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# The Paranoid Style in Contemporary Legal Scholarship

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# ESSAY

## THE PARANOID STYLE IN CONTEMPORARY LEGAL SCHOLARSHIP

*Francis J. Mootz III* \*

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Pierre Schlag lays it on the line in his recent contribution to the *Michigan Law Review*: judges and legal academics are trapped in a jointly constructed maze of meaningless normative justifications of the legal system.<sup>1</sup> Schlag contends that judges recoil from “all that law is and all that law does”<sup>2</sup> and

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1. See Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2060 (1993) [hereinafter *Clerks*]. Schlag previously has used the metaphor of a maze to characterize legal thought. See Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 931 (1991) [hereinafter *Normativity*] (illustrating the perspective of some legal thinkers as follows: “Who wants to prescribe or recommend things to judges anyway? Sounds like a recipe for formalism. What’s more, if one enters the bureaucratic maze of doctrinal restatements restated, one ends up with restatement consciousness. And why do that? Because it’s law? Doubtful.”).

2. *Clerks*, *supra* note 1, at 2054. Schlag elaborates: “There is, thus, a very

embrace "a romanticized and inflated shadow image"<sup>3</sup> of the law that legitimizes, at least in their minds, the violent character of their practice. Legal academics serve as handmaidens in this delusional enterprise, Schlag argues, by continuing in the role that they first assumed after graduating from law school: the role of judicial clerk.<sup>4</sup> As a consequence "of the legal academic's primal identification with the persona of the judge,"<sup>5</sup> Schlag concludes, legal scholarship devolves into "the legitimation and rationalization of judicial opinions,"<sup>6</sup> which is to say that legal scholarship is devoted to obscuring the real workings of the legal system.

It is difficult not to discern the psychoanalytic imagery in Schlag's account. The judge (as parent) and the academic (as child) share the same delusions, yet believe they are at odds with each other. When Judge Harry Edwards criticizes the increasingly abstract and interdisciplinary character of contemporary legal theory, Schlag adopts the patient tone of an insightful analyst to explain how the rebellious sons and daughters of the academy in fact reinscribe the same old delusions in their intellectual endeavors, despite their showy efforts not to grow up to be just like dad.<sup>7</sup> Judges employ the well-recognized cognitive defense mechanism of denial when writing their opinions, and legal academics dutifully confer the mantle of intellectual sophistication and rigor on this exercise of self-deception.

In this essay I will argue that the psychoanalytic imagery in Schlag's article runs deeper than Schlag intends. Schlag champions the postmodern legal critic who can pierce the delusions of normative legal justifications, but upon close inspection Schlag's critic exhibits the style of functioning that we commonly would attribute to a paranoid individual. My thesis is that this affinity between Schlag's account of postmodern criticism and the symptoms of paranoia reveals that Schlag's

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real sense in which the judge *wants not to see, wants not to understand, wants not to pursue certain lines of inquiry.*" *Id.* at 2055.

3. *Id.*

4. *See id.* at 2056 (describing the legal academic's relationship with the judge).

5. *Id.* at 2067.

6. *Id.* at 2063.

7. *See id.* at 2071-72 (criticizing Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) as an example of one generation blaming its "jurisprudential failures" on its "offspring"). Schlag's article appeared in a symposium devoted to legal education in which the contributors each responded to Judge Edwards's claim that legal academics no longer serve the needs of the practicing bar and bench to the extent that they had in the past. *See Symposium: Legal Education*, 91 MICH. L. REV. 1921-2219 (1993).

project is desperately misguided. I do not mean to suggest in any way that Schlag personally exhibits any symptoms of paranoia, but only that his account of the postmodern critic describes a person whose approach to the world parallels that of a paranoid individual.<sup>8</sup> Neither Schlag nor any similarly

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8. See William Bywater, *The Paranoia of Postmodernism*, 14 PHIL. & LITERATURE 79 (1990) (comparing postmodernism to a state of intellectual paranoia). Linda Fisher questions Bywater's distinction between exhibiting a paranoid style and being paranoid. See Linda Fisher, *Hermeneutics of Suspicion and Postmodern Paranoia: Psychologies of Interpretation*, 16 PHIL. & LITERATURE 106, 114 n.4 (1992). In contrast, Richard Hofstadter previously has argued for the validity of this same distinction, although in a different context, by stating:

I have neither the competence nor the desire to classify any figures of the past or present as certifiable lunatics. . . . It is the use of paranoid modes of expression by more or less normal people that makes the phenomenon significant.

When I speak of the paranoid style, I use the term much as a historian of art might speak of the baroque or the mannerist style. It is, above all, a way of seeing the world and of expressing oneself. . . .

Of course, the term "paranoid style" is pejorative, and it is meant to be; the paranoid style has a greater affinity for bad causes than good. But nothing entirely prevents a sound program or a sound issue from being advocated in the paranoid style, and it is admittedly impossible to settle the merits of an argument because we think we hear in its presentation the characteristic paranoid accents. Style has to do with the way in which ideas are believed and advocated rather than with the truth or falsity of their content.

RICHARD HOFSTADTER, *The Paranoid Style in American Politics, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3-5 (1965).

Hofstadter discusses the often marginal, but at times very powerful, tendency for Americans to view sociopolitical events as a function of perceived conspiracies, framing his study with an analysis of the "Red Scare" paranoia of the 1950s. Historian Gordon Wood notes that a number of historians of the revolutionary period broadened Hofstadter's thesis by suggesting that the paranoid style of that time evidenced underlying "paranoid delusions" among the founders about Britain's design for the colonies. Gordon S. Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 WM. & MARY Q. 412, 405-06 (1982) (describing the impact of psychohistory). Wood argues that the paranoid style was so ubiquitous in the revolutionary era that it is a mistake to confuse the paranoid style with clinical paranoia. *Id.* at 407-09. He contends instead that the paranoid style during this period was a manifestation of the then prevalent world view stressing individual autonomy and moral responsibility for historical events, a world view that has not entirely dissipated in the face of our modern acceptance of collective social forces.

The belief in plots was not a symptom of disturbed minds but a rational attempt to explain human phenomena in terms of human intentions and to maintain moral coherence in the affairs of men. This mode of thinking was neither pathological nor uniquely American. . . . In our post-industrial, scientifically saturated society, those who continue to attribute combinations of events to deliberate human design may well be peculiar sorts of persons—marginal people, perhaps, removed from the centers of power, unable to grasp the conceptions of complicated causal linkages offered by sophisticated social scientists, and unwilling to abandon the desire to make simple and clear moral judgments of events. But people with such conspiratorial beliefs have not always been either marginal or irrational.

*Id.* at 429, 441.

intelligent and well-adjusted critic seriously can propose to adopt in real life the critical pose that Schlag describes in his article. Although I argue that Schlag's provocative essay crystallizes the poverty of a certain style of postmodern legal discourse, I nevertheless assert that his effort provides a contrasting touchstone from which we can think productively about the insight that postmodern thought lends to legal theory.

This essay is organized in three parts. The first part describes Schlag's thesis that normative legal discourse constitutes an unhelpful maze, and emphasizes that his critique presupposes that he, and perhaps a few others, have escaped this hegemonic maze. Part II draws the comparison between Schlag's theoretical posture and clinical paranoia. Part III contrasts the postmodern paranoia of Schlag's account with a dialogical conception of postmodern thought that embraces the inevitability of normative legal discourse, using the idea of the rule of law as a point of discussion. The essay concludes that Schlag's efforts to radicalize the critique of subjectivity are unconvincing, inasmuch as they posit a legal theorist who properly would be characterized as paranoid.

### I. MAZED AND CONFUSED

In Schlag's view, contemporary legal theory is no more than "happy talk jurisprudence" that leaves "the violent ontology of law completely untouched."<sup>9</sup> Legal theorists are impotent and obfuscatory because they disengage from the reality of law and devote themselves to constructing increasingly intricate mazes of normative justifications for a practice that never is honestly discussed, let alone questioned.<sup>10</sup> After a few years of

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Wood's thesis is helpful in clarifying the distinction drawn in this article between being paranoid and exhibiting a paranoid style. On one level I am arguing that Schlag participates in a wider intellectual world view that leads to the adoption of the paranoid style. Just as the founding fathers, steeped in the Enlightenment milieu of their day, needed to ascribe social conditions to conscious human agency, so too contemporary postmodern legal scholars operate on the basis of a critical world view that compels them to radically challenge appearances and commonly held beliefs. Schlag is no more paranoid than the founding fathers, although like them he adopts the paranoid style.

On a deeper level, I argue that Schlag *does not* and *cannot* exhibit the paranoid tendencies that he describes. Just as the motivating world view of the founding fathers no longer rings true, the assumptions about individual and social life that motivate Schlag's critical paranoid style appear to be contradicted by the manner in which we conduct our "real" (that is to say, not our "scholarly") lives. In other words, Schlag is not paranoid, and so his account of the legal critic can hold no appeal, even for himself, except on a very stylized, provocative, and intellectual level.

9. *Clerks*, *supra* note 1, at 2060-61.

10. *Id.* at 2068 (describing the rationalization of law by legal academics).

grinding out law review articles, even the most realistic academic becomes lost in the maze and forever separated from the reality of law. Schlag believes that practicing lawyers avoid this jurisprudential maze because their institutional role as advocates does not foster within them a need for comforting rationalizations.<sup>11</sup> Practicing lawyers are unreflective actors immersed in the real world of law, but judges—and sycophantic academics—escape from the reality of judicial practice by constructing and entering a complex normative maze.

The justificatory maze comforts judges in two principal ways: it underwrites their bureaucratic practices with “a greater, grander . . . legitimating power,”<sup>12</sup> and it provides them with “a script to follow”<sup>13</sup> so as to absolve them of their personal complicity in legally sanctioned violence. Schlag does not begrudge judges their emotional crutch, but he is exasperated because legal academics not only take the maze seriously, they undertake most of the labor in its construction.<sup>14</sup> Much legal scholarship is composed of attempts to provide judges with ever more intricate elaborations of the legitimating strategies of “justify and redeem” and “constrain and control.”<sup>15</sup> Schlag contends that scholars who have the “inclination” and “capacity” to find a way out of the maze and to begin asking intellectually creative and challenging questions about what is really going on, are the vanguard of an exciting, epochal movement within the academy.<sup>16</sup>

Admittedly, there is something appealing about Schlag’s account, but its appeal stems not from its *originality* but from its *familiarity*. Schlag’s description of the maze comports with the modern conception of critical thinking ushered in by the

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11. See *id.* at 2057. Schlag explains:

A lawyer looks at doctrine and sees a tool, a vehicle, an opportunity, a threat, a guarantee. . . . Lawyers can be forced—a term deliberately used—to use nicer-warmer signifiers [developed by academics], but they will, of course, use these nicer-warmer, kinder-gentler signifiers in the same old coercive ways, to accomplish the same old performative tasks they were hired to do.

*Id.* at 2057, 2066.

12. *Id.* at 2054.

13. *Id.* at 2055.

14. See *id.* at 2062 (questioning whether construction of the maze is vital intellectual thought, but insisting that his questioning is not meant as a criticism of judges or judging).

15. See *id.* at 2063-67 (describing the “justify and redeem” and “constrain and control” strategies). Schlag insists on the ubiquity of this bivalent structure of legal thought. “While these mazes are all different, they are all aesthetically very much the same: they are constructed of repeated exercises of *constrain and control* and *justify and redeem*.” *Id.* at 2069.

16. See *id.* at 2074.

Enlightenment. Participants in a given practice are confused, in this case mazed and confused, about what is really going on and the critic's goal is to expose their confusions. Schlag has undertaken the critic's task in his broad critique of normative legal thought.<sup>17</sup> This style of critical inquiry is decidedly modern in its genesis; the exemplars, of course, are Freud, Marx, and Nietzsche.<sup>18</sup> However, the postmodern spin on critical inquiry recognizes the need to abandon the self-assurance that animates the approaches adopted by Freud and Marx. As Schlag emphasizes, the way out of the maze "does not, indeed it cannot, reduce to a prescription or a recommendation or a solution or even a criticism."<sup>19</sup> Freud's psychic architecture and Marx's historical materialism give way to the mysterious experience of a paradigm shift, a flash of insight that does not tell us what to do because it is the act of *telling* that is being put into question.

The epistemological problems posed by modernist critical projects are only partially answered by adding a postmodern gloss. Schlag's effort to analyze legal scholarship *from outside the maze* is extremely problematic. Schlag believes that most scholars reside within a maze characterized by "dreariness," but that a select few have found a way out, gained perspective

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17. See *Normativity*, *supra* note 1; Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) [hereinafter *Nowhere to Go*]. Schlag accurately emphasizes that a critique of normative legal thought entails a critique of the assumption that legal subjects are competent to engage in normative thought. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991) [hereinafter *Problem of the Subject*].

18. Paul Ricoeur has convincingly argued that demystification plays a central role in contemporary hermeneutical philosophy owing to the intellectual legacy of Freud, Marx, and Nietzsche:

I think that any modern hermeneutics . . . is an effort to struggle against idols, and, consequently, it is destructive. It is a critique of ideologies in the sense of Marx; it is a critique of all flights and evasions into otherworlds in the sense of Nietzsche; a struggle against childhood fables and against securing illusions in the sense of psychoanalysis.

Paul Ricoeur, *The Language of Faith*, in THE PHILOSOPHY OF PAUL RICOEUR 223-38, 234-35 (Charles E. Reagan & David Stewart eds., 1978).

Consider, for example, the similarities between Schlag's posture and that adopted by Ludwig Feuerbach in his famous attack on Christianity, an attack that presages and influences the later work by Marx and Freud:

I am nothing but a natural philosopher in the domain of the mind. Not to invent, but to discover, "to unveil existence," has been my sole object; to see correctly, my sole endeavor. . . . I have only given away the secret of the Christian religion, only extricated its true meaning from the web of contradictions and delusions called theology. . . . Religion is the dream of the human mind.

LUDWIG FEUERBACH, THE ESSENCE OF CHRISTIANITY 2-3 (E. Graham Waring & F.W. Strothmann eds., 1978) (George Eliot original trans., 2d ed. 1843).

19. *Clerks*, *supra* note 1, at 2074.

on the maze, and now engage in a fruitful questioning that reveals rather than obscures the law.<sup>20</sup> In sharp contrast, I reject the idea that such a dramatic escape can take place. Just when a scholar believes that she has scaled the last wall of the maze, she will be confronted by a boundless horizon of paths endlessly circling within the ambit of the same maze. Hope for escape must always be dashed in the end, but this does not mean that an individual's comportment within the maze is without ethical or political significance. The central problem for contemporary jurisprudence is not the maze of normative legal discourse, but the failure to recognize the maze as an unavoidable condition that is productive of knowledge.

Postmodern thought is a stimulating force, but it has been overused and abused by more than one scholar in search of a truly radical break from the politics of normalcy. The questions raised by the maze are much more subtle and complex than Schlag allows. Schlag's confusion over what the maze represents, how it operates, and the consequential function of critical theory, exemplifies the postmodern crisis in legal theory. Put differently, Schlag's characterization of the maze, offered with a sly wink and a conspiratorial nod to others in the know, comes off sounding just a bit paranoid.

## II. DON'T LOOK NOW, BUT THERE'S A NORMATIVO FOLLOWING ME<sup>21</sup>

I want to clarify what I mean by paranoia. The paranoid style of functioning is characterized by "an intense, sharply perceptive but narrowly focused mode of attention" that results in an attitude of "elaborate suspiciousness."<sup>22</sup> Paranoid individuals constantly strive to demystify appearances; they take nothing at face value because they regard reality as an obscure dimension hidden from casual observation or participation.

The obvious is regarded as misleading and as something to be seen through. So, the paranoid style sees the world as constructed of a web of hints to hidden meaning. . . . The way in which the paranoid protects fragile autonomy is by insuring,

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20. See *id.* at 2074.

21. See *Nowhere to Go*, *supra* note 17, at 168 (describing the awakening of a "normativo," a legal scholar who is "deep into *norm selection* and *norm justification*").

22. Bywater, *supra* note 8, at 80 (utilizing the description of paranoia in DAVID SHAPIRO, *NEUROTIC STYLES* (1965) as part of his critique of STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980)).



or at least insisting, that the paranoid's interpretation of events is *the* interpretation.<sup>23</sup>

Paranoia must be distinguished from the mature, skeptical view that not *everything* can be taken at face value. Paranoia amounts to a refusal to take *anything* at face value.

William Bywater recently suggested that some postmodern literary criticism has come to resemble a paranoid, rather than simply critical, posture.

Postmodernism's relentless refusal to accept any description, theory, or state of consciousness at face value, its unswerving insistence that what seems most clear and certain is least likely to be so, and its maneuvers which demonstrate that stability in meaning or in sense of self must give way to eternal slippage have all been cited as evidence of postmodernism's nihilistic and destructive character. . . . The self which formerly was able to confront nothingness is now dissolved into a concatenation of signifiers or a jumble of disconnected images. The hope which might have sprung from the dissolution of the old values is rendered as suspect as those old values themselves. Postmodernism does not refresh us with a sense of renewal, rather we seem to be frozen with intellectual paranoia.<sup>24</sup>

Linda Fisher intelligently extends Bywater's claim in her comparison of postmodernism and the tradition of the "hermeneutics of suspicion" exemplified by Marx, Nietzsche, and Freud.<sup>25</sup> The subtle dialectic of the hermeneutics of suspicion and the hermeneutics of belonging, elegantly represented in the famous exchanges between contemporary Continental philosophers Jürgen Habermas and Hans-Georg Gadamer,<sup>26</sup> is flattened by postmodernism's radical quest to overturn received traditions. Consequently, at least some postmodern efforts dissolve the important distinctions "between suspicion and paranoia, limitation and abnegation, and, finally, destruction and self-destruction."<sup>27</sup>

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23. *Id.* at 80-81.

24. *Id.* at 79.

25. See Fisher, *supra* note 8, at 107. Paul Ricoeur popularized the term "hermeneutics of suspicion." See PAUL RICOEUR, FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION 32-36 (Denis Savage trans., 1970); see Fisher, *supra* note 8, at 107 n.5 (recognizing Paul Ricoeur as an authority on the hermeneutics of suspicion). Jürgen Habermas has provided the most careful translation of this tradition into a modern conception of emancipatory critique. See JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., 1971).

26. See Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U. L. REV. 523, 584-96 (1988) (discussing the Gadamer-Habermas debate).

27. Fisher, *supra* note 8, at 111. Fisher goes on to argue that

I contend that Schlag's pointed and challenging jurisprudential writings, typified in his recent description of the normative maze, thematically exhibit postmodern paranoia. Schlag believes that the vast majority of judges and legal scholars remain trapped within a maze of empty normative platitudes, and that only a select few have the penetrating insight to recognize what law *really* is and how it *really* operates. "[W]hether cast as celebration or as criticism, the normative prescriptions of the 'law' of the academy generally end up as part of the cheerful, happy, self-congratulatory celebration of a law whose violence and destructiveness thus become obscured."<sup>28</sup> Normative legal talk is an epiphenomenon that theorists use to compensate for what Schlag terms "*ontological deficits*,"<sup>29</sup> a fancy phrase that I take to mean the unsatisfactory condition of the legal system as it *really* exists within social practices and psychological formations.

Some might argue that Schlag's approach does not mirror the paranoid style of functioning to the extent that his picture of the postmodern legal critic ostensibly reaffirms the importance of ethics and intellectual creativity. However, the classic paranoid personality never espouses a bleak, total nihilism. Instead, paranoid individuals attempt to secure the integrity of their world view against the widespread delusions that they attribute to virtually everyone else. The paranoid believes in the possibility of providing a true description, but also that only she and perhaps a few other people are capable of seeing this truth. There is precious little assistance that the paranoid can offer to members of the general populace, whose inability to see things correctly is, as Schlag asserts in the context of legal theory, "a constitutive aspect of their very being as legal

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with the radicalized extension represented by postmodernism, where the point is precisely to dismantle with no ground left, but only a multiplicity of standpoints which amounts to no standpoint—an everywhere which is nowhere—the enabling suspicion of the older tradition is extended and intensified into paranoia—and thus becomes disabling. The difference is between a critical project which might choose to exempt itself from presenting a positive alternative, and one which precludes the possibility of a positive alternative.

*Id.* at 112. Fisher makes the important point that Heidegger's conception of *destruktion* involves a clearing away that allows for new thinking, *see id.* at 111, in contrast to the more radical conception of deconstruction advocated by Jacques Derrida as a necessary radicalization of Heidegger's project. *See* Hans-Georg Gadamer, *Destruktion and Deconstruction* (Geoff Waite & Richard Palmer trans., 1985), reprinted in *DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER* 102, 112 (Diane P. Michelfelder & Richard E. Palmer eds., 1989).

28. *Clerks*, *supra* note 1, at 2061.

29. *Id.* at 2073.

academics."<sup>30</sup> The paranoid regards her special insight as the product of "an accident or a miracle,"<sup>31</sup> and so there simply is no point in trying to educate others about the error of their ways.<sup>32</sup> "Like the paranoid, the critic will see change as something foreign; as something which befalls a person and which can be spoken about only after it has occurred."<sup>33</sup> The way out of the maze cannot be described, reports Schlag, but those lucky academics who awake one morning to find themselves outside the maze can begin participating (with Schlag) in "an extraordinarily exciting time in American legal thought."<sup>34</sup>

As described by Schlag, the postmodern legal critic bears an uncanny resemblance to a paranoid individual. I have no doubts that Schlag, as a person dealing with everyday life, is entirely free from paranoid tendencies. Why, then, does his asserted intellectual persona assume such a counterproductive posture? Quite simply, the imperative to radicalize the critique of foundationalism and formalism eventually carries theory, and the persona adopted by the theorist, beyond the realm of ordinary discourse. Schlag does not engage his readers in a shared quest for decency and happiness in an often brutal and traumatic world, but instead challenges such a normative quest as being symptomatic of deeper-seated problems. Schlag's radicalism is extended to the point of cannibalizing its own presuppositions. "A collection of discourses that in their strategic maneuvering have precluded the possibility of being discursive, have succeeded not just in being destructive, but in being self-destructive."<sup>35</sup> When the hermeneutics of suspicion is pushed to the point of paranoia, the critical effort dissolves into a self-described irrelevance.

### III. POSTMODERN DESTRUCTION AND THE RULE OF LAW

The differences between my conception of postmodern legal theory and Schlag's are highlighted by our very different reactions to the idea of the rule of law. Schlag regards the rule of

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30. See *id.* at 2073 (stating that the idea among American Scholars that normative thought is competent to address legal problems "is a constitutive aspect of their very being as legal academics").

31. See Bywater, *supra* note 8, at 83 (asserting that the paranoid's rigidity requires that any change in her beliefs must be regarded as "an accident or a miracle").

32. Refer to text accompanying note 19 *supra*.

33. Bywater, *supra* note 8, at 83.

34. *Clerks*, *supra* note 1, at 2074.

35. Fisher, *supra* note 8, at 113 (describing the destructive nature of postmodern thought). Refer to note 27 *supra*.

law as a “virtually empty” signifier whose sole purpose is “*simply [to] arrest thought upon impact.*”<sup>36</sup> Schlag does not propose to reformulate the idea of the rule of law, or even to replace it with a more fitting concept, because such moves would circle within the same vacuous maze of normative legal thought.<sup>37</sup> Schlag’s disengagement from the language used by lawyers and judges is so stark and unrepentant that its significance easily is underestimated. In an important sense, the ongoing struggle over the terms and conditions of social organization defines Western history. A significant feature of this struggle has been the ongoing effort to describe what it means for a society to be governed by the rule of law. Schlag bifurcates the operation of the legal system from the discourse of its participants, arguing that the normative claims made by those attempting to describe what the rule of law entails is superfluous to the reality of law. By doing so, he openly places in question whether discourse can describe, not to mention influence, practice.<sup>38</sup> Admittedly, much of the “fancy” scholarship of the academy is removed from the everyday language of legal practice, but the assertion that every theoretical invocation of the rule of law is detached from some deeper, hidden, nonlinguistic realm of legal reality greatly overstates the case.

The extent of critical detachment presumed by Schlag’s total rejection of the usefulness of discussing the rule of law is quite fantastic. An individual who truly could achieve this detachment would be exhibiting the *paranoid style*.<sup>39</sup> I

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36. See *Clerks*, *supra* note 1, at 2070 (listing “The Rule of Law” as a “dramatically underspecified” term lacking intellectual content).

37. See Richard Delgado, *Moves*, 139 U. PA. L. REV. 1071 (1991).

38. Schlag believes that the maze exists because legal academics hold the wrong-headed view that the violence of the law “can be transformed” by means of normative prescriptions “into something else—into something more palatable, like doctrine, or normative theory, or grand dialogue.” *Clerks*, *supra* note 1, at 2073 (explaining how legal academics “get into and propagate the maze”). In other contexts Schlag has attempted, somewhat unconvincingly, to distance himself from Stanley Fish’s signature observation that theory holds no consequences for practice. See Pierre Schlag, “*LE HORS DE TEXTE, C’EST MOI: The Politics of Form and the Domestication of Deconstruction*,” 11 CARDOZO L. REV. 1631, 1646 n.41 (1990).

39. Some might argue that such detachment is not paranoid if it is warranted by the facts. In other words, if Schlag’s description is correct, he is piercing socially-held delusions rather than exhibiting paranoia. My point is this: Schlag’s jurisprudential claims are analogous to a person’s assertion that he is being followed by martians who are disguised as average human pedestrians. Although we would not consider this person to be paranoid if it turns out that they are in fact being followed by martians, we might agree that this person exhibits a paranoid style by virtue of his thorough-going skepticism about the apparent reality surrounding him, and that this paranoid style draws into strong question the accuracy of his beliefs. The paranoid style not only is a suspect strategy at the outset, it is a strategy that feeds on itself and becomes more and more fantastic in each of its incarnations.

With an ever increasing intensity, the paranoid style co-opts the theorist and prevents her from retrenching or revising her approach, even when the bankruptcy of the paranoid style is manifest.

A familiar example from the history of philosophy illustrates this point. Descartes initiated a revolutionary philosophical approach by according methodological primacy to radical doubt. Rene Descartes, *Discourse on the Method of Rightly Conducting the Reason and Seeking for Truth in the Sciences*, in 1 THE PHILOSOPHICAL WORKS OF DESCARTES 92 (Elizabeth S. Haldane & G.R.T. Ross trans., 1978) [hereinafter DESCARTES]. When Descartes supposed that a malicious genius might be manipulating all of his sensory perceptions, he employed a particularly strong version of the paranoid style in his quest to determine how reason can yield knowledge. Rene Descartes, *Meditations on the First Philosophy in Which the Existence of God and the Distinction Between Mind and Body are Demonstrated*, in DESCARTES, *supra*, at 144, 150-51. This paranoid style led to the remarkable metaphysical bifurcation of mind and body. *Id.* at 149-57. Descartes almost certainly did not believe in the existence of an evil genius, nor did his methodological supposition lead his readers to adopt such a belief, but his paranoid style nevertheless set philosophical thought on an unproductive course by narrowly defining rationality and understanding in a manner that blossomed with the Enlightenment. PETER A. SCHOOLS, DESCARTES AND THE ENLIGHTENMENT 4 (1989) (defending the thesis that "the eighteenth century's Enlightenment thinkers did little more than widely disseminate" an ideal inherited from Descartes). Heidegger's redirection of continental philosophy in this century, captured in the phrase "Being-in-the-World," amounts to a struggle against the legacy of Descartes' paranoid style. See MARTIN HEIDEGGER, BEING AND TIME 78, 83 (John Macquarrie & Edward Robinson trans., 1962) (contending that the "compound expression 'Being-in-the-World' indicates in the very way we have coined it, that it stands for a unitary phenomenon," thereby challenging "the naive supposition that man is, in the first instance, a spiritual Thing which subsequently gets misplaced 'into' a [corporeal] space").

Schlag's theoretical posture is parasitic upon Descartes' paranoid style in a startling way. Descartes viewed radical doubt as a tool to be utilized by an individual having free will and autonomy, an individual created in the image of God. SCHOOLS, *supra*, at 48. Every good postmodernist now ridicules Descartes' presuppositions—and their culmination in the Enlightenment—but rather than questioning the paranoid style on the basis of its bizarre fruits, some postmodern thinkers conclude that Descartes is to be faulted because he was insufficiently radical in his approach, in other words because he *wasn't paranoid enough*. Cf. Robert Post, *Postmodern Temptations*, 4 YALE J.L. & HUMAN. 391, 394 (1992) (endorsing Frederick Jameson's characterization of postmodern academic writing as betraying a "schizophrenic nominalism" in its "search-and-destroy" critical fervor, in the course of reviewing FREDERICK JAMESON, POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM (1991)). Schlag's relentless attack on the ubiquitous presumption of the integrity of the legal subject challenges Descartes at the most fundamental level of his philosophy, but in a very important sense Schlag's critique carries forward the same virulent paranoid style. Thus, although Schlag likely believes that carrying out Descartes' method is less plausible than discovering that Elvis was abducted by martians, he proposes to overcome Cartesian rationalism by *radicalizing* the gesture of distancing thinking from common-sense assumptions about human existence. Compare SCHOOLS, *supra*, at 14 ("Because reason is misdirected by what Descartes considers pernicious habits, it is like someone caught in what he regards as a vast web of prejudice. He believes that the impediments can be destroyed in a revolt which calls for the exercise both of freedom and of methodic doubt.") with *Problem of the Subject*, *supra* note 17, at 1729-30 (arguing that each of the principal modes of contemporary legal theory fails because it "already presupposes the existence of a particular subject—and that this subject [the "conventional liberal subject" who is a "conscious, sovereign individual"] is nowhere to be found").

wholeheartedly share Schlag's assessment that the justificatory efforts of judges and scholars alike to define the rule of law has been framed by the unhelpful polarity of *justify and redeem* and *constrain and control* strategies.<sup>40</sup> Yet the recognition that past formulations no longer suffice leads me to attempt to articulate a new conception of the rule of law that accords with our experience.<sup>41</sup> It is possible to destroy rigid conceptions of the rule of law without embracing endless deconstruction that renders further discussion moot.

Schlag is correct that the traditional accounts of the rule of law often are caricatures that arrest thought and discussion,<sup>42</sup> but I argue that we should resume a vital discussion rather than conclude that all discussion inherently is vacuous. The criticism that rule of law *talk* doesn't capture *reality* reveals a wistfulness for the foundationalist hope of discovering a political truth that is not subject to a contingent, ongoing dialogue among members of society. By claiming that everyone else is trapped in a meaningless maze, Schlag conveniently avoids placing himself at risk in normative dialogue. By asserting that normative legal dialogue is irrelevant, Schlag eliminates the possibility that he might have to change his mind in light of the force of a better argument, and he avoids an obligation to rescue the *hoi polloi* from the maze. In sum, Schlag's approach insulates him from the contingent and provisional language of social discourse.

Such an insulating move runs contrary to antifoundational accounts of the rule of law, which emphasize that the law never operates outside the context of wider social struggles to define the terms of sociopolitical organization. Traditional normative legal thought ordinarily is criticized as being unhelpful because it offers a constricted and artificial conception of legal norms, not because normative legal thought is by nature irrelevant to legal practice. Quite the opposite seems true: every assertion of legal power is predicated on a normative conception of politics that always is subject to attack and reassessment. Escape from the maze of normative legal thinking is the

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40. See *Clerks*, *supra* note 1, at 2071; see also Francis J. Mootz III, *Rethinking the Rule of Law: A Demonstration that the Obvious is Plausible*, 61 TENN. L. REV. 69, 77 (1993) (characterizing rule of law jurisprudence in terms of the conflicting goals of constraint and innovation, and offering a hermeneutical account that moves beyond this dogmatic stalemate).

41. See Mootz, *supra* note 40, at 131-32; see also Francis J. Mootz III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249, 253-54 (1993) (discussing and defending the rule of law).

42. Refer to note 36 *supra* and accompanying text.

familiar dream of empiricists and rationalists alike, but it simply is not possible. Talking about the *reality* of law as distinct from our representation of this reality in normative legal dialogue constitutes a performative contradiction.<sup>43</sup> This is not to say that reality is wholly linguistic, but rather that our experience and understanding of reality is always linguistically mediated in a shared realm of normative public dialogue.<sup>44</sup>

It is helpful to return to Schlag's description of practicing lawyers as doctrine-wielding technicians immune to the normative talk of the academy. Schlag regards normative legal language, pitched in the form of doctrine, as a *tool* that lawyers *use* rather than a *world* that they *inhabit*.<sup>45</sup> The idea that legal language is a tool seems beyond question, given the conventional picture of practicing lawyers as hired guns concerned

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43. By performative contradiction I mean that the critic's performance of the critique (i.e., speaking within the normative language of legal discourse) contradicts the effort to eschew normativity, even if the propositional content of the critique does not necessarily raise this contradiction. This point is emphasized by Jürgen Habermas and Karl-Otto Apel in their attempts to outline a discourse ethics. See, e.g., JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 89-90 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990) (explaining the idea of a performative contradiction in the course of developing a discourse ethics derived from the normative presuppositions of social interaction); Karl-Otto Apel, *The Hermeneutic Dimension of Social Science and its Normative Foundation*, 25 MAN AND WORLD 247, 252-53 (1992) (distinguishing his approach in some important respects from Hans-Georg Gadamer's philosophical hermeneutics, but emphasizing the foundation of hermeneutic understanding in intersubjective communication as the basis of a discourse ethics).

44. See HANS-GEORG GADAMER, TRUTH AND METHOD 381-491 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989). Gadamer asserts that "*language is the universal medium in which understanding occurs. Understanding occurs in interpreting.*" *Id.* at 389. Gadamer continues:

We must rightly understand the fundamental priority of language asserted here. . . . The fact that our desire and capacity to understand always goes beyond any statement that we can make seems like a critique of language. But this does not alter the fundamental priority of language. . . . [T]he critical superiority which we claim over language pertains not to the conventions of verbal expression but to the conventions of meaning that have become sedimented in language. Thus that superiority says nothing against the essential connection between understanding and language. In fact it confirms this connection. For all critique that rises above the schematism of our statements in order to understand finds its expression in the form of language. Hence language always forestalls any objection to its jurisdiction. Its universality keeps pace with the universality of reason.

*Id.* at 401. Gadamer summarizes his thesis by arguing that "[l]anguage is not just one of man's possessions in the world; rather, on it depends the fact that man has a world at all." *Id.* at 443.

Gadamer's insight has direct application to my discussion. Normative legal language, including discussions of the rule of law, might easily become an unhelpful, rigid schematization, but it is always within this same medium of normative discourse, in the give-and-take form of dialogue, that the encrustations can be overcome.

45. See *Clerks*, *supra* note 1, at 2057.

solely with their appointed “performative tasks,”<sup>46</sup> but this picture is woefully inadequate. Language, including legal language, is an intersubjective realm that asserts dominion over the speaker rather than serving as a tool for monadic, self-directing individuals. The philosopher Hans-Georg Gadamer argues that

[i]t is obvious that an instrumentalist theory of signs which sees words and concepts as handy tools has missed the point of the hermeneutical phenomenon. . . . [T]he capacity to use familiar words is not based on an act of logical subsumption, through which a particular is placed under a universal concept. Let us remember, rather, that understanding always includes an element of application and thus produces an ongoing process of concept formation. . . . The interpreter does not use words and concepts like a craftsman who picks up his tools and then puts them away. Rather, we must . . . reject any theory that does not accept the intimate unity of word and subject matter.<sup>47</sup>

Gadamer aptly describes my experience with legal language as a commercial litigator. The law was never a separate text that could be pressed into service on behalf of my clients, but rather an intricate, interlocking series of concepts within which all practitioners lived. The practice of law involves constantly reassessing legal concepts within a normatively-charged (and often emotionally-charged) discourse.<sup>48</sup>

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46. *Id.* at 2066.

47. GADAMER, *supra* note 44, at 403.

48. In the end, it is my experience as a lawyer, rather than my jurisprudential commitments as a legal academic, that guides my criticism of Schlag's theoretical claims. I did not attend law school in order to become a law professor. I did not clerk for a judge or seek employment with a large private firm. Upon graduation from law school, I joined a medium-sized firm in Hartford, Connecticut where I slugged it out with other lawyers, principally in the not-so-glamorous and overburdened state court system. In almost every respect I matched Schlag's description of the hard-nosed lawyer rather than his description of the self-deluding academic. The theme of this essay is that the practice of law, the *real* practice of law that occupies the great majority of judges and lawyers in this country, is a normative dialogue in which the needs and interests of individuals, communities, and nation constantly are assessed and adjudicated. See Lief H. Carter, *How Trial Judges Talk: Speculations About Foundationalism and Pragmatism in Legal Culture*, in LEGAL HERMENEUTICS: HISTORY, THEORY AND PRACTICE 219, 228 (Gregory Leyh ed., 1992) (contending that judges pragmatically approach legal disputes by attempting to rearticulate “community values and experiences” in response to the problem before them). Normative legal language is not just the *talk* of judges and lawyers, it is the medium through which they *act*. It's a maze, all the way down.



## IV. CONCLUSION

As Hilary Putnam concisely states, "[t]he elimination of the normative is attempted mental suicide."<sup>49</sup> I would refine Putnam's observation by including paranoid distancing within the scope of mental suicide. Professor Schlag writes powerfully, invariably capturing my interest and leading me to important new insights. However, his effort to distance himself from the normative legal language that is our heritage falls short, as it must. I congratulate Schlag for his skill in destroying some of the most cherished talismans in our legal vocabulary, including the rule of law. But destruction is never total. In the wake of destruction we inevitably chart new paths in the maze. Legal theory properly is viewed not as an attempt to escape the maze of normative legal thought, but as an effort to develop shared strategies for navigating through the maze. Forging a path, rather than finding an exit, is the goal. That is enough for me.

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49. Hilary Putnam, *Why Reason Can't Be Naturalized*, in *AFTER PHILOSOPHY: END OR TRANSFORMATION?* 222, 241 (Kenneth Baynes et al. eds., 1987).