Romancing the Real

Jane B. Baron

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

Recommended Citation

Available at: https://repository.law.miami.edu/umlr/vol57/iss3/6

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.
Romancing the Real

JANE B. BARON*

Legal thought (meaning the thinking that people trained as lawyers do) has structure; it falls into predictable and describable patterns. Although perhaps no one would own up to this idea today, some folks once believed that understanding the structure of legal thought possibly could lead to change in "the real world." The transformative potential (the very phrase sounds quaint) of understanding the structure of legal thought had two interrelated or cumulative components. The first pertained to one's own consciousness: Once one saw that legal arguments were but moves, and once one learned the anatomy of such moves and how to deploy them, one would no longer be dazzled or even mildly persuaded into believing that any legal result (particularly a result one found offensive) was required in any sense. Call this "liberation from false necessity." The second way in which understanding the structure of legal thought could be transformative was more external and strategic: One could expose the guts of an opponent's arguments to demonstrate that such arguments did not in fact prove what they purported to prove, or that they supported conclusions directly opposite those in whose service they had been proposed. Call this "acquisition of argumentative prowess."

Pierre Schlag can slice, dice, dissect, deconstruct, expose (etc.) the structure of legal arguments with the very best in the business; indeed, his descriptions of the forms of legal thought may be the best in the business. For him, though, there is no transformative potential whatever in this skill. We cannot be liberated from false necessity and see more clearly the way things might be because the very way in which we think "always already" limits our (but not Schlag's?) imaginative capabilities. Nor will our understanding of the structure of legal arguments and our resulting argumentative prowess enable us to use legal thought critically to defang our opponents or rebut their substantive positions. Whether we talk doctrine, policy, or values, we, along with our opponents, play a fundamentally empty and meaningless game with fundamentally empty and meaningless forms. You cannot advance your cause with mere shadows.

* Professor of Law, Temple University Beasley School of Law. Thanks to Michael Fischl for inviting me to participate in this symposium, to Pierre Schlag for listening graciously, to the symposium participants for good ideas, and to Jeffrey Dunoff and Rick Greenstein for helpful comments on early drafts.
In Schlag's hands, the very idea of a critical project or of transformation seems like a pathetic joke. The thought forms in which we are "always already" enmeshed allow us to think—worse, even to perceive—only in a limited number of ways, the ways supported and governed by reason. Anything that cannot be processed within reason's forms cannot be processed at all, or can be processed only in a way that reason has already tamed. Because we "always already" (can Schlag overuse this term more?) think within the narrow cabin formed by reason, we have lost our capacity to question this structure. We cannot think about it because we think in it (although Schlag can, I guess, because he doesn't?).

Meanwhile, though the ontological status of law and its forms remains unexplored, reality is very much out there and is very real. Take emotions, tradition, prejudice, dogma, rent seeking, power politics, authority, custom, convention, and force. Schlag treats these attributes as truly authentic—until, that is, imperialist reason substitutes for the genuine article images, proxies, and simulcrums that go by the same name but are not the same (real) thing.

The philosophy of Schlag's position is well beyond me, but what I will call its psychology is of great interest. Schlag's real world is largely a world of chaos, disorder, and violence, a world masked or transformed by the enchantments and pathologies of reason into some place we could actually stand to live. Yet, any experience we might have of order or rationality (or anything else positive) is dismissed as delusional, the result of our enchantment. Nor can we testify from our own lived feelings that we are not enchanted, because our own feelings of nonenchantment are not reliable evidence of nonenchantment. The fact that we say the world is good or orderly does not make it so any more than our saying we are progressive legal thinkers makes us progressive legal thinkers. Neither the reasons for which we might want to believe in the possibility of order, rationality, progressivity, and the like, nor the aspirations behind such concepts as the rule of law are, in Schlag's world, even worth exploring. Self-interest, the need to believe that what one does has a point, explains all.

Schlag is as sensitive as anyone to the extent to which the borders bounding fields (law, phrenology) are constructed rather than natural, the products of desires (to believe, to know, to see ourselves as doing good) rather than elemental need. It is somewhat surprising, then, to find Schlag defining law into a sphere distinct from the "real" brute forces reason seeks to control.1 We, of course, can think of certain

---

1. Of course, on this matter as on many others, Schlag is cagey, as he never exactly specifies the connection between law and reason. On the one hand, for example, he tells us that reason is
experiences, emotions, traditions, power relations, and so forth as authentic, and anything we say about these forces in law as inauthentic and distorted. This is one way of characterizing the way law works. Once we take this step, we can define law professors as thug trainers and judges as murderers. This is one way of defining what we and they do.

Why draw the boundaries this way? In the old days, those days to which I alluded at the outset, law was not set apart from, but placed firmly within, the clusters of belief that made up reality. Crest toothpaste prevents cavities. God is good. Private property is necessary to a well-functioning social order. The point was not that law was a fantasy, but that "reality" was. What we had taken to be brute reality was historical contingency, and once it was seen to be contingent, it could be changed. Maybe this was naïve; how, I can hear Schlag ask, can we somehow stand outside our beliefs about reality long enough to change them? But at least in this naïve format, structural understanding had a point, a purpose. It went somewhere.

Of course, Schlag rejects the need for thought to go somewhere, so to him I would guess that this is all beside the point. I will blunder forward, nevertheless, and suggest one implication I see in Schlag's structural description/deconstruction of legal discourse. The entire vocabulary of law is, for those on the political left anyway, almost fully played out. Time after time after time, we have demonstrated the indeterminancy, shallowness, and contradiction of doctrine, process, and policy. We may have persuaded absolutely no one on the other side (whether that side be understood as the right or as those still convinced that there are such things as truly legal methods). All of that is irrelevant, though, for we have persuaded ourselves of the vacuity of our own language and conventions. No wonder, then, that even those who are won over by Schlag's critique of normativity find themselves wondering where we go from here.

**Enchantments and Delusions: A Case Study**

Schlag's scholarly project is on some level importantly descriptive. This, he tells us, is what legal scholars say about law; this is what...
reason does (or is said to do); this is how it works (or appears to work).

It seems important, then, to examine whether Schlag’s descriptions of legal arguments’ structure, the nature of legal reasoning, are accurate.

In this part of the paper and the one that follows, I take up this problem in the context of zoning law, asking what the well known and widely discussed Mt. Laurel cases might show us about Schlag’s descriptive acumen. Might not these cases help us answer Schlag’s frequently repeated questions about what this thing called “law” really is and whether “it” is there at all?

The first Mt. Laurel decision,7 handed down in 1975, occupies over thirty-five pages in the Atlantic Reporter. There must be a lot of law here, right? The holding is perfectly clear:

[E]very [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity . . . for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.8

The problem to which the holding was addressed was also perfectly clear. Mt. Laurel, like virtually every other suburban community in New Jersey, had zoned only for single family and light industrial uses; there was no district in which multi-family housing could be built.9 There was, the court explained, good reason for this pattern:

This policy of land use regulation for a fiscal end derives from New Jersey’s tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality’s children. The latter expense is much the largest, so, basically, the fewer the school children, the lower the tax rate. Sizeable industrial and commercial ratables are eagerly sought and homes and the lots on which they are situate are required to be large enough, through minimum lot sizes and minimum floor areas, to have substantial value in order to produce greater tax revenues to meet school costs. Large families who

---

4. See, e.g., ER, supra note 1, at 97-106.
5. For one argument that those descriptions omit too much, and therefore cannot be accurate, see Joanne Conaghan, Schlag in Wonderland, 57 U. MIAMI L. REV. 543 (2003).
6. Readers who are already convinced that Schlag sees clearly (or does not), or who are impatient with case descriptions of all types (or with descriptions of Mt. Laurel), might want to skip ahead to the section entitled, “But Why?”
8. Id. at 724.
9. Id. at 719-20.
cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income.\textsuperscript{10}

Here is a real world problem: Suburban towns do not zone for housing affordable to those of middle and low incomes. Here is a legal solution: All towns must zone for their fair share of the regional need for such housing.

It is well known that \textit{Mt. Laurel I} did not immediately “solve” the problem.\textsuperscript{11} In the short term, it did not produce more low and moderate income housing in New Jersey’s suburbs, and it is not even clear that it produced changes in local zoning ordinances. Even if it had produced substantial changes in zoning statutes, those changes on their own would have been of little significance because permitting multi-family dwellings in a given district by no means guarantees that those dwellings actually will be built.

What \textit{Mt. Laurel I} unquestionably did produce was more cases. These cases, the outgrowth of serious (and fiscally sensible) resistance to the “big idea” of \textit{Mt. Laurel I}, explored the many ambiguities in the original holding. What was a “developing” municipality, anyway? What was the relevant region? Who decides a region’s “fair share?” What remedies could be imposed against townships that refused to comply with the \textit{Mt. Laurel I} mandate?\textsuperscript{12} The first \textit{Mt. Laurel} decision, then, produced only more decisions, each of which could be appealed (more decisions), remanded (more decisions), and appealed (more decisions) again.

Ultimately, what \textit{Mt. Laurel I} produced was another Big Case, \textit{Mt. Laurel II},\textsuperscript{13} which, one would imagine, would contain a truckload of

\begin{footnotesize}
\begin{itemize}
\item 10. \textit{Id.} at 723.
\item 11. As the New Jersey Supreme Court stated nearly ten years later in the litigation’s next phase:
\begin{quote}
The Mount Laurel case itself threatens to become infamous. After all this time, ten years after the trial court’s initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papercrusted over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel’s determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.
\end{quote}

S. Burlington County NAACP v. Township of Mt. Laurel, 456 A.2d 390, 410 (N.J. 1983). See also Toll Brothers, Inc. v. Township of West Windsor, 802 A.2d 53, 93 (N.J. 2002) (“Since 1983, when Mount Laurel II was decided, approximately 480,000 residential dwelling units have been constructed of which about 26,000 units, or 5.4 percent, constituted units affordable to low and moderate income households.”) (Stein, J., concurring in part and dissenting in part).
\item 12. These cases are described in the second \textit{Mt. Laurel} decision, S. Burlington County NAACP v. Township of Mt. Laurel, 456 A.2d 390, 413-14 (N.J. 1983).
\end{itemize}
\end{footnotesize}
law, occupying, as it does, over 120 pages in the *Atlantic Reporter*. *Mt. Laurel II* began with the observation that *Mt. Laurel I* had resulted not in housing, but “in paper, process, witnesses, trials and appeals.”¹⁴ This experience demonstrated the need for a strong judicial hand.¹⁵ I suppose one could say that the opinion was indeed strong. Among other things, the court consolidated future litigation over *Mt. Laurel* issues before a limited number of judges, authorized mandatory set-asides by which builders would be required to include a stated percentage of low and moderate income housing in any approved development, and permitted courts finding *Mt. Laurel* violations to grant “builder’s remedies” whereby developers who successfully prosecuted exclusionary zoning claims and who promised to deliver substantial numbers of low-income housing units would be granted permission to build additional market-priced units over the number normally permitted by the zoning ordinance.¹⁶

It is not surprising that, like its predecessor, *Mt. Laurel II* produced yet more cases. The opinion, or maybe it was the townships affected, also awakened the sleeping dragon legislature, which finally enacted the New Jersey Fair Housing Act to deal with *Mt. Laurel* issues.¹⁷ The statute, the details of which need not detain us, moved exclusionary zoning issues from the courts to a newly created administrative agency called the Council on Affordable Housing.¹⁸ In addition, it produced yet another big case, *Mt. Laurel III*,¹⁹ taking up an additional forty *Atlantic Reporter* pages and holding the statute to be constitutional.²⁰

In terms of housing, what did the statute and the final opinion produce? The question is hotly debated, but the range of answers is limited between some/a noticeable amount and none/an insignificant amount.²¹ Almost no one asserts that, as a result of *Mt. Laurel*, New Jersey’s suburbs are now flush with low or even moderate income housing.

Stepping back, *Mt. Laurel*, in the aggregate, can be seen as illustrating Schlag’s point about “law.” Developers, public advocacy groups,

---

¹⁴. *Id.* at 410.
¹⁵. *Id.*
¹⁶. For the court’s summary of its own ruling, see *id.* at 418-20. The nature of the builder’s remedy is lucidly explained in CHARLES M. HAAR, SUBURBS UNDER SIEGE 44-45 (1996).
²⁰. *Id.* at 642. Just a few months ago, after this symposium was held, the New Jersey Supreme Court decided yet another case involving the *Mt. Laurel* doctrine, upholding the builder’s remedy. Toll Brothers, Inc. v. Township of West Windsor, 802 A.2d 53 (N.J. 2002). Only time can determine whether *Toll Brothers* will prove to be yet another Big Case.
and townships maniacally turned out argument after argument for or against a "fair share" obligation. Courts, with equal energy, turned out opinion after opinion, each with reasons or a "rationale," and, finally, the legislature ultimately turned out a Big Statute. All of this "legal" activity—the generation of arguments, the writing of opinions, the creation of a statute—produced nothing, related to nothing, and signified nothing. The real world problem, consisting of a complex mixture of racism, small town politics, and bureaucratic ineptitude was reduced to the legally-digestible, contentless form of "exclusionary zoning." Law then functioned as a collective delusion that we were "doing something" about this problem by talking and writing and drafting in a certain way.

And I have not yet mentioned the professional planners and law professors who, from the very beginning, turned out paper after paper detailing what the advocates, courts, and legislature should do. The academic analysis of the exclusionary zoning problem in a collective number of pages could probably fill an entire series of the Atlantic Reporter. It embodies numerous disputes over matters ranging from the true "source" of the Mt. Laurel obligation (was it "in" the state constitution all along?\(^2\) to the appropriate scope of "judicial activism" in solving zoning problems.\(^2\) One of the more lively debates pits believers in the virtues of local decision making against those who see the problem as being amenable to solution solely in regional terms.\(^2\) The localist/regionalist debate has spawned a variety of vaguely surreal proposals for new hybrid institutions of government—between the micro level of individual towns and the macro level of the entire state—with ingenious schemes for voting in new regional elections.\(^2\) The proposals, which from the start had that wifty, "hey let's just make the world again" quality, have in today's post-September 11 era a particularly hallucinogenic feel. That is, after we finish the war on terrorism and boost military spending by previously unimaginable percentages, we will reconfigure local government institutions which have almost totally depleted their treasuries by paying overtime to police officers and converting local bus and train stations into protectable bunkers? Maybe not.


\(^{23}\) See, e.g., HAAR, supra note 16, at 175-85.

\(^{24}\) Leading figures in the debate include Gerald Frug on the side (mostly) of localism (see, e.g., Jerry Frug, Decentering Decentralization, 60 U. CHI. L. REV. 253 (1993); Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059 (1980)) and Richard Briffault on the side (mostly) of regionalism (see, e.g., Richard Briffault, Localism and Regionalism, 48 BUFF. L. REV. 1 (2000); Richard Briffault, The Local Government Boundary Problem in Metropolitan Areas, 48 STAN. L. REV. 1115 (1996)).

The (normative) form, (self-referential) substance, and (practical) implausibility of the academic proposals regarding the now thoroughly "legalized" problem of "exclusionary zoning" would seem to exemplify Schlag's description of the legal mind imprisoned in reason's web. Academics prod and poke the problem from every conceivable direction, which turns out to be one direction—the direction of "what can we do?" They apply to the problem all manner of approaches, which turn out to be one single approach—the approach of applying various available legal theories. These academics then supply innumerable possible solutions, not one of which holds the slightest interest to anyone outside academia, let alone anyone actually interested in housing. Thus far, then, on a purely descriptive level, Schlag does seem to be right.

CASE STUDY REDUX: THE (IM)POSSIBILITY OF RECONSTRUCTION

Does it change anything if we think about *Mt. Laurel* in a slightly different way? As an alternative, imagine a court composed of judges familiar with, if not fully adept at, Schlag's critical stance. The "police power," such judges might say, being but an idea, a legal construction, cannot actually force or block actions; it cannot *require* or *mandate* anything at all. Nor can the "general welfare" truly *encompass* or fail to encompass, *include* or fail to include, any particular interest. Legal entities, these judges would understand, cannot, in reality, *do* things.

How would such judges explain language such as the following?

The constitutional power to zone . . . is but one portion of the police power and, as such, must be *exercised* for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare *includes* more than the welfare of that municipality and its citizens: it also includes . . . the housing needs . . . of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined *abuse* the police power . . . .

The judges might say: We wrote this in a "positive moment" of jurisprudential enchantment. We were at this moment experiencing and instantiating a "subjectivist aesthetic," in which "legal entities are cast as the effective source of legal action [and] become personified—endowed with the characteristics reserved for subjects: will, intention, purpose, and even personality." We couldn't help ourselves, the judges might continue, because the aesthetics in which we write are not entirely or

27. ER, *supra* note 1, at 98.
even partially within our control. Rather, they are "forms of perception, apprehension, and expression . . . that precede (and almost always evade) the conscious prosecution of legal or philosophical disputes on the relation of epistemology to ontology, language to thought, ideas to materiality (and so on)."\textsuperscript{28} Well, perhaps the judges would say something of this sort, but I kind of doubt it. Even judges with healthy skepticism about whether the "police power" or the "general welfare" has any determinate content or decisional power might decline to defend \textit{Mt. Laurel} by citing their own enchantment by or enslavement to preconsciously operating ideas. They might believe that there was a method to their apparent madness. Let us call this method "expressivism."

Generalizing broadly and eliding certain academic controversies,\textsuperscript{29} expressive theories of law focus less on what law "does," i.e., law's material consequences, than on what law "says," i.e., the messages and signals law sends.\textsuperscript{30} Law, in other words, can "make a statement," and a judge might be seriously concerned with the statement made in a particular case.

In this light, consider the position of the judges who heard the various arguments in the \textit{Mt. Laurel} cases. They might have had a pretty good idea that, without dramatic changes in local tax and school finance structures, the imposition of a "fair share" obligation would actually change little. They might also have been sufficiently influenced by legal realism (whether they called it that or not) to understand that the concepts "police power" and "general welfare" could not and did not, of their own intrinsic power, mandate a fair share obligation, a builder's remedy, or even a decision in the plaintiffs' favor. Such judges might, nonetheless, have felt the need to say something about exclusionary zoning. A holding that such zoning is permissible expresses an attitude of tolerance, if not outright approval, of economic and urban/suburban segregation. Conversely, a holding that such zoning is impermissible expresses disapproval, if not outrage, at both exclusionary practices and the self-regarding, parochial reasons that tend to be offered in support of

\textsuperscript{28} Id.


those practices. A court concerned enough to express this sort of disapproval and outrage might therefore assert that the general welfare "includes" extra-municipal interests and that land use regulations "abuse" police power without actually believing that these concepts could actually do any such things. The point of such an opinion would be to clarify the values implicated by the zoning practices at issue and endorse some (the inclusion values) while condemning others (the exclusionary values).

I, of course, have no idea whether the judges of the New Jersey Supreme Court actually had expression in mind when they wrote the Mt. Laurel opinions, but assuming they did, would this expressivist interpretation rescue the case from Schlag's enchantment critique? I am ninety-nine percent confident that the answer is "no." All the expressivist viewpoint does is move the problem of the subjectivist aesthetic to a higher level of abstraction. Rather than rules "talking," "requiring," or otherwise "governing," in expressive theories, "the law," either generally or as embodied in a particular opinion, "speaks," "conveys," and "signals." The nature of this "law," the source of authority for these "opinions," remains unexamined. Also remaining unexamined is the assumption shared by the judges and their legal audience alike that there must be a purpose to their work, and that their purpose is rational—in this case the rational purpose being the expression of something about the acceptability of exclusionary zoning. Expressivism as an escape from the enchantment of reason? Not a chance. To the contrary, expressivism just instantiates the enchantment in another guise. Once again, on a descriptive plane, Schlag seems right.

**BUT WHY?**

There is, however, something curious about Schlag's theories. As far as enchantment goes, there is not much to distinguish the Mt. Laurel cases from, say, Bowers v. Hardwick. Aren't Mt. Laurel and Bowers alike based on the same unreflective premise that controversial issues must be approached and resolved rationally, that law is rational, and that it makes sense to try to deal with the complex constellation of forces involved in disputes over exclusionary zoning and homosexuality by reference to law? Indeed, as far as enslavement to reason goes, there might not be much to distinguish the actual Mt. Laurel cases condemning exclusionary zoning from a hypothetical trio of Mt. Laurel cases endorsing such zoning. Insofar as the court in Anti-Mt. Laurel relied on reified concepts such as "the police power," "the general welfare," "the Consti-

tuition,” or “the power of the court,” a decision upholding exclusionary zoning would be no better and no worse than the original decisions, which also attributed animistic or fetishistic force to these concepts. Thus Mt. Laurel and its evil twin could both properly be characterized as products of delusions about the power of ontologically suspect entities (legal doctrines, policies, and so forth) and the connection of these entities to the world outside the legal “grid.”

I am probably just naive, but I am not sure why I would want to see the actual Mt. Laurel decisions as delusional. The answer, I suppose, is that what I want has nothing to do with the matter in hand; wanting law to be meaningful, good, or progressive will not, of its own accord, make law any of these things, though it gives us ample reason to persuade ourselves that law is already all of them.32 Still, is it not worth asking what is the point of an analysis that makes a mockery of every aspect of Mt. Laurel?

Well, what is the analysis, anyway? Schlag concerns himself with the connection between form and substance.33 Schlag is, of course, not the first to take an interest in the relationship between form and substance in legal thought,34 but Schlag has his own “take” on the form/substance issue. Legal form, he asserts, drains ideas, insights, urges, dreams, and so on, of any power, interest, or energy they might otherwise have had. Indeed, life-drain, enervation—these are the critical, if not defining, features of the legal form.35

Why is it important to see this? Clarity on this point will most certainly not help us reinvigorate legal thought, and the attempt to use it for this purpose is simply to run once more in the empty circle in which reason imprisons us.36 Nor will it help us change anything in the world, for another signal feature of legal thought is its inability to connect to

32. See ER, supra note 1, at 55 (describing the “strikingly odd, yet pervasive belief that human life and human law must always already be responsive to normative desires for reason, order, progress, and the like”).

33. See id.

34. For example, I would be shocked if there were any participants in this symposium who are not familiar with Duncan Kennedy’s Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976).

35. See infra text accompanying note 37.

36. Indeed, to attempt to use our insights in any way would enact what Schlag calls the “progressive fallacy,” i.e., “the belief that the aspects of a practice (say, law) that are ‘good’ are constitutive of or essential to the practice, while those aspects of the practice that are ‘bad’ are merely by-products of or contingent to the practice.” ER, supra note 1, at 99. Schlag asserts that there is no reason to believe in this cheery scenario or its “progressive corollary,” which holds that “intellectual effort can be usefully deployed to reform the practice so as to eliminate the bad aspects.” Id. All that the progressive fallacy and the progressive corollary have going for them, in Schlag’s view, is “a faith in cheery scenarios.” Id.
anything in the world. It is on this point that Schlag most distinguishes himself from earlier critical legal thinking.

To see this point, consider the following three excerpts from The Enchantment of Reason:

In American law, . . . considerable effort is expended to make . . . sources of belief [other than reason] more like reason itself.

. . . .

. . . The process of rationalization transforms the manifold meanings of authority, of experience, tradition, perception, and other sources of belief into the ordered propositional aesthetic of reason . . . .

Indeed, in the rationalization process the hold of experience (as experience), tradition (as tradition), perception (as perception) is typically degraded. And it is easy to see how: to the extent that the raison d'être for experience, tradition, and perception becomes their conformity to reason, they lose their intrinsic power. The foreign criteria of reason such as coherence and consistency come to displace experience and perception. When rationalization has completed its work, all sources of belief must be redeemed in the court of reason. 37

Now, this view [that the field of law is rational] is taken for granted by virtually all American legal thinkers—even though it is, once one thinks about it, a controversial (if not improbable) presumption. Why, after all, would one presume that the interested actions of state agents (known as judges) attempting to resolve difficult disputes in circumstances of serious information deprivation and strategic behavior would be ruled by reason or rationality? Why in particular would one presume that such adjudication would exhibit rationality when indeed the laws that inform this adjudication are often the product of rent seeking, power politics, outright deceit, and other questionable strategic behaviors? 38

After all, in law, reason confronts significant competition as a source of belief. There are authority, tradition, custom, convention, force, power, experience, emotion, faith, dogma, and so on . . . . How did they come to be subordinated to reason? Similarly, in law, reason confronts hostile worlds—worlds hostile to the very possibility of reason itself. These are the worlds of radical pluralism, or radical incommensurability, worlds of paradoxes and undecidabilities, worlds resistant to identity thinking. How is it that reason has vanquished its competitors and established its rightful rule? 39

37. Id. at 25.
38. Id. at 39.
39. Id. at 40.
In each of these paragraphs, reason is defined by contrast to other qualities. The reader will pardon me for appropriating a Schlagian technique and just listing them. In the first excerpt they are:

- authority
- experience
- tradition
- perception

In the second excerpt they are:

- rent seeking
- power politics
- outright deceit
- other questionable strategic behaviors

In the third excerpt the list is really long:

- authority
- tradition
- custom
- convention
- force
- power
- experience
- emotion
- faith
- dogma
- worlds of radical pluralism, or radical incommensurability
- worlds of paradoxes and undecidabilities
- worlds resistant to identity thinking

All of these qualities—until subdued by the flattening and enervating effects of reason—have an authenticity, a reality, that Schlag never accords to law.

Compare this to the following statement from Bob Gordon's oft-cited and remarkably lucid essay in David Kairy's book, *The Politics of Law*: "Legal discourses don't just mask the realities of power and life, but participate in constructing those realities."\(^{40}\)

To take a simple example used by Gordon in his original essay and more recently by Joseph Singer in two new books,\(^{41}\) a property discourse centered around "ownership" will create one reality of property rights, a reality, in which owners are perceived to have very low levels...
of duty to others and very high levels of independence from the state. A
different discourse of property, centered around “obligation,” will create
a different reality, in which owners are understood always to owe duties
to others and always to depend on the state for the protection of their
rights.\textsuperscript{42}

The larger point is this: If Gordon’s observation is true, then all of
the qualities in the lists above, qualities Schlag contrasts to reason and
law, could themselves be cast as, in some measure, products of law.\textsuperscript{43}
They have no independent life or power that law can deplete or tame,
but instead take whatever life or power they have from law itself.
Changes in law, one could infer, might change reality.

Now, I do not wish to make too much of the Schlag-Gordon con-
trast on the issue of reality. As his earlier work attests, Schlag is too
much the post-modernist to “believe in” reality at the crude level the
lists reflect. In his recently published The Aesthetics of American Law,
Schlag refers not to facts but to “fact-fields” (his quotation marks); facts,
he points out, always come already characterized and shaped.\textsuperscript{44}
On the older critical legal studies side, I am also not sure how confident anyone
ever was about the ability of law to define reality wholesale. Even way
back when Gordon wrote his original essay, he hedged, lumping law
with religion and television as but one of the many “clusters of belief . . .
that convince people that all the many hierarchical relations in which
they live and work are natural and necessary.”\textsuperscript{45} The contrast between
the view of facts as law-independent and the view of facts as law-depen-
dent should not be overdrawn.

Yet, imagine that what Gordon said were true. There would be an
easily discernable point to doing what we legal academics (and isn’t
Schlag one of us?) do. If legal conceptions and the social world were
connected in some way, then thinking about law would also be a way of
thinking about the material world, and trying to change the way we think
about law—for instance, to use my earlier example, trying to convince
people that property need not be modeled on ownership but on obliga-
tion—would be a way of trying to change the material world. Question-
ing what legal doctrine foregrounds and backgrounds,\textsuperscript{46} revealing
“nested oppositions” in legal rules,\textsuperscript{47} and all manner of similar analyses

\textsuperscript{42} See Baron, supra note 30.
\textsuperscript{43} For Gordon’s statement of this idea, see Robert W. Gordon, Critical Legal Histories, 36
\textsuperscript{44} Schlag, Aesthetics, supra note 3, at 1103.
\textsuperscript{45} Gordon, supra note 40, at 648.
\textsuperscript{46} For more on this technique, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 244-63
(1997).
of the patterns and structure of standard legal argumentation, including the kinds of analyses Schlag himself has so often performed (consider *The Empty Circles of Liberal Justification*48), would, or could, at least potentially be useful; if we could see and make others see how we ourselves artificially “froze” reality, we could unfreeze it.49 At the very least, we could begin to think about changing it because we would no longer be victims of belief in reality’s immutability.50

Twenty-plus years of engaging in various versions of this practice have revealed how much more complicated all this is than it originally seemed. From Stanley Fish we learned how silly it might be to envision standing outside one’s own structures of belief in order to change them.51 From feminists and critical race theorists we learned that “we” might not be “we,” but multiple intersecting and overlapping “we’s” with potentially differing interests and engagements.52 From law and society folks we learned to question whether there was any relation between lawyers’ and judges’ ideas about law and actual social practices; if there was little relation to begin with, changes in legal consciousness (even if “we” could actually effect such changes) would be unlikely to have much impact on everyday behaviors.53

None of this proves that legal change and social change are impossible, only that effecting social change through law is considerably more difficult and chancy than first had been thought. One could see, however, why it might be worth trying to solve (or work around) the problems: thinking about law would still be a way—perhaps now a more nuanced, humbled way—of trying to fix what was wrong with the world.

This strategy would not work, of course, if “the world” is intractably out there, isolated from and immune to thought. That is exactly as Schlag presents the world in those excerpts and in the lists culled from them. The question is why, knowing better—that is, having no illusions about a pure factuality unmediated by perspective or shaping—Schlag would choose to portray “reality” that way.

49. For a description of hopes along these lines, see Jane B. Baron, *The Undersell: An Essay on Duncan Kennedy’s A Critique of Adjudication*, 22 Cardozo L. Rev. 797, 805-07 (2001).
50. Id. at 807.
Law as an Empty Box

Rhetorically, Schlag’s opposition constructs law as an empty box, or perhaps a box filled only with reason, which, given reason’s fundamental emptiness, is the same thing. Emotion, tradition, power, deceit, and so on, in their authentic forms, are somewhere else—they are independent. Law never really gets them, in their authentic versions, into its big tent; if they show up under that big top, it is after they have been brutalized by reason into mere parodies of their true selves. So, to restate the question, why an empty box?

One aspect of this conceptualization is that it helps highlight the question of power in law. How can an empty box “rule,” “govern,” “control,” “mandate,” “police,” “organize,” “require,” “guard against,” or do any of the thousands of other things law is supposed to do? Schlag loves nothing more than an absurd verb, and his construction of law renders almost all verbs used about the subject absurd.

Although Schlag’s construction is genuinely annoying (“Dammit, I really cannot find a non-absurd verb!”), this aspect of his analysis seems, alas, a direct legacy of the left’s relentless critiques of “legal” reasoning. Imagine that one has shown that concepts such as “corporations” cannot credibly “reside” in one place rather than another;\(^4\) that rules, because of their vagueness or propensity to be swallowed by their exceptions, cannot “determine” outcomes;\(^5\) that polices such as “security of transactions” can be enlisted in aid of equal and opposite results even in relatively simple cases and thus do not really “support” anything at all.\(^6\) If one has shown all these and countless other pathologies of legal reasoning, it should come as no surprise that “law,” the amalgam of these discredited concepts, rules, policies, and pathologies, cannot be said credibly to “do” much either. “Their” vocabulary—the vocabulary of the right, of believers in objectivity, process, and other comforting bromides—turned out to be “our” vocabulary, too, and to the extent we continue to use it (and how could we not?) we sound as vacuous as those we critique.

This is an important observation, and one would think it would be widely celebrated. After all, critics on the left have been tilting at the law/politics distinction for decades now, and a convincing demonstration that the vocabulary of law is not worth using would seem to pave

---

the way for a far more direct, open, and illuminating debate about politics. In other words, it may be that Schlag employs the empty box to, in effect, embarrass us into stopping all this silly and discredited “law” talk. That would seem a worthy goal, so why does Schlag’s work get people so mad?

One of many answers might lie in those lists set out earlier. In the first, recall, reason was contrasted to

- authority
- experience
- tradition
- perception

In the second, the contrasting qualities were

- rent seeking
- power politics
- outright deceit
- other questionable strategic behaviors

Whatever might be said about the first list, the qualities in the second are pretty frightening. One could be pardoned for wishing that there might be some mechanism to control them. This wish, of course, is just a micro version of the ideals behind “the rule of law,” as Schlag is well aware. “Reason,” he explains, is understood by believers in the rule of law to be a “disciplining mechanism” that can constrain and control dangerous human motivations such as self-interest, vengeance, and hate, as well as modes of interaction such as power, prejudice, arbitrariness, and sloth.57

Schlag openly confronts the stakes riding on this image. Stripped of reason and the rule of law, the legal system would be reduced to “an assortment of legal actors, judges, and lawyers who practice ritualized forms of violence on each other and on other people.”58 “As for legal academics,” he continues, “they are demoted to the status of thug-trainers.”59 Of course all this has a psychological dimension as well, involving “the surrender of the professional self to all manner of uncontrollable forces.”60

Having nodded to hopes and fears that underlie the rule of law ideal, Schlag proceeds to a remorseless demonstration of the instability, circularity, and implausibility of the claims made on its behalf.61 Of course, the idea that the rule of law cannot actually constrain power has

57. ER, supra note 1, at 20.
58. Id. at 21.
59. Id.
60. Id.
61. See, e.g., ER, supra note 1, at 39, 117. See also Pierre Schlag, Clerks in the Maze, 91 MICH. L. REV. 2053 (1993).
a long and distinct pedigree in critical theory. What particularly characterizes Schlag's version of the critique is its apparently complete contempt for any of the impulses, fears, or aspirations that might lead any individual or community of thinkers to want something like the rule of law.62

Schlag dismisses desires for qualities such as order, control, or meaning as "pathological,"63 and even "comical."64 Take, for example, the urge for a state that is strong enough to protect individuals from selfish others but still somehow limited in its capacity to threaten individual freedom. It is one thing to say, as earlier rule-of-law skeptics did, that an urge of this variety is understandable, but, sadly, impossible to achieve.65 It is quite another thing to mock the urge itself, to ignore it, or to attribute it and others like it to "disciplinary solipsism."66

I suppose it is not altogether surprising that, in dealing with the psychological aspects of the rule of law ideal, Schlag focuses almost entirely on the professional's need to "believe in" the rule of law as a means of evading the possibility that his or her work is empty and pointless. The "selves" in Schlag's works are thin, abstract creatures, defined mostly by (professional) role: legal actors, law students, judges, academics, and so forth. Gender? Race? Emotions? Neuroses? Sexual orientation? The "actors" in Schlag's work do not have any. At one point in time, this approach—abstract, bloodless, impersonal—would have been considered distinctly gendered; would a woman write this way? Be that as it may, the approach certainly leaves an awful lot out, and that may explain why Schlag's work is hard to love. Why would you even try to engage with the ideas of someone who finds your hopes and fears pathetic and laughable, who thinks "you" have been constructed by reason to ask meaningless questions and be comforted by circular answers?

In his conclusion, Schlag asserts:

The rationalist aesthetic reduces understandings and capacities to mere "positions," "methods," "theories" that one is supposed to choose. This is no small thing. To the extent intellectual and social culture is screened and formatted in the image of the rationalist aes-

63. ER, supra note 1, at 117.
64. Id. at 119.
66. ER, supra note 1, at 5-6, 11.
thetic, we lose depth, dimension, and contrast. Ultimately, cultural
and individual memory are erased. . . . Ultimately, our mode of
thought itself becomes shallow. And when this is the case, there is
not a thing that thought, as such, can do about it: shallow in/shallow
out. The rationalist aesthetic becomes the frame within which
thought occurs. The more it succeeds, the more it obliterates every-
thing else.67

Here again we have definition by opposition. On the one side, there is
“the rationalist aesthetic,” and on the other there are

- understandings
- capacities
- intellectual and social culture
- depth
- dimension
- contrast
- cultural and individual memory

Schlag goes deep into the rationalist aesthetic, and his description
of it is hard to fault. The contrasting terms, on the other hand, are pretty
underdeveloped. The richness that reason is said to flatten is only thinly
described. Everything worth wanting seems to be on the list; certainly it
is hard to see why anyone would want to live within the rationalist aes-
thetic. Because of the latter, however, we can never—or perhaps no
longer?—get to the former. The game here seems seriously rigged. I,
for one, just don’t want to play.

67. ER, supra note 1, at 143.