

Counterintuitive Thoughts on Legal Scholarship and Secured Transactions

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INTRODUCTION

I teach and write in the field of commercial law. Let's say I have a potentially beneficial, though credit-limiting and therefore radical, idea for a change in the Uniform Commercial Code (UCC).¹ I decide to devote research energies to this idea. I want to figure out whether my unorthodox concept, if implemented, would facilitate corporate responsibility or just result in a dearth of available financing.²

I start to think about this research but I have already, in a sense, read too much. I am haunted by James J. White's statement that "[b]anks and other secured creditors . . . worship security with apostolic zeal. The secured

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1. For example, I might want to explore possibilities for reforming UCC section 9-203 to prevent the attachment of a security interest in the context of project finance to assets acquired while a debtor violated human rights, labor or environmental standards. For discussion of how these standards might be defined and of the most obvious drawbacks and benefits of this type of reform, see *infra* Part II. This reform could potentially harness the control secured lenders have over debtors to encourage corporate responsibility. In more concrete terms, UCC section 9-102 could be revised to include definitions of "project finance" and "project finance debtor." Then, UCC section 9-203 could be revised to say that project finance debtors do not have, within the meaning of the statute, "rights in collateral" acquired while taking actions in violation of certain standards. I would like to emphasize here that I am just thinking in public in this Essay. This reform is totally infeasible for a range of reasons referenced in this Essay. The primary purpose of this work is to think through whether and how a legal scholar should commit to such a project given its real-world infeasibility.

2. See discussion *infra* Part II.

creditors' [sic] argue for stronger and broader security, not for weaker and narrower security. And no one has less power in such a debate than a law professor with a counterintuitive idea."³

I am now not just a commercial law scholar; I am a law professor with a counterintuitive idea. I have to reassess the value of my project. I am not sure on what grounds a law professor ought to present and defend a normative position on secured transactions law that bears no reasonable relationship to politically viable possibilities for UCC reform.

I have written before that aesthetic elements of commercial law deter engagement with difficult, unanswered questions about the desirability of certain types of reform.⁴ I have written also about the infeasibility of progressive reform of UCC Article 9 given unsecured creditors' and third parties' tendencies to identify as members of an imagined community of capitalist investors, rather than as separate from and affected adversely by the interests of financial institutions.⁵ These are descriptive critiques that deepen understanding of the workings of commercial law. Regardless of how accurate these critiques may be, however, the impulse can persist to try to find legal solutions to problems that commercial law presents.

I have a reform idea for, say, UCC section 9-203, and it is far-fetched in terms of socio-cultural acceptability and political viability. So what? As a legal scholar, am I limited to exploring only the possibilities for law that might actually be enacted or applied by lawmakers? Many developments in law seemed infeasible at first.

At this point I remember Ugo Mattei's observation that "there is little question that U.S. law has been capable of exaggerating the fundamental aspects of western law, making them highly spectacular . . . [for example,] scholars are engaged in highly creative intellectual exercises with

3. James White, *Work and Play in Revising Article 9*, 80 VA. L. REV. 2089, 2090-91 (1994).

4. Heather Hughes, *Aesthetics of Commercial Law—Domestic and International Implications*, 67 LA. L. REV. 689, 716-17 (2007).

5. Heather Hughes, *Creditors' Imagined Communities and the Unfettered Expansion of Secured Lending*, 83 DEN. U. L. REV. 425 (2005).

little restraint from the actual technicalities of the law.”⁶ Building on Guy Debord’s work on the idea of the spectacle society, Mattei regards certain kinds of highly creative intellectual exercises among American legal academics as a symptom of U.S. dominance as a spectacular society.⁷

My section 9-203 reform proposal would be an intellectual exercise undertaken in spite of extreme improbability of actual, technical effectuation. But, first of all, I am a U.S. legal scholar and I think it might be naïve to attempt some renunciation of dominance. Second, it is important that legal scholars have the capacity to go out on a limb to articulate reforms oriented towards social justice.

The bottom line is that it is a challenge to figure out what, how, and why to write at this late stage in the spectacular evolution of the U.S. legal academy. Policing lines between the legitimate and the illegitimate in the production of professional standards is not necessarily a conservative exercise to preserve unjust hierarchies. It is also the essential work of staking out a space in which hierarchies embedded in law and social order can be challenged and undermined through the production of hierarchies of other kinds.

On the one hand, legal academia in the U.S. rewards theory and creativity.⁸ Faculties tend to frown upon “black letter” approaches to legal scholarship. Theory is valued highly. Yet, at the same time, most law professors are compelled to have a purpose beyond theorizing law. Theory is vital, but theory can’t just sit around being smart. Theory is supposed to yield understandings of law and formulations of law that will on some level advance racial equality or efficiency or morality or distributive justice or wealth maximization, and so on.

Contrast this notion to Stanley Fish’s “theory minimalism.” Fish argues that nothing—no practical application whatsoever—follows from theoretical approaches to law.⁹

6. Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEGAL STUD.* 383, 437 (2003).

7. *Id.*

8. See, e.g., James Gordley, *Mere Brilliance: The Recruitment of Law Professors in the United States*, 41 *AM. J. COMP. L.* 367, 369 (1993) (discussing the emphasis on creativity in U.S. legal academia).

9. See Stanley Fish, *Theory Minimalism*, 37 *SAN DIEGO L. REV.* 761 (2000).

Also, theory itself cannot provide approaches to or views of law that transcend partisan concerns.¹⁰ According to Fish, as academics we study the law for its own sake and for the sake of teaching.¹¹ Advising lawmakers or taking partisan positions is just not part of the job description.¹² Calling on theory for transcendent understanding or legitimacy is also not part of the job description, because no such theory will be forthcoming.¹³

Fish is an outlier with his theory minimalist position both because legal academics want theory to do or mean something for law itself and also because legal academics perpetually seek explanatory or legitimating theories of law that transcend partisan concerns. Most feel that, in one way or another, the general purpose of legal scholarship is to deepen understanding of law to yield answers to vexing legal problems or justifications for lawmaking. Given that law school is a professional school of heterodox methodologies, it seems that for many the legitimacy of legal scholarship lies in its relevance, however tenuous, to lawmaking.¹⁴ This Essay is, in part, an inquiry into why this is so.

Theories of law that explain, justify or propose approaches to lawmaking in the “field of pain and death”¹⁵ seem to bear a relationship to legal academia’s institutional legitimacy. Descriptive, theoretical work has value in deepening collective understandings of law and, hence,

10. *See id.* at 762.

11. Stanley Fish, *Save the World on Your Own Time*, CHRON. HIGHER EDUC., Jan. 23, 2003, <http://chronicle.com/jobs/news/2003/01/2003012301c/careers.html>.

12. *See id.*

13. *See Fish, supra* note 9.

14. As this Essay discusses, relevance to lawmaking can be quite tenuous. I do not limit the range of legal academic projects that are relevant to lawmaking to those that are explicitly normative or prescriptive. For some legal thinkers, though, the legal academy’s legitimacy is linked to its capacity to be relevant in a very concrete way to the work that lawmakers consciously and explicitly do. This is evidenced by the recent debate sparked by Adam Liptak’s column in the New York Times about the decline in judges’ citations to law review articles. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8. This column was followed by several blog discussions on the matter. *See, e.g.*, Althouse, http://althouse.blogspot.com/2007_03_01_archive.html (Mar. 19, 2007, 07:56 EST).

15. ROBERT COVER, *Violence and the Word*, in NARRATIVE VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER 203, 203 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995).

law's possibilities. Arguments that present prescriptions for lawmakers handling specific issues are contributions to governance.

In other words, in contrast to Fish's approach, most approaches to legal scholarship assume some causal relationship between the research and writing of law professors and law itself. Among and within these approaches, of course, there is contentious debate over (1) which theories of lawmaking are actually legitimating; (2) which descriptive theories are true; (3) which prescriptions are right; and (4) whose justice is paramount. Add to this a range of views of what legal scholarship should look like in terms of voice, vocabulary, structure, substantiation, and length. And, to boot, throw in a consciousness that different forms of legal scholarship have differing political connotations.

In the face of this cacophony, Pierre Schlag has stepped back and made legal scholarship itself his subject.¹⁶ I read his latest challenge to the legal academy just as I was struggling to figure out whether and how to make a counterintuitive reform proposal for secured transactions law.

Schlag presents what he calls the "dedifferentiation problem"—a mode of loss of external reference¹⁷—and contends that this problem is "catastrophic for the ways in which legal thinkers have usually thought about established theories and research agendas in law."¹⁸ His argument is that the collapsibility of distinctions fundamental to most understandings of law—like the

16. PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998); PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM AND THE AMERICAN LEGAL MIND* (1996) [hereinafter SCHLAG, *LAYING DOWN THE LAW*].

17. Scholars in various fields have discussed and developed the concept that ontological categories like law are constructed in the absence of reference to any external determinant. At this point in time a range of different arguments have proliferated around this theme. For example, Continental philosophers such as Jean Baudrillard and Jacques Derrida have asserted the complete non-referentiality of concepts foundational to law. JEAN BAUDRILLARD, *Simulacra and Simulations*, in JEAN BAUDRILLARD: *SELECTED WRITINGS* 166 (Mark Poster ed., 1988); JACQUES DERRIDA, *OF GRAMMATOLOGY* 158 (Gayatri C. Spivak trans., 1976) (1967) ("There is nothing outside of the text.").

18. Pierre Schlag, *The Dedifferentiation Problem* 5 (Legal Stud. Research Paper Series, Working Paper No. 07-09, 2007), available at <http://ssrn.com/abstract=975810>.

distinction between law and society or law and art—makes doing legal scholarship as we know it impossible.¹⁹

Schlag's critique provides a useful framework for exploring the impulse to pursue creative approaches to law that are extremely unlikely to be implemented. This Essay responds to Schlag and then considers whether, for my unrealistic law reform proposal, there is any value, or any alternative, to either utopian normativity²⁰ or the "as if" thought experiment.²¹

Ultimately, this is an essay about legal academic professional responsibility from the vantage point of a commercial law scholar. It explores implications of the concept of loss of external reference²² for legal scholarship.

I speculate that there is a relationship between crises of institutional legitimacy in law and the need for most legal scholarship to be relevant on some level to lawmaking. When I say "relevant to lawmaking" I do not mean, necessarily, offering legal solutions to problems or containing explicit, normative, or prescriptive responses to issues that law presents. Rather, I mean all legal scholarship, however abstract, oriented in opposition to Fish's assertion that nothing—no application whatsoever—follows from theoretical approaches to law.

If we were to take dedifferentiation and other, more totalizing theories of loss of reference seriously, the need for a relationship between legal scholarship and lawmaking²³ might be understood as part of a project of constructing viable distinctions between law/politics or law/culture in the production of a social order. The space within this project for unrealistic research agendas, then, becomes interesting to define.

19. See *infra* text accompanying notes 24-30.

20. By this I mean an agreement in the form: we should reform the law to read like x for reasons a and b, where a and b are not on lawmakers' radar screen. See *infra* Part III.

21. By this I mean an argument in the form: if we were serious about social objective y, we would reform the law to read like x for reasons a and b. See *infra* Part III.

22. See *supra* note 17.

23. This assumption is, of course, contested. See generally Fish, *supra* note 9; Schlag, *supra* note 18.

I. LEGAL SCHOLARSHIP AND LOSS OF EXTERNAL REFERENCE

Schlag offers a simple statement of loss of reference in the context of legal scholarship. The dedifferentiation problem is that there is nothing to be said about the relations between two identities such as law and culture or law and politics, law and economics, or law and language because they are not separable in the first place.²⁴

Schlag presents this dedifferentiation problem in the context of cultural studies of law.²⁵ He describes how legal scholarship about law and culture begins with a sense of reciprocal determination—law shapes culture, culture shapes law.²⁶ In order to avoid the prospect of shallow, abstract circularity, this scholarship focuses on internal complexities within reciprocal determination, making it more dynamic and nuanced.²⁷ The dedifferentiation problem is an experience that follows from the development of the dynamic model. Schlag quotes Naomi Mezey's statement: "Perhaps we should not speak of the "relationship" between law and culture at all, as this tends to reinforce the distinction between the concepts that my description here seeks to deny."²⁸

As cultural studies of law become more sophisticated, the premise of the disciplinary framework of "law and ..." scholarship becomes unsustainable. We cannot differentiate law and culture to begin with; we have nothing positive to say about their relations because we do not have two things to relate to one another. As Schlag puts it: "What

24. See Schlag, *supra* note 18, at 3.

25. *Id.* at 6-13.

26. *Id.*

27. Schlag is criticizing two general categories of legal scholarship. First, he laments the "conventional perspective" of legal scholarship that focuses just on how law should shape society. This work overlooks reciprocal determination and then further narrows itself by focusing on how the law should shape society by changing rules and doctrines to achieve the desired effect. Second, he is criticizing work in which reciprocal determination and its attendant problems are explicit challenges, but the author still insists on the "two-way" view of reciprocal determination. The author unreflectively relies on the "law and ..." disciplinary framework that presumes separable subjects that can mutually constitute one another. See *id.* at 9-10.

28. *Id.* at 11 (quoting Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 46 (2001)).

authorizes us to distinguish the legal and the social in the first place? Why accept such a distinction? What are its referents? In fact, are there any referents—apart from the disciplinary frameworks that automatically reproduce such distinctions in order to get their research agenda off the ground?”²⁹

The concept that it is impossible to sustain distinctions between law and culture or politics or art, and so on, is not new. As I read Schlag’s argument, I find that one key to it is that it is essentially about loss of reference—law and culture as “*ab initio* non-referential.”³⁰ If there were an external referent or object—“law” or “culture”—then the dedifferentiation problem would not arise because the bases for distinction would be in reference to such object.

Numerous legal scholars have drawn on twentieth century developments in continental philosophy to show that concepts foundational to law lack external referent or that distinctions between such concepts cannot be sustained.³¹ The concept of law has meaning not because it references some object—the law—that exists, but because it is perpetually contrasted to or distinguished from politics, culture, art, science. Distinctions between law and culture are constructed through perpetual comparing and contrasting of these ideas. Meaning is produced through contrast to other concepts that are themselves constructed through contrast. There are no identifiable, external objects to which these concepts refer.

Schlag does not relate his argument explicitly to any canon of thought on non-referentiality. When I read it, though, especially in the context of thinking about possibilities for progressive legal scholarship, I can’t help but remember some of the more extreme and totalizing statements of loss of reference that I have read.

For example, Jean Baudrillard’s concept of simulacrum

29. *Id.* at 13.

30. *Id.*

31. See Adam Thurschwell, *Critical Legal Studies*, in A DICTIONARY OF CONTINENTAL PHILOSOPHY 112-14 (John Protevi ed., 2006); see also DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* (1992) (drawing upon Derrida to discuss judicial responsibility given that no text or tradition exists beyond the act of interpreting it); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

asserts that subjects are not constituted by, and do not originate in, any objective reality beyond an endless representation and simulation that constitutes them.³² A simulacrum is complete continuity between real and imaginary, model and subject, map and territory—“the generation by models of a real without origin or reality: a hyperreal.”³³ From the vantage point of simulacra, the ability to articulate moral order—to distinguish the legitimate from the illegitimate—precedes the power to differentiate between obedience and transgression, the difference on which the law is based.³⁴ Therefore, the state’s power to administer law is staked upon its ability to construct with representations and contrast resonant distinctions in the face of simulacra—the continuity of the legitimate and the illegitimate.³⁵

I am reminded also of theories of indeterminacy in law; they are rooted intellectually in this constellation of theories about loss of reference.³⁶ According to these theories, concepts (e.g., individualism) only have meaning in reference to their opposites (e.g., altruism), and these concepts exist in intractable contradiction. Because there is no meta-theory with which we can resolve intractable contradictions, legal rules are indeterminate—an adjudicator can seek justification from either side of a relevant binary opposition in the disposition of any given issue.³⁷ Therefore, adjudication inevitably involves the ideology or politics of the adjudicator and law cannot be

32. Some years ago I borrowed Baudrillard’s concept to critique the legislative debate over the Defense of Marriage Act. Heather Lauren Hughes, *Same-Sex Marriage and Simulacra: Exploring Conceptions of Equality*, 33 HARV. C.R.-C.L. L. REV. 237 (1998) (arguing that both the Defense of Marriage Act supporters and its opponents generate distinctions in the production of a moral order, portraying what they oppose as scandalous).

33. BAUDRILLARD, *supra* note 17, at 166.

34. *See id.* at 178.

35. *See generally* Hughes, *supra* note 32.

36. Schlag characterizes indeterminacy as a theory of law offered to complicate reciprocal determination. Schlag, *supra* note 18, at 10-11. The point here is that indeterminacy is also a theory of law derived from the concept of non-referentiality that is central to the dedifferentiation problem. *See* Thurschwell, *supra* note 31, at 113.

37. *See generally* DUNCAN KENNEDY, CRITIQUE OF ADJUDICATION (1997); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

extricated from politics.

Note that the assertion that law cannot be separated out from politics is not the same as saying that law is all just politics or it's all just ideology. The collapsibility of law and politics just means that we must perpetually construct the line between them in the production of legitimacy and institutional capacity.³⁸

These prior applications in legal scholarship of the concept of loss of reference or conflation of distinctions focus on lawmaking. They state in various ways how the non-referentiality of concepts fundamental to law creates crises of institutional legitimacy in law. The state's capacity to administer law depends upon its capacity to produce viable oppositions without external reference. The indeterminacy of legal rules threatens to reduce adjudication to the naked exercise of political will.³⁹

In *The Dedifferentiation Problem*, Schlag is arguing about the implications of loss of reference for legal scholarship. His concept of dedifferentiation asserts loss of reference, but it is more modest and situated than Baudrillard's loss of reference or Derrida's strong statement that there is nothing outside the text.⁴⁰

38. From this perspective, we might even understand a legal formalist like Ernest Weinrib to be engaged in the same essential project as his alleged adversaries, the critical legal theorists of the 1970s and 1980s. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (presenting "a noninstrumental conception of the rationality of juridical relationships" and rejecting "the assumption that law is essentially political"). It is beyond the capacity of this Essay to present and defend this position, but the idea is that the premise that drives Weinrib's pursuit of a non-instrumental conception of juridical relations is precisely that we must discern immanent rationality in law or we will be left with nihilism. In other words, the accuracy of statements of indeterminacy in law necessitates the project of constructing a non-instrumental understanding of adjudication. Understanding indeterminacy of legal rules does not necessarily truncate the legitimacy of a formalist project like Weinrib's. In fact, it can underscore such project's importance.

39. These theories continue to influence legal scholarship despite the alleged demise of critical legal studies for want of an alternative to nihilism. In fact, we might even go so far as to say that the accuracy of the basic critical legal studies indeterminacy thesis drives the contemporary relevance of formalism and natural law. Put another way, this thesis can be understood as necessitating, for example, appeal to God as a source of legal norms. The more deeply we understand indeterminacy, the more important transcendent sources become.

40. See E-mail from Pierre Schlag to author (Aug. 10, 2007) (on file with

On the one hand, he argues that, for legal scholars, recognizing that “one’s key identities (law and the social) are *ab initio* non-referential . . . requires abandonment of the security of the disciplinary framework and an overhaul of the research agenda.”⁴¹ But at the same time he concedes that, “in law . . . differentiations are not simply intellectual constructs but also in some sense the organization of state and civil society.”⁴² Differentiations central to law are “forcefully sustained by judges, legislators, and administrative officials,”⁴³ and even if they “do not always register fully or faithfully . . . they do register and endure.”⁴⁴ Schlag does not take the more extreme step of stating that distinctions crucial to lawmaking itself are collapsible such that the legitimacy of law itself becomes questionable, leaving us with the deep and difficult question of how to conceive of the state’s capacity to administer violence.⁴⁵

He stays focused on his target—legal scholarship—and says that a problem arises “to the extent that legal thinkers adopt this language of the law as their own.”⁴⁶ The “intuitive sense that the acute differentiations of law [do] register”⁴⁷ for purposes of the administration of law does not permit legal scholars to produce and enforce a disciplinary framework based on these differentiations. The logic of Schlag’s argument about abandonment of legal scholarship in the face of dedifferentiation turns on the old questions of whether and how legal scholarship is relevant to lawmaking.⁴⁸

We are now back where we started, but with a deeper appreciation of my initial questions. I agree that the dedifferentiation problem as Schlag presents it exists. But

author).

41. Schlag, *supra* note 18, at 13.

42. *Id.* at 24.

43. *Id.*

44. *Id.*

45. Schlag may reach this question in other work. The critique here is limited to *Dedifferentiation*.

46. Schlag, *supra* note 18, at 25.

47. *Id.*

48. Schlag himself has challenged elsewhere the relevance of legal scholarship to lawmaking. SCHLAG, LAYING DOWN THE LAW, *supra* note 16.

deciding how to respond to this problem just raises once again the questions that began this Essay. Most approaches to legal scholarship assume some relationship, however tenuous, between scholarship and the evolution of law. Many of even the most theoretical, descriptive critiques imply some directive, some sense that the enhanced understanding of law gained through the critique will assist in thinking about how to use law (or not) in the face of some problem.⁴⁹

It seems that we already produce differentiations in the course of thought (much like we all breathe in the course of living). When I think about this I become concerned primarily with determining what modes of differentiation are right or good. I do not mean to assert, here, that I have the agency and epistemological clarity to control all of the conceptual distinctions that I invoke. Rather, I am speaking about how to make a conscious decision about what to write as a legal scholar. In the context of a decision to pursue a research agenda that will depend *ex ante* on certain distinctions, the collapsibility of these distinctions as a theoretical matter does not stop me in my tracks.

Why? Because fortifying differentiations that enable justificatory theories for law as law operates in the field of pain and death has moral value for all who believe that there is at least some relationship between legal scholarship and law.⁵⁰ After all, legal scholarship can aid in the production of social orders. Legal scholarship can produce justificatory theories of law in which we believe.

In this exercise I am taking dedifferentiation seriously, but rejecting the premise that legal scholars are not entitled to adopt the language of the law as their own. The legal academy generally rejects this premise just as it rejects Fish's theory minimalism. When I do so, I come to a conclusion that is the opposite of Schlag's: the implications of dedifferentiation are, if taken to heart, a windfall for the ways in which legal thinkers pursue established theories and research agendas in law.

The experience of loss of reference presents a paradox that I experience as presenting an ethical question relevant

49. See discussion *infra* Part III on "prosthetic normativity."

50. Again, Schlag challenges this assumption. SCHLAG, LAYING DOWN THE LAW, *supra* note 16.

to the work of legal scholars.⁵¹ The paradox is that distinctions are collapsible, yet we always generate and rely on distinctions—between what is law and what is not, for example—in order to think, argue, administer a civil society, etc. The loss of reference itself is not paradoxical. What is paradoxical is how we can understand the collapsibility of distinctions and yet simultaneously rely on and invoke them.

The ethical question that occurs to me once I consider the collapse of distinctions essential to theories of law is: If we inevitably participate in constructing differentiations in the course of thought, what modes of differentiation are best? It seems that, once we experience loss of reference, we must construct realness and the capacity for reference everywhere in the production of a social order lest this only ever be done for us. One could object that although injecting realness into differentiations is possible, it is a political act.⁵² But from the vantage point of dedifferentiation, there is no way to distinguish a political act from an act of law.⁵³

If we were to accept the more totalizing theories of loss of reference, we might find that there is a dark, compelling reason for maintaining that legal scholarship relates and applies to law. My purpose here is not to establish or defend the truth of totalizing theories of loss of reference. I am not sure that I agree with them myself and in any event they are far more complex than they typically appear in legal scholarship (my own included, of course).

But I do think that if we were to take the intellectual foundations of the dedifferentiation problem seriously, a question arises as to whether and how crises of institutional legitimacy in law affect the professional roles of legal academics. Schlag denounces the disciplinary framework as a worthy referent with which to construct differentiations

51. Derrida articulated this notion that ethical questions follow immanently from loss of reference. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE (Drucilla Cornell et al. eds., 1992); see also Adam Thurschwell, *Specters and Scholars: Derrida and the Tragedy of Political Thought,* in DERRIDA BEFORE THE LAW: DECONSTRUCTION AND LEGAL THEORY (Peter Goodrich et al. eds., forthcoming 2008), available at <http://ssrn.com/abstract=654581>.

52. See E-Mail from Pierre Schlag, *supra* note 40.

53. And, of course, I have no new suggestions on how to do this.

foundational to theories of law.⁵⁴ How does he distinguish the legal academic disciplinary framework⁵⁵ from the institutional frameworks that enable distinctions essential to the administration of civil society? To what other, more worthy referent do the differentiations that “register and endure”⁵⁶ in the administration of law refer? The dedifferentiation problem amplifies the necessity of exercises in differentiation lest the whole enterprise disintegrate and lawmaking itself be left without comprehensible justificatory frameworks.

One might object that law does not need a justificatory framework—that in fact we are better off simply revealing the brute politics and fights over resources that law can mask. It is beyond the scope of this work to defend the need for justificatory theories of law. Rather, I am observing this need and relating it to theories of loss of reference and the desire for legal scholarship to relate on some level to lawmaking.

Now consider the impulse to present progressive conceptions of law despite their infeasibility. We can relate this impulse to a need to produce differentiations that support theories of lawmaking. If we already produce distinctions between the legitimate and the illegitimate in the production of a legal or social order, the explication of a desirable order is important work. My desirable social order may very well be far from the status quo—it may involve radical rules for secured transactions.

But if we consider concepts foundational to law to be non-referential, there is a tension surrounding the impulse to advance utopian law reform proposals. On the one hand, making unrealistic reform proposals can be a way of articulating a desirable social order—of contrasting the legitimate and the illegitimate. On the other hand, the need for legal scholars to maintain some claim of relevance to lawmaking demands recognition of the relationship between the arguments for law reform that we develop and what is possible in the world. I am speculating that this need is actually driven by the crises of legitimacy in law

54. See Schlag, *supra* note 18, at 13.

55. I understand the “disciplinary framework” to mean a template for academic thinking about law in which certain distinctions—between law and art, for example—are unreflectively assumed.

56. Schlag, *supra* note 18, at 24.

itself that so many other thinkers have identified.⁵⁷

If we view the need for most legal scholarship to be relevant on some level to lawmaking as related to loss of reference within law itself then the utopian research agenda poses a challenge. It becomes important to figure out how it might be possible for a law review article to at the same time (i) propose unrealistic reform in the articulation of a desirable social order and (ii) maintain some theoretical relevance to lawmaking, however tenuous. Parts II and III below explore strategies for doing this.

II. A COUNTERINTUITIVE IDEA FOR SECURED TRANSACTIONS LAW

At this point I want to present an example of an infeasible law reform proposal. Again, the primary purpose of this work is not to thoroughly explicate and troubleshoot this proposal, but to think through whether, as a legal scholar, I ought to undertake such a project in the first place. Part III then situates this proposal vis-à-vis loss of external reference and its implications for legal scholarship.

In the past year I have heard a couple of presentations by law professors about non-state actors, corporate responsibility, and the role of transnational corporations. Discussions about transnational corporations and human rights or the environment tend to focus on activities at the level of the corporation and the state's capacity to regulate them.

As someone who writes and teaches about secured lending, I see transnational corporations as debtors or, more likely, parents of debtors. Transnational corporations can make promises to act responsibly, but they are rarely spending their own cash on the projects that yield the results in question. They are borrowing funds from lenders and those lenders typically retain significant control over their debtors' activities through financing covenants to ensure that they get repaid.

The concept of corporate responsibility might have more teeth if it were taken up a level on the financial food chain—i.e., if it extended to parties that finance the

57. See, e.g., BAUDRILLARD, *supra* note 17; KENNEDY, *supra* note 37; Weinrib, *supra* note 38.

activities of corporations. I sometimes wonder if the costs of capital that large corporations seem to require to participate in development projects, combined with the levels of investors that ultimately fund these projects,⁵⁸ fatally complicate efforts to corral corporations themselves into respecting the positions of affected communities and lands.

The law could take corporate responsibility up the financial food chain by redefining the concept of debtor “rights in the collateral” for purposes of UCC section 9-203 in the context of project finance. This could be a global justice activist’s dream UCC revision. It would harness the control that secured creditors have over corporate debtors in order to curb violations of certain labor, environmental or human rights standards.

I am going to explain—schematically—what I have in mind and what I think the major pitfalls and benefits of this reform would be. Keep in mind, though, that this reform is infeasible. My own prior work discusses how both aesthetics of commercial law and creditors’ imagined communities deter consideration of this type of reform.⁵⁹ My own work aside, scholars widely recognize the UCC drafting process as one in which proposed revisions that potentially limit businesses’ access to credit are dead on arrival.⁶⁰

58. In a typical development project, the transnational corporation forms a subsidiary or project company that will take title to all of the assets of the project and borrow funds from the project lenders to acquire and develop the assets. The lenders are looking to the proceeds of the project over time for repayment. The lenders may sell participations in the project loan or the project loan may become part of a portfolio that the lenders themselves borrow against or securitize. In other words, the number of investors can multiply and become more remote from the original project lenders, making the possibility of renegotiation or adjustment in the face of unforeseen problems on the ground more difficult.

59. Hughes *supra* note 4; Hughes, *supra* note 5.

60. See Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 632 (1998) (citing Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 327); Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1374 n.3 (1997); see also Steven L. Harris & Charles W. Mooney, Jr., *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349, 1356-64 (1997); Jeffrey S. Turner, *The Broad Scope of Revised Article 9 is Justified*, 50 CONSUMER FIN. L.Q. REP. 328, 328-29 (1996); William J.

Further, my proposal would require the UCC drafters to dedicate substantial resources to figuring out how to define the circumstances in which security interests would no longer attach under section 9-203; even substantial efforts might yield standards and definitions that create uncertainty surrounding the enforceability of certain security interests. Revisions that consciously create uncertainty are as anathema to the ambitions of UCC Article 9 as are revisions that reduce access to credit.

That said, in the area of project financing, secured lenders have already articulated the “Equator Principles.”⁶¹ These are industry standards for loans that the Equator Principles Financial Institutions (EPFIs) consider to be responsible to make.⁶² Numerous major U.S. and foreign lenders such as Bank of America, ABN AMRO, and Wells Fargo are EPFIs.

In a nutshell, the EPFIs agree (i) to assess the social and environmental impact of projects using standards developed by the International Finance Corporation (IFC) and the World Bank; (ii) to require debtors to have an action plan for continuing compliance with these standards, including a grievance mechanism and mechanisms for consulting with all sectors of affected communities; and (iii) to incorporate into their loan documents covenants linked to compliance.⁶³ I have not as of yet uncovered any reports of instances in which a debtor has breached these covenants, let alone any instance in which, in response to a breach, an EPFI has pursued remedies. In other words, the practical effect of the Equator Principles at this point is unclear. I use them here to illustrate that lenders have contemplated their role vis-à-vis corporate responsibility in the project finance context.⁶⁴

Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 CORNELL L. REV. 1511 (1997).

61. THE “EQUATOR PRINCIPLES”: A FINANCIAL INDUSTRY BENCHMARK FOR DETERMINING, ASSESSING AND MANAGING SOCIAL & ENVIRONMENTAL RISK IN PROJECT FINANCING (July 2006), http://www.equator-principles.com/documents/Equator_Principles.pdf.

62. *Id.* at 1.

63. *Id.* at 2-5.

64. This industry acknowledgment is very exciting. It opens up possibilities for calling upon parties to a range of different types of structured financings to covenant to produce certain results. *See, e.g.*, Heather Hughes, Understanding

One way to think of my idea for UCC section 9-203 is as an augmentation and codification of rules that the project financing industry has already voluntarily adopted. Given current levels of environmental damage, for example, why continue to let powerful industries self-regulate? Of course, this reform would only apply to transactions governed by UCC Article 9, but that is a huge number of transactions.⁶⁵

But again, the fact that many major project lenders have adopted the Equator Principles does not mean that my UCC section 9-203 has real-world traction. There is a huge difference between industry acknowledgment of the need to facilitate responsible projects and industry capacity to accept a commercial code that complicates as a matter of law the enforceability of security interests themselves.

UCC section 9-203 specifies the requirements for creating an enforceable security interest. The basic requirements are that (i) the debtor agrees to grant a security interest; (ii) the creditor extends value; and (iii) the debtor has rights in the collateral.⁶⁶ The requirement that the debtor have rights in the collateral simply ensures that the debtor has the capacity to grant an interest in the collateral. One cannot transfer more than one has.

In theory, this simple property concept could be altered for purposes of this statute to deny a debtor's rights to transfer an interest in personal property that it acquires unethically in the context of project financing. UCC section 9-102 could be revised to include definitions of "project finance"⁶⁷ and "project finance debtor."⁶⁸ Then, UCC section

the Development Potential of Worker Remittance Securitization (Aug. 2007) (unpublished manuscript, on file with author).

65. I focus on Article 9's attachment provision and not its priority rules precisely because enforceability of security interests governed by Article 9 is determined by compliance with section 9-203. Priority, on the other hand, can be the province of the law where collateral is located. Also, the purpose of this proposed reform is not primarily to alter the distributive effects of Article 9 in bankruptcy. It is to harness creditors' monitoring power to avert certain types of debtor behavior during the life of the project.

66. U.C.C. § 9-203 (2000).

67. I will borrow the EPFIs' definition here:

Project finance (PF) is a method of funding in which the lender looks primarily to the revenues generated by a single project, both as the source of repayment and as security for the exposure. This type of financing is usually for large, complex and expensive installations that might include, for example, power plants, chemical processing plants,

9-203 could be revised to say that project finance debtors do not have, within the meaning of the statute, “rights in collateral” acquired while taking actions that result in violation of certain human rights, labor, or environmental standards.

Defining these standards for purposes of the UCC would be a challenge. Definitions of standards in each of the areas of human rights, labor, and environment would need to be developed and referenced in the statute.

A project financier’s security interest would not attach to—meaning it would not extend to or be enforceable against—assets that the debtor acquired during a period of time in which it was also violating the prescribed standards. If security interests did not attach in such circumstances, then project financiers would have a strong incentive to use financing covenants and monitoring to ensure that debtors take care to protect interests of affected communities.⁶⁹ Again, the Equator Principles already require major lenders to include such covenants in their loan documents. The idea here is that the proposed revisions to the attachment provisions of the UCC would force project lenders to monitor compliance with these covenants and increase the likelihood that they exercise remedies upon breach.

mines, transportation infrastructure, environment, and telecommunications infrastructure. Project finance may take the form of financing of the construction of a new capital installation, or refinancing of an existing installation, with or without improvements. In such transactions, the lender is usually paid solely or almost exclusively out of the money generated by the contracts for the facility’s output, such as the electricity sold by a power plant. The borrower is usually an SPE [Special Purpose Entity] that is not permitted to perform any function other than developing, owning, and operating the installation. The consequence is that repayment depends primarily on the project’s cash flow and on the collateral value of the project’s assets.

BANK FOR INT’L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS 49 (2005), <http://www.bis.org/publ/bcbs118.pdf>.

68. A “project finance debtor” would be a debtor that is a party to a project financing.

69. See Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625 (1997), for a discussion of the effects of the monitoring power of secured creditors. See also Douglas G. Baird, *Secured Lending and its Uncertain Future*, 25 CARDOZO L. REV. 1789, 1792-96 (2004); Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 903-04 (1986).

This idea has, of course, potential drawbacks even if it were possible to enact. One might say it allocates the costs of a company's non-compliance to parties without the best information or control over the company's activities. But the idea here is not to shift costs from the company to its lenders. It is to magnify the costs of non-compliance for both debtors and lenders in order to more forcefully require adherence to norms designed to avoid the externalization of costs to third parties. Failing to abide by the prescribed standards would become too costly for a corporation to contemplate since this would jeopardize the corporation's ability to obtain financing.

This type of reform might make secured lending itself too costly to undertake. Companies might turn to borrowing exclusively on an unsecured basis. They might look primarily to devices like negative pledge clauses, in combination with transfer of assets to special purpose vehicles with no other creditors, in order to avoid the increased costs of secured borrowing under this more complex and costly schema.

In any event, challenges this section 9-203 idea would face include defining in a clear way the circumstances in which interests would not attach and overcoming technical complications. The project here is not to take on these challenges, but to try to think through why and how to devote resources to such an idea at all given its real-world infeasibility.

III. SITUATING THIS REFORM PROPOSAL VIS-À-VIS LOSS OF REFERENCE AND ITS IMPLICATIONS FOR LEGAL SCHOLARSHIP

The counterintuitive idea for secured transactions law described in Part II is just one example of a progressive experiment that a professor might think about proposing in the form of a law review article. Given that the reform will not be enacted, what form might such an article take and what might its value be?

To summarize where we've been, theorists have used the concept of loss of reference to show crises of institutional legitimacy in law. Loss of reference in lawmaking itself drives a need for sustainable distinctions and non-instrumental conceptions of juridical relations. Legal scholars participate in the construction of sustainable

differentiations that lawmaking requires. The dedifferentiation problem as Schlag presents it surely exists. But if taken to its logical conclusion and read in light of its own intellectual roots, it actually produces a possible justification for the legal academic disciplinary framework.

On the one hand, the section 9-203 reform proposal described in Part II is infeasible. On the other hand, the proposal itself articulates one view of desirable social and legal order. If we think of concepts foundational to law as non-referential, it seems imperative to engage in the production of desirable legal and social orders. From the vantage point of loss of external reference we must engage in the production of distinctions between the desirable and the undesirable in order to fortify the distinctions on which the law is based.

To do this, we could simply argue for reform in a state of utopian normativity. By utopian normativity, I mean arguments that take the form: we should revise UCC section 9-203 to read like x for reasons a, b, and c. This type of argument seems to say that when the forces of the universe shift and the political tide starts flowing my way, my reform proposal will be all ready. If lightning strikes the UCC drafters and they turn into global justice activists, I've got the statutory experiment for them.

The assertion that the universe should change to accommodate a progressive experiment is a type of statement of desirable social order. Inviting readers to think through a possibility for using the UCC to effectuate corporate responsibility presents and produces distinctions between legitimate and illegitimate approaches to project finance.

But at the same time acknowledging the project of producing differentiations in the construction of a social order is not license to write just anything. Rather, this project leads to heightened sensitivity to professional objectives.

In other words, the problem with simply arguing for the reform of UCC section 9-203 described in Part II is that it is so infeasible that any pretense to relevance to lawmaking seems lost. Again, the universe of projects that I consider "relevant to lawmaking" is not limited to politically feasible normative or prescriptive projects. I include in the "relevant to lawmaking" category all projects oriented in opposition to

Fish's assertion that no applications whatsoever follow from legal academic writing. The vast majority of legal academic projects purport to be relevant to lawmaking in some way. Part of the collective legal academic project is in crafting and maintaining this conceptual relevance—it is linked to our capacity to construct and fortify the distinctions on which law relies as it operates in the field of pain and death. This Essay is, again, about how and why this is so and, given that it is so, whether and why to present totally infeasible reform proposals.

On the one hand, simply arguing for the UCC section 9-203 reform is not good because its infeasibility undermines the capacity to feel relevant to law. On the other hand, the problem of negative externalities of companies' activities and the fact that lenders are a potential source of control over those activities persists; the reform proposal does articulate one view of desirable order.

Another approach might be to present the infeasible reform argument in the form of an "as if" thought experiment. By the "as if" thought experiment, I mean arguments that take the form: if we were serious about equality/fairness/social objective *y*, then UCC section 9-203 should be revised to read like *x*.

In the context of the reform described in Part II, we might say: if we were serious about curbing irresponsible projects that hurt people and the environment, we would refuse to enforce security interests in assets acquired through such projects.

The "if" component acknowledges the infeasibility of the ensuing reform proposal; it thereby brings the project a little closer to earth. But standing alone, this "as if" approach implies a call to get serious about social objective *y*. This makes it very close to utopian normativity. Again, the idea here is that, on the one hand, we need to articulate some desirable legal order, but on the other hand, we need to maintain some conceptual relevance to lawmaking for the sake of the legitimacy of the enterprise—for the sake of protecting the space in which legal scholars might define desirable orders.

There is a way to do this. It is possible to build on the "as if" thought experiment by stating that getting serious about objective *y* will not happen for reasons *p* and *q*. Discussing the prospect of reform *x* in the context of

explication of p and q then becomes a form of dialectical edification—a way of demonstrating how the law does and does not work. This approach can be relevant to lawmaking on some level, however tenuous, and at the same time articulate unrealistic reform ideas.

Again, in the context of the reform described in Part II, we might say: if we were serious about curbing irresponsible projects that hurt people and the environment (social objective y), we would refuse to enforce security interests in assets acquired through such projects (reform x). We will not get serious about social objective y, however, because aesthetics of commercial law (factor p) deter consideration of reform x⁷⁰ and creditors' imagined communities (factor q) make reform x politically unworkable.⁷¹

This is a fine way to construct an academic argument and falls into the realm of the descriptive theory that deepens understanding of law's possibilities. Because this approach focuses on p and q—not just reform x—it is a way to present reform x despite its political infeasibility. This approach does the best job, I think, of navigating the tension between the need to articulate a desirable social order and the need to have some conceptual relevance to lawmaking.

The relevance of this type of argument to law is more tenuous than in more straight-forward normative arguments. The idea is that a theoretical explication of a problem in law through dialectical edification functions to deepen understanding of law. This better understanding of law helps strategic thinking about how to use law (or not) in response to the problem.

We might call this prosthetic normativity. Prosthetics sometimes complete bodies that the dominant culture perceives as lacking something, such as in the case of amputees. Other times, prosthetics enhance or transform bodies that are not otherwise incomplete by dominant aesthetic standards, such as in the cases of trans-gendered persons or of actors. In either case, we can view prosthetics as continuous with the flesh or, conversely, as inconsistent, as an artificial extension of the flesh. From either vantage point they are not quite real, but they have a certain

70. See Hughes, *supra* note 4, at 716-17.

71. See Hughes, *supra* note 5, at 429-31.

utility—they do a job.

The institutional need for most legal scholarship to be on some level relevant to lawmaking yields a preference for certain forms of completeness of argument in legal academia. We are more sophisticated than to think that every article has to offer prescriptions to a problem. However, the majority in legal academia rejects Fish's theory of minimalism. Many are unprepared to adopt the view that no application whatsoever follows from theoretical legal scholarship.

So, even legal scholars who pursue abstract, descriptive theories of law tend to take a kind of normative step. This step is to say that the greater understanding that we gain from the critique at issue could lead to improved lawmaking, though, of course, the task of lawmaking is obviously remote from the methodology of the critique.⁷² This type of normative turn can complete otherwise disturbing arguments. Some accept it as a logical component of the whole and others identify it immediately as foreign. Some don't even notice the seams. Others remain disturbed.

72. Even anti-normativity guru Schlag has been known to engage in this type of normative turn. See Fish, *supra* note 9, at 768-71 (pointing out a normative component in Schlag's work).