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David R. Cleveland
Valparaiso University, david.cleveland@valpo.edu

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CLARION CALL OR STURM UND DRANG: A RESPONSE TO PIERRE SCHLAG'S LECTURE ON THE STATE OF LEGAL SCHOLARSHIP+

DAVID R. CLEVELAND*

I. INTRODUCTION

I agree with Professor Schlag—and his unnamed colleague—that being a law professor is truly one of the last great jobs on earth.[1] It is not quite, as one of my former fellow law firm associates called it, "the loophole in legal life," but it is a grand vocation. Part calling and part privilege, the ability to

+ In March 2010, Nova Southeastern University's Shepard Broad Law Center sponsored an invited lecture by Pierre Schlag, the Byron R. White Professor at the University of Colorado Law School. Professor Schlag, a widely-published author and thinker on topics such as the culture of legal thought, was invited to speak on the state of legal scholarship. His lecture to the faculty was followed by faculty responses by Professors David R. Cleveland, Olympia Duhart, and Anthony Niedwiecki. As a result, the Nova Law faculty enjoyed a lively and enriching discussion on the state of legal scholarship, which *Nova Law Review* had hoped to publish. Professor Schlag has declined to publish his lecture believing his comments were sufficiently covered in his prior article, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009). Professors Cleveland and Duhart have decided to publish their responses, in answer to Professors Schlag's lecture and also to his *Spam Jurisprudence* piece. The *Nova Law Review* is pleased to publish these brief, informal, and lively pieces.

* Associate Professor of Law, Nova Southeastern University, J.D. Georgetown University Law Center, B.A. Western Michigan University.

1. Based on his provocative essay, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. L.J. 803 (2009) [hereinafter *Spam Jurisprudence*], Pierre Schlag was invited to speak at Nova Southeastern University, Shepard Broad Law Center in March 2010. This brief essay is written in response to that speech, the text of which he has declined to publish. The initial essay drew invited responses, and it is not my intention to duplicate or rehash their assessment of *Spam Jurisprudence* but to address the permutation addressed by Pierre Schlag in his March 2010 speech. *See* Daniel R. Ortiz, *Get a Life?*, 97 GEO. L.J. 837 (2009); Richard A. Posner, *The State of Legal Scholarship Today: A Comment on Schlag*, 97 GEO. L.J. 845 (2009); Richard H. Weisberg, *Daniel Arises: Notes (Such as 30 and 31) from the Shlagaground*, 97 GEO. L.J. 857 (2009); Robin West, *A Reply to Pierre*, 97 GEO. L.J. 865 (2009).

think, write, and teach about whatever you want is the dream of many practicing lawyers and the joy of academics in America's legal academy. I also agree with Professor Schlag that legal academics ought to "do something intellectually edifying, politically admirable, or aesthetically enlivening."[2] What I disagree with is his premise that nothing good is happening in legal scholarship, or, as he hyperbolically puts it, "legal scholarship today is dead—totally dead."[3] If only that were true; my reading list would suddenly become manageable, people would stop provoking me with interesting new ideas, and I could tell my grand ideas about the law to my friends and colleagues without all the effort that goes into traditional scholarship. The "problem" is that there is a whole lot happening.

Reading *Spam Jurisprudence* and hearing Professor Schlag's speech bemoaning the death of legal academic scholarship, I envision the legal academy cast in the role of the poor old man in *Monty Python and the Holy Grail* who is being carried off to be buried by medieval undertakers, proclaiming loudly that he's not dead, only to be told, "yes you are," and "shut up, you'll be stone dead in a moment."[4] I assure you, I'm not dead. I've got things I want to say—more things than I have time to commit to writing—and while I'd admit my few articles are *de minimus* in the grand scheme of things, it seems unlikely that I'm the only one with something to say who is trying to say it.[5] In fact, my reading list grossly exceeds my reading time, so there are certainly lots of interesting ideas being put forward. My first major point of disagreement with Professor Schlag then is that things are, indeed, happening—good things, interesting things, provocative things. I encourage everyone to go look[6] and see if there aren't a host of interesting articles on

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2. *Spam Jurisprudence*, *supra* note 1, at 806. It seems a bit stilted to call a fellow academic "Professor Schlag," particularly in so light-hearted an exchange, but alas the respectful and slightly formal Midwesterner in me would not permit me to call him "Pierre" as his colleagues who know him better have done. *See supra* note 2.

3. *Spam Jurisprudence*, *supra* note 2, at 804.

4. MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1975).

5. In fact, I appear to be fixated on a single federal court reform issue. *See generally* David R. Cleveland, *Clear as Mud: How the Uncertain Precedential Status of Unpublished Opinions Muddles Qualified Immunity Determinations*, 65 U. MIAMI L. REV. 45 (2010) [hereinafter Cleveland, *Clear as Mud*]; David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. APP. PRAC. & PROCESS 19 (2010); David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685 (2009) [hereinafter Cleveland, *Draining the Morass*]; David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61 (2009).

6. After you finish reading this piece and sending a note of praise and support to its author, of course.

your topic of choice, ranging from theoretical to empirical to practical.[7] Though I give you this caveat: Toni Morrison has purportedly said, "If there's a book you want to read, but it hasn't been written yet, then you must write it," and the same may be true of legal scholarship.[8] Now, perhaps none of these articles are inventing the next Critical Legal Studies, Critical Race Theory, or Law and Economics model, but it is an unfair and unnecessary burden to put on every legal scholar the obligation to make every article a ground-breaking, paradigm-shifting, or field-creating piece. Rather, legal scholarship can, and regularly does, advance our knowledge and understanding in more modest, and frankly more useful, ways. This is truer than ever given the quantity of publications, breadth of subject matter, increased outlets for publication, and greater access to those publications.

This brings me to my second significant point of disagreement with Professor Schlag. Far from the Dark Age (or is it post-apocalypse?) he perceives us to be in, where our intellectual landscape is a mere echo of times gone by, littered only with the sun-bleached bones of past paradigms and rusted out husks of interpretive mechanisms of the past, I see an active, growing, and vibrant vista—a world where people really do "'have things to say . . . and [are] going to say them.'"[9] Many scholars are out there living the proposed utopia right now—they are writing where they have something to say, knowing it will be published, and they're doing it in a way that is personally and professionally satisfying. The landscape you'll find in legal scholarship is far more hospitable than ever before. This *is* a golden age of legal scholarship. The reasons are many, but perhaps I can artificially cabin them into three categories: freedom, access, and professionalism.

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7. For example, in the narrow area of treatment of unpublished opinions within the federal appellate system, a quick search reveals: Penelope Pether, *Constitutional Solipsism: Toward a Thick Doctrine of Article III Duty; or Why the Federal Circuits' Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955, 958–60 & nn.14–19 (2009) (examining the theoretical limitations of prior analyses on both sides of the unpublished opinion debate); Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001) (detailing an empirical study of the effect of non-publication on case outcomes); Cleveland, *Draining the Morass*, *supra* note 6 (giving a practical assessment the likelihood of high Court review and the best arguments for certiorari).

8. *Toni Morrison Quotes*, GOODREADS.COM, http://www.goodreads.com/author/quotes/3534.Toni_Morrison (last visited Apr. 20, 2011).

9. Spam Jurisprudence, *supra* note 1, at 807.

II. FREEDOM

There exists now an unprecedented freedom in legal scholarship. No one mode of legal thought holds sway. No one outlet of publication controls distribution of ideas. No one audience for legal scholarship must be catered to or appeased. Legal scholarship can be written to serve many different purposes, not just to establish doctrine and theory among scholars, but to improve the law by influencing courts, legislatures, and executives.[10] Legal scholarship can also be written with an eye toward aiding and improving the practicing bar,[11] informing law, and even pre-law, students.[12] It can be aimed at making us better teachers,[13] informing and influencing public and private policy decisions,[14] and, yes, even for humor.[15]

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10. *See* David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 Cornell L. Rev. 9 (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1640681 (empirically demonstrating an increase in citation to law reviews in federal appellate opinions); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 43–44 (1992) (discussing types of "practical legal scholarship").

11. These can include things such as health benefit plans and the American with Disabilities Act. *See generally* Gwen Thayer Handelman, *Qualified Medical Child Support Orders: Recent Developments*, Am. Bar. Ass'n Section of Taxation Meeting Materials (2000); Gwen Thayer Handelman, *Find the Client (with a Little Help from Your Friends in the Federal Courts)*, 26 J. PENSION PLAN & COMPLIANCE, 2000, at 1; Steven Wisotsky, *Sounds and Images of Persuasion: A Primer*, 84 FLA. B. J. 40 (2010).

12. *See generally* LINDA F. HARRISON & DAWN BENNETT-ALEXANDER, THE LEGAL ENVIRONMENT OF BUSINESS, (edition and year); LINDA F. HARRISON, DAWN BENNETT-ALEXANDER & LAURA HARTMAN, BUSINESS LAW (forthcoming 2012); LINDA F. HARRISON, DAWN BENNETT-ALEXANDER & LAURA HARTMAN, BUSINESS LAW "M" (forthcoming 2012).

13. *See generally* Debra Moss Curtis & David M. Moss, *Curriculum Mapping: Bringing Evidence-Based Frameworks to Legal Education*, 34 NOVA L. REV. 473 (2010); Debra Moss Curtis, *Teaching Law Office Management: Why Law Students Need to Know the Business of Being a Lawyer*, 71 ALB. L. REV. 201 (2008); Debra Moss Curtis & Judith R. Karp, *In a Case, on the Screen, Do They Remember What They've Seen? Critical Electronic Reading in the Law School Classroom*, 30 HAMLINE L. REV. 247 (2007); Debra Moss Curtis, *Everything I Wanted to Know About Teaching Law School I learned From Being a Kindergarten Teacher: Ethics in the Law School Classroom*, 2006 BYU EDUC. & L.J. 455 (2006); Debra Moss Curtis, *You've Got Rhythm: Curriculum Planning and Teaching Rhythm at Work in the Legal Writing Classroom*, 21 TOURO L. REV. 465 (2005); Debra Moss Curtis & Judith F. Karp, *"In a Case, in a Book, They Will Not Take a Second Look!" Critical Reading in the Legal Writing Classroom*, 41 WILLAMETTE L. REV. 293 (2005); Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273 (2010).

14. Jessica B. Wilkinson & Robert Bendick, *The Next Generation of Mitigation: Advancing Conservation Through Landscape-Level Mitigation Planning*, 40 Envtl. L. Rep. News & Analysis 10023 (2010); Joel A. Mintz, *Some Thoughts on the Merits of Pragmatism as a Guide to Environmental Protection*, 31 B.C. Envtl. Aff. L. Rev. 1 (2004).

But there is great freedom not only in why we write but in what we write. The current legal academy is perhaps more welcoming than ever of works that go beyond the traditional model of proposition of doctrine and theory and the recitation of history or arm-chair sociology. Legal scholarship today openly embraces empirical work on both the legal system itself and on the world in which it operates.[16] It also encourages both interstate and international comparative law as well as inquiries into professional duties and ethics.[17] As skills training and preparation for law practice becomes increasingly important to the profession, legal scholarship has expanded to include works on pedagogy, cognition and metacognition, integration of subjects across the curriculum, and related fields aimed at improving teaching of law students. There is even a body of scholarship aimed at demystifying the process of legal education for educators and law students alike.[18]

This overwhelming freedom in why we write and what we write is matched also with a great deal of liberty in how we write. Both the written form that we give our thoughts and the process by which we get them there are less constrained than ever before. In regard to form, it is safe to say that legal scholarship takes more varied forms now than ever before. There is

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15. *See* Robert M. Jarvis, *If Law Professors Had to Turn in Time Sheets*, 86 CALIF. L. REV. 613 (1998); Robert M. Jarvis, *W(h)ine and Roses*, 54 J. LEGAL EDUC. 465 (2004).

16. *See* RICHARD A. POSNER, OVERCOMING LAW 209–10 (1995) ("In any sensible division of responsibilities among branches of the legal profession, the task of conducting detailed empirical inquires into the presuppositions of legal doctrines would be assigned to the law schools. Too many constitutional scholars conceive their role as that of shadow judges, writing, in the guise of articles, alternative judicial opinions in Supreme Court cases."); Debra Moss Curtis, *Licensing and Discipline of Fiscal Professionals in the State of Florida: Attorneys, Certified Public Accountants, and Real Estate Professionals*, 29 NOVA L. REV. 339, 340 (2005); Debra Moss Curtis & Billie Jo Kaufman, *A Public View of Attorney Discipline in Florida: Statistics, Commentary, and Analysis of Disciplinary Actions Against Licensed Attorneys in the State of Florida from 1988–2002*, 28 NOVA L. REV. 669, 669 (2004).

17. GWEN THAYER HANDELMAN, RESEARCHING ETHICAL ISSUES, THE COMMUNITY TAX LAW REPORT (Spring/Summer 2004); Gwen Thayer Handelman, *Ethics, Privilege, and Related Issues in Employee Benefits Practice*, J. Deferred Compensation, Spring 2004, at 1, *reprinted in* Corporate Counsel's Guide to ERISA (Aug. 2004) *and* ALI-ABA, Fundamentals of Employee Benefits Law (Feb. 2004); Gwen Thayer Handelman, *Ethics*, Am. Bar Ass'n Section of Labor and Emp't Law, Emp. Benefits Law (ABA/BNA 2d. ed. 2000).

18. *See generally* McKay Cunningham, *Freshman Professor: The First Year; The First Semester; The First Day*, 3 PHOENIX L. REV. 389 (2010); Gerald F. Hess & Sophie M. Sparrow, *What Helps Law Professors Develop as Teachers?—An Empirical Study*, 14 WIDENER L. REV. 149 (2008); Gerald F. Hess, *Improving Teaching and Learning in Law School: Faculty Development Research, Principles, and Programs*, 12 WIDENER L. REV. 443 (2006); Gerald F. Hess, *The Legal Educator's Guide to Periodicals on Teaching and Learning*, 67 UMKC L. REV. 367 (1998); William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463 (1995); JOURNAL OF ASSOCIATION OF LEGAL WRITING DIRECTORS (2007), http://www.alwd.org/lc&r.html.

still plenty of legal scholarship in the form of treatises distilling the mass of case law into coherent rules and doctrinal law review articles arguing for a legal result that fits the author's descriptive or normative view.[19] But the current landscape, lush and green with possibility, extends far beyond the traditional confines. There is an expansion of empirical scholarship on both the law's operations and its effects. There is an increase in interdisciplinary work and collaboration. There is greater interest than ever in shorter, more immediate, and more interactive scholarly commentary on current legal events.

In addition, there are more numerous and more interesting outlets for legal scholarship than ever before. Not only are there law reviews, but subject matter journals, journals published in other countries, online law journals, and even online versions and inter-issue updates to prestigious law reviews. If one so desires, an author can circumvent the law review scene entirely and self-publish on the Social Science Research Network (SSRN) or BePress's online catalog. Those authors who want to write shorter written pieces will find law reviews more accepting than ever of shorter pieces and widely read blogs eager for interesting content of the shorter variety.

How we write has also become considerably less constrained. While most scholars that I know still collect a box, pile, or file of research materials, the laptop computer and widely available internet access have made the world our office. With adequate preparation, one can easily research and write from anywhere. To the extent that one's work involves the input of others, modern communications have made it easy to share entire works with others instantly and over great distances.

Legal scholars in America seem incredibly, unprecedentedly free to write about what they want in the way that they want from wherever they want. In addition, access to both the sources of legal scholarship and to the legal scholarship itself seems to be far greater than ever before.

III. ACCESS

This great freedom is matched by an unprecedented access to legal and non-legal sources, colleagues, and, eventually, each scholar's work. What used to be available only by visits to the physical home of the document are increasingly available online. Not only through major information services

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19. The author has written such an article but denies having been oppressed by the dominant paradigm into doing so. *See, e.g.*, Cleveland, *Clear as Mud*, *supra* note 6 (arguing for uniform use of unpublished opinions in qualified immunity analyses, preferably by according all such opinions full precedential value).

like Westlaw and Lexis, but also up free services like GPO Access.gov, Thomas, Google Scholar, and many others. Access to source materials is coupled with access to the ideas and thoughts of colleagues, even pre- or mid-drafting. First, the previously mentioned expansion of empirical and interdisciplinary work has opened the doors of the legal academy to greater collaboration with a wide variety of other professionals and academics in other disciplines. Whether the nature of the relationship is idea development, co-authorship, or review of your own written work, the body of legal scholarship is enriched and certainly enlivened by this cross-pollination. Second, technological advancements in communications such as email, internet document repositories, blogs, webpages, and the like, make instantaneous and detailed collaboration (and disputes) easier than ever before. Whether it's running your work past other scholars you respect, or reading the thoughts of another scholar with whom you vehemently disagree that plants the seed for your scholarship in the first place, modern technology facilitates the scholarly dialog in way that used to be more time consuming and less common.

Finally, if you want your work to be read, access to published works has never been better. While electronic publication of law reviews is not new, it is worth noting the field-leveling effect this has. First, access is no longer limited to the top few law reviews that a given school, law firm, or court can afford. All the law reviews and journals are present in the commercial database for the same fixed fee. Second, articles in these databases are commonly located via word searches, which pull up all relevant articles, not just those in the top law reviews. Even within the traditional law review publication structure, this results in a significant increase in access to works not placed in a top law review. Even article authors who lack the proxies for qualities often used by top law reviews in selecting works can still expect their works to be read by interested parties given the database system. Outside the traditional law review form of publication lies a wide variety of other publication venues. These venues allow for publication of scholarship in forms both brief and long. Examples include, SSRN, BePress, AALS Section Newsletters, legal webpages, and legal blogs. These venues provide not only outlets for scholarly thoughts but access by a wide audience to those thoughts. What is even more exciting is the immediacy and ease with which these publication venues can be used and the way that they encourage feedback from readers.

IV. PROFESSIONALISM

While this added freedom and access is sufficient to convince me that it's a good time to be reading and writing legal scholarship, there is one other issue that makes this a good time to be legal scholar. Professionalism of

legal scholarship is a beneficial movement, not an occurrence to be bemoaned. The legal academy has clearly resolved the scholarship vs. teaching debate in favor of requiring both. This puts added pressure on law professors, pressures that are lessened by formalized scholarship opportunities, mentoring, and clear, but flexible and inclusive, standards for publication expectations. Perhaps my experience is not representative, but I have found these forces to increase my ability to say what I want to say rather than, as Professor Schlag suggests, indoctrinating or limiting me to the reigning legal hegemony.[20] The proliferation of scholarship presentation opportunities, both targeted to junior faculty and otherwise, provide forums to express ideas not just in the written medium but conversationally. They allow an author to gauge the reactions of their audience and not only learn of specific criticisms or skepticism, but to address it on the spot. I cannot say enough about the benefit of the mentorship I have received from colleagues both here at Nova and elsewhere. To say that those folks have merely been perpetuating an oppressive or repressive entrenched paradigm is insulting to those efforts.

V. CONCLUSION

In sum, conditions seem right for a greater breadth and depth of legal scholarship than ever before. The landscape of legal scholarship seems to me anything but dead. To me, it appears wide-open, vibrant, and full of possibility.

Perhaps I am not the audience Professor Schlag is writing to, for, or about. I am not someone who has been around the academy a long time, which may disqualify me in his eyes to present a response. First, as a newer member of the academy, it may well be that I am writing merely to "make my bones" and will one day go quietly into the night of legal scholarship, never to be heard from again. Second, as a newer member of the academy, it may also be the case that nothing interesting is happening, but I just think that everything is interesting because it's all new to me. But even if both of these are true, and I am not Professor Shlag's target audience, I would still implore him to speak more plainly to those who are. His professed purpose: to provoke some sense that we legal thinkers can "turn [our] backs on the dominant paradigm" of legal scholarship and try to "do something intellectually edifying, politically admirable, or aesthetically enlivening," needs elucidation.[21] What paradigm of legal scholarship are we shedding when the present paradigm is unfettered freedom, access, and support? What does this

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20. *Spam Jurisprudence*, *supra* note 1, at 806–07.
21. *Id.* at 806.

avant-garde intellectually, politically, and esthetically advanced work look like? What benefit is obtained by producing more of it?

I am certainly not willing to say that this is *the* Golden Age or that legal scholarship has reached a pinnacle, but it seems clear to me to we are at a time in legal scholarship with great possibilities. Write about what you want, publish in your choice of formats, participate in a culture that encourages scholarship, both formally and informally. What is perhaps most interesting is that on his ultimate point,[22] Professor Schlag and I agree: We should probe and examine and discuss those things about the law that trouble or fail to make sense to us and we should all think and write and explore.

Professor Schlag, inspired by the 1966 film *Endless Summer*, would tell putative scholars: "'You guys reeeeeaaaaaaaally missed it. You should have been here yesterday.'"[23] In contrast, the voice I hear and the message I would give you is that of Mickey from the 1976 film Rocky. I suggest to you that this is your moment and you're going to be great: "You're gonna eat lightnin' and you're gonna crap thunder!"[24]

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22. *Id.* at 835.
23. *Id.* at 804; *see also* THE ENDLESS SUMMER (Bruce Brown Films 1996).
24. ROCKY (Chartoff-Winkler Prods. & United Artists 1976).