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Understanding The Recurrent Crisis In Legal
Romanticism: Two Criteria for Coherent Doubt
Chris Sagers*

Abstract

Broadly skeptical or relativistic criticisms of law and legal discourse, of the kind prevalent in the last generation in American legal scholarship, pose an inherent logic problem: they tend to impugn normativity itself just as much as they do their intended target. What seems amiss is that the act of critique is itself normative. However it is stated, and notwithstanding efforts by the critic to say otherwise, it is hard to see how the normativity implied in the very act of critique—indeed, in the very act of having purposes at all—is not at odds with the critique itself.

As an organizing theme, this paper observes a parallel in the history of a much more influential intellectual movement, the “romantic” phase in nineteenth century literature. While no one seems to have noticed the striking similarities between that movement and our recent generation of legal iconoclasm, the lesson is that the conflict latent in this work is destined to lead only to ever more mystical, seemingly desperate efforts to explain how one can be both a productive legal academic and be a skeptic. As the romantic experience suggests, that cycle

* Associate Professor of Law, Cleveland State University; I welcome all feedback at csagers@law.csuohio.edu. My special thanks to Tom Richardson, Jim Sandman and Bruce Swartz, because karmic hygiene counsels one always to do nice things for good people. No person spoke with me more about this paper than Pierre Schlag, and despite the arguments I make here about his work I am eager to avoid any misunderstanding over my own veneration for his work and for his generosity. My thanks for feedback to Ben Barton, Barton Beebe, David Gray Carlson, Jeanne Schroeder, Brian Tamanaha, Adam Thurschwell, Mark Tushnet, and the junior faculty at Cardozo Law School. Thanks also for feedback on earlier incarnations of this paper, so different that they probably will not recognize it, to Ross Davies, Daniel Farber, Matt Frank, Jack Schlegel, and Joseph Singer. Finally, thanks to my own colleagues for ongoing feedback and exchange on these matters, especially the peerless and incomparable Jim Wilson.

Incidentally, as a one-time would-be “bad boy” of legal scholarship, the author would like to point out that he got his ear pierced *waaaayyyy* before it was cool.

sooner or later ends when plausibility is exhausted and the winds of academic fashion turn elsewhere. But the more central contribution of the paper is a technical one. It will carefully model the internal logic conflict itself, and then devise a means logically to test whether various likely and widely held scholarly purposes could, under this test, resolve the conflict. Ultimately, this paper is something of a confession of one doubter that apparently there is no solution to this conflict.

Hume, and other sceptical innovators, are vain men, and will gratify themselves at any expense. . . . Truth, sir, is a cow which will yield such people no more milk, and so they are gone to milk the bull.

—*Samuel Johnson*¹

INTRODUCTION

It was apparently never much appreciated among those brash legal iconoclasts who enjoyed so much attention in the last forty years or so, nor among all we who shared their sympathies, that latent at the heart of their project was an ancient logic problem. At length it would cause the temporarily glamorous project to fade from academic fashion and for the time being seem to have been defeated. It is evidently not now appreciated by their many critics that, sooner or later, they will be back. Lessons from history suggest that while that ancient logic problem is a hard and dispiriting one that causes doubtful movements periodically to fade, they do not disappear. Revolutionary critique, on the one hand, and received culture, on the other hand, are often conceived as locked in a zero-sum struggle, and as a matter of academic fad one or the other may seem at a given time to be in ascendancy. Somehow the struggle can be played out and forgotten fairly quickly, and the fact that the recent struggle in law finds close ancestors from so long ago will turn out to be quite telling.²

¹ JAMES BOSWELL, *BOSWELL'S LIFE OF JOHNSON* 314 (Oxford Univ. Press 1980) (1763) (quoting Samuel Johnson).

² This insight resembles in very small form that made by sociologist Randall Collins in his massive world history of philosophy. He recounts the recurrence of skeptical arguments throughout recorded history and in a variety of cultures, and argues that they are a particular aspect of the process by which “critical epistemologies” cyclically interact with ever more abstract metaphysics. See RANDALL COLLINS, *THE SOCIOLOGY OF PHILOSOPHIES: A GLOBAL THEORY OF INTELLECTUAL CHANGE* 807-13 (1998).

The ancient problem of logic is as follows. Skepticism—the epistemological position that we do not or cannot *know* things in an objective sense—or morally relative critiques, or other approaches implying broad doubt of values, have a way of painting themselves into a corner. In its simplest version, the logic conflict is simply that one cannot assert as a matter of fact either that there is no truth or that it is impossible to know things. Both statements are self-contradictory.³ In that version the problem is easy to evade—a person can be earth-scorchingly skeptical without explicitly stating propositions whose truth is required.⁴ But even more careful statements of doubt eventually tend to work themselves back into the same problem, and one purpose here is to show that that is indeed the case. When worked out to their logical conclusions, they tend to cast doubt on normativity itself. The problem then is that critique, by its nature, is itself normative.⁵ Legal philosophy must ask how one can be both a doubter and continue to speak or write anything at all. More to the point, how can one be both a doubter and a law professor, a person whose vocation is normally thought to require evaluation of things? Here is a cold, honest, and unflattering confession: though I have spent more than ten years thinking about it, and despite my instinct that it is not insoluble, I am afraid I do not know.⁶ Indeed, this paper

³ Aristotle observed this; the statements assert their own truth, an assertion that the statements themselves say cannot be made. See ARISTOTLE, *METAPHYSICS*, bk. I, ch. 4, at 59-64 (Hippocrates G. Apostle trans., Peripatetic Press 1979).

⁴ While epistemological skeptics seem to assert that “we cannot know anything,” and therefore to refute themselves, they need not make that strong claim just to be skeptical. The skeptic can just claim that “it seems like I do not know anything for sure,” and, after all, *de gustibus non est disputandum*. See Christopher L. Sagers, *Waiting With Brother Thomas*, 46 UCLA L. REV. 461, 462 n.3, 484-86 (1998) [hereinafter Sagers, *Waiting*]. The ancient skeptics, following Pyrrho of Elis, made this argument at great length, claiming that their only purpose was to retreat to the calm of an inner state of refusal to decide anything at all (the state of “epoche” or ἐποχή). See SEXTUS EMPIRICUS, *OUTLINES OF SKEPTICISM* 10 (Julia Annas & Jonathan Barnes trans., Cambridge Univ. Press 1994); JONATHAN BARNES, *THE TOILS OF SCEPTICISM* 8-9 (1990) (explaining the use of ἐποχή in Sextus and ancient skepticism).

Still, it turns out the even the totally Pyrrhonian skeptic has an internal logic conflict like other doubters; it just takes a more elaborate argument to see why. See *infra* Part IV(9).

⁵ See Christopher L. Sagers, Student Book Review, *Postmodern Legal Movements: Law and Jurisprudence at Century's End*, By Gary Minda, 95 MICH. L. REV. 1927, 1938-42 (1997) (critical of Minda for failure even to acknowledge the normativity ironically implied in his book). See also Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L. J. 1229 (1979).

⁶ James Boyle put it this way: “[T]he trouble with confronting really hard problems is that you probably won't be able to solve them. As different drafts of

resurrects the tortured palimpsest of an optimistic manuscript on the question called *Cum Grano Salis*,⁷ later scaled back in ambition and renamed *The Identity of Moral and Legal Criticism*,⁸ neither of which saw the light of day, and the successive drafts of which seemed like ever more strained efforts to explain something to myself that I did not understand.

Thus, rather than produce yet another struggling, unconvincing effort to solve the conflict between doubt and normativity, I will offer two ideas that I think are more valuable. This first is a surprising and overlooked lesson from history, and a bit of a sociology of the working of doubt over time. It so happens that latter-day legal doubters have found themselves stuck in the same unresolved struggle that caused an earlier and more important cultural movement to dissipate as an independent force, the European literary and cultural phenomenon known as romanticism.⁹ Building on this insight, this essay's organizing theme is that if our recent legal iconoclasm has perhaps sputtered out for a time, there is a historical example to help explain why, and to suggest that they will return. The example of the Romantics also nicely corroborates one of the major arguments made in this paper: that the logic problem is a problem for all kinds of doubters, even if they avoid technical skepticism or outright critique of normativity. Most of the Romantics did not seem concerned with technical questions of that nature, and yet wound up in just the same conflict as epistemological skeptics.

Second, I will offer my confession that, apparently, that struggle cannot be overcome. Here will arise what I hope is an

this article accumulated, I revised my aspirations downward to meet my performance so many times that I began to feel like a defense contractor." James Boyle, *Anachronism of the Moral Sentiments? Integrity, Postmodernism, and Justice*, 51 STAN. L. REV. 493, 496 (1999).

⁷ Christopher L. Sagers, *Cum Grano Salis* (unpublished manuscript, on file with the author).

⁸ Christopher L. Sagers, *The Identity of Moral and Legal Criticism* (unpublished manuscript, on file with the author).

⁹ To be clear, I will not try to prove that any present-day legal philosopher is a Romantic. Claims have been made that a huge number of divergent and conflicting philosophic or literary movements were "romantic." But as Arthur Lovejoy pointed out long ago, if all these very different things are romantic, then the word means nothing at all. See Arthur O. Lovejoy, *On the Discrimination of Romanticisms*, 39 PUBS. MOD. LANG. ASSN. 229, 232 (1924).

What is more important is the fact that today's legal iconoclasm has worked itself through the same ultimately exhausting trauma as did the Romantics, and I think for the same reason: because at the heart of our philosophy are commitments at odds with the normativity ineluctably inherent in our purpose as scholars.

even more valuable contribution. The paper will carefully model the internal logic conflict itself, and then devise a means logically to test whether various likely and widely held scholarly purposes could, under this test, resolve the conflict.

Before going any further, though, the following is necessary to avoid confusion: I do *not* believe that my own inability to solve this logic conflict proves anything about doubt itself. Any such claim would itself be illogical, and would just restate the feeble *reductio ad absurdum* with which skepticism is routinely attacked.¹⁰ My own doubtful instincts persist unabated. If my surrender proves anything, it is only that the logic conflict will ultimately have to be reconceived or approached in some way other than the one presented here.

The problem of the normativity of doubt has been observed elsewhere. In law, critics of doubt have frequently made a point of it, arguing that it makes doubt itself internally inconsistent,¹¹ that it is belied by the way that doubters actually live,¹² and that the harm

¹⁰ A work like this probably had to be written by someone who actually cares about this scholarship. External critiques are often written by persons who find skepticism so preposterous that they remain fixated on simplistic arguments and do not give serious thought to arguments that could actually be troubling to the doubter. Accordingly, most criticism in the legal literature comprises no more than arguments that all boil down to a *reductio ad absurdum*, in roughly the following form: “Skepticism would leave us in a state of nihilism [or some other seemingly undesirable position], and therefore must be wrong.” To some this point of view has an instinctive appeal, but it turns out to be illogical. Other typical arguments are really just more or less sophisticated restatements of claims like “well, it just seems to me like I know things” or “I just know what’s right and wrong.” For a collection of these and other such arguments, and more extensive thoughts about them, see Sagers, *Waiting*, *supra* note 4, at 480-91.

¹¹ See, e.g., Dale Jamieson, *The Poverty of Postmodernist Theory*, 62 U. COLO. L. REV. 577, 577-83 (1991) (arguing that postmodernism cannot be a useful legal philosophy because its basic tenets are contrary to theory-building); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 873 (1989) (arguing that the new doubtful scholarship has prematurely interred metaphysics); Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1, 3 (1993) (arguing that doubt leads to an infinite regress of interpretations and ultimately leads to “a philosophical hall of mirrors” or a “seriously false and misleading picture of the law.”).

¹² See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 84-85 (1986):

[The doubter] cannot reserve his skepticism for some quiet philosophical moment, and press his own opinions about the morality of slavery, for example, . . . when he is off duty and only acting in the ordinary way. He has given up his distinction between ordinary and objective opinions; if he really believes . . . that no moral judgment is really better than

done to normativity is actually dangerous.¹³ Legal doubters are aware of the conflict,¹⁴ and some have tried to offer solutions to it.¹⁵ Commentators are also aware that even in law, it is not new; though it goes persistently unresolved, the problem is old.¹⁶

The paper proceeds in five parts, which successively lay out an explanation of the problem itself, the legal work to which I think it applies, and then, for context, a practical example of a particular legal scholar whose writings are widely cited and appear to remain influential, but seem the poorer for failure to address the problem.¹⁷ The paper's intellectual heart, however, is in Part IV.

any other, he cannot then add that in his opinion slavery is unjust.

See also Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 310 (1985) (“[Doubters suffer from] a kind of conceptual schizophrenia: when writing they propound subjectivist epistemology, but when it comes to daily living they make judgments and decisions as we all do: presupposing the existence of tables, chairs, and right answers to hard moral dilemmas and legal cases.”).

¹³ *See, e.g.*, EDGAR BODENHEIMER, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 316 (1940) (cautioning that the skepticism of the legal realists could lead to totalitarianism); Morris Cohen, *On Absolutisms in Legal Thought*, 84 U. PA. L. REV. 681, 691 (1936) (criticizing legal realists for “nihilistic absolutism”); Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 10 (1986) (arguing that CLS destroys without providing a replacement for what it has destroyed and is thus “politically unappealing and politically irresponsible”).

¹⁴ *See, e.g.*, Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 L. & SOC. INQUIRY 779 (1992) [hereinafter Fischl, *The Question*]; Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 174 n.18 (1990) [hereinafter Schlag, *Nowhere to Go*].

¹⁵ *See, e.g.*, Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984).

¹⁶ That it is an old one in law perhaps reflects the timelessly problematic nature of legal administration. *Cf.* A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CINN. L. REV. 819, 830-31 (1990) (arguing that “iconoclasm” unites skeptical legal philosophies, despite their changing methodologies and jargon over time, and identifying evidence of it as early as 1345). But indeed, it is an old one everywhere, *see infra* Part IV(9), which is unsurprising in that it is not a legal problem as such, and rather is a basic existential dilemma.

¹⁷ The exemplar I chose—Pierre Schlag—will probably make some people roll their eyes a little bit. But, while I don't think I am exactly an Agent of P.I.E.R.R.E., *see* Keith Aoki, *P.I.E.R.R.E. and the Agents of R.E.A.S.O.N.*, 57 U. MIAMI L. REV. 743, 746 (2003) (a *comic strip*, no less), there are several reasons that this choice makes sense. First, Schlag appears to lack faith as much as a person possibly could in knowing. Second, he appears deliberately to have remained apolitical. Finally, he has explicitly faced the problems of normativity latent in his work and wrestled with them at some length.

The analysis here may also be of use in that Schlag's work is still widely cited, but has not been the focus of much sustained analysis. Prior to a

That Part sets out a list of possible solutions to the inner logic problem of broadly skeptical or relativistic critique—in effect, a series of possible purposes that the critical author could take as his own without invoking a conflict with his own critical commitments. Ultimately, none of them are satisfying, as I believe that they each fail to meet one or the other of two simple requirements. Namely, for methodological reasons that I will explain in Part I, the doubter should be able to state a purpose for his work that: (1) is not in conflict with his own criticism, and (2) does not require that he not care whether his statement of his views is “true” or has some other value. It turns out that the list in Part IV is the best evidence that our recent iconoclastic legal scholarship is really just a latter-day romanticism: as was the case for the Romantics themselves, as one continues along this list from one solution to the next, it is as if one is climbing a ladder toward ever more lyrical, mystical solutions, until one can hardly find any resolution except utterly inert quietude. Tellingly, presenting the list in increasing order of compliance with the two desiderata above—making it easier for the doubter to avoid conflict with his purposes and to care about the value of his criticisms—also turns out to put them in order of increasingly mystical, magical lyricism.

Alas, then, with little else to say, Part V provides some brief closing remarks. And a farewell.¹⁸

I. THE PROBLEM: PROPOSITIONS INHERENT IN ACTION OR AFFIRMATION

Capturing what I claim to be the ancient logic problem entails one bit of probably contentious analytical philosophy or psychology. As mentioned, working through this one technical issue, and devising a test from it to evaluate doubtful philosophical positions, will be a main contribution of this essay.

The problem as I conceive it is that doubters suffer a conflict between propositions that seem implied by things that they do or say, on the one hand, and the content of their statements, on the other hand. Specifically, the act of critique itself—indeed, the

2003 festschrift in the *University of Miami Law Review* the only sustained survey of Schlag's work appears to have been David Gray Carlson, *Duellism in Modern American Jurisprudence*, 99 COLUM. L. REV. 1908, 1937 (1999).

¹⁸ Do not worry. I am not going to pull a Roquentin. Cf. *infra* note 97-98 and accompanying text. I am also not really going to pull much of a Rodell, because I do not want to. See Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936); *infra* Part V. Actually, even Rodell did not completely pull a Rodell. See Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279 (1962).

mere fact of being, in any state other than inert quietude—seems to imply commitment to some proposition that is ineluctably normative, or at least affirmative. The reason this instinct is probably contentious is that, admittedly, it is not logically necessary that an action is itself the statement of a proposition, or even evidence of a person's belief in a proposition. Stating the issue in that way begs the question whether people even have purposes or know what their purposes are before they act.

The problem can be avoided by a more precise statement of the goal of this essay. First, I propose that it is an appropriate philosophical question whether *my own* purposes are consistent with *my own* criticisms. It is appropriate at least if a study of the resulting inner conflicts could yield generalizable insights. So, regardless of whether it could be said that a person *must* hold a given purpose as a logical necessity, I begin by asserting that I, a person with doubtful philosophical instincts, *do in fact have purposes*. Second, I believe that this fact can be logically generalized. Even if I cannot state that *every* person who writes or speaks has a given purpose, it remains useful to ask whether doubtful criticisms are logically at odds with commitments that are in fact widely held, or that would be if critics more commonly examined their own purposes. Finally, the question of which purposes are widely held is an empirical one, and one that I cannot answer. So, as an alternative, I will hypothesize a series of what seem like likely purposes—the list of purposes that appears in Part IV, below—and I will then *test* them. Importantly, I am not strictly interested in whether a given purpose is *merely* logically consistent with doubt. It would be logical for a person to state philosophical positions that he actually believes are false, if his purpose is to lie. So to generalize the test in a way that is more useful, I propose that any purpose that might be a likely one for the doubter should be tested against the following two criteria:

- (1) the purpose should not conflict with the doubter's own criticisms, and
- (2) it should not require that he not care whether the content of his philosophy is "true" or has some other value (including by rendering it unimportant or innocuous).

The second criterion needs one clarification. Some approaches to solving the doubter's logical conflict really just make the initial doubt itself seem unimportant. They begin by claiming that, indeed, we cannot know things, and objective

knowledge is highly suspect. But they then say we can proceed pretty much as before by using some second-best proxy for knowledge. This is a conflict in violation of the second criterion. As will be seen below, for this reason the effort just does not really work.¹⁹

In effect the approach in this essay hypothesizes an ideal “doubting person,” like the “rational person” of economics or the “reasonable person” of tort law, and asks what the ideal doubting person could take as a purpose. Admittedly, it skirts the empirical psychological issue of how people actually have and experience purposes, but it does this for the sake of explanatory power. Finally, it bears observing again that while the question being asked, strictly speaking, is the fairly narrow one of *why state a critical proposition*, the deeper question is really existential. The question asked is really *why do anything at all*, or even more fundamentally, *what is the reason for being?*

An awkward problem is to say to what legal philosophy this logic problem applies, because it could apply to different kinds of arguments. That is, different kinds of arguments about law state or imply propositions that might be illogical because of this problem. It would in particular be wrong to impute it to “schools” with colloquial labels, like critical legal studies (“CLS”), postmodernism, post-structuralism, or pragmatism.²⁰ Most obviously, the logic conflict confronts those who explicitly state technical skepticism (that is, any epistemological position that knowledge is to some greater or lesser extent beyond human capacity). However, it also applies to any explicit moral relativism or cultural critique that tends to impugn normativity as such. A critical legal philosopher may or may not explicitly state a

¹⁹ See *infra* Part IV(2). Brian Tamanaha pointed out what may seem to be a logical weakness in the argument of this Part II. It may not actually be possible to engage in *inaction*, particularly if one takes Sartre’s view that a deliberate decision not to choose is itself a choice. If so, then it is not true that action *necessarily* implies a purpose. For the sake of clarity, I have tried to emphasize in the text why I think my test is a worthwhile exercise even though it plainly is correct that action does not logically prove purpose. In the alternative, Professor Tamanaha observes that a person could act with no commitments—such a person might be the true “ironist.” But as I suggest in Parts IV(5) and IV(6) below, I think that a motive like that would fail or at least pose a serious tension under the second element of my test—it would require that the content of the doubter’s views do not themselves have any value.

²⁰ For example, many writers commonly associated with CLS have advocated social change or otherwise stated their views without openly skeptical or relativistic critique. See, e.g., William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEG. EDUC. 175 (2001) (arguing that law and politics are inseparable, but that such a state of affairs is to be desired).

skeptical epistemology or a moral relativism. But her approach to uncovering injustice hidden within legal concepts will ordinarily involve a demonstration of the epistemological or metaphysical inadequacies that afflict legal rules. As has been observed, those inadequacies turn out not to be limited only to legal concepts, and make it hard for CLS scholars to articulate different avenues to justice that do not conflict with that same critique.²¹ For example, in the past few decades this kind of critique has often invoked the Derridean attack on “privileged perspectives.” To take one well known example that is also important to this essay, Pierre Schlag once attacked the “stabilized, situated perspective” from which any “normative legal thought” proceeds, and argued that once such a perspective is no longer “privileg[ed],” then “the specific deployments of [its] distinctions” are no longer “experienced as valid.”²² The making of that observation implies at a minimum that the observation itself has value—that it deserves to be made, that it is important. But that judgment, in turn, implies a privileged perspective. It implies that the logical error made by normative legal scholars—their failure to realize that their prescriptions require a logically indefensible privilege for an otherwise unproven normative commitment—is bad. It therefore asserts that illogic is bad and should be exposed, but does not prove that normative commitment except by (illogically) relying on a sense of obviousness. One reply might be that observing illogic is just aesthetic, and therefore needs no more justification than art.²³ But aside from the fact that few philosophers seriously consider themselves only artists, and fairly constantly state or imply propositions seriously at odds with doing just art, art *does* need some justification in my very attenuated sense.²⁴

²¹ See Fishl, *The Question*, *supra* note 14, at 781-82 (critiquing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)); see also Fiss, *supra* note 13, at 9-10; Singer, *supra* note 15.

²² Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 824, 828 (1991) [hereinafter Schlag, *Normativity*].

²³ Schlag makes this argument. See *infra* notes 56-57 and accompanying text.

²⁴ At the time he wrote the argument quoted above, Schlag replied to just this criticism. See Pierre Schlag, *Stances*, 139 U. PA. L. REV. 1059 (1991). But his reply seems not to deny that there is an internal logic conflict. He said that by adopting “the logic of stance—the very same metaphorical logic that prompts the question of privilege,” his critics had “short-circuit[ed]” interesting questions about the nature of the subject, and had “frustrate[d] the . . . project of dialogical openness.” *Id.* at 1061. He implied that there could be “jurisprudences that operate differently”—that do not require the taking of stances, *id.* at 1062, but his only indication of what they would be is that they would seek “to reveal how the scene of (normatively charged) stances is itself

The same logic problem affects broad critiques of law that wear formally different clothing. Pragmatists intend to preserve their own power to distinguish between better and worse courses of action, and generally to rise above nihilism. Even so, since they begin their demand for pragmatic, context-specific problem-solving with an epistemology scathingly skeptical of theory and distinctions, they find they have a lot of trouble even stating their philosophy without contradicting their own premises.²⁵ A race theorist or a cultural anthropologist might insist on a “cultural relativism” or “multiculturalism,” so as to allow different peoples to be valued without discrimination. The theorist pretty quickly seems forced to give equal dignity to seemingly very bad ideas, including some directly hostile to the very reasons for theorizing about race or culture.

Above all, the problem can be implied in places where it is not intended and may not be obvious. Legal theory and scholarship is almost inevitably normative because of the inescapably normative nature of its subject matter. Therefore, a broad criticism of law or of theory about law, implying that it is missing some necessary predicate or rests on some prior commitment that is irretrievably deficient, will be very hard to contain so that it does not amount to a critique of normativity as such. In any case, there is no reason that the logic problem is limited only to critiques of *law*. Generally, even where it is not intended, any broad skepticism or critique of intellectual effort usually has immanent within it the seeds of strong epistemological critique of normativity. This is so even though it may be stated as a critique of language or culture. If it broadly impugns the ability of those tools to lead to objectively knowable propositions, it implies the same consequences as skeptical epistemology and risks the same logical defect. In fact, I believe that all of these positions can be converted directly into epistemological skepticism, as they are only semantically distinct from it.²⁶

constructed,” *id.* But does not seeking to reveal something imply that it is valuable to seek to reveal something?

²⁵ This problem is explained in detail in Chris Sagers, *Monism, Nominalism and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. STATE L. REV. 219, 223-24 & n.18 (2006), Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L. J. 409 (1990), and Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L. J. 687 (2003).

²⁶ Though it is really a point for another day, I believe that such distinctions—between systematic epistemological and metaphysical critique—are actually only semantic. Indeed, I wonder how epistemology is ever more than semantically distinct from metaphysics or ontology, since every proposition of

Again, the conflict is more than just a problem of method for the scholar, because it is more than just a problem inhering in writing or speaking philosophical positions. It is a problem posed by the very fact of having a purpose. Accordingly, the truly recurrent crisis, which we can expect to see repeated, is a central existential one: if action by its nature implies purposes undermined by skepticism, but one nonetheless feels compelled by skeptical instincts, then one must try to reconcile the having of a purpose with the bleak nihilism that seems to follow skeptical critique (taken to its logical extreme). In other words, the central question in this paper, and the one driving the apparent demise both of the Romantics and latter-day legal iconoclasts, is no less than this: why exist?

Incidentally, a fair criticism is that it seems artificial to limit this essay's concern to *legal* philosophy. I will say in my defense only that, to this extent, I take an important legal literature as I have found it. Broadly skeptical critiques of law themselves very quickly lead one into purely abstract epistemological or cultural criticism. This has led some legal iconoclasts to attempt whole new foundational schools of thought or expansive psychological models that purport to capture the understanding or "doing" of law. Though these efforts normally purport to be meta-critique relevant only to legal scholarship, there is no obvious reason for their limitation to it.²⁷

In any case, for the sake of convenience, hereinafter I will call this logic conflict "The Problem."

II. MODELING LEGAL ROMANTICISM

So why have I said that this scholarship and its inner conflict echo romanticism?

I hope I will not be too remiss in not duplicating here some long exegesis on the literary and philosophical movement loosely known by that name; I think it should suffice to invoke the large secondary literature on the topic. Instead, I want to highlight main

metaphysics seems to beg a question of epistemology. At least if one has any doubts about knowledge, I wonder if there really is any difference between asking "does X exist?" and asking "can I know whether X exists?" *Pace* Plato, incidentally, and 2500 years of footnotes. *Cf.* PLATO, THEAETETUS 9 (Robin A.H. Waterfield trans., 1987) (preface; noting, with evident veneration, that "*Theaetetus* establishes the study of knowledge as a branch of philosophy in its own right distinct from, especially, ontology.").

²⁷ See, e.g., Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002) [hereinafter Schlag, *Aesthetics*].

themes, and in particular to set out those most illuminating parallels to latter-day legal iconoclasm. That the movement's name is difficult to define—indeed, that “movement” is the wrong word, and really should be replaced by “constructed artifact of convenience among cultural historians”—is well known.²⁸ Also commonly said is that “romantic” characterizes a wide collection of philosophers, historians, poets and artists, whose work collectively contributed to a turn in the development of the modern intellectual world of the West. It is sometimes even said that our present-day sensibilities really remain “romantic,” to some extent.²⁹

Though it is probably misleading to some extent to say so, romanticism was in many ways in reaction to Enlightenment rationality.³⁰ The Romantics were generally fascinated with the organic and the natural over the urban and the rational; by *Gemeinschaft* over-rationalized, “artificial” associations; by an opposition to analytical conceptual thought;³¹ by the exaltation of

²⁸ As one observer stated, “[t]he idea of [r]omanticism is at once indispensable and embarrassing to cultural historians. They cannot do without it[,] . . . [b]ut they are acutely worried by the problem of defining it.” Rt. Hon. Lord Quinton, *Philosophical Romanticism*, in *THE OXFORD COMPANION TO PHILOSOPHY* 778 (Ted Honderich ed., 1995). There is also Arthur Lovejoy's famous view: “[t]he word ‘romantic’ has come to mean so many things that, by itself, it means nothing.” Lovejoy, *supra* note 9, at 232.

²⁹ ISAIAH BERLIN, *THE ROOTS OF ROMANTICISM* 1-2 (1965) (“[R]omanticism . . . is the largest recent movement to transform the lives and the thought of the Western world. It seems to me to be the greatest single shift in the consciousness of the West that has occurred, and all the other shifts which have occurred in the course of the nineteenth and twentieth centuries appear to me in comparison less important, and at any rate deeply influenced by it.”); BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 682 (1945) (“Revolt of solitary instincts against social bonds is the key to the philosophy, the politics, and the sentiments, not only of what is commonly called the romantic movement, but of its progeny down to the present day.”); see also BARRY ALAN SHAIN, *THE MYTH OF AMERICAN INDIVIDUALISM: PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT* (1994) (discussing the rise of individualism and its significance on a world scale, circa 1800, a phenomenon associated with romantic rhetoric).

³⁰ However misleading it may be, though, it is probably in their enemies that the Romantics were the most unified. As has been said, “[i]n the case of a movement in ideas . . . consensus is most easily discovered in what the individuals involved were all against. What they were all for is harder to get at.” Franklin L. Baumer, *Romanticism (ca. 1780-ca.1830)*, in 4 *DICTIONARY OF THE HISTORY OF IDEAS* 198-204 (Philip P. Wiener, ed. 1974). Moreover, as Baumer says, “the big story is that the various wings of the romantic movement developed largely independently of one another, out of native impulses, but also—otherwise there would be no consensus—in reaction against a body of ideas common in certain respects to them all.” *Id.*

³¹ As Wordsworth said, “to dissect is to murder.” BERLIN, *supra* note 29, at 120.

the individual and self-actualization, an ideal inevitably at odds with universal morality; and by the significance of artistic genius, at the expense of *le philosophe*.³² It does not imply a technical “skepticism” of a Pyrrhonian or Academic variety, and indeed most philosophical Romantics were confident of their ability to derive important metaphysical abstractions through reason grounded in *a priori* premises.³³ But basic commitments commonly thought to be romantic nonetheless were inherently at odds with systematic normativity, and indeed, with system itself. Romantics exalted the liberation of the individual, especially the idealized “genius” of unbridled artistic creativity, for it is through that person that the Infinite is revealed. Within such a strong individualism, values were precisely what men created for themselves, and therefore there could be room for neither universal moral norms nor received aesthetic constraints.³⁴ At its extremes, romanticism stood for the view that there is no rational structure in reality at all.

And there is the rub. However moving those individualistic passions may have been—and indeed, however important they may have been in the origins of the modern self and modern liberal institutions³⁵—they immediately opened the raw need to find some alternative means by which to understand, without reverting to all that the Romantics had rejected.³⁶ Most tellingly, their solutions

³² See generally BERLIN, *supra* note 27; see also 7 FREDERICK COPLESTONE, S.J., A HISTORY OF PHILOSOPHY 1-21 (Image Books reprint ed. 1994) (1963); MORSE PECKHAM, BEYOND THE TRAGIC VISION: THE QUEST FOR IDENTITY IN THE NINETEENTH CENTURY (1962); RUSSELL, *supra* note 29, at 675-84; Baumer, *supra* note 30, at 199. Quinton, *supra* note 28, at 778.

³³ Notably, those significant philosophers most commonly associated with romanticism, the post-Kantian German idealists, began by developing their central concept of “absolute thought,” “absolute ego” or “infinite spirit,” a transcendental, supra-individual, often seemingly god-like metaphysical phenomenon by which ultimately to derive a systematic explanation of the structure of reality. In one form or another, they captured that reality as the self-unfolding of absolute reason; it could be understood as reality becoming aware of itself through reflection upon itself by one of its own manifestations, human awareness. In other words, the universe comes to know itself through the mind of man. See COPLESTON, *supra* note 32, at 3-9.

³⁴ William Blake’s declaration is emblematic:

“I must Create a System, or be enslav’d by another man’s;
I will not Reason & Compare: my business is to Create.”

WILLIAM BLAKE, JERUSALEM, ch.1, plate 10 (1804); see also BERLIN, *supra* note 29, at 118-20.

³⁵ See generally SHAIN, *supra* note 29.

³⁶ See BERLIN, *supra* note 29, at 121-22.

tended to become ever more mystical, spiritual and, seemingly, desperate. To a reader of the recent generation of legal iconoclasm, romanticism's most familiar trait is this escalation into essentially spiritual efforts to resolve the conflict (or to explain how it could be left tolerably unresolved), along with its tendency to spin out ever more wildly assertive and absolute empirical assertions about man's nature and place in reality.³⁷

Again, it is awkward to say that this same cycle played out within particular philosophies, and especially to try to attribute it to colloquially named schools. I will observe only that in that frenetic burst of critical literature beginning in the 1960s and reaching its feverish heyday probably between the late 1980s and the mid-1990s, it came ever more clearly to be seen that logically necessitated in its nature was a strong skepticism or an iconoclasm otherwise leading to moral or epistemological relativism.³⁸ What these works share, and what perhaps they inherited from the nineteenth century, is a struggle against rationalized knowledge, against analytically dissectable science of the social or human. Such knowledge was thought to be hostile and stifling to the nature of man, who rather is passionate and organic and must be allowed to thrive in the irrational.

III. A PRACTICAL EXAMPLE

As a practical example I have chosen the work of Pierre Schlag. I believe his work contains The Problem I have described.³⁹ The choice is useful because, though he does not say

³⁷ See, e.g., *id.* at 120, arguing that, according to the Romantics:

[w]henever you try to understand anything, by whatever powers you have, you will discover . . . that what you are pursuing is inexhaustible, that you are trying to catch the uncatchable, that you are trying to apply a formula to something which evades your formula, because wherever you try to nail it down, new abysses open, and these abysses open to yet other abysses."

See also COPLESTONE, *supra* note 32, at 19-21.

³⁸ Reaching a culmination of sorts in *Symposium: The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991).

³⁹ I am not the first to notice. See Carlson, *supra* note 17, at 1937 ("Is it not a norm that one should not be normative?") (alteration in original). Professor Carlson's paper was one of the few thoughtful critiques of Schlag's work prior to a University of Miami symposium in 2003.

so himself, most of his work appears to be deliberately apolitical.⁴⁰ If even a consciously apolitical argument suffers from the internal logic problem I observe, then perhaps it is true that no broadly doubtful critique can escape it.⁴¹

A. Schlag in Substance: The Metaphysical Critique

Schlag does not present his work as a generalizable system.⁴² For present purposes I think that we can focus on one particular line of his argument, which happily is quite intriguing, and also happens to be the most plainly apolitical: his critique of the metaphysics implied by discussions of legal doctrine. For convenience I will refer to this as Schlag's "metaphysical critique."

Schlag has identified the following question as a main inquiry: "[w]hen legal thinkers ascribe meaning or consequences to authoritative legal sources," like constitutions, statutes, or judicial precedent, "just what are they talking about?"⁴³ He says that in answering this question, and in "attempt[ing] to cast [law] in the form of science[.]," the characterization of law by practitioners, judges, and academics has been "aesthetically organized around a fundamental ontology of reifications and animisms."⁴⁴

⁴⁰ See, e.g., Duncan Kennedy, *Pierre Schlag's The Enchantment of Reason*, 57 U. MIAMI L. REV. 513, 513 (2003) (describing Schlag as "vigorously refus[ing] not just political correctness but all concession to our desire that enlightenment should be politically edifying.>").

⁴¹ The analysis is not strictly a criticism of Schlag's work. There might be a small logical problem in trying to make it a criticism; as Schlag said at a 2003 symposium on his works, it is not really fair to fault an argument for failure to do everything. He says his critics usually focus not on errors in what he has said but on what he fails to say. See Pierre Schlag, *A Reply—The Missing Portion*, 57 U. MIAMI L. REV. 1029, 1029-30 (2003) (taking to task "the sometimes implicit, sometimes explicit claim that the failure to include someone's favorite [unattended-to issue] in my account compromises what I have done."). But my view is that no matter what he says or does not say, a legal doubter cannot avoid The Problem, and Schlag is only an example.

⁴² At least until recently. Cf. Schlag, *Aesthetics*, *supra* note 27 (setting out a systematic structure of different "aesthetics" by which to characterize the psychological process by which legal actors understand legal phenomena; apparently summarizing systematically his previous work on point). Even if it is possible to construct a "linear Pierre" from his various non-linear observations, see Kennedy, *supra* note 40 at 515 (purporting to do so), and Carlson, *supra* note 17, at 1911 (distilling a "four-point thesis" from all of Schlag's work), which is unnecessary here.

⁴³ Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681, 1697-98 (1996) [hereinafter Schlag, *Hiding the Ball*] (italics omitted).

⁴⁴ Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 877 (1997) [hereinafter Schlag, *Phrenology*].

This in itself is not self-evidently bad. We employ many hypothesized non-real entities as a matter of convenience. This seems true of tautological mathematical propositions, for example; every signifier contained in the proposition “ $2 + 2 = 4$ ” has only an imaginary signified, but the proposition is still practically useful. Because we have trouble generally talking about intangible things, our language is more full of ontological metaphors than we are normally aware. Regardless of whether or not it poses problems in other contexts, this way of thinking is problematic when one is thinking about law. Though Schlag is not especially explicit about it, I take him to mean that in law we expect hypothesized entities—“authoritative legal sources”—to *do* things, to be performative. In particular, we expect them to constrain or guide application. Thus, in law, hypothesized, intangible ontological entities are used as part of an “unthinking transformation of classifications designed to describe . . . into effective ontological agencies”⁴⁵ This can also be described as “[a] transposition from epistemic heuristics to ontological actualities.”⁴⁶ This epistemic-to-ontological transformation occurs through three confluences, which Schlag says happen concurrently. First, classifications are “transubstantiated into robust ontological entities that are part of the world to be explained.”⁴⁷ These hypothesized entities are then “reified: they become determinate object-forms with stabilized identities.”⁴⁸ Finally, they become ontological *agencies*, rather than mere objects. “[T]hey are endowed with animistic properties. They [thus] become capable of producing behaviors, actions, and the like.”⁴⁹

It is this epistemic-to-ontological transformation that causes the trouble. Because they are not only imaginary, but also have no “stabilized referent,” “all manner of complex relations [can] be established among” the ontological agencies that are employed in law, with the result that “virtually anything could be said about how they [are] related to each other.”⁵⁰ Such agencies thus become “super-full objects,” in that they are “composite[s] of a variety of attributes, many of which are contradictory or mutually repellent.”⁵¹ In other words, this transformation causes authoritative legal sources—the Constitution, for example—to be

⁴⁵ *Id.* at 888.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 889.

⁵⁰ *Id.*

⁵¹ Schlag, *Hiding the Ball*, *supra* note 43, at 1704-05.

“capacious,” such that “they serve as hosts for a great number of (often conflicting) cognizable legal meanings.”⁵² Thus, we in our professional culture have the everyday habit of speaking of something as natural and simple, when in fact it is complex and problematic.

*B. Is Pierre Schlag a Normative?*⁵³

So is Schlag’s work normatively problematic? In a sense, Schlag has in some areas of his work directly attacked normativity itself—he has stated a strong, explicit moral skepticism.⁵⁴ But his metaphysical critique is not itself logically a criticism of evaluation. It is either or both a criticism of a way of making government decisions, and of a way of talking about a behavior. Even if his normative critique raises The Problem, his metaphysical critique might be severable, to stand on its own and be logically tested on its own merits. It is more useful to do that here because the question is whether a person can state *any* broadly doubtful position without invoking The Problem. If a doubtful argument containing no explicit moral commitments invokes The Problem, then maybe they all do.

In fairness we should give Schlag a chance to explain his own normative commitments, if he has them. I believe that the closest he has come to stating his purpose, at least in any careful manner, are two very similar statements, one fairly old and one quite recent. Twenty years ago he wrote that “[m]y effort here, as elsewhere, is to try to displace, decenter, and weaken this system of normative legal thought.”⁵⁵ He did not explain why that was his purpose, but in a more recent observation he deepened the insight. “Mine is itself an aesthetic project,” he wrote, “an attempt to awaken in the reader a sensitivity for and a recognition of the different aesthetics of law.”⁵⁶ Though strictly speaking the latter was offered only as an explanation of the paper in question, I take it that he would be satisfied with this as a purpose for his writings overall. He made fairly clear that it was a basically altruistic, humanistic purpose. He said: “[my] project will be successful to

⁵² *Id.* at 1681.

⁵³ He once was, apparently, but says he gave it up. See Schlag, *Nowhere to Go*, *supra* note 14, at 168-69.

⁵⁴ This was as explained above at note 22 and accompanying text. Again, he seems to have denied that he actually took a position of moral skepticism, but it is very hard to see how exactly he avoided it as the necessary consequence of his critique of privileged positions.

⁵⁵ Schlag, *Nowhere to Go*, *supra* note 14, at 174 n.18.

⁵⁶ Schlag, *Aesthetics*, *supra* note 27, at 1054.

the extent it enables the reader to recognize the various aesthetics of law and their influence on law and legal professionals—including most especially herself or himself.”⁵⁷

As a defense to *The Problem* this argument just begs a normative question: you can desire to “awaken . . . sensitiv[it]ies”⁵⁸ if you like, but why do that?

There is other evidence of Schlag’s normative animus. A lot of it is apparently quite superficial; it looks like normativity, but perhaps only on the surface. First of all, his prose is laced with the language of judgment, as in the tone of his critique of law and legal culture,⁵⁹ his apparent concern with the “violence” of law,⁶⁰ and

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ This is in part through his depictions of ugliness in law, which seemingly conveys that something must be “wrong” or “bad” by the human emotions that ugliness invokes. For example, he is bothered by “the fancy corporate law office on the thirty-eighth floor, where the ethereal, perfectly typed words of impeccably dressed attorneys produce highly mediated, largely unseen effects on the messy flesh of humanity below.” Schlag, *Aesthetics*, *supra* note 27, at 1061; *see also* Schlag, *Normativity*, *supra* note 22, at 805 (“the cherished ‘ideals’ of legal academic thought are implicated in the reproduction and maintenance of precisely those ugly ‘realities’ of legal practice the academy so routinely condemns.”).

More generally, Schlag often writes about law and legal culture in harshly disparaging language. He finds mainstream legal scholarship “pseudoscience” and “nonsense [rendered] plausible.” Schlag, *Phrenology*, *supra* note 44, at 910, 918. It is often so “utterly unconvincing” and “vacuous” that it must be argued with “sufficient self-righteousness, pomposity, pseudo-sophistication, or status in institutional affiliation” that “no one will notice.” Schlag, *Nowhere to Go*, *supra* note 14, at 170. In the end, it is “not simply that normative legal thought is *coercive* and *boring*, but also *ineffectual* and (ironically) *aimless*.” Schlag, *Normativity*, *supra* note 22, at 851 n.133 (emphasis in original). The law is no better. Because there is “no ‘there there,’” legal practice “must be faked, bluffed or simulated.” PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 13 (1998) [hereinafter SCHLAG, *ENCHANTMENT*]. Presumably that is why the “empirical, aesthetic, and metaphysical representations of the Supreme Court,” at least if they are taken as “valid descriptions of social life,” are “madness.” PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FESTISHISM AND THE AMERICAN LEGAL MIND* 8 (1996).

⁶⁰ *See, e.g.*, Schlag, *Aesthetics*, *supra* note 27, at 1050 (“To suggest then that the law is an aesthetic enterprise can easily seem cavalier, ethically obtuse, even cruel. We are confronted with the disturbing possibility that law paints its [violent] order . . . on human beings with no more ethical warrant or rational grounding than an artist who applies paint to canvas.”); Pierre Schlag, *Anti-Intellectualism*, 16 *CARDOZO L. REV.* 1111, 1115 (1995) (“The law of judges is thus given shape, not by a desire to produce insight or understanding, but rather by that law’s desire to hide from itself its own violent and destructive character.”).

frequent offhand comments that veer close to open normativity.⁶¹ Schlag also occasionally comes close to identifying himself with openly political scholarly movements,⁶² and once in a while he comes tantalizingly close to offering a “should” this or a “should” that—as when he advises law professors to “stop trying to ‘do law,’ or more accurately, stop pretending to ‘do law.’”⁶³ Finally, he

Schlag also frequently invokes the “field of pain and death.” See Pierre Schlag, *A Reply—The Missing Portion*, 57 U. MIAMI L. REV. 1029, 1036 (2003) (quoting Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (“Legal interpretation takes place in a field of pain and death.”) (footnote omitted)); see also Schlag, *Aesthetics*, *supra* note 25, at 1050 (same); Schlag, *Normativity*, *supra* note 22, at 863 n.168 (same); Schlag, *Nowhere to Go*, *supra* note 14, at 187 (same).

⁶¹ See, e.g., Schlag, *Aesthetics*, *supra* note 27, at 1077 (“[I]t is obviously possible to have intelligent and helpful conversations about the identities of the players and the stakes.”); Pierre Schlag, *Jurisprudence Noire*, 101 COLUM. L. REV. 1733, 1740 (2001) (reviewing LAWRENCE JOSEPH, *LAWYERLAND: WHAT LAWYERS REALLY TALK ABOUT WHEN THEY TALK ABOUT LAW* (1998)) (observing that Joseph’s book “could be taught in a cultural studies or law and anthropology course,” and “this would surely be a good thing.”); Schlag, *Nowhere to Go*, *supra* note 14, at 170 (stating that the “negative point” of feminist and CLS scholars “is right and important.”); *id.* at 190 (“Viewed dynamically, normative legal thought could conceivably begin to apprehend the crash [of liberal humanism] and respond.”); Pierre Schlag, *Anti-Intellectualism*, 16 CARDOZO L. REV. 1111, 1115 (1995) (discouraging the “self-identification of the legal thinker” with “the figure of the judge” because it “may not be terribly helpful Indeed, [it] institutes aesthetically, socially, and rhetorically all manner of assumptions, attitudes, and beliefs constructed to close off inquiry, constructed to shut down thought.”).

In an early effort no doubt reflecting the temperament of youth he called himself a member of “The Left,” though given the passage of years and his failure to do such things ever after perhaps that can be overlooked. See Pierre Schlag, *An Appreciative Comment on Coase’s The Problem of Social Cost: A View From the Left*, 1986 WIS. L. REV. 919 (1986).

⁶² See, e.g., Pierre Schlag, *Politics and Denial*, 22 CARDOZO L. REV. 1135, 1136 (2001) (observing that “[f]or those of us on the margins of CLS, it was always a bit frustrating not to know just what CLS thinkers meant by ‘politics.’”).

Schlag also once concluded an otherwise bombastic but not obviously political article with a few lines that read like Marxist, Walter Benjamin-esque critique. See Schlag, *Nowhere to Go*, *supra* note 14, at 190-91 (arguing that the training of lawyers in a “liberal humanist” tradition “is a harmless self-indulgence, except that it provides instrumentalist bureaucracies with an absolutely marvelous and captivating rhetoric that defines, organizes, routinizes and services their clientele. It’s all really neat. 7-11 sells freedom (which you can find in their Slurpees). Pepsi brings you the downfall of the Berlin Wall.”).

⁶³ Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427, 428 (1997) [hereinafter Schlag, *Continuation of God*].

sometimes goes virtually so far as to say, in effect, “the [article] [book] you are reading is an affirmative social good.”⁶⁴

There are several reasons that for present purposes I will take all these possible lapses *cum grano salis*. First, as for Schlag’s sometimes disparaging tone and loose, superficially normative prose, I believe that he normally does these things coyly and as a deliberate matter of style. One could also ignore some of these as moments of incaution in less-serious, presumably less-worked pieces, and one might observe that Schlag sometimes carefully couches or equivocates these kinds of statements so as not to cause internal conflict.⁶⁵

Other seemingly problematic normative evidence is really much harder to ignore. First of all, everything in Schlag’s writing betrays an aching desire to explain why this all just feels wrong—to know why law has “failed to live up to its ambitions”⁶⁶—and to find a different understanding of law that does not. He more or less explicitly argues as much in his comparison of legal scholarship to the nineteenth century “pseudo-science” of phrenology. The purpose of the comparison, he says, is that “something might be learned by trying to understand how the phrenologists went wrong.”⁶⁷ His conclusion is that both disciplines share a common doom by way of his own metaphysical critique. The phrenologists “had their ontology wrong. The fundamental faculties [which were hypothesized personality traits thought by the phrenologists to bear a measurable and predictable quantitative correlation to the size of

⁶⁴ See, e.g., Pierre Schlag, *Writing for Judges*, 63 U. COLO. L. REV. 419, 423 (1992) (observing that, if we examine mainstream scholarship in the proper critical manner, “we might [arrive at] an understanding of what ‘law’ is and how ‘law’ maintains itself.”).

⁶⁵ For example, while he advised law professors to “stop pretending to ‘do law,’” he gave this advice only to “those legal academics who find th[e] prospect” of being forced “to participate in [a] covertly theological discourse” to be “unappealing.” Schlag, *Continuation of God*, *supra* note 63, at 428.

Incidentally, there are also certain tics in Schlag’s writing that seem potentially to create internal logic problems, which are not really relevant here. For instance, he sometimes writes about imaginary or inanimate things as subjective agencies. “[R]eason,” for one, “secrete[s] its own objects and frames in language and practice,” Schlag, *Continuation of God*, *supra* note 63, at 439, and it has an “ambition . . . to rule,” SCHLAG, ENCHANTMENT, *supra* note 59, at 81. This to me seems merely playful and unobjectionable. More problematic is his habit of asserting the absolute nature of problems, which absoluteness he appears to know only on the basis of a priori speculation. These pronouncements often take on what seems like an openly theological eschatology, and to that extent resemble a problem noticed in connection with romanticism, discussed above. See *supra* note 34 and accompanying text.

⁶⁶ Schlag, *Phrenology*, *supra* note 44, at 886.

⁶⁷ *Id.* at 878.

‘cranial prominences’] did not exist. They were not linked to the size of cranial organs. Further, the cranial organs did not bear any relation to cranial prominences.”⁶⁸ Likewise, the failure of law results from its “amalgamation of animisms and reifications; of self-referential complexity, of self-legitimations and folk beliefs.”⁶⁹

Another evident purpose that Schlag more or less acknowledges is to expose intellectual dishonesty, of which he seems eager simply to make people aware. As mentioned above, he says that his “project will be successful to the extent it enables the reader to recognize the various aesthetics of law and their influence”⁷⁰

Schlag has not been unaware of the logical conflicts these purposes seem to raise, given his own critique of legal epistemology, metaphysics, and normativity. The only answer he has been able to offer is of a fairly common type, and for reasons elaborated below,⁷¹ it is not especially convincing. He has acknowledged that work like his “often treads very close to issuing some normative judgments of its own,” but argued that “while the normative vocabulary and grammar [of mainstream legal discourse] are no longer an acceptable currency for intellectuals to use in advancing claims for human beings, there is no other vocabulary, no other grammar, as of yet.”⁷² Likewise, he felt it okay to “recognize[] and embrace[] [the] predicaments and paradoxes” within his own critique, because the “insist[ence] on naive rationalist conceptions of coherence, consistency, elegance, etc., is largely the product of disciplinary hubris and the inertia of academic bureaucracy.”⁷³ Indeed, he continues, to attempt to avoid the paradox would be wasteful, for “[i]t would beg the exceedingly interesting question of where the boundaries (if any) of this system

⁶⁸ *Id.* at 886.

⁶⁹ *Id.* at 887.

⁷⁰ Schlag, *Aesthetics*, *supra* note 27, at 1054. One other obvious problem explained by Schlag’s metaphysical critique is that the capaciousness of super-full objects permits the familiar indeterminacy criticized by CLS, *see, e.g.*, KELMAN, *supra* note 21, at chs. 1-3, which is arguably “bad” for political reasons. However, Schlag does not seem personally concerned with indeterminacy and, in the rare instances when he even mentions it, he seems to offer it mainly as evidence of other, essentially aesthetic problems. *See, e.g.*, SCHLAG, ENCHANTMENT, *supra* note 59, at 20-21 (mentioning the CLS indeterminacy argument apparently as evidence of why mainstream legal thinkers react defensively to the metaphysical critique).

⁷¹ *See infra* Part IV(7).

⁷² Schlag, *Nowhere to Go*, *supra* note 14, at 174 n.18.

⁷³ *Id.*

of normative legal thought are located and whether this system can even be adequately conceptualized as having a determinate or localizable inside and outside. These are complex and interesting questions, and I am not about to close them off prematurely simply because the rationalist aesthetic of traditional legal thought abhors paradox.”⁷⁴

In two ways, the fact that Schlag reached this point shows how closely latter-day legal iconoclasm mirrors the experience of the Romantics. First, he started with enthusiastic, bombastic, jubilant critique, and found sympathy throughout the academy (he remains among the most frequently cited American legal academics). But second, when pressed, he came up against The Problem, even though he more than others has avoided political commitments. Even more telling is that his explicit attempt to solve it borders on the magical—though there is “no . . . vocabulary, no . . . grammar, as of yet” in which to explain a solution, we must “embrace[] . . . predicaments and paradoxes,” a defiance that ultimately preserves for us “exceedingly interesting questions”

IV. WHAT COULD THE ANSWER BE? OTHER IDEAS THAT DON'T WORK

Over many, many years, several answers have been offered to The Problem, and I have come up with some others of my own. One theme unifies them, which is that they each seem unsatisfactory for one of two reasons: that is, they fail the test that was laid out in Part II, above. First, the answer should not conflict with doubt itself, and it would conflict if it evaded The Problem by pretending that the initial doubts themselves are just unimportant. Thus it should not supply an alternative definition of knowledge or normativity that in itself renders doubt innocuous. It is no help to the doubter if the answer is to compromise all doubtful insights; he should not render skepticism impotent simply in order for it to be logically coherent. Otherwise, he should give up doubt. Second, the doubter can't be satisfied by answers whose strategy is to dissociate the purpose of writing from its substance. Thus, a satisfactory answer would require the writer to care about the writing, at least in some way.

Therefore, an answer to The Problem is not going to be compelling unless it does the following: it allows the doubter to care about the substance of his writing without compromising the

⁷⁴ *Id.*

view that his doubtful insights ever mattered in the first place.⁷⁵ It is here, again, that a key evidence of the affinity with romanticism becomes clear. In searching for a purpose that seems permissible under this standard, we will, as did the Romantics, climb a ladder into ever greater abstraction, eventually reaching outright mysticism.

I can think of a series of possible answers, but none of them seem to work. Below is a list of hypothesized purposes that seem likely, in summary form. They appear in an important order: they are both in order of increasing compliance with the two conditions above, *and* increasing mystical abstraction. They are:

- (a) The Truth for Its Own Sake;
- (b) Altruism and/or the Second-Best “Market Place of Ideas” (also known as “Pragmatism”);
- (c) Pure Aesthetics;
- (d) Self-Service and Fame;
- (e) Malevolent Self-Service;
- (f) Self-Service and Fun;
- (g) Infinite Preservation of Absurdity and the Poetry of the Impossible (also known as the “Always Already” Trick);
- (h) Justification of Existence;
- (i) Quasi Buddhism;
- (j) Art; and
- (k) Complete Revision of Our Job Description.

A. *The Truth for Its Own Sake*

Most obviously, people might write philosophy because they want to know the truth. (The reason they seek truth might be a second purpose, an altruistic one, perhaps; I will consider that next.) This seems like a pretty bad idea for a doubter. Although the goal of truth is certainly one that real people pursue in the real world, and though that class undoubtedly includes some people sharing the doubter’s outlook, I think it is too radically in conflict with the doubter’s resignation to accept as a purpose. Even recast as mere positive description—law as aspirationally non-normative social science—work that also endorses any serious doubt will

⁷⁵ To be clear, I will not consider what any particular writer might actually desire or intend, since a writer might have a desire or intent that is logically at odds with his or her own premises. The question is, rather, what should a hypothesized doubting person, with the two pre-commitments contained in the test, take as a purpose? *See supra* Part II.

conflict with well known and prominent normativity problems inherent in social theory.⁷⁶

B. Altruism and/or The Second-Best “Market Place of Ideas” (also known as “Pragmatism”)

The fact, however, that some (most?) writers believe that they are seeking the truth suggests another purpose: whether or not they have any hope of finding the truth, they are seeking it *for* someone. For themselves, yes, but since they document their search in publicly accessible documents, some of them presumably are seeking truth for others as well—for example, mankind. Thus, most writers undoubtedly hope that their writings will yield some benefit for other people, whether it be better policy, a better understanding of life, or purely a more accurate understanding of whatever is the question at hand. The double problem is that even if the goal (justice? superior policy?) were not already quixotic given the doubter’s doubts, The Problem is still implicated. That is, you may seek a “benefit,” but why is it a “good” in the first place? The doubter’s views do not obviously rule out a desire to amuse other people or make them happy or whatever.⁷⁷ The problem arises when the doubter tries to serve that good-natured desire through some means that the doubter’s own premises hold to be impossible.

One quotidian rebuttal is that The Problem itself can simply be recast in some way so that it does not actually frustrate normative policy discussion—that is, so that one can both be a critic of legal doctrine as such and yet still write scholarship with normative implications. To many people this seems simple, because it only requires some second-best alternative definition of “knowledge” that depends on some measure of reliability or usefulness, rather than certainty, and therefore resembles how we in fact live our everyday lives. This is also why many people think doubters are ridiculous. It is implied that the problem is with skepticism itself, in that it asks too much from reality. “You skeptics,” the argument goes, “allow the perfect to be the enemy of the good.” Another way of saying this, with my apologies to those who believe I am glossing over important details, is “why can’t we just be pragmatists?”

⁷⁶ Cf. Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Non-Falsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231 (1991) (noting a series of such problems inherent even in would-be non-normative economic theory).

⁷⁷ *But see infra* Part IV(3).

I think that this is in fact the way that most of legal academia now explains itself. Most law professors share some sense of the metaphysical flabbiness of legal discourse and there is apparently a common consensus about indeterminacy and the politicization of law. And yet few law professors would concede that this means their normative, more or less doctrinal scholarship is not an affirmative social good. Likewise, I expect that this self-image actually animated most of legal realism and CLS.⁷⁸ At least once a person associated with CLS argued that critique does lead to utter nihilism, but that nihilism nevertheless does not prohibit “passionate moral commitments.”⁷⁹

My response is that in some sense this rebuttal is right—all roads really do lead to pragmatism. It is just that pragmatism is really, really bad, if you want either (1) to preserve a notion of the “good” with any stability or claim to preservation, or (2) to believe skepticism is not trivial or irrelevant.

Another strategy within this rubric is to treat epistemological critique as a matter of academic hygiene—skepticism does no more than remind you to be vigilant about your own assumptions and take care to avoid undue pretensions to truth.⁸⁰ First, I do not think that this is actually as feasible as it might seem, as I tried to show in connection with the discussion of Schlag.⁸¹ It is actually extremely hard to write without stating or implying normative propositions logically at odds with skepticism.

⁷⁸ See, e.g., Simon, *supra* note 20, at 178, 181-84 (seemingly critical of the academic “tendency to move *above* the terrain of political contest,” claiming that “nearly everyone believes that politics can and should be principled in important respects”; calling generally for a larger “nonconservative” or “left of center” social program to rival the conservative one currently in action which allegedly has made law-and-economics successful in worldly respects); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293, 297-304 (1984) (alteration in original).

⁷⁹ Singer, *supra* note 15, at 7. As I understand him, Singer argues that normativity can be reconstructed in the wake of nihilistic critique by a process of “moral decisions” that are no different than our “everyday moral decisions.” *Id.* at 62, Singer sets out a short list of rudimentary values he believes should be discovered through this process, including the prevention of cruelty and misery. *See id.* at 67-70.

⁸⁰ See, e.g., Richard Michael Fischl, *The Epidemiology of Critique*, 57 U. MIAMI L. REV. 475, 485-86 (2003) [hereinafter Fischl, *Epidemiology*] (“[T]o ‘read Schlag’ is to become far more self-conscious about one’s participation in the conventions of legal scholarship,” but that merely makes it “impossible to cast [law] in a role that has it doing all the work . . . without a wink or some other form of rhetorical distancing.”).

⁸¹ See *supra* note 58 and accompanying text.

And second, even if it were feasible, it would mean that doubt does not matter.

C. *Pure Aesthetics*

Maybe the skeptic can simply say that his purpose is to expose ugliness or intellectual dishonesty in legal discourse. Such a purpose seems hard to criticize, and might seem comfortably and appropriately non-normative. The problem is that there is in fact a norm. The fact of making the criticism itself implies the value that it is better to cleanse ugliness and purge dishonesty, and indeed an honest aesthete would normally have to admit an altruistic motive as well—the beautification is being done for mankind. Therefore, if the ugliness or dishonesty to be exposed is the very illogic of normativity itself or the systematic epistemological or metaphysical failures in law as such, then The Problem is in full effect.⁸²

D. *Self-Service and Fame*

Though I'm sure it would be slightly *tref* to say it out loud, some component of most people's desire to write is the desire to be, alas, *famous*. This desire in fact could explain a lot of scholarly effort. Do graduate students in music composition really listen to Stockhausen, Boulez, or Elliot Carter (gritting their teeth) because they like it? Do graduate students in women's studies read Foucault because they want to know the truth? Maybe sometimes, but often not.⁸³ I think most people who do these things do them in part because they want to become famous.⁸⁴

⁸² One might try to distinguish this argument by saying “yes, but my argument is not about beauty, it is about understanding the way we think about law.” See, e.g., Schlag, *Aesthetics*, *supra* note 27, at 1051. The problem is that even if a person intends only that, one must still ask why the person does it, at least if either the aesthete or the one questioning him also believes in a radically doubtful critique of law itself. Anyway, I think that the purported aesthete rarely intends any more than that.

⁸³ I think this explains why young doubters, who might secretly believe in an all-encompassing and earth-scorching nihilism, can pump out scholarship that is normative in one way or another, so long as the goal of getting really, really famous can plausibly be kept afloat. In this way fame does the same existential work for young legal academics that clients do for practicing lawyers. Contrary to what script-writers for television lawyer shows evidently imagine, practicing lawyers seem largely unconcerned as to whether their clients' positions are “right” or “just” in any transcendental sense. Cf. MODEL CODE OF PROF'L RESPONSIBILITY R. 1.3 cmt. 1 (2003) (“A lawyer must also act . . . with zeal in advocacy upon the client's behalf.”).

⁸⁴ This is occasionally admitted, though not often by the people seeking the fame. The late Fred Rodell of Yale said as much of the “studious gents who

This self-serving motivation is not in itself logically self-contradictory. I do not think the criticism that is the doubter's defining trait requires the doubter not to seek fame, even as the sole purpose of writing. This is so because the mere criterion of internal coherence does not require any normative outcome, including "correctness." In itself, it does not require the writer to prove or accomplish anything related to the content of his work. It merely requires that the doubtful writer's motives not be in conflict with other observations the doubter makes—about our epistemic capacity, the resulting consequences for knowledge and objectivity, and so on. For what it is worth, I see no reason to believe that, say, narcissism or ambition are so bad in themselves.

Obviously the self-serving motivation purpose fails the other criterion of the test in Part II, because it would require the doubter's purpose to be divorced from his content. Interestingly, if we stopped here one might say that what I have really done is just to prove as a matter of logical necessity that the doubter's only coherent purpose *must be* some cynical self-service. This is not good.

E. Malevolent Self-Service

There are other reasons to write that also seem self-serving, or perhaps other ways to describe this same desire to be famous, that are also logically permissible from the doubter's perspective. Maybe the doubter wants to work out frustration because he resents the world and wants to retaliate in some way. Maybe he is both weak and angry and can find no other way to soothe his impotent rage than to strive for the envy of his peers. Maybe he is like Jean-Batiste Clamence from Camus's *The Fall*, who tried to convince the world of its own guilt so that he could be their superior.⁸⁵ Again, however bad, selfish, or unhealthy these motives might seem, I think they pose no logical conflict with doubt itself.

diddle around in the law reviews," noting that "the accepted way of getting ahead in law teaching is to break constantly into print in a dignified way." See Rodell, *Goodbye to Law Review*, *supra* note 18, at 43, 44. A dyspeptic effort to be as funny as Rodell is Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 927 (1990) ("To some degree all of them—whether genuine scholars, would-be wisemen, or coerced clones—are motivated by the gratification of ego, the satisfaction of habit, and the expectations of university image-makers."). Also interesting is Robert A. Williams, Jr., *Vampires Anonymous*, 95 MICH. L. REV. 741 (1996). I think the surprising thing is not that anyone has said these things, but that so few have.

⁸⁵ See generally ALBERT CAMUS, *THE FALL* (Vintage Reissue ed. 1997). I think, incidentally, that there is another, quite different reading one could make of *The Fall*, and it is one that should be of interest to lawyers. I'm keeping it to myself

Again, not only do self-serving motivations like these violate one of my criteria, they turn out not to be even very good descriptions of possible motives for philosophizing. Though narcissism, ambition, or cruel self-service can perhaps explain writing produced for other people's consumption, writing does not account for all of what doubters do. There is no necessary difference between confronting your intuitions silently or out loud. Silent activity is at least sometimes not related to the desire to be famous. The doubter's inner longing is like secret prayer to the faithful, which seems divorced from its impact on others. So there is something else going on when the doubter writes, it seems to me, in addition to any illegitimate motive like a search for truth, and illogical yet self-serving motives like the desire for fame or cruelty. In any event, this motive cannot be the one that, for me, solves The Problem.

It turns out that there is one other self-serving answer that seems to overcome even these problems. Namely:

F. Self-Service and Fun

This one is harder. There is nothing obviously illogical about a doubter writing because it is enjoyable.⁸⁶ Indeed, writing because you want to write is not undermined even by the argument that it implies that writing itself is good, and therefore illogically makes a positive claim about a value, because, strictly speaking, writing because you want to has the same rhetorical content as eating because you want to eat. That is, it has no rhetorical content. It implies no proposition except that the writer wants something, and therefore there is nothing to be logically incoherent with anything else.

It is harder for me to say that this is not the answer (and as I will explain later, this motive is part of why this paper is a farewell). The reason it is not ultimately satisfying is that if one is writing doubt and still having fun with it, one must almost certainly not care about the inner coherence of the writing.⁸⁷

for now, though, as I don't believe anyone else seems to have thought of it and it will be the subject of a future paper.

⁸⁶ Cf. Carlson, *supra* note 17, at 1911 (taking Pierre Schlag to task because "we need not . . . feel bad because we enjoy reading and writing legal scholarship.").

⁸⁷ I mean, a tautology is not what a doubter is hoping for at *all*—all I have said here is "the doubter writes because he wants to." This pure self-service motive "legitimizes" a doubter's writing when the doubter is not even trying to be right or to make something he thinks is good. Indeed, it would be the very desire to be "right" or to make something "good" that would be the problem. The problem for me, obviously enough, is that my motive is more complex than simple self-interest, and if I were really convinced that the only intellectually acceptable

G. Infinite Preservation of Absurdity and the Poetry of the Impossible (also known as the “Always Already” Trick)

A sophisticated solution that doubters themselves have devised is that the apparent paradox of The Problem is okay—that there is nothing wrong with paradox and that indeed it should be preserved. Thus, for all I know, maybe this paper itself is wrong by its nature—maybe looking for the answer is itself the problem. Camus derided all the “leaps” by which other doubters had avoided the nihilism implicit in their doubts;⁸⁸ he thought that any attempt to resolve the apparently absurd nature of human existence is “[t]o impoverish that reality whose inhumanity constitutes man’s majesty,” and believed therefore that “[i]t is essential to die unreconciled [because] . . . in that consciousness and in that day-to-day revolt [absurd man] gives proof of his only truth, which is defiance.”⁸⁹ Some CLS adherents similarly counsel against the search for inoculation from The Problem; they say that not only is it not a virus, it is a good thing.⁹⁰

A slightly different incarnation of the argument in effect blames the nature of language itself for logical contradictions inherent in critique of law. That is, it is not the critic’s fault that the only language he can use to criticize law and culture is the very language of that culture itself. In some people’s work this comes off as pretty shallow and sophistical; as Schlag observed, “[o]ne of the tricks of some postmodernist writers is to avoid explicitly making normative statements, knowing full well that the reader will read the language in a normative way and that, in a pinch, the reader can always be blamed for having read those ‘normative’ judgments into the text.”⁹¹

Sometimes this is better handled. I think Schlag has done it better than others; his version of the argument was already set out

reason for which I could write were cynical or evil, I would stop writing. Anyway, so far as it matters to me, I think we can safely assume that no one writes, says, or thinks philosophy solely for cynical or self-serving motives like fame or envy, without caring about rightness or beauty or other content-related, value-driven matters. I will not be satisfied until I explain some motive of the doubter that captures the richness of his feelings when he writes but that is also legitimate.

⁸⁸ ALBERT CAMUS, *The Myth of Sisyphus*, in *THE MYTH OF SISYPHUS AND OTHER ESSAYS* 1, 32-50 (Justin O’Brien trans., Vintage Books 1991) (1942).

⁸⁹ *Id.* at 55.

⁹⁰ See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 73 (1997); Fischl, *Epidemiology*, *supra* note 80, at 479.

⁹¹ Schlag, *Nowhere to Go*, *supra* note 14, at 174 n.18.

above.⁹² Professor Fischl thoughtfully observed that “[w]e can’t step outside of ‘law’ and look at it,” because when we do so “we are looking at *us*.”⁹³

A final variation is that the contradiction implied by The Problem is good because it is a necessary engine of the dialectical evolution of culture. The argument as I have heard it begins with a tremendous problem of public relations, in that it relies on Hegelian metaphysics and Lacanian psychoanalysis. In any case, the idea is that internal contradiction in law and other normativity merely evinces dialectical change underway, such that, though they may never be perfect, law and normativity are always in the process of “becoming.” To hold their inchoate nature against them would be to allow the perfect to be the enemy of the good.⁹⁴ Incidentally, it appears that Schlag’s later work could be understood as essentially aspiring to a dialectic vision of this nature, valuing the impossibility of essentials as the motor of human creativity.⁹⁵

My problem with all these views is that however thoughtful they are, they actually seem to do no more than restate the same old normativity in fancy language. If preservation of paradox is good, it must be good for something, and often as not the something turns out to be the same social values for which everyone from the center and on to the left has always argued. Even the Hegelian model seems like just old-fashioned dialectical materialism, since the “something” it is good for is the

⁹² See *supra* notes 72-74 and accompanying text.

⁹³ Fischl, *The Question*, *supra* note 14, at 802.

⁹⁴ See Carlson, *supra* note 17, at 1934-35; see also J. M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131, 1139, 1176-83 (1994); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 986-88, 1028-30 (1990); Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 197-201 (1996). See generally Sagers, *supra* note 4, at 476-77.

⁹⁵ Namely, he appears to have summarized his entire previous critique of the metaphorical conceptualization of law in Schlag, *Aesthetics*, *supra* note 27. But in this work he has implied, arguably in some tension with prior work, that even when legal culture is seen in the most critical, anti-foundationalist and decentered mood, in which we experience “identities collapsing and . . . differentiation falling away,” there is something left to be desired. *Id.* at 1115. Apparently he endorses our willing embrace of this experience (though he is fairly non-prescriptive in saying so), so that we can “appreciate law as a creative enterprise . . .” *Id.* at 1115. He says: “to reject this [critical and decentered] aesthetic as destructive, on the ground, for instance, that it renders law impossible, is to shut oneself off from an important experience of law and its creative aspects.” *Id.* at 1094.

destabilization of illegitimate hierarchies and so on. Professor Carlson's Lacanian model is harder to fault in itself; but as he states it, it reads like mere positive description of the human psychological predicament and therefore fails my *other* goal, which is to make doubt matter.

H. Justification of Existence

Sartre adds an interesting perspective. The protagonist of *Nausea*, his first novel,⁹⁶ is Antoine Roquentin, a middle-aged would-be historian, who at the time of the story has become disillusioned with life and the quest for meaning, and suffers pathological loneliness. Roquentin may be no breath of sunshine, but he provides another and the subtlest yet of the reasons one might write: as Roquentin says, writing is perhaps no more than a means to “justify your existence.”⁹⁷ He decides at the very end that he can “justify [his] existence,” he “might succeed . . . in accepting [himself],” by writing a novel.⁹⁸

⁹⁶ JEAN-PAUL SARTRE, *NAUSEA* (Lloyd Alexander trans., 1964) (1938).

⁹⁷ *Id.* at 237. Roquentin's crucial revelation is to realize, as a result of his face-to-face struggle with nothingness, that there are no “adventures.” As a young man, Roquentin traveled the world and had affairs with women—all in the search, he later realizes, of adventure. Roquentin recalls his frustration one day, during the course of a love affair, over the fact of his lover's existence. Her reality—as opposed to the idea of her—spoiled the “adventure” of the affair. Thus, when she was away from him, his affair with her was a fantasy—he was finally living what he imagined real life should be. But then she reappeared and he found himself hating her—because in her real presence “one had to begin living again and the adventure was fading out.” *Id.* at 56. As he says, “everything they tell about in books can happen in real life, but not in the same way.” *Id.* at 54. It was this, then, that by middle age had eroded what Roquentin had lived for. The promise of meaning latent in culture—which always seemed just beyond his reach and which kept his life in motion—had turned out to be a fantasy.

⁹⁸ *Id.* at 237-38. He says, imagining how his own existence would be molded by the fact of having written a book, that

there would be people who would read this book and say: “Antoine Roquentin wrote it, a red-headed man who hung around cafes,” and they would think about my life . . . as something precious and almost legendary. [The book at first] wouldn't stop me from existing or feeling that I exist. But a time would come when the book would be written, when it would be behind me, and I think that a little of its clarity might fall over my past. Then, perhaps, because of it, I could remember my life without repugnance.

This does not really work for me. First of all, I think Sartre is just being unduly French in claiming one's existence needs justification. I for one am pretty content despite complete agreement with Sartre's conception of the human existential predicament, and for now at least am troubled only by an evident logical problem in a scholarly endeavor with which otherwise I am in love.

Another problem with listening to Roquentin is that Sartre did not intend the story as advice to the troubled doubter. Indeed, he viewed Roquentin's new optimism with cruel, subtle irony. Though it is not at all obvious, and though Sartre gives no other hint that this is what he intended, *Nausea* is written as a collection of journal entries, "found," says the book's fictional Editor's Note, "among the papers of Antoine Roquentin,"⁹⁹ suggesting that at some time after his optimistic renaissance Roquentin killed himself. Indeed, in nearly his last words in *Nausea*, Roquentin says that after his novel is finished he hopes that he will look back on the moment when he decided to write it and say "[t]hat was . . . when it all started."¹⁰⁰ This is the same way that in his youth he described the "adventures" of which he dreamed, his many, invariably hopeless attempts to live the real life he imagined.¹⁰¹ In his optimism at the end of the book, Roquentin apparently had forgotten the critical discovery of nothingness that he recorded much earlier in his journal.¹⁰² This in itself reflects what I tend to think is the case: writing to justify one's own existence does not answer The Problem, because it really just begs the same old normative questions that have been held in abeyance.

I. *Quasi Buddhism*

An idea that I find more compelling can be found in the writings of the ancient skeptics. Ancient skepticism is curiously neglected in modern academia, given the enormous significance it

Id. at 238.

⁹⁹ *Id.* at 6.

¹⁰⁰ *Id.* at 238.

¹⁰¹ *See id.* at 54 ("Now I see so clearly what I wanted. Real beginnings are like a fanfare of trumpets.").

¹⁰² Strictly speaking, I suppose it does not really matter if Sartre meant that Roquentin was a fool. The question is not the psychological one of how we should evade despair, but whether it is logically coherent for the doubter to write to save his own life. One might observe, incidentally, that Sartre himself wrote not only one, but several novels and other works, almost all of them following *Nausea*, and all while living what seems to have been a happy life.

had in the ancient Mediterranean and in the Renaissance.¹⁰³ Though it is now seriously studied only by specialist philosophers and classics scholars, I think most of what is said by phenomenologists, the existentialists, and other modern doubters already exists in ancient skepticism. To be precise, I mean the skepticism attributed to an influential Greek figure of the fourth century B.C.E. named Pyrrho of Elis, the only significant extant record of which is found in the writings of a second century C.E. philosopher named Sextus Empiricus.¹⁰⁴ The skepticism recorded by Sextus is all encompassing and earth scorching—he argued that because we seem always incapable of choosing from among any of the possible judgments we might make, we are left in a state Sextus calls *epoche*—that is, suspension of judgment.¹⁰⁵

Sextus tells us that the reason the skeptic chooses *epoche*—or perhaps more accurately, resigns himself to it or allows it to overtake him—is to seek tranquility. In his view and allegedly in that of Pyrrho, the problem in life is our drive to answer questions affirmatively, a drive that will always be frustrated. Reasoning that the absence of frustration leaves one in tranquility, the skeptic of Pyrrho’s flavor suspends judgment.¹⁰⁶ Sextus also seems to have a pretty good answer for the evident conflict between the doubter’s radically skeptical epistemology and the means by which he must express it. He says that in “attending to what is apparent, we live in accordance with everyday observances, without holding opinions—for we are not able to be utterly inactive.”¹⁰⁷ Therefore, so long as the skeptic avoids holding opinions, he can have a job, eat, enjoy things, and observe social customs.¹⁰⁸ The observation is

¹⁰³ See generally RICHARD POPKIN, THE HISTORY OF SKEPTICISM: FROM SAVANAROLA TO BAYLE (2003).

¹⁰⁴ See SEXTUS, *supra* note 4. That claim is perhaps subject to some dispute since well known figures in later phases of Plato’s academy, notably Carneades and Clitomachus, also purported that their teachings followed Pyrrho. Sextus tells us otherwise, *see id.* at 57-62, and he is nowadays usually taken at his word in that respect. See BARNES, *supra* note 4.

¹⁰⁵ See *id.* at 47. Barnes and Annas translate *ἐποχή* as “suspension of judgment,” though it is often merely transliterated to *epoche*. Cf. BARNES, *supra* note 4, at 8-9.

¹⁰⁶ See *id.* at 10-11.

¹⁰⁷ SEXTUS, *supra* note 4, at 9.

¹⁰⁸ See *id.* at 9 (“By nature’s guidance we are naturally capable of perceiving and thinking. By the necessitation of feelings, hunger conducts us to food and thirst to drink. By the handing down of customs and laws, we accept, from an everyday point of view, that piety is good and impiety bad. By teaching of kinds of expertise we are not inactive in those which we accept. And we say all this without holding any opinions.” (footnotes omitted)).

simply that the mere living of life in an ordinary manner does not, in itself, imply propositions at odds with skepticism.

The problem is that Sextus never explains why one would not just go the whole way and be a real Buddhist.¹⁰⁹ That is, “tranquility” seems like a plausible defense of doubt in and of itself, but not of doubtful writing. Indeed, “tranquility” seems not the likely state of a man who argues a lot, and no one could argue more than Sextus did.¹¹⁰ In any case, this essentially Buddhist motivation resembles “self-service” and “fun” insofar as it seeks the internal reward of “tranquility,” but it just seems to be incorrect as an explanation for why one would express doubt *publicly*.¹¹¹

J. Art

In some sense, maybe the most compelling argument is that The Problem is actually wrong, because even the doubting law professor is fully licensed to “do art.” The issue might be that The Problem itself quietly draws a distinction between “philosophy” and “art.” That is, it presumes that “philosophy” exists as a thing importantly distinct from other things, including art. We normally do not insist that art defend its own “purpose,” and many of us hold it to no standard of “truth” or “objective goodness.” Therefore, if the art/philosophy distinction is not real, maybe there is nothing wrong with writing about philosophical matters for the sake of writing about them, even though they may not attain logical provability.¹¹²

¹⁰⁹ The fascinating thing is that there is evidence that Sextus, and Pyrrho before him, really were Buddhists, after a fashion. Pyrrho was attached to the retinue of Alexander the Great during his campaign to India, and is alleged by the Roman historian Diogenes Laertius to have met a group of the so-called “gymnosophists,” a word often taken to mean Buddhists or other Indian holy men. The affinity between Pyrrhonian skepticism and ancient Buddhism is so tantalizing that there seems to be something to this. See 2 DIOGENES LAERTIUS, *THE LIVES OF THE EMINENT PHILOSOPHERS* 475 (R.D. Hicks trans., Loeb Classical ed. 1995); Richard Stoneman, *Naked Philosophers: The Brahmins in the Alexander Historians and the Alexander Romance*, 115 *J. Hellenistic Stud.* 99, 104-05 (1995).

¹¹⁰ See SEXTUS, *supra* note 4, at ix (translator’s preface, noting that “the lifeblood of Sceptical practice . . . [is] argument, argument, argument.”).

¹¹¹ If the Buddha really was the Buddha, one imagines he would have been more like the Siddhartha of Herman Hesse’s novel than the mythological Buddha of even Theravada Buddhism. See HERMAN HESSE, *SIDDHARTHA* (Bantam Reissue ed. 1981).

¹¹² I take this to be, for example, Rorty’s meaning in his distinction between “constructive” and “edifying” scholarship. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 357-60 & n.4 (1979). It is also reminiscent of Alfred Kazin’s view that “[w]hat gets us closer to a work of art is not

This again seems hard to reject as wrong; I guess my response would actually be an aesthetic one rather than a logical one. If the purpose is the same as the purpose of art, then most legal philosophy (and certainly anything I can imagine writing) would look a lot different than it does.¹¹³

K. Complete Revision of Our Job Description

Finally, maybe the thing to do is just stop being law professors as traditionally defined. Robert Williams, a self-identifying “Critical Race Practitioner,” urged such a program. It begins with relinquishment of “warped and twisted forms of parasitic deviancy plaguing a sick, decaying, and self-absorbed society,” including the law professor’s “assigned responsibilities in life,”—which are, namely, “to fine-tune the workings of capitalism and the Social-Darwinist state by doing doctrinal scholarship about the things which . . . enlightened, high-minded fellows . . . care[] about intensely, like the efficiency of the mailbox rule.”¹¹⁴ Such a catharsis calls for more than “sit[ting] on your ass and deconstruct[ing] the world with your word processor.” Rather, since one cannot “be a Vampire Law Professor and do Critical Race Practice at the same time,”¹¹⁵ the apotheosis apparently requires one to stop writing altogether and commit totally to teaching (including teaching critical theory) and public service. “[R]eaching more people —different types of people—with the

instruction, but another work of art.” ALFRED KAZIN, *WRITING WAS EVERYTHING* 7 (1995).

¹¹³ I have heard an argument on occasion that does not belong here exactly, but that is so delicious that I have to get it in somewhere. A believer might say that there simply must be some purpose in a writer’s mind when the writer sets out to do “philosophy” that is not at all an artist’s purpose, because the work of philosophers who are self consciously trying to do philosophy is often unbearable to read. Many philosophers for all appearances exert no effort at all to make their work enjoyable to read, implying that there must be some purpose of their philosophy that is not artistic. One could say that this superficial difference reflects a real underlying difference, which is that philosophy is a methodological enterprise. That is, philosophy must adopt certain careful methods of making distinctions and definitions and so on, because it is thereby that it brings us confidently toward truth. Hence the brain-flattening prose. I think this argument is pretty simplistic; nothing follows from the fact that a philosopher has chosen a particular style. The adoption of a rigorous analytical approach in itself just begs a question that the doubter is comfortable answering in the negative—whether we humans are in a relation to phenomena that allows us to dissect them in this manner of certainties. What is adorable about it is that in essence the argument is this: “Chris, your claims must be wrong because so much of philosophy is *really, really awful*.”

¹¹⁴ Williams, *supra* note 84, at 757.

¹¹⁵ *Id.* at 758.

message, . . . that's what doing Critical Race Practice is all about, in [Williams'] mind."¹¹⁶

I would not say that Williams is wrong, exactly; it is just that this is not an answer to The Problem. It is a surrender.

* * *

I can imagine other purposes like the more subtle ones—spiritual purposes that do not depend on truth but also are not wholly divorced from the content of philosophy. They trouble me, however, and I think that they cannot overcome the sense of their philosophical incoherence. Roquentin's new life plan, for example, is one that apparently does not call for him to try to be right about the world; his purpose really seems like a dramatically stated desire to be famous. The problem with Sextus, on the other hand, is that he seems to imply a value. Though the desire for tranquility is not necessarily related to the truth of his arguments (indeed, Sextus repeatedly reminds us that the skeptic does not claim that his beliefs are true, only that they are how the world seems to him¹¹⁷), and though desire for tranquility is a self-serving motive that is hardly one I would feel bad about adopting, tranquility does not explain why Sextus would write—and it is his argumentative enterprise that by its nature seems to imply a value.

Anyway, I think that one could continue to screw one's brain down on this problem, and continue to read the books upon books upon books that might shed light on it. But I think it is time to admit that that will not lead to a satisfactory conclusion. Maybe religious persons, political progressives, and other heroes generally are right, and the problem with doubt is merely the absence of courage to believe. The evident reality remains that there is no better reason to believe one thing than another. I continue to cling to my view that skepticism reflects not a lack of courage, but a greater capacity for critical self-reflection.

V. A CONFESSION AND A FAREWELL

I am pleased to add that making this confession and farewell fills me with a great and unexpected relief. This is only a little because it frees me of the sometimes icky politics that seem to surround gatherings and communities of critical thinkers (and left politics as well, interestingly enough¹¹⁸). Indeed, one reason

¹¹⁶ *Id.* at 757.

¹¹⁷ See, e.g., SEXTUS, *supra* note 4, at 9.

¹¹⁸ Witness the crucifixion of Albert Camus, for example, following his break with state socialism in the early 1950s. See HERBERT R. LOTTMAN, ALBERT CAMUS: A BIOGRAPHY (2d ed. 1997). The scandal ensued after his publication

they turn icky is not that we are bad or dishonest people, it seems to me, but that when The Problem is ignored or assumed out of existence ours becomes the most naked of emperors. More importantly, this confession and farewell ends for now the agony of compulsion to argue over something that everyone seems to acknowledge has no answer, and the agony of perpetually asking my own internal, neurotic philosophical task-master for permission to write about things that are completely fascinating.

This suggests for now an adoption of something like a Quasi-Buddhism or Self-Service and Fun motivation, and takes advantage of the only possible sense in which most law professors resemble professional basketball players: however inconsequential, wrongheaded or aesthetically misguided the endeavor may be, producing legal scholarship is nevertheless a craft, which happens to be of an essentially literary character. It is a craft at which we excel, and as to which a certain community of our fellow craftspeople enjoys playing spectator. Thus, an irony that all skeptics should love is that perhaps the skeptic can succeed only by going silent about skepticism.

of *The Rebel* in 1951, where his central thesis was that revolutionary ideology would, in the hands of succeeding dictatorial powers, devolve to intellectual formulas and, ultimately, terror. See ALBERT CAMUS, *THE REBEL: AN ESSAY ON MAN IN REVOLT* (Anthony Bower trans., 1st Vintage ed. 1991) (1951). Though *The Rebel* was not without friends among the non-communist Left, the book and Camus were savagely attacked by the communists then dominant among the French literati, led most notably by Jean-Paul Sartre. See LOTTMAN, *supra*.