Dalhousie Law Journal

Volume 47
Issue 1 *Thinking With and Against Pierre Schlag*

Article 3

3-2024

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Recommended Citation

Genevieve Renard Painter, "The Political Economy of Laughter and Outrage" (2024) 47:1 Dal LJ 9.

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Genevieve Renard Painter*

The Political Economy of Laughter and Outrage

> "I really did try, I tried hard to be a man, to be a good man, and I see how I failed at that. I am at best a bad man. An imitation phony second-rate him with a ten-hair beard and semicolons."[1]

A bit uncomfortable. That is how it feels to be among dear friends but labelled professionally as an outsider. I have a law degree, a bar membership, and a PhD in Jurisprudence and Social Policy. I am a professor in a women's studies department at Concordia University. At conference receptions, people respond breathlessly, "But they don't have a law school at Concordia!?," as though I am hearing confession in a gas station, or something as heretical. I teach legal history, international law, feminist legal theory, and constitutional law to undergraduates who are not in law school and mostly don't want to go to law school. Undergraduates who are not law students can read treaties, statutes, and cases—even Supreme Court cases. You can teach them about standards of review, division of powers, slippery slopes, reasonable men, and legal pluralism. They can independently generate the difference between primary and secondary rules. They can read law review articles.

A bit uncomfortable. That is how you might feel on hearing that undergraduates outside of law are reading law review articles. It might disturb the cozy feeling that we are writing for each other, and that we write for each other as transference for our field's ideal audience—judges and legislators. The *they* who we imagine reading our law review articles are allied with the status quo and better still, poised next to the levers of power.

But if by any chance you want an inventory of how many other sources of power and alliances there are in the world, try letting undergraduates read a law review article and setting them on the policy prescriptions or normative take-aways. I invited a law professor to give a guest lecture in my course. She ran the slides prepared for her law teaching. A complex regulatory and political question was on the table. "What should we do?,"

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1. Ursula K Le Guin, The Wave in the Mind: Talks and Essays on the Writer, the Reader, and the Imagination (Boulder, CO: Shambhala Publications, 2004) at 4 [Le Guin].

the slide said. The class cried back, "march," "run for office," "organize," "abolish the police," "fire all the judges." Every non-law student interpreted this *we*—and its recourses—as outside the law. Their *we* was not the state or the court. Concordia undergraduates in a women's studies classroom are a wonderfully unusual sample, it must be said. But their reaction was a bracing reminder that there are so many ways beyond the law to solve problems. Indeed, to many people, non-law solutions seem the most obvious, though that may be hard for law professors to fathom. Blackstone may be pithy, but nobody chants it at a street demonstration.

Instead, we who have been indoctrinated into law think that we can get out of whatever mess we are in with more law, or different law. If you have a hammer, everything, even words, looks like a nail. If we say we want less law, some smug crit will pop up to tell us that having less law is also a kind of law.

Our profession includes many who are devoted to crunching, re-crunching, organizing and re-organizing doctrinal and normative problems. Poking fun at these devotees has become something of a disciplinary sport for those kitted out in the Schlag team colours. But those who do the ridiculing do something that is not so different: we debate about methods. For example, in legal history, armies of scholars are doing historicist work—diligently uncovering *what really happened*, putting things *in the right context*, and filing life on the correct shelf in the law library. Meanwhile, an insurgent force has raised a methodological flag to campaign for what it calls "critical legal history"—which frankly serves up a buffet of reheated debates from the Department of History, marinated in either too much or not enough Marx, depending on your politics. If judges don't listen to us when we tell them what do, we can console ourselves by telling each other what to do and how through methodological debates in law review form. It is difficult to explain our passion for this pastime to Concordia undergraduates in women's studies.

> *"Footnote 19. Of course, even the author would have to recognize that designers of the Yellow Pages must, at some point, try to emulate the internal perspective of the user. I have a point here, don't I? A pretty good one I'd say."*[2]

We are writing for ourselves, and we have reason to blush at our self-absorption. People are watching. Undergraduates are reading. Scholars in other disciplines are skimming. Schlag revels in mocking this internal

2. Pierre Schlag, "Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art) Essay and Responses" (2009) 97 Geo LJ 803 at 810 [Schlag].

perspective. But we should admit that the way he writes—the way many of us write—is deeply cliquish. As a genre, law review scholarship, especially the kind that judges are imagined to read, strains to signal in-groupness. Kant, Rawls, Hart, and Raz haunt its pages with direct or elliptical insights about the law. Even those shunning these idols, armed with stones and calling themselves critics of the legal academy, find themselves simply marking off the location and dimensions of a glass castle.

> *"Footnote 65. I'm certainly glad he mentioned Heidegger. I know it helped me out a lot. And I'm sure the editors are just euphoric."*[3]

I think the quietly desperate need for in-group jargon may be symptomatic of enduring anxieties about law's status as a discipline, relative to other academic disciplines. But don't worry, I'm not about to prescribe a remedial dose of sociology or any other sort of extra-mural science. I am going to do something truly innovative: I will repeat what has been said by others. Faced with a lack of a common understanding of the conditions of validity of legal scholarship, we rush to a proxy to assess value—things like the number of publications, or the law review in which it was placed, or the number of footnotes, or whether it was cited by a judge.

> "*Footnote 53, We pick up the interview with rock legend Nigel Tufnel pointing out to rock reporter, DiBergi, that Nigel's new amp goes up to eleven. Nigel Tufnel: The numbers all go to eleven. Look, right across the board, eleven, eleven, eleven .... Marty DiBergi: Oh, I see. And most amps go up to ten? Nigel Tufnel: Exactly. Marty DiBergi: Does that mean it's louder? Is it any louder? Nigel Tufnel: Well, it's one louder, isn't it? It's not ten. You see, most blokes, you know, will be playing at ten. You're on ten here, all the way up, all the way up, all the way up, you're on ten on your guitar. Where can you go from there? Where? Marty DiBergi: I don't know. Nigel Tufnel: Nowhere. Exactly. What we do is, if we need that extra push over the cliff, you know what we do? Marty DiBergi: Put it up to eleven. Nigel Tufnel: Eleven. Exactly. One louder. Marty DiBergi: Why don't you just make ten louder, and make ten be the top number and make that a little louder? Nigel Tufnel: [Pause] These go to eleven. THIS IS SPINAL TAP (Spinal Tap Prod. 1984) (rockumentary manqué).*"[4]

Whether the author is good company over dinner: also one louder.[5] I know it is impolite to ask, sitting below the salt as I do, but what are we

3. *Ibid* at 832.
4. *Ibid* at 827.
5. "There is no way I'm going to cite people here. That would be career suicide." (*Ibid* at 833.)

all doing with our time? Why are some of us, myself included, so devoted to tearing down something we think is so flawed? How did you miss the opportunity to do something else with your one extraordinary life? Are we insane to go to work every day, where:

> *"Footnote 7, The manifest sense among law professors that law is somehow responsive to serious intellectual argument is facilitated by the conventional representation of law as a field of ideas, propositions, theories, and the like. It's as if cls never happened. Hell, it's as if Holmes and Llewellyn never happened."*[6]

There is one patently obvious reason. It is our job. I beg your pardon: your jobs. Your salaries are paid by law students, student loans, law firms, lawyers, and the taxation of wealth, some of it generated by the practice of law. Schlag may be right. Much of the profession may be a shocking waste of intellectual energy. This entire roundtable may be profligate in the extreme—especially when around us the planet is warming, the viruses are mutating, and the fascists have mobilized.

> *"Footnote 51. Now this recognition does not mean that normative legal thought is immediately powerless. On the contrary, there is an entire academic authority structure (largely feudal in character) that organizes itself and its own academic reproduction in terms of the categories and grammar of normative legal discourse. It cannot be expected that this authority structure will automatically fold even if it recognizes that its claims to intellectual legitimacy are vacuous."*[7]

A lot of intellectual energy may be wasted because the job of law professor requires it. No job escapes this scandal, although some entail processing less email. But perhaps the reason we do not exit is the dearth of alternatives. After a doctorate in English, we resolutely chewed our way through a law degree in order to have a slim (the slimmest!) chance of becoming a member of that dying breed, an academic who enjoys 20th century working conditions. We are in the midst of a sea change in university research and education. Faculty from Ireland to Israel, from the UK to the USA have spent more time on the picket line in the last five years than they have filing expense reimbursements requests. The humanities are on life support. Our screens abound with riveting long-form punditry and double shots of creative genius, but the work is so freelance it can only be marbled with the fat of trust funds. That folder on your computer of 'links to read' is thick with authors who have doctorates and horror stories

6. Schlag, *supra* note 2 at 805.
7. Pierre Schlag, "Normative and Nowhere to Go" (1990) 43 Stan L Rev 167 at 185.

from the academic job market. We are the very lucky ones. But we are weaving our good fortune into spam, not gold.

> *"Footnote 63. Actually the argument has already been made here—in fact several times. It's part of the routine. We can even pretend the citations are here. They are."*[8]

Schlag says we are all polemicists to some degree. Look around. There is plenty of fuel for polemics, but there are some fires that legal scholars are shy to start. First, we are not writing polemics about the bonfire of the humanities—and that's not just because Samuel Moyn has gotten there first. Globally, we are in the grip of a massive capture of the university by reactionary interests and corporate managerialism. You don't need a historian to tell you that these forces are unlikely to man the barricades against global fascism or global warming. Nor are law professors. Indeed, law faculties and other professional schools are often first to line up to feed at the corporate trough and fill in the latest performance evaluation matrix. Law professors tend to be more likely to organize about changes in university travel policies than about basic labour standards or the norms of professional courtesy that one might presume are important to people who spend their summers by the lake writing about morality. For a community so devoted to signaling in-group membership, it is surprisingly short on class solidarity.

Second, we are not writing polemics about the footnotes. Footnotes have become a tragedy and a comedy, as Schlag so mordantly illustrates. Eyes roll about the sophomoric law review editor who wants a citation for "the sun rises in the east." But we cannot blame our students. Where once scholars were indicating the ratio of a case in the footnotes, now they can be found distilling the work of their peers into similar maxims. *From Apology to Utopia* (international law is indeterminate, maybe). *Only Words* (porn is dreadful stuff; make it illegal). *Madame Bovary* (bored wife learns that adultery is so wrong it's lethal). *The Dispossessed* (another world, any other world, could be better than this one, if only marginally). These parenthetical annotations try to stipulate what texts 'say.' They are a virus that kills the interpretive ambiguity that makes real intellectual engagement possible, exciting, and erotic; that turns the space above the line into a place of playful encounter. One could be forgiven for thinking that we not only write for judges, we also write as judges, fantasizing that one day our texts might be noted up. Me, I am just here for the ratio(s).[9]

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8. *Ibid* at 189.
9. Molly M King and others, "Men Set Their Own Cites High: Gender and Self-Citation across

Speaking of footnotes, we are not writing polemics about different citation styles. Those of us old enough to have spent hours relocating commas and quotation marks know it is a staggering waste of time and brain power. At best, diversity in citation formats is a job creation program for research assistants (one that, in publicly funded universities, entails the state funneling subsistence stipends to students in the form of taxable wages via lay financial managers, i.e. professors). There should be wide-scale collective revolt about this, but no. When you tell colleagues about citation management software, they say they prefer their footnotes artisanal.

> *"Footnote 8: Could we have some cites, please? Really, I would like to cite to Duncan Kennedy here."*[10]

Why is the footnote so fetishized? Schlag teaches us that it's because the footnote is the site of our deepest desires. Sure, all that author-reader encounter above the line is hot, but we want to end up below the line. We want to write something so long, so swollen with prescription, so full of parts, so thick in footnotes, that it will be distilled to a maxim below someone else's line. We write for this future, to beget a time that flows from the present on a current of citations. In our footnote fetish, the legal scholar looks like one of the last torchbearers of modernity, bravely clinging to a theory of time in which the future will improve on the present because the past has been correctly understood and carried forward (the past being ourselves immortalized in a pinpoint cite). This view is so at odds with the reality of post-modernity or the cataclysm of the anthropocene—take your pick—that legal scholarship looks like a vintage model but not the kind you'd want on a pin-up. What good do our modern citations do in this, our time? But,

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Fields and over Time" (2017) 3 Socius 1; Genevieve Renard Painter, "The Political Economy of Laughter and Outrage" (forthcoming) Dalhousie LJ; Genevieve Renard Painter, "Contingency in International Legal History: Why Now?" in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law* (Oxford University Press, 2021); Genevieve Renard Painter, "'Give Us His Name': Time, Law, and Language" in Emily Grabham and Siân Beynon-Jones (eds), *Regulating Time: New Perspectives on Law, Regulation, and Temporalities* (Routledge 2018); Genevieve Renard Painter, "When Is a Haida Sphinx: Thinking about Law with Things" (2017) 68 N Ir Leg Q 391; Genevieve Renard Painter, "Law as Minor Jurisprudence: Is It a Mistake?" (2017) 21 Law Text Culture 276; Genevieve Renard Painter, "A Letter from the Haudenosaunee Confederacy to King George V: Writing and Reading Jurisdictions in International Legal History" (2017) 5 London Review of International Law 7; Genevieve Renard Painter, "A Figure in Law and the Archive Samera Esmeir and the Making of Juridical Humanity" (2013) 22 Qui Parle Qui Parle 235; Genevieve Renard Painter, "Thinking Past Rights: Towards Feminist Theories of Reparations" (2012) 30 Windsor YB Access Just 1.

10. Schlag, *supra* note 2 at 806.

"Footnote 67, Do you like the small cap font above? I live for that."[11]

Schlag is so thrilling because he marries incredible insight with incredible jokes and, I confess, it can feel good, so good, to read it. The humour ranges from satirical to self-deprecating to buffoonish to catty. For the humour to be assumed to entertain, rather than bloody, the reader, the reader has to be imagined as basically okay. [Reader, you're basically okay, right?] But to outsiders and those who live at the blunt end of the law, Schlag's irreverence isn't quite so funny. In fact, the irreverence does much of the work of drawing the line between insider and outsider. Can you chortle knowingly at a joke about *Palsgraf*, Heidegger, or the Clapham omnibus? Very famous scholars have lobbed these criticisms at Schlag, often in a polemic form. Perhaps they are worried that Schlag is laughing directly at them, ridiculing their life's work. Schlag thinks it is all very funny. But, like all good satire, it is also deadly serious, as law takes place in a field of pain and death. I should cite here but I don't because we all know that's Cover's line.[12]

I cannot imagine assigning Schlag's articles to my undergraduate students at Concordia, many of whom are working class and people of colour. I once found myself in front of a blackboard passionately defending the position that the police were bound by the rule of law, because most students had experiences that led them to believe cops were racist thugs in hats accountable to precisely no one. I anticipate many of my students would dismiss Schlag's humour, along with his argument, as the work of another self-indulgent white man chuckling from his armchair. The comedian Hannah Gadsby was said by some to have revolutionized stand-up comedy with her show, *Nanette*, simply by doing an entire set as though she were a straight white man, when she is not. Schlag is getting away with something with his humour not just because he is writing for a clique of legal scholars well-primed for his jokes, but also because he is doing so as someone white, male, and privileged. That is not his fault. It is also not his fault that we find him so funny. I am not blaming him for it, even though no one writes satire by accident. I am saying what is true: I cannot be another Pierre Schlag. And that is not just for want of brilliance. (I self-deprecate as a show of force, because "I am a man, and I want you to believe and accept this as a fact."[13])

11. *Ibid* at 832.
12. Schlag, *supra note* 2, footnote 8 [Made you look].
13. Le Guin, *supra* note 1 at 4.

> *"Footnote 42: Also at this point I would like to say I am gay. In fact I am the first gay footnote to come out in an American law review—ever."*[14]

People with my interests at heart have urged me to moderate my tone, dial back the jokes, and stop writing in a register that befits neither my body nor my rank. I'm at best a bad man, and you should "distrust everything I say. I am telling the truth."[15] The truth is I wish for a world in which we could know how funny Patricia Williams is on the page, or Adelle Blackett, or Katherine Franke, or Fleur Johns, or Val Napoleon.

Let us write that world.

14. Schlag, *supra* note 2 at 819.
15. Le Guin, cited in Liam McHugh-Russell, "Show and Tell" (forthcoming) Dalhousie LJ.