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Distorting Reason

C. J. Summers

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Distorting Reason

Pierre Schlag, *The Enchantment of Reason*. Durham, North Carolina: Duke University Press, 1998. Pp. 160. \$17.95.

Judges, attorneys, academics, even law students, have all been caught within a spell—a spell of their own making. The leaders of the profession voice its incantation with pride: We are united by “a faith in the power of reason.”¹ This spell is insidious for it erases all knowledge of its own existence. At least this is what Pierre Schlag would have us believe in *The Enchantment of Reason*.² Schlag claims to have seen through the mists of this illusion, and he presents a broad, skeptical argument that reason has betrayed the American legal community. Schlag’s skepticism is not merely the now commonplace Holmesian position that “[the law] cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”³ It is a view that is affiliated with the Critical Legal Studies (CLS) movement, the more ambitious descendent of legal realism. Schlag takes as a starting point a central claim of the Critical theorists: All legal texts, theories, arguments, and positions are radically contextual in nature, and legal reasons are merely *ad hoc* or *post hoc* rationalizations for prior “situated” beliefs.⁴ Schlag treats this claim as settled wisdom. The book, then, is best described as a reaction to the recalcitrant members of legal and philosophical academia who have remained loyal to liberal ideology and its commitment to reason.⁵ It seeks to explain to the Critical theorists

1. PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 19 (1998) (quoting Anthony Kronman, Dean of Yale Law School, as quoted in *America’s Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 20, 1995, at 84).

2. SCHLAG, *supra* note 1.

3. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (Mark DeWolfe Howe ed., Little, Brown 1963) (1881).

4. SCHLAG, *supra* note 1, at 38-39; cf. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 19-25 (1984) (claiming that judicial decisions are predictable despite the indeterminacy of legal principles because they are the result of common human motives); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 570-73 (1983) (claiming that the absence of a coherent basis for the law results in the unprincipled nature of reasons given within the law). Leading CLS scholarship is anthologized in *CRITICAL LEGAL STUDIES* (Allan C. Hutchinson ed., 1989).

5. Cf. Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U.

why their colleagues remain unconvinced while at the same time it attempts finally to win over the holdouts. Schlag thus has both a descriptive and normative purpose when he argues that the resistance to CLS jurisprudence is due to—and thus a demonstration of—the same misplaced reliance upon reason that the Critical theorists have been insisting is pervasive all along.⁶

Schlag contends that the traditional “rule of law” is, in effect, the “rule of reason.”⁷ The legitimacy of legal systems depends upon the degree to which reason, rather than vengeance, self-interest, prejudice, or arbitrariness, governs (or is perceived to govern) their norms and their practice.⁸ Schlag argues, however, that appeal to reason cannot provide a satisfying analysis of legitimacy because the conception of reason in American jurisprudence is fragmented into two broad views. One view takes reason as the “central command” of the legal system, the rigorous and unyielding mechanism by which the artifacts of law are applied to actual situations and the organizational force which guides the development of the legal machine.⁹ The other view characterizes reason as a tool, used by legal actors to impart legitimacy upon other non-reasoned forms of belief such as experience, moral sentiment, and power.¹⁰ The tension between these two uses of reason in law gives rise to the traditional hobbyhorse of the Legal Realists:¹¹ that reason can be made to support both sides of a legal debate.¹² Schlag offers no analysis of the sources of this indeterminacy, but only presents an example of this phenomenon. He suggests that balancing tests are paradigm cases in which either side can be justified by reason, and reason, in effect,

PA. L. REV. (1993) (proposing and defending a position which claims that the success of the liberal ideology does not demand determinism of reason, and only requires a qualified form of objectivity).

6. See SCHLAG, *supra* note 1, at 15-17.

7. *Id.* at 20-22.

8. *See id.*

9. *Id.* at 26-29.

10. *See id.*

11. *See, e.g.*, JEROME FRANK, *LAW AND THE MODERN MIND* 1-13 (1930) (claiming that law is unsettled before a particular decision, thus presupposing that arguments could be made on both sides); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 22-23 (1960) (claiming that the given techniques of legal reasoning leave “huge correct leeways to produce variant results”); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (listing pairs of accepted principles of statutory interpretation that contradict each other). Legal Realist writings are collected in the anthology *AMERICAN LEGAL REALISM* (William W. Fisher III et al. eds., 1993). Of course, the Legal Realists did not believe that all reasonable arguments were equally valid. The validity of a legal argument turned not upon whether it was a reasonable application of legal techniques of reasoning, but upon whether it met certain policy or functional criteria. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (fleshing out the functional criteria for judicial decisionmaking).

12. *See* SCHLAG, *supra* note 1, at 30-33.

“runs out.”¹³ Pressure to maintain the rule of reason, however, prevents legal actors from recognizing that reason does not provide a determinate answer. Instead they dogmatically assert that reason favors one side or the other,¹⁴ invoking the common phrases “it just stands to reason,” “good judgment clearly tells us,” and the economical “clearly.”¹⁵ What is most disturbing about situations where reason runs out, Schlag asserts, is the widespread belief among academics and practitioners that these proclamations are a function of reason and therefore a victory for the rule of reason. Schlag refers to this uncritical acceptance of asserted reasonableness as the “Noble Scam”¹⁶ and finds that it is a pervasive phenomenon in legal discourse.¹⁷ Because of widespread blindness or indifference to the Noble Scam, reason often serves to legitimize and rationalize the influence of vengeance, self-interest, prejudice, and arbitrariness in the law.¹⁸

Schlag offers two broad arguments for his claim that reason is insufficient to determine legal questions. First, he argues that reason is itself flawed and that its internal defects are reflected in legal discourse.¹⁹ Second, he claims that certain aspects of legal discourse are formulated in such a way that they undermine the operation of reason.²⁰ Both the flaws of reason itself and the problematic nature of the law hopelessly distort attempts to use reason within the law. Further, Schlag argues that it is these same flaws in reason and the law that, insidiously, obscure their own pernicious effects from the sight of legal actors.²¹ This is the enchantment of reason. Schlag’s elaboration of each prong of his argument, however, displays a pervasive inattention to important substantive issues and a failure to recognize subtle, and not so subtle, differences in theories of the nature and requirements of reason. A reader is constantly confronted with arguments that make unjustified assumptions about controversial issues, or which are cast in a blatantly mischaracterized intellectual landscape. It is unclear what to make of such a work because critical dissatisfaction with it is not focused on any particular aspect, but is distributed across the entire project. Criticism of the book, however, must necessarily be particularized. This Book Note

13. *Id.* at 31-32.

14. *See id.* at 33-39.

15. *Id.* at 30.

16. *Id.* at 38.

17. *See id.* at 33-39.

18. *See id.* at 38-39.

19. *See id.* at 60-91.

20. *See id.* at 92-125.

21. *See id.* at 33-39.

therefore analyzes two instances of these faults and explores their effect on Schlag's work. Because errors such as the two presented below riddle the book, Schlag's entire project is compromised.

I

Schlag's first criticism of reason is an argument about "self-reflexivity"—that is, that there is no way of placing reason upon a non-question-begging foundation. It seems that any method of justifying or criticizing reason must itself assume the validity of reason. This apparent paradox is only interesting, however, if reason is in *need* of justification. Schlag argues that it is. He suggests that because reason is held out as regulating belief, it must be distinguished from other "forms of belief" such as "experience, custom, tradition, insight, intuition, revelation, disclosure, and so on."²² Schlag concludes that reason must be held to the same standards as other "forms of belief" because it is inextricably enmeshed in belief.²³ He argues that reason depends upon belief in several ways.²⁴ The most important is that "[r]eason is itself a kind of belief. Indeed, whether we are talking about the principle of noncontradiction, or the idea that like cases should be treated alike, we are talking about beliefs."²⁵ It is uncontroversial that we have beliefs about reason, such as a belief about the law of non-contradiction. It is also true that on the common understanding reason operates upon beliefs. It is, however, far from obvious that reason is itself a kind of belief. Consider the following argument that reason cannot be a kind of belief, or more accurately, cannot consist of a set of beliefs.

While Schlag never settles on one clearly articulated conception of reason, any plausible account must hold that reason is at least a method of deriving new beliefs from old.²⁶ Schlag appears to accept this when he includes inductive and deductive reasoning—which clearly fulfill this function—among several "types of reason."²⁷ Consider, then, the following three familiar beliefs:

- (1) If Socrates is a man, then Socrates is mortal.²⁸

22. *Id.* at 58-59.

23. *Id.* at 61-63.

24. *See id.* at 61.

25. *Id.* at 62.

26. Or perhaps, on a weaker account, reason consists in bringing certain beliefs to conscious attention using other beliefs already within conscious attention.

27. SCHLAG, *supra* note 1, at 76.

28. For simplicity I have particularized the common first belief, "All men are mortal."

(2) Socrates is a man.

(3) Socrates is mortal.

Now, according to our working notion, reason is the method by which we get from belief in (1) and (2) to belief in (3); specifically, it is the means by which (3) is deduced from (1) and (2). Absent the operation of reason, belief in (3) does not simply happen when there is belief in (1) and (2). If reason consists only in a set of beliefs such as non-contradiction and, in this case, *modus ponens*²⁹—as Schlag suggests—then the operation of reason in this situation results in our original belief set being expanded to something like the following:

(1) If Socrates is a man, then Socrates is mortal.

(2) Socrates is a man.

(4) From a belief set consisting of ‘If A then B’ and ‘A’, add a belief, ‘B.’³⁰

Simply believing these three things (or as many more as you might care to add), however, does not result in any new beliefs. Specifically, it does not result in the belief that Socrates is mortal. The belief (4) is a belief about how we do or should reason, it is not the act of reasoning itself. Even if one had this belief set, it would still be necessary to carry through on the reasoning process recommended by (4) in order to arrive at (3).³¹ It is this process of going from a set of beliefs to another, not any belief about such a process, which comprises reason. This fact is commonly recognized by the requirement that the processes of reason answer not to truth and falsity, as do beliefs, but to validity and invalidity—on the common version of validity, to truth-preservingness and non-truth-preservingness.

This argument is obviously too simplistic. There is more to reasoning than the formal processes of drawing logical conclusions from past beliefs. The notion of reason that Schlag employs at times

29. In the propositional calculus, the term *modus ponens* applies to any inference of the form ‘If p then q , and p ; therefore q .’

30. This example expands upon Schlag’s concession that reason may be a “special” kind of belief, or a “belief about beliefs.” SCHLAG, *supra* note 1, at 61.

31. In fact, it would not be unreasonable, in the technical sense, to believe (1), (2), and (4) and still not believe (3). While it *would* be unreasonable to believe (1), (2), and (4) and *deny* (3), it is commonly accepted that reason does not demand that all conclusions permitted by the operations of reason be drawn.

seems to be quite broad.³² Indeed it seems to include any process of ratiocination—as distinguished from sensory impressions, emotional reactions, hypnotically implanted beliefs, and so on. Even if reason is meant to include this broader set of mental operations, however, it must—as a *de minimis* requirement—encompass deductive and inductive reasoning. In any case, it should be apparent—though it will not be argued here—that even on this broader conception reason consists of a group of mental operations, not a set of beliefs. The discussion above, therefore, is sufficient to demonstrate that Schlag’s self-reflexivity argument begins with a faulty conception of the nature of reason. Of course, in order to ask appropriate questions about reason and justification—much less launch a broad skeptical challenge—you must begin with a conception of reason that accurately represents the subject of criticism. Schlag begins with an inadequate conception, and his inquiry cannot legitimately proceed upon such a foundation. If reason is not a set of beliefs then Schlag has not shown that reason is in need of justification and his concerns over self-reflexivity take no purchase. The point is not so much that the position that Schlag adopts is ultimately wrong. After all, someone might argue that it is appropriate to criticize reason by treating it as a set of beliefs, namely beliefs about reason.³³ Schlag, however, offers no such argument because his mischaracterization of reason does not reveal the need. The true objection to Schlag’s argument is that he draws such a tendentious conclusion too casually, leaving its justification to a simple observation that fails to distinguish between a belief about a thing and the thing itself.³⁴ From such poorly reasoned premises, no conclusion can be convincing.

II

The second basis that Schlag offers for the failure of reason in law is similarly sabotaged by Schlag’s frequent inattention to central components of his argument. Here he lays out practical ways in which discourse in the law creates “predicaments” for any attempts to rely on reason.³⁵ Some of these practical effects are commonplace. The *misuse* of reason to rationalize the expression of prejudice, for

32. See, e.g., SCHLAG, *supra* note 1, at 76 (“Reason, as has been suggested, is a way of selecting, testing, monitoring, and replacing beliefs. Reason is a way of deciding upon what moves to make—what pathways, what relations to create.”).

33. Even this argument would not suffice for Schlag. The fact that reason should be treated as a set of beliefs for purposes of criticism does not entail that it is in need of the kind of justification that such a set of beliefs requires.

34. I suspect that ultimately the “justification” is supposed to lie in a cultural conception—which Schlag assumes to be settled wisdom—that the nature of reason has been obfuscated by the defenders of reason or by reason itself.

35. SCHLAG, *supra* note 1, at 92-125.

example, is a universally acknowledged problem (which has a solution in the *correct* application, not abandonment, of reason). Some of Schlag's examples, however, are seemingly novel predicaments having to do with common ways of conceptualizing legal artifacts and forming arguments within the law. Unfortunately, *The Enchantment of Reason* does not provide a satisfactory analysis of these proposed difficulties. In the rest of this Book Note I wish to pursue one of the possible defects of legal reasoning which Schlag has perceptively brought to our attention but has failed to adequately flesh out. This is only one example of the lack of substantive engagement with relevant issues that is an unhappily pervasive feature of the book.

Schlag claims that legal reasoning employs at least two metaphysical aesthetics. The "subjectivist aesthetic" treats legal artifacts as if they had intentional properties.³⁶ Legal actors speak of the "will" of the Constitution, the "intention" of a law, the "animosity" of a decision, but no one believes that these artifacts actually have the properties attributed to them.³⁷ Similarly, the "objectivist aesthetic" is the tendency to imbue legal concepts with properties appropriate to physical objects.³⁸ Legal operations, which we label "balancings," lead us to conceive of legal artifacts, such as interests and rights, as having "weight," "boundaries," "plasticity/rigidity," and "direction."³⁹ Schlag contends that these aesthetics are necessary to the law because they underlie its purported objectivity and stability, while at the same time they undermine its credibility because they are false representations of reality.⁴⁰

Schlag considers "as-if" jurisprudence, which claims that objectivism and subjectivism talk within the law is merely metaphorical and thus does not incur false metaphysical commitments.⁴¹ As-if jurisprudence thereby attempts to reap the stabilizing and objectifying benefits of these aesthetics without incurring any commitment to the undesirable metaphysical thesis that they seem to imply.⁴² Denouncing this as an attempt to "have their cake and eat it too," Schlag claims that this position leaves the stabilizing and objectifying functions of these aesthetics without a foundation. He presents only one argument to this effect:

36. *Id.* at 104.

37. *Id.*

38. *Id.* at 100.

39. *Id.* at 101-02.

40. *See id.* at 106-07.

41. *See id.* at 108-11.

42. *See id.*

Again [within as-if jurisprudence] we run into the question: Metaphor for what? If the “bindingness” of doctrine does not come from the doctrine and if the “trumpiness” of rights does not come from the subjective power of rights, then where do they come from? Similarly, if the neutrality, impartiality, universality, stability of legal artifacts do not come from the objective character of law, then where do they come from?⁴³

These are important questions—important beyond the domain of legal discourse. Similar debates about the metaphysical status of “abstract” entities have raged for centuries, even millennia.⁴⁴ Mathematicians treat groups of things as if they comprise “sets” and vectors as if they have “direction,” but many of them deny that these terms denote anything.⁴⁵ Questions about the ontological status of numbers, for example, are still debated today.⁴⁶ Positions analogous to the two that Schlag outlines, as well as many shades in between, are advocated in these fields.

A more recent re-enactment of this debate has taken place in the context of the possible-worlds analysis of modality. The only satisfactory account of modal relations (e.g., necessity and possibility) posits a domain of alternate universes, termed worlds, and proceeds as follows:

- (1) Blue swans are possible if and only if there is a world, w , such that at w there are blue swans.

If we believe that blue swans are possible and we desire to remain logically consistent, this analysis requires us to detach the antecedent and conclude that:

- (2) There is a world, w , such that at w there are blue swans.

Since w is obviously not *this* world⁴⁷ we find ourselves committed to non-actual worlds. Some have argued that we should accept such

43. *Id.* at 110.

44. One of the modern competing views is known as Platonism, *see, e.g.*, CRISPIN WRIGHT, FREGE'S CONCEPTION OF NUMBERS AS OBJECTS (1983) (defending Frege's Platonism about belief in the existence of numbers), modeled after Plato's belief in the existence of abstract “forms,” *see, e.g.*, PLATO, PHAEDO 93-155 (G.M.A. Grube trans., Hackett Pub. Co. 1981).

45. *See, e.g.*, Gideon Rosen, *The Refutation of Nominalism(?)*, 21 PHIL. TOPICS 149 (1993) (arguing against Fregean positions in favor of commitment to mathematical objects).

46. *Compare* JOHN P. BURGESS & GIDEON ROSEN, A SUBJECT WITH NO OBJECT (1997) (arguing for interpretations of mathematics that do not claim the existence of numbers), *with* WRIGHT, *supra* note 44.

47. The truth of this particular claim about blue swans is unimportant. All that is needed is the claim that some things that are possible are not actual, that is, they do not exist or are not the case in this world.

commitments to non-actual worlds because the practical benefits for modal discourse are so tremendous.⁴⁸ Other philosophers find such commitments too far at odds with common sense to accept.⁴⁹ Given their commitment to the possibility of blue swans, however, they look for ways to reap the benefits of the “possible worlds” analysis while avoiding the ontological commitment that it carries on its face. One vein of alternative theories is known as fictionalisms.⁵⁰

The fictionalist accounts of modality build on theories of pretense.⁵¹ One version makes explicit use of what is known as a story prefix. Consider the following sentence:

- (3) According to the Holmes stories, there is a brilliant detective at 221b Baker Street.

No one thinks that believing (3) will commit you to the existence of a detective, brilliant or otherwise, at 221b Baker Street; it doesn't even commit you to 221b Baker Street, or to detectives for that matter. Similarly we can offer the following versions within modal discourse:

- (4) Blue swans are possible if, and only if, *according to the possible worlds story*, there is a world, *w*, such that at *w* there are blue swans.

Now, if we detach the antecedent here, we are left with the following sentence, analogous to (3), and entailing no commitment to the entities mentioned within the story prefix:

- (5) According to the possible worlds story, there is a world, *w*, such that at *w* there are blue swans.

If this works, then the fictionalist has acquired the benefits of the possible worlds analysis of modality without incurring unwanted ontological commitments to strange entities like possible worlds.

Several difficulties for this approach have been raised in the literature. There are concerns about the ability of such a story to produce the facts that we think it should. Does the modal story

48. See, e.g., DAVID LEWIS, ON THE PLURALITY OF WORLDS 1-92 (1986).

49. See, e.g., Gideon Rosen, *Modal Fictionalism*, 99 MIND 395 (1990); Stephen Yablo, *How in the World?*, 24 PHIL. TOPICS 255 (1996) (offering an alternative nominalist theory which he terms metaphoricalism); cf. Joseph Melia, *On What There's Not*, 55 ANALYSIS 223 (1995) (arguing that the analytic usefulness of a proposed entity is not necessarily a reason to accept its existence).

50. See, e.g., Rosen, *supra* note 49.

51. The following account borrows from that of Gideon Rosen. See *id.*

produce too many facts, such as facts about possible worlds?⁵² Or does it produce too few, leaving out things we think are possible?⁵³ There are also concerns about the justification provided by such a story. People obviously care about the modal facts. They regret things that might have been and hope for things that might yet be. It is far from clear, however, that such deep concern can be based upon a *story* about possible worlds.⁵⁴ While it is not obvious that a fictionalist account of modality can produce all the benefits of a theory that elects to accept ontological commitment to possible worlds, the debate is open. Similarly, if we read Schlag's as-if jurisprudence as a type of fictionalist account, then it is an open question whether such a theory can produce the objectivizing and stabilizing functions that an ontological commitment to laws and rights was supposed to allow. If a fictionalist account of legal artifacts can produce these results then Schlag's two aesthetics pose no dilemma for the legal actor. There is only the superficial appearance of commitment to abstract objects. The legitimizing effect of the two aesthetics comes, as it were, for free.

Schlag does not flesh out his as-if jurisprudence enough for us to know whether he had in mind something like the fictionalist account laid out above. The fictionalist account does, however, pursue the same ends that Schlag attributed to as-if jurisprudence and arguably meets them. While Schlag is ultimately concerned only with the legal domain of discourse, his argument does rest upon a philosophical thesis about metaphysical commitment and the appropriate basis of justification. Such abstract criticisms of legal practice are unconvincing, unless informed by plausible alternatives from analogous work in the philosophical literature. As with his conception of reason, the objection is not so much that Schlag's position must be wrong, but that his cavalier endorsement of tendentious views and superficial treatment of important issues makes any conclusions he draws unconvincing.

III

The Enchantment of Reason attempts to explain why some elements of the legal and philosophical communities have resisted certain claims of the Critical Legal Studies movement and why they

52. See, e.g., Bob Hale, *A Desperate Fix*, 55 ANALYSIS 74 (1995) (claiming that the semantics of the story prefix trap the fictionalist into commitment to possible worlds).

53. See, e.g., Stephen Yablo, *Objects and Objectivity 4: Fictionalism 4-7* (Sept. 30, 1997) (unpublished manuscript, on file with author) (suggesting that the mechanisms for developing the fictionalist story are inadequate to underlie certain claims about possibility).

54. See, e.g., Rosen, *supra* note 49, at 349-54.

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are unable to see that the law's reliance upon reason serves only to obfuscate and assist the exercise of power and prejudice. At the same time it is, perhaps, an attempt to finally convert these tenacious defenders of reason, to show them that their resistance to CLS is just another result of the very problems which Critical theorists have emphasized all along. Ironically, Schlag's work serves exactly the opposite function. It reinforces the argument voiced by critics of CLS that the issues raised are serious and worthy of study, but that Critical theorists have done them a disservice by substituting trendy jargon, impressionistic arguments, and attacks on the status quo for careful argumentation, attention to detail, charitable consideration of competing positions, and intellectual humility. Seen as the alternative, Schlag's book is evidence that being under the spell of reason is not always such a bad thing.

— *C.J. Summers*

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