Reflections on Rothko and Writing: A Response to Pierre Schlag’s Lecture on the State of Legal Scholarship

Olympia Duhart*
Reflections on Rothko and Writing: A Response to Pierre Schlag’s Lecture on the State of Legal Scholarship

Olympia Duhart*

I. INTRODUCTION ................................................................. 513
II. RESPONSE ................................................................................... 514
III. CONCLUSION .............................................................................. 522
IV. APPENDIX .................................................................................. 523

1. INTRODUCTION

William Shakespeare wrote, “commit the oldest sins the newest kind of ways.” I believe that this adage is an appropriate way to frame the response that I will offer today. Shakespeare urges us to reinvigorate familiar terrain with a personal touch. To transform it with our own innovation. And I think it is highly applicable to the current state of legal scholarship. Professor Schlag is right; in many ways legal scholarship has become a bit of an artifact, it has become an old sin, and for a lot of us it can be exhaustive. More
than that, it can be irrelevant, it can be derivative, it can be reductive. But I
am asserting that with fresh eyes, minds, and hands, we can bring it back
from the brink and, in keeping with the “death” metaphor offered by Profes-
sor Schlag, we can perform a miracle and bring it back to life. Many of us
have already been successful at resurrection.

II. RESPONSE

I agree with Professor David R. Cleveland that legal scholarship is
alive, and the technological advances available to legal scholars in the twen-
ty-first century can improve our writing.3 We can reach more people, and we
can talk about more things. There is a very expansive definition about what
constitutes legal scholarship. Today it includes pedagogy, practice, interdis-
ципiplinary work, and entertainment.4 Therefore, writing can be more relevant,
it can be more accessible, it can be more responsive and exciting. It can be
more alive and necessarily less “dead.”

In his lecture, Professor Anthony S. Niedwiecki addressed the issue of
entrenched paradigms of legal scholarship and how we perpetuate those pa-
radigms.5 I will, in full disclosure, announce that I particularly contribute to
the problem because I am an LSV6 professor and a seminar instructor who

807–08. He also argues that “law review articles are causally and constitutively pretty far
removed from any real stakes, save perhaps for the career of the author and a few other
people.” Id. at 813. Professor Schlag’s criticism has been met with several responders, who
have penned their own comments. See, e.g., 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); Robin West, A Reply to Pierre, 97 Geo. L.J. 865 (2009). My own re-
ponse published here represents the lecture I gave at Professor Schlag’s Nova appearance as
one of three faculty “responders.” My colleagues, Professor David R. Cleveland, Associate
Professor of Law at Nova Southeastern University Shepard Broad Law Center, and Professor
Anthony S. Niedwiecki, formerly at Nova Southeastern University Shepard Broad Law Center
and now Director of the Lawyering Skills Program at The John Marshall Law School, were
also responders at the forum.

3. David R. Cleveland, Clarion Call or Sturm Und Drang: A Response to Pierre
Schlag’s Lecture on the State of Legal Scholarship, 35 Nov. L. Rev. 503 (2011). Professor
Cleveland’s essay response notes that modern technological advances in communication allow
us to write from anywhere, collaborate with others over great distances, and “circumvent the
law review scene entirely” by publishing on “the Social Science Research Network (SSRN)”.
Id. at 508.

4. Id. at 508. (“It can be aimed at making us better teachers, informing and influencing
public and private policy decisions, and, yes, even for humor.”).

5. Anthony S. Niedwiecki, Professor, Nova Southeastern Univ. Shepard Broad Law Ctr., Lecture at Nova Southeastern University Shepard Broad Law Center (Mar. 12, 2010).

6. “LSV” refers to Lawyering Skills & Values, the first year, two-semester writing,
research, and skills program for law students at Nova Southeastern University Shepard Broad

http://nsuworks.nova.edu/nlr/vol35/iss2/9

2
teaches students to use the CREAC formula. I enjoy highly routinized writing instruction for the benefit of others, but primarily, I think, for myself. So, I share blame in this, but I want to defend the structure I teach as an efficient vehicle and point out that it is just really one of the methods you can employ to make your writing clear and understandable.7

In talking about our creative format, as always, exceptionality is in the eye of the beholder. Professor Schlag challenged us to become less traditional regarding the law review format, which in many ways imitates a judicial opinion or brief.8 He warns that we should be less dependent on the legalist form.9 However, when Professor Richard Delgado did just that in The Rodrigo Chronicles,10 he was criticized by some of his colleagues for exploiting his status as a minority and being paid lots of money to write “childish stories” about minority groups.11

Law Center. This course is an expansion of the traditional Legal Research and Writing class offered at most American law schools.

7. Of course I am not alone in my reliance and defense of the CREAC method for teaching students how to draft legal memoranda. Other writing experts advance the CREAC formula for legal memos. See generally Richard K. Neumann, Jr. & Sheila Simon, Legal Writing (2008). Of course there are countless ways to organize an effective legal memo. Adherence to the CREAC method in my writing courses helps me give the students a “default” organizational structure so that I can focus their attention on higher level skills such as analysis and synthesis. The CREAC structure also has an intuitive appeal for identifying a legal issue, stating the rule, applying the rule, and supporting a predictive or persuasive conclusion; in many ways, this structure mimics the way we solve problems outside of the law school classroom. Such elements have proven quite helpful to the first year writing student. See 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, 309–310 (2010). As a former newspaper reporter, I confess that I was initially resistant to the formulaic writing style forced on most first year students, but after years of practice I am convinced it works—at least in this little arena.

8. Schlag, supra note 2, at 813. More to the point, Professor Schlag criticizes the law review format for being an “imitation of the legal brief and the judicial opinion.” Id.

9. See id.

10. See generally Richard Delgado, Rodrigo Chronicles: Conversations About America and Race (1995). In a ground-breaking departure from the traditional law review paradigm, Professor Delgado makes use of the narrative technique and employs the fictional character “Rodrigo”—the son of an African-American serviceman and an Italian mother—to engage with a fictional professor of color and have a series of discussions on law; the topics have included law and economics, civic republicanism, essentialism and anti-essentialism, and black crime, among other things. See id.; see also Richard Delgado, Rodrigo’s Final Chronicle: Cultural Power, Law Reviews, and Attack on Narrative Jurisprudence, 68 S. CAL. L. REV. 545, 546 n.3 (1995). The esteemed Professor Derrick Bell has also, of course, demonstrated the strength of legal storytelling. See generally Derrick Bell, The Power of Narrative, 23 LEGAL STUD. F. 315 (1999).

So do you fall into the paradigm or do you try something different? Basically, we are getting stuck with the battle of the experts. So the question still remains, what makes scholarship exceptional? How can we pull it out of mediocrity? Is it merely innovation—either substantively or in format? (You can debate about that all day.) Is it the controversy that it engenders? Is it compliance with normative expectations? Is it influence over the law? Is it the mentor that you are able to convince to review your article and who was conspicuously thanked in that little cover footnote with hopes of securing a higher placement? Is it how frequently you are cited? Is it the quality or the ranking of the law review that decides to publish you? Or is it something else? Is it intellectual rigor? Is it the aesthetic value?

Let's consider this picture\textsuperscript{12} from Mark Rothko,\textsuperscript{13} and if you could take a second to look at it I think that this picture from Rothko can give us a little guidance here. Just take a second and figure out what you truly think of this picture. Perhaps, like me, you believe this is an exceptional image and you feel transported by its simplicity.\textsuperscript{14} It looks vast, overwhelming, lonely, and

\begin{quote}
ASSAULT ON TRUTH IN AMERICAN LAW (1997)) ("[C]ritical race theorists teach by example that the role of a member of a minority group is to be paid a comfortable professional salary to write childish stories about how awful it is to be a member of such a group."). See generally Daniel A. Farber & Suzanna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807, 808–09 (1993) (critiquing the value of legal storytelling as legal scholarship). In their essay, Professors Farber and Sherry recognize the impact of narrative among members of minority groups, but challenge the status of such narrative as scholarship:

One frequent claim on behalf of storytelling is that stories build solidarity among the members of an oppressed group, thereby providing psychological support and strengthening community. We have no reason to question these effects, or to dismiss them as negligible. Nevertheless, we do not believe that these effects in themselves are sufficient to validate the stories as scholarship.


12. \textit{See} sample work in Appendix, \textit{infra} page 525 and accompanying notes.


14. The balance, texture and tonality of Rothko’s work cement his exceptionality:

The artist invented his own rules as his creations emerged from within him. The combination of red and yellow generally produces orange, but when Rothko combined these two colors they
beautiful. Or maybe you are thinking “my kid can do that, it’s just a bunch of rectangles in a square.” 5

Without a doubt, there is a real impossibility in ever trying to quantify quality. We will never all agree on this painting, but the value still remains undisturbed even if we don’t reach a consensus. This is true whether we are trying to evaluate the quality of writing 16 or Rothko. This correlates with the message we heard today from Professor Schlag about Constitutional interpretation: Essentially it is entirely dependent on our preconscious conceptions of the Constitution. 7 This is a message I have been trying to relay all semester to my first year Constitutional Law students: Constitutional interpretation is nothing new—see McCulloch v. Maryland 8—but our own perceptions, experiences, and judgments can make it so.

There is a point where I respectfully disagree with our guest today. Specifically, I dispute Professor Schlag’s assertions that our articles are didn’t necessarily lead to orange as we know it. Instead, his colors—and therefore, his paintings—have their own emotion, sense of mystery, and meaning. Each of Rothko’s works is larger than the sum of its parts.

OTTMAN, supra note 13, at 105; see also DIANE WALDMAN, MARK ROTHKO 1903–1970: A RETROSPECTIVE 60 (Carol Fuerstein ed., 1978) (recognizing the effective use of “[s]patial illusionism” in Rothko’s work).

15. “Rothko had, and continues to have, his share of adverse criticism.” Rachel Barnes, Divine Art, Dark Souls, THE GUARDIAN (London), Jan. 27, 1993, at 5. Furthermore, I would not assert that my personal appreciation of Rothko’s work, nor his historical status among preeminent artists would place his work above criticism. Another writer adds: “Mark Rothko is awash in such contrast, contradiction and confusion.” Jonathan Mandell, Being and Nothingness/Mark Rothko’s Reputation Is Built on Work That’s at Once Quite Something and ‘Very Close to Nothing,’ NEWSDAY, Sept. 22, 1998, at B6. The characterization merely makes my point that both art and writing are what you make them or see them to be. Indeed, others with much more experience and expertise in assessing art have been dismissive of Rothko’s work. Former New York Times critic Edward Alden Jewell, for instance, deemed Rothko’s work “obscure,” and said the artist’s creations left him completely “befuddled.” 19 Eva Hogan, Real Red: Art Critics and Mark Duel, Broadway, http://www.broadway.tv/broadway-features-reviews/real_red (last visited Apr. 20, 2011).

16. Back to writing, the attempt to evaluate or quantify legal scholarship is nothing new. See, e.g., Philip C. Kissam, The Evaluation of Legal Scholarship, 63 WASH. L. REV. 221, 221 (1988) (“Researchers, readers, academic committees, law school deans, research agencies, and editors of publications frequently evaluate works of legal scholarship.”).

17. See comments of Professor Pierre Schlag, Lecture at Nova Southeastern University Shepard Broad Law Center Symposium (Mar. 12, 2010) (unpublished manuscript on file with author). Professor Schlag addressed the inherent difficulty of Constitutional interpretation:

What I got out of this is the recognition that the antagonists in the interpretation debates are not talking about the same thing. Their disputes are not about how to interpret the Constitution, but rather a much more fundamental and interesting dispute about what it is. For some, it is a unitary text, for others it is a structured charter, for others it is a political event, for some an originary source of meaning, for others a bridge to the past and so on.

Id.

"pretty far removed from any real stakes, save perhaps for the career of the author and a few other people."  
Here I'm going to rely on another quote, "if you miss your mark aim wider" and at this point you should consider a bull's-eye. Very narrowly, I think we sometimes measure the success of our scholarship by looking for that little circle in the middle of the bull's-eye and I think we have to consider the whole target and look beyond the bull's-eye to measure the value of our writing.

Our scholarship does matter to policy makers. We have colleagues in the room who have influenced policy makers both in Florida and in other states about the legitimacy and the need to preserve DNA evidence to protect innocent people. We have colleagues who have influenced Congress over Forestry measures; colleagues who have helped direct the path of the Environmental Protection Agency. So, there is a very direct link between what we are writing and the influence we have.

19. Schlag, supra note 2, at 813.
20. The quote is inspired by Henry David Thoreau's "In the long run, men hit only what they aim at. Therefore, though they should fail immediately, they had better aim at something high."  
23. See, e.g., JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES (1995). Professor Mintz continues to publish numerous law review articles and book chapters that contribute significantly to the environmental law field. "His journal articles have repeatedly been considered to be among the 30 best articles of the year in the environmental law field by peer reviewers."  
Id.
24. In myriad ways, colleagues have used their law review articles as a tool for social justice work. Recently, a colleague highlighted defects in the criminal justice system. See generally Heather Baxter, Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis, 2010 MICH. ST. L. REV. 341 (2010) (discussing how attorneys who represent indigent criminal defendants are not getting the proper funding and, as a result, citizens are being deprived of their Sixth Amendment Right to Counsel). Others have used their law review platform to advance quality of life for people wading through the civil litigation process on personal matters. See generally Elena Langan, "We Can Work It Out": Using Cooperative Mediation—a Blend of Collaborative Law and Traditional Mediation—to Resolve Divorce Disputes, 30 REV. LITIG. 245 (2011) (suggesting that a blended ADR method can be used to resolve high-conflict divorce cases extra-judicially as an alternative that allows
I want to point out that there really isn’t necessarily a linear path. Sometimes, it goes back and forth. Therefore, if we examine the bull’s-eye, our legal scholarship can have a very wide-reaching impact and my hope is that it does stretch beyond the Capitol and the courtroom. I’d like to think that some members of the legal academy actually wrote about something they didn’t understand and they were successful for it.

Here are a few examples I want you to consider: Professor Anne Enquist didn’t understand why her first year legal research and writing students did not know how to write. To help introduce them to the new world of writing at law school, she had to unpack for them how undergraduate writing is so radically different from legal writing, and she did so in an article. Professor Enquist contrasted this practice with the goal in most legal writing “to make complex things seem simple.” In short, she didn’t understand the dilemma she faced as she tried to help new law students make the transition into legal research and writing and she wrote an article about it.

Professors Cheryl Harris and Devon Carbado didn’t understand why black Hurricane Katrina survivors were termed looters and not treated fairly by the media following the storm; they wrote about it. They argued that Katrina provided insight into how social life is interpreted through various frames (both literally and figuratively). They wrote: “As a result of racial frames, black people are both visible (as criminals) and invisible (as victims).”

Professor Ediberto Roman and Christopher Carbot didn’t understand why there were so few Latino and Latina tenure-track faculty members at lawyers to comply with their ethical obligation of providing zealous representation). I maintain that both types of scholarship are legitimate, worthwhile, and important contributions both to the legal academy and to society.

25. Anne Enquist, Talking to Students About the Differences Between Undergraduate Writing and Legal Writing, 13 PERSP. 104 (2005). Professor Enquist makes great uses the epistle form in this piece and offers her advice in the form of a “letter” to new law students. I thank my colleague Professor Camille Lamar for suggesting that I include this excellent article as mandatory day-one reading for my first semester LSV students.

26. Id.

27. Id.

28. Id.

29. See Cheryl I. Harris & Devon W. Carbado, Loot or Find: Fact or Frame?, in AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA 87 (David Dante Troutt ed., 2006).

30. Id. at 103.

31. Id.
American law schools and they wrote an article about it. They used their article as a vehicle to raise the sometimes delicate issue of diversity and to enable other colleagues to do the same thing at their own schools. Specifically, Professor Roman and Carbot addressed the abysmal figures of Latino/Latina law professors, analyzed data measuring credentials and placement, and laid out a case for the benefits of diversity in the academy.

Professor Francisco Valdes didn’t understand why hierarchies are so difficult to overcome for “outsiders” and he wrote about it. He examined the culture wars, backlash jurisprudence and social retrenchment as a means of understanding the “jurisprudential follow-up” to “social and legal antidiscrimination legacies.”

Professors Keith Aoki and Kevin Johnson did not understand why, in their assessment, LatCrit did not focus more on “quality control” in its scholarship symposia. The two issued some tough love about LatCrit scholarship. Essentially, they argued that there wasn’t enough “Crit” in LatCrit and they wrote a law review article about it. And in response, of course, came a retort. Professors Valdes and Margaret Montoya didn’t understand why LatCrit’s scholarship project that reflected the “democratic” model of knowledge production wasn’t being recognized as another manifestation of its anti-subordination mission. They wrote an article about it.

32. Ediberto Roman & Christopher B. Carbot, Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?, 83 IND. L.J. 1235 (2008). The article built on the work of Professor Michael Olivas, who worked with the Hispanic National Bar Association, to produce the “List” of the top U.S. law schools located in high Latino/Latina area but had no Latino/Latina professors on faculty. Id. at 1238; see also Michael A. Olivas, The Education of Latino Lawyers: An Essay on Crop Cultivation, 14 CHICANO-LATINO L. REV 117 (1994).

33. Roman & Carbot, supra note 32, at 1238.

34. Id. at 1241. “Increasing Latina professor representation also stands to enrich the academic and scholarly exchange of ideas between colleagues, and to facilitate a more diverse learning experience for students.” Id.


36. Id.


38. Id. at 1159 (“Ultimately, we conclude that LatCrit has been relatively successful at establishing a community and at institution-building, but less successful with respect to the production of high quality scholarship.”).

39. See id.

40. See Margaret E. Montoya & Francisco Valdes, “Latinas/os” and The Politics of Knowledge Production: LatCrit Scholarship and Academic Activism as Social Justice Action, 83 IND. L.J. 1197, 1205 (2008). In response to the criticism of LatCrit scholarship in Profes-
article, Professors Valdes and Montoya vigorously defended the LatCrit experiment as a conscious avoidance of the re-inscription of hierarchy found in some vanguardist models.\footnote{See id.}

Professor Doug Colbert didn't understand why we as law professors were not doing a better job of training young lawyers to honor their charge to serve the public good, and he wrote about it.\footnote{Id. at 1229.} Professor Colbert called for law professors to take seriously the charge of the Preamble of the ABA's Model Rules of Professional Conduct to enhance every person's access to a lawyer.\footnote{See Colbert, supra note 43, at 33-34.} He challenges law professors to train a generation of lawyers who will "embrace its duty to serve when entering the profession."\footnote{Id. at 7.}

The list could go on and on, but this is as good a starting place as any for us to examine the times and life of legal scholarship. And for more traditional authority here, you can always pick up a court opinion—clearly something that does have an impact on real, living people. At least one recent empirical study challenges the "conventional wisdom" that legal scholarship has lost its relevance to courts.\footnote{See David L. Schwartz & Lee Petherbridge, The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study, 96 CORNELL L. REV (forthcoming 2011) (on file with Nova Law Review).} Over the past two decades, there has been a "marked increase in the frequency of citation to legal scholarship in the reported opinions of the circuit courts of appeals."\footnote{Id. (manuscript at 1). The study tracked trends in the citation of legal scholarship by United States circuit courts of appeals over the past 59 years. Id. A review of figures indicated that legal scholarship has become increasingly cited by circuit courts.}

\begin{itemize}
  \item Professors Aoki and Johnson's article, Professors Montoya and Valdes asserted the "lump-sum" treatment of entire body of published works was "intellectually irresponsible." \textit{Id.} at 1203.
  \item \textit{See id.}
  \item \textit{Id.} at 1229. Professors Valdes and Montoya argued that the LatCrit scholarship model fostered social justice action and change:
    \begin{quote}
      \[This proactive engagement of difference in multiple ways across multiple axes of identification produces not only knowledge but also solidarity in the service of social justice action. These multiple forms and levels of engagement tend to cultivate the openness, understanding, and motivation necessary for antisubordination collaboration across multiple categories of identity—including across intra-"Latina/o" axes of difference; this attention to difference and diversity helps to set the stage for critical coalitions that stand on shared and enduring principles rather than temporarily converging interests. In our experience, the act and process of collaboration over time deepens levels of mutual understanding and trust that progressively enable greater intellectual and discursive risks, which oftentimes yield important epiphanies, and create bonds of mutual respect and engagement that can only enrich any kind of knowledge production activity both in the short and long term.\]
    \end{quote}
    \textit{Id.} at 1227-28.
  \item \textit{See generally} Douglas L. Colbert, \textit{It's Not Funny: Creating a Professional Culture of Pro Bono Commitment, in Vulnerable Populations and Transformative Law Teaching: A Critical Reader} 31 (Soc'y of Am. Law Teachers & Golden Gate Univ. Sch. of Law eds., 2011).
  \item \textit{See Colbert, supra note 43, at 33-34.}
  \item \textit{Id.} at 7.
  \item \textit{Id.} (manuscript at 1). The study tracked trends in the citation of legal scholarship by United States circuit courts of appeals over the past 59 years. \textit{Id.} A review of figures indicated that legal scholarship has become increasingly cited by circuit courts.
\end{itemize}
III. CONCLUSION

So we are going to aim wider and look beyond the bull’s-eye and hope that our scholarship is no longer limited in its ability to influence judges and courts of law? If we do this in a wider way we can reach the Courts, the Capitol, the students who read it, the colleagues who disagree with it, the researchers who review it, the committees who vet it, and some of our friends who we pull in to proof-read it for us.

All of these continued efforts will expand the universe of the people who can accept the challenge and press hard on those aspects of the law that don’t make sense to us. Such efforts will help us perform a few modern-day miracles and breathe new life into what has been called a dying breed. After all, these are the same people who are going to one day become policy makers, judges, attorneys, and law professors. And despite Professor Schlag’s dire pronouncements, these people will hopefully go out, change the world and maybe even one day write a law review article about it. As the great philosopher Yogi Berra\(^\text{48}\) said, “It’s déjà vu all over again!”\(^\text{49}\)

cates that there is an upward trend; “circuit judges have written more opinions citing legal scholarship and cited to legal scholarship in a higher proportion of reported opinions.” \(\text{Id. at } 21\).

48. Baseball icon Yogi Berra is not only a member of the Baseball Hall of Fame, he is known off-the field for his astute and amusing observations about life. \textit{See generally} \textsc{Yogi Berra, The Yogi Book “I Really Didn’t Say Everything I Said”} 30 (1998).

49. \textit{Id. at } 30.
No. 13 (White, Red, on Yellow) 1958

50. MARK ROTHKO, No. 13 (WHITE, RED, ON YELLOW), (1958). A black and white reproduction of a Mark Rothko painting could never do justice to this brilliant work. You have to imagine it in white, red and yellow color blocks, or find online a digital image of the painting at The Metropolitan Museum of Art’s website. See Mark Rothko, METRO. MUSEUM OF ART, http://www.metmuseum.org/toah/works-of-art/1983.63.5 (last visited Apr. 20, 2011). But I do believe that even a black and white reproduction of the piece will illustrate the point I am making about the potential dismissal of the work for its sheer simplicity. Abstract expressionism, like much of what we write, is in the “eye of the beholder.”