation of Holocaust denial. Sherry, supra note 28, at 484. The development of post-Enlightenment approaches to knowledge evaluation has been a particular concern among feminist philosophers, producing, \textit{inter alia}, new formulations of objectivity and scientific knowledge. See generally Sandra Harding, Whose Science? Whose Knowledge? (1991); Helen Longino, Science and Social Knowledge: Values and Objectivity in Scientific Enquiry (1990); see also Walby, supra note 80; Harding, supra note 80.
Third, standpoint is not necessarily synonymous with "experience." Some versions of standpoint methodology rely more upon notions of experience than others and there is no doubt that individual and group experience often constitute the raw material upon which particular standpoints, including feminist standpoints, are articulated. Yet, in its more sophisticated forms, standpoint is mediated experience, the product of thinking about and reflecting on experience, or, drawing upon the work of leading standpoint theorist Sandra Harding, standpoint is the means by which knowledge is derived from (in the case of feminist research) "women's lives." Standpoint methodology is not, therefore, inconsistent with a recognition that particular experiences may be fallible and contestable. Nor does it have to proceed on the assumption that the experiences of a particular group (women, people of color) are necessarily the same. Indeed, properly deployed, standpoint methodology will highlight, not obscure, difference.

Finally, to invoke the notion of standpoint is not necessarily to invoke the idea of an epistemically privileged position. It is true that early feminist standpoint theories did presume the idea of a particular female vantage point, derived from the structure of women's lives, that was privileged because it was the perspective of the oppressed. The claim was that women, by virtue of their marginalized status, could "see beneath the surface of . . . social relations" and thus had a better grasp of social reality than men who, as rulers, were possessed of a vision that was both "partial and perverse." The implications of this position, that there was some "true" reality there to be represented or understood, led to its rejection by many feminist postmodernists, but the value of standpoint does not have to rest upon such absolute notions of privileging. This does not mean, however, that there is not a lot to be gained from

83. Nor is reducible to the idea of "perspective." As Sandra Harding observes: "Standpoint is not a perspective. It takes science and politics to achieve a standpoint. Standpoints are socially mediated; perspectives are unmediated." Sandra Harding, Reinventing Ourselves as Other: More Agents of History and of Knowledge, in AMERICAN FEMINIST THOUGHT AT THE CENTURY'S END: A READER (Linda S. Kauffman ed., 1993).

84. This notion of standpoint fully allows for the possibility of a researcher accessing and mediating perspectives and experiences that are not her own.

85. This argument is developed further in a feminist legal context in Joanne Conaghan, Reassessing the Feminist Theoretical Project in Law, 27 J.L. Soc'y 351 (2000).


87. Id. at 285-87. See also the pioneering work of Patricia Hill Collins, supra note 78, developing standpoint methodology in a black feminist context. Collins argues that the position of "outsider-within" a community "provides a distinctive angle of vision," id. at 12, which, while partial, necessarily contributes to a better understanding of social relations. For elaboration, see id. at 251-71.
focusing on the lives of marginalized or oppressed people. Once we accept the social nature of knowledge, we must also recognize that it is "not politically innocent," in particular that it is intimately connected to power, its exercise, and its effects. The context in which knowledge is produced and disseminated includes social relations that are oppressive and hierarchical, leading to the systematic silencing or devaluation of some perspectives and the privileging of others. Thus, if we want to expand our understanding, build our knowledge of the world we inhabit, we must endeavor to counter the effects of dominance by seeking out those perspectives not readily available. Sometimes, that may require us to assume a sceptical attitude towards presentations of social relations (whether in the legal academy or otherwise) in which the perspectives of the marginalized and oppressed are conspicuous by their absence.

*I Am Half Sick of Shadows* . . .

There are, undoubtedly, a number of parallels between Schlag's dissection of reason's operation in law and the critical insights that have emerged from feminist legal scholarship. In both cases, the concern with reason is in terms of its role in constituting and legitimating legal knowledge, and the reductions and distortions to perception and the understanding this produces. Indeed, the role of reason in the constitution of an univocal legal knowledge that operates to disqualify other forms of knowledge is a recurrent theme of legal feminist work. While Schlag is concerned with the general damage that reason inflicts upon "one's cognitive possibilities," the primary concern of feminist legal scholars is with the power implications of reason's legal deployment. Feminists come to reason as a legitimating discourse deeply implicated in women's disadvantage.

At the same time, neither Schlag nor feminists are wholly immune to reason's charms. Schlag's distaste for deception reveals a desire for integrity that is resonant of the best of reason's promises. Feminist emphasis on the development of strategies to combat, *inter alia*, gender disadvantage presupposes a capacity for critical thought and action that might be thought to correspond with something akin to reason. Indeed,

88. *TANESINI*, supra note 80, at 187.
89. *TENNYSON*, supra note 30, at 54.
91. ER, supra note 1, at 144.
many argue passionately that despite its checkered path, reason is the most effective route to women's emancipation. Thus, in both instances the relationship with reason is fraught with complexity and ambivalence. Neither Schlag nor feminists are wholly willing to abandon it.

But there the commonalities cease, the parallels fade away, the landscape radically changes. Applying a gender lens to Schlag's account of reason's operation, the prospect now before us is one in which notions of gender and reason appear inseparable; in which material context—raw, messy, often ugly to behold—figures prominently in reason's critique; in which bodies—in all their rich diversity and variegation—come into view.

Consider first the often-rehearsed claim that reason is "male" or "gendered." This dimension—completely absent from Schlag's critique—is the primary route by which most feminists come to debate about reason. What exactly does the claim that reason is male or gendered entail and what, if any, are the consequences of failing to address it? One can find an abundance of evidence, both in philosophical and legal writing, of the view that women, by virtue of their biological differences from men, have inferior reasoning capacities. This is explicit, for example, in the work of Aristotle and Rousseau, and implicit in the writings of Locke and Kant. It is also to be found in legal judgements, particularly those of the late nineteenth century denying women access to the professions. Thus, a Scottish judge considering women's eligibility to study medicine observed: "It is a belief, widely entertained, that there is a great difference in the mental constitution of the two sexes, just as there is in their physical conformation."

93. For Aristotle's views on women, see Susan Moller Okin, Women in Western Political Thought 73-96 (1979); Jean Grimshaw, Philosophy and Feminist Thinking 38-42 (1986); Marcia L. Homiak, Feminism and Aristotle's Rational Ideal, in A Mind of One's Own: Feminist Essays on Reason and Objectivity 1 (Louise M. Anthony & Charlotte Witt eds., 1993) (arguing a defense of Aristotelian rationality in feminist terms).
94. See Okin, supra note 93, at 99-194 (providing an extensive discussion of Rousseau's views on women).
95. Sandra Fredman, Women and the Law 7-9 (1997); Grimshaw, supra note 93, at 50-52.
96. See Grimshaw, supra note 93, at 42-46 (analyzing Kant's Of the Distinction between the Beautiful and the Sublime in the Interrelations of the Two Sexes).
The assumption was that because women's bodies differed from men's, so also did their minds: women's outward appearance and, in particular, their reproductive capacities became grounds for asserting their intellectual inferiority. In this sense, reason was perceived as naturally or biologically male.

Even early feminists such as Mary Wollstonecraft, who challenged the denial of full reasoning capacity to women, continued to acknowledge intellectual differences between the sexes claiming that they were social rather than biological in origin, a product of their confined lives and consequently narrow aspirations.98 Similarly, John Stuart Mill argued that women's apparent unfitness for many aspects of public life was a consequence of differences "in their education and circumstances" rather than "nature."99 In both cases, the assertion was effectively that nurture, not nature, was to blame for women's intellectual inadequacies although, as always, the line here is far from clear-cut. Insofar as women's social roles were prescribed and proscribed by their biological functions, women's bodies continued to be viewed as, to a degree, incompatible with the development of full reasoning skills. Reason might only be socially male, but society can be just as oppressive as biology.

In recent times, the social argument has taken a more positive turn, with feminists focusing not on what women lack in terms of traditional reasoning skills but rather on what they have in terms of distinctly feminine ways of knowing.100 The social knowledge derived from women's lives highlights reason's particularity and its limits. It also points to a realm that reason cannot reach and in which it does not reign. As de Beauvoir remarked:

Women have no grasp on the world of men because their experience does not teach them to use logic and technique; inversely, masculine apparatus loses its powers at the frontiers of the feminine realm. There is a whole region of human experience which the male deliberately ignores because he fails to think it; this experience woman

98. Mary Wollstonecraft, A Vindication of the Rights of Women, in Wollstonecraft: A VINDICATION OF THE RIGHTS OF MAN AND A VINDICATION OF THE RIGHTS OF WOMAN AND HINTS 87-125 (Sylvana Tomaselli ed., 1995) (1792). In addressing the education of women, Wollstonecraft observes: "I shall only insist that men have increased that inferiority till women are almost sunk below the standard of rational creatures. Let their faculties have room to unfold, and their virtues to gain strength and then determine where the whole sex must stand in the intellectual scale." Id. at 105.


100. See generally Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982).
This modern version of the social masculinization of reason is a potentially powerful weapon in the armory of the critic of reason. It renders reason both contingent and particular; it draws attention to the hidden values upon which reason's purported neutrality rests; and it necessarily exposes the hierarchies reason institutes, simultaneously undermining them. Where it founders, of course, is in the essentializing assumptions about gender that tend to underpin it. Social life is too diverse and gender identity too unstable to sustain the claim that women and men, by virtue of distinct social roles, reason differently.

One route round this difficulty is simply to take gender out of the equation; that is, to reassert the insights that (inter alia) the feminist critique of reason has elicited—in terms of reason's particularity, imperious tendencies, and hierarchical effects—but to allow the gender dimension to disappear. This is, up to a point, precisely what Schlag has done. Because it cannot confidently be asserted that reason is biologically or socially male, gender is deemed irrelevant. The difficulty is that it is not. There continues to be a strong cultural association between reason and masculinity that critics of reason ignore at their peril.

The long history of reason's association with masculinity in western philosophical thought has been painstakingly tracked and analyzed by feminist scholars. The story that unfolds is far from unidimensional or one-track; the implication of gender in discourses of reason is both complex and multifaceted. At the same time, certain features of their imbrication merge. In particular, it is clear that maleness often operates as a metaphor for reason and reason as a metaphor for male-

---


102. For example, the prioritizing of rights over relationships or justice over care. See GILLIGAN, supra note 100; see also ROBIN WEST, CARING FOR JUSTICE (1997). For a parallel critique of the specificity of reason as instrumental, see JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., 1971). This (un)ethical/ideological dimension to reason—its importation and legitimation of a particular set of values about human nature and social organization—is evident nowhere in Schlag's critique.

103. Schlag has stopped short of an important dimension of the feminist critique in pushing the boundaries of reason in a positive direction to embrace a wider range of cognitive processes. Schlag's concern is to expose what rational discourse, traditionally conceived, expresses; feminists are concerned with uncovering and articulating what it suppresses. This is not to say that he is without his moments of recognition. For example, his observation that: "Faith in reason is not without its opportunity costs—namely, the costs involved in sacrificing the other sources of belief, sources such as experience, custom, convention, intuition, disclosure, perception, awareness, understanding, and so on." ER, supra note 1, at 58.

ness. In a sexually hierarchical world, masculinity lends authority to reason, and reason gives weight to masculinity and the social relations upon which it is based. It follows too that femininity is often presented as symbolic of what reason is not; woman is invoked to denote that which reason stands against; she is nature not culture, private not public, body not mind, emotion not reason, open not closed. She represents the other side of Cartesian reason, a narrow conception of reason that privileges abstract, passionless, disembodied thinking over human thought in general. This is reason, more or less, as it appears in Schlag’s critique. If masculinity lends authority to the kind of reason Schlag is addressing; if femininity is symbolically excluded from it; if, in other words, reason functions as a norm in the constitution, regulation, and validation of gendered social relations, what are the implications of failing to acknowledge this? To put it another way, what does a gender perspective reveal that a Schlagean standpoint overlooks?

The Mirror Cracked . . .

In a multitude of ways, this blindness to the gendered implications of reason reveals the limits of Schlag’s critical interrogation. It fixes the point where he stops asking questions, the moment when his analysis is “marked by [his] own authorship.” It betrays both his standpoint and his lack of awareness of it. Most importantly, it exposes the consequences of this inattention.

First, take Schlag’s apparent disregard for the dualisms typically invoked to denote and delimit reason’s domain. In particular, neither the mind/body nor the reason/emotion dichotomies emerge as significant in Schlag’s account of reason’s role in legal scholarship. Emotion, for example, is listed by Schlag as just one of many sources of belief above which reason purports to stand. The rhetorical power and frequent invocation of reason over emotion in legal discourse does not fully emerge although it is actively played out in Sherry’s article. More importantly, it is not clear that Schlag’s critique seriously undermines the reason/emotion dualism. Although Schlag intends to show that reason is no

105. See, e.g., Jean Paul Sartre, “The obscenity of the female sex is that of everything that ‘gapes open.”’ See GRIMSHAW, supra note 93, at 35. See quote from de BEAUVIOR, supra text accompanying note 101 (identifying women with what cannot be defined).

106. On the maleness of Cartesian rationality, see LLOYD, supra note 104; BORDO, supra note 104. Not all feminists agree that Cartesian rationality is irretrievably masculine. See, e.g., Margaret Atherton, Cartesian Reason and Gendered Reason, in A MIND OF ONE’S OWN, supra note 93, at 19.

107. See TENNYSON, supra note 30, at 56.


better than (among a host of other things) emotion, thus challenging the
dualism's hierarchy, what he does not do is seriously question representa-
tions of cognition that assume the separation of reason and emotion.
By restricting himself, for the most part, to a narrow investigation of
reason as a source of belief (as opposed to a cognitive process), there
lingers undisturbed an assumption that reason can be exercised without
emotion (even if it very often is not).

Similarly and relatedly, Schlag not only fails to attend to the signif-
ificance of the mind/body dichotomy in discourses of reason, but, as a
consequence, actively reinforces it. Nothing in The Enchantment of Rea-
son questions the separation of reason from our embodied condition; at
no point is there any acknowledgement of the corporeal context in which
reason is exercised. Bodies are simply not in Schlag's script.110

By contrast, the symbolic association of the body with femininity in
western philosophical and political discourse and its consequent exclu-
sion from the parameters of rational discourse has inevitably drawn fem-
inist attention, so much so that the body has become one of the most
important and recurring themes in feminist scholarship, a powerful lens
through which feminists can glean new understandings of what and how
we know.111 A focus on the body spotlights the extent to which knowl-
edge-producing practices continue to be embedded in the mind/body
dichotomy; that is, in the assumption that corporeal context is irrelevant
to the exercise of the mind except insofar as it is governed by it.112
Within this ubiquitous frame of reference, mind rules matter, logic tames
experience, and reason, devoid of the corrupting influence of materiality,
delivers truth. Moreover, the scholar is deemed immortal, his particular-
ity erased, his standpoint denied. The body is a way of challenging this
immortality and the limitations it imposes on understanding. It also ren-
ders standpoint explicit. As Bottomley observes: "A central theme of
feminist work is the need for 'embodiment' . . . which, in this context,
emphasises that we think and write from a position in which we are
never simply 'mind' . . . we are so much more and therefore so much less
than that."113

In The Enchantment of Reason, the body is simply assumed away,
its banishment accompanied by a series of de facto exclusions, including

110. See Pether, supra note 19, at 224.
111. Pioneering feminist work on the body includes Judith Butler, Bodies That Matter:
On the Discursive Limits of Sex (1993), and Elisabeth Grosz, Volatile Bodies: Toward a
Corpooreal Feminism (1994). For excellent analysis and overview of feminist perspectives on the
body, in and beyond a legal context, see Therese Murphy, Feminism on Flesh, 8 Law & Critique
37 (1997); see also Bottomley, supra note 108.
112. See Grosz, supra note 111, at 14.
113. Id. at 128.
gender, race, context, material practices, and history. Their exclusion operates metaphorically to affirm "the view from nowhere," the idea, crucial to conventional legal discourse, that reason, properly exercised, is independent of identity and circumstances;\textsuperscript{114} that it is, in other words, unsituated. It looks like the mind/body dichotomy is at the heart of what is missing from Schlag’s critique.

Without the body, gender fails to materialize and its association with reason is overlooked. In fact, the problem here has a circularity to it. Because he fails to attend to gender perspectives, Schlag misses the importance of the mind/body dichotomy in conferring reason’s authority. And because he misses the importance of the mind/body dichotomy in conferring reason’s authority, he fails to take account of gender perspectives. In any case, the result is that both the specificity and systematicity of reason’s exclusionary tendencies get lost. Schlag acknowledges that reason effects the “subjugation of the many to the one, of pluralism to monism, of polytony to monotony, of difference to sameness,”\textsuperscript{115} but nothing in his account tells us who or what is subjugated. By contrast, a focus on standpoint can illuminate how concepts such as coherence and fit—legal reason’s favored form—help to sustain the political and ideological status quo by disqualifying the perspectives of marginalized and oppressed groups. As Margaret Radin remarks, “if the perspective of the oppressed includes significant portions of the dominant conception of the world, and the role of the oppressed group in it, then the oppressed perspective may well be incoherent. . . .”\textsuperscript{116} It also follows that reason, effectively deployed, can do far more than convert “tastes and preferences into the idioms of law . . . .”\textsuperscript{117} Certainly, these are not random conversions. One might be forgiven, however, after reading The Enchantment of Reason, from assuming that they were. For similar reasons, race too is rendered invisible, and with it the concerns of critical race theorists. People of color have long had ample grounds for regarding the mind/body dichotomy as suspect, its philosophical endorsement having too long co-existed with material practices with which it contradicts. Thus, the narratives of critical race theorists are, to a significant extent, narratives of and about the body.\textsuperscript{118} They are a direct challenge to academic discourses that render the body immaterial. Race is a lens that spotlights particularity because the general has been

\begin{footnotesize}
\footnotesize
\textsuperscript{114} See Sherry, supra note 28, at 456.
\textsuperscript{115} ER, supra note 1, at 44.
\textsuperscript{117} ER, supra note 1, at 34.
\textsuperscript{118} See, e.g., Anthony Paul Farley, The Black Body as a Fetish Object, 76 Or. L. Rev. 457 (1997); see also generally Thinking Through the Body of Law (Pheng Cheah et al. eds., 1996).
\end{footnotesize}
formed in the image of whiteness. Thus, the project of embodiment has strategic implications for critical race theorists as well as feminists. More importantly, the mind/body dichotomy implicates reason directly in racist and sexist beliefs and practices.

The lack of attention to any kind of material context in *The Enchantment of Reason* only serves to compound these problems. In an idealist exploration of reason, gender and race are concepts that are easy to overlook. Yet, when reason is (re)located alongside the material and social practices which produce it, gender and race are more likely to come into view. This is nowhere better illustrated than in the context of current debate in the American legal academy about the “rationality” of feminist and critical race scholarship.\(^{119}\) It is difficult to come away from this body of literature without some awareness of the acute relevance of race and gender to the politics and practices of American legal academia. This wave of “attack scholarship”\(^{120}\) has all the hallmarks of a power struggle in which the privileged, compelled to justify their privilege, fiercely defend the idea that “academic standards” act as neutral arbiters of intellectual value and worth.\(^{121}\) Reason, unsurprisingly, is up to its neck in it. At best, it is a mantra for ignorance and smug complacency; at worst, it is a euphemism for intolerance, close-mindedness, and the preservation of white male supremacy. It is certainly difficult to disentangle current versions of reason, as articulated by mainstream American legal scholars, from the politics of racism and sexism in the academy.\(^{122}\) Remarkably, Schlag manages it.

**Conclusion**

*To be legally trained is to undergo a serious reduction of one's cognitive possibilities.*\(^{123}\)

> “Well it's no use your talking about waking him,” said Tweedle-dum, “when you're only one of the things in his dream. You know very well you’re not real.” “I am real!” said Alice, and began to cry

---


121. For a critical exploration of “the evaluation controversy” see Schlag, *Laying Down the Law*, *supra* note 4, at 60-76.

122. Lest it be thought that United States legal scholars have a monopoly on racism, see Peter Goodrich & Linda Mills, *The Law of White Spaces: Race, Culture, and Legal Education*, 51 J. LEGAL EDUC. 15 (2001), for an account of sadly familiar practices in the British academy.

123. ER, *supra* note 1, at 143-44.
... "If I wasn’t real . . . I shouldn’t be able to cry."\textsuperscript{124}

During the course of this article, I have sought to invoke notions of standpoint to identify and explore the political and intellectual implications of Pierre Schlag’s failure to engage with feminist and critical race scholarship. I have suggested that in the context of the tasks \textit{The Enchantment of Reason} sets out to perform, such neglect is serious and weakens the authority of his critique. Nevertheless, what flaws in his work there are, in my view, are far from fatal. In addition, it would be wrong of me to finish this account without acknowledging the power that remains. Pierre Schlag makes us think long and hard about legal education, and, in particular, about what it is we do when we teach our students to “think like lawyers.” He delineates the contours and traces the paths along which legal reasoning purports to progress, identifying the traps to which the unwitting (Dworkin, Sunstein, Sherry . . .) too easily succumb. By so doing, he highlights the deleterious effects that (legal) reason can induce, including severe cognitive limitations (“serious blind spots and a stunningly selective sense of curiosity”\textsuperscript{125}) and the virtual shutting down of imagination and creativity.

Insofar as Schlag’s concern is with developing strategies of resistance to these mind-numbing effects, I am with him all the way. Nor do I see this as a solely pedagogic issue, although Schlag’s work has strong pedagogic promise. What Schlag does is open up a space for new understandings of what “doing law” can entail. His focus on the delusions that afflict those who deploy conventional legal methods does more than affect their discreditation. In his sharp delineation of the intellectual structure and internal dynamics of traditional legal arguments, Schlag exorcizes reason and frees the legal self from the prison of her own alienation; or, at least, he contributes to conditions in which we might come to believe this to be possible. It is a pity, then, to see that even he has blind spots. It is disheartening to recognize—just at the very point where liberation from “small thinking”\textsuperscript{126} and “shallow forms of thought”\textsuperscript{127} seems possible—that he is still, to some extent, imprisoned. It is impossible not to want to save him from his gloomy pronouncements about the inescapability\textsuperscript{128} and dreariness\textsuperscript{129} of it all. At the same time, one cannot suppress the lurking suspicion that his all-pervading scepticism derives from the luxury of occupying a position where he

\textsuperscript{124} See \textit{ALG}, supra note 26, at 155.
\textsuperscript{125} \textit{ER}, supra note 1, at 140 (footnote omitted).
\textsuperscript{126} \textit{Id.} at 144.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.} at 17.
\textsuperscript{129} \textit{Id.} at 141-42.
does not *have* to believe—passionately and unremittingly—in the possibility that we can shape the world to better ends.

In the end, it comes down to this. Representations are always approximations and we each simultaneously instigate and operate under conditions of constraint. These are the important insights. They should not remain obscured behind blustering invocations of the rational autonomous subject; nor should they be dismissed as trite or inconsequential. In tracking the delusions and excesses of American legal scholars, Schlag makes these insights harder to ignore. Yet, he remains unwilling to look closely at what precisely they entail. After all, there is constraint, and there is constraint. There are representations, and there are representations. Standpoint methodology highlights the gap between the representations of the dominant and the lives and experiences of the oppressed; it helps us distinguish the recognition that discourse generally is accompanied by constraint from the specification of the particular constraints that characterize the lives of oppressed and marginalized people. Without standpoint, there is a real risk, as Schlag’s book demonstrates, that these differences simply will not surface. Effaced from discourse—radical or otherwise—they are simultaneously effaced from our consciousness.

*The Enchantment of Reason* is a powerful book with concrete political implications, but its standpoint (unsurprisingly) reflects the situation of its author. It is the standpoint of someone who is bemused by the prodigious invocation of an idea which is either not what it purports to be or which, pushed to its limits, is without substance. It is not the standpoint of an “outsider/within” the academy. That does not mean it is without value to feminists, critical race scholars, and others with “outsider” status. On the contrary, in collapsing reason into its “traditional enemies,” Schlag’s book constitutes a compelling indictment of the intellectual status quo in American law, exposing its tendentiousness, folly, and fragility.

> At this the whole pack rose up into the air, and came flying down upon her; she gave a little scream, half of fright and half of anger, and tried to beat them off, and found herself lying on the bank, with her head in the lap of her sister, who was gently brushing away some dead leaves that had fluttered down from the trees upon her face. “Wake up, Alice dear,” said her sister. “Why what a long sleep you’ve had!” “Oh, I’ve had such a curious dream!” said Alice.\(^{131}\)

---

130. As in Larry Alexander’s incomprehensible remark that “our situatedness is as immaterial to our theoretical enterprises as it is inevitable.” Larry Alexander, *Theory’s A What Comes Natcherly*, 37 SAN DIEGO L. REV. 777, 778 (2000).

131. See *AW*, supra note 2, at 109.