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## Scholarship in Action: The Power, Possibilities, and Pitfalls for Law Professor Blogs

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# SCHOLARSHIP IN ACTION: THE POWER, POSSIBILITIES, AND PITFALLS FOR LAW PROFESSOR BLOGS

DOUGLAS A. BERMAN\*

A general debate concerning whether law blogs can be legal scholarship makes little more sense than a general debate concerning whether law articles or law books can be legal scholarship. Blogs—like articles and books—are just a medium of communication. Like other media, blogs surely can be used to advance a scholarly mission or a range of other missions.<sup>1</sup>

Looking through the debate over law blogs as legal scholarship, I see a set of bigger and more important (and perhaps scarier) questions about legal scholarship and the activities of law professors. First, the blog-as-scholarship debate raises fundamental questions about what exactly legal scholarship is and why legal scholarship should be considered an essential part of a law professor's vocation. And the key follow-up question is whether blogging should be part of that vocation. In this short paper, I set out a few initial observations about the evolution and value of legal scholarship, and then share some thoughts on the power, possibilities, and pitfalls of law professors blogging to explain why I hope blogging will become an accepted and valued part of a law professor's vocation.

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\* William B. Saxbe Designated Professor of Law at The Ohio State University Moritz College of Law. Blog: Sentencing Law and Policy, <http://sentencing.typepad.com>. I owe much to my colleague Marc Spindelman for a set of extraordinary discussions about the issues raised in this article (and many other issues).

1. Obviously, not all articles or books—not even all law articles or law books—have a scholarly mission. Nevertheless, when a law professor reports that she is working on a book or an article, no one questions whether the medium of expression is sufficiently scholarly. The reason, of course, is that the law professor is expected to be working on a type of book or article that fits the current norms of legal scholarship. She is expected to be writing an academic press book or a long, heavily footnoted article on a theoretical or policy subject of interest to the legal academy. (Of course, even within the genre of law professor books and articles, there often are spoken and unspoken debates over whether casebooks or nutshells or commentaries ought to “count” toward a professor's expected scholarly output.)

These basic realities about traditional scholarly media for law professors should inform analysis of blogs by law professors. Some blogs by law professors—just like some books and articles by law professors—clearly are not seeking to advance scholarly ideas about the law and legal institutions: Glenn Reynolds' InstaPundit is the archetype here. But other blogs by law professors clearly have scholarly elements: the exegesis of hot legal topics sometimes appearing at Concurring Opinions or PrawfsBlaw or The Volokh Conspiracy and posts that comprise Larry Solum's Legal Theory Lexicon certainly fit this description. And some blogs, such as The Becker-Posner Blog, are exclusively devoted to the expression of scholarly ideas.

## I. ON THE EVOLUTION AND VALUE OF LEGAL SCHOLARSHIP

The broad topic of legal scholarship is, of course, far beyond the scope of this little paper.<sup>2</sup> But in this setting I want to note briefly how the norms of “traditional” legal scholarship have evolved in recent generations. Let’s start with articles and use the *Harvard Law Review* as a marker of “traditional” legal scholarship. Consider the length and footnotes of the first four major pieces in the *Harvard Law Review* volumes published roughly two generations ago, one generation ago, and recently:

TABLE 1: *HARVARD LAW REVIEW*’S EVOLUTION

	Vol. 64 (1950–51)	Vol. 89 (1975–76)	Vol. 114 (2000–01)
Average length of first four articles	24 pages (26, 34, 17, 17)	42 pages (45, 22, 38, 61)	109 pages (108, 80, 95, 151)
Average number of footnotes in these articles	86 footnotes (88, 131, 74, 50)	184 footnotes (229, 51, 205, 249)	494 footnotes (348, 273, 525, 830)
Some other items of note in these issues	1. Many pieces by practicing attorneys 2. Two “comments” from Harvard professors averaged 7 pages and 25 footnotes 3. January issue had a 22-page exchange of correspondence between Dean Griswold and a member of Texas bar	1. A few pieces by practicing attorneys 2. The short article was an empirical piece concluding with 3 pages of data 3. January issue included a 17-page commentary with a 4-page appendix with model legislation	1. No pieces by practicing attorneys 2. A piece that runs 95 pages and 525 footnotes is called a “Commentary” 3. Dec. issue included book review of 32 pages and 90 footnotes

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2. Many volumes have been written—and many more surely will be written—about what legal scholarship can and should be. My own vision is informed by the notion that law professors engage in research and writing to develop insights and disseminate ideas about the nature and impact of laws and legal institutions.

This amateur empiricism shows, among other things, that the size and styles of traditional legal scholarship, at least in the *Harvard Law Review*, have evolved considerably with each generation.<sup>3</sup>

Though much could be said about this evolution, I want to spotlight technology's role in this story. Modern technologies have made primary legal materials easier to find; have made law review pages easier to revise, produce, and distribute; and have made footnote sources easier to find, cite, and check. In turn, the overall girth of scholarly production has increased dramatically, the norms of traditional legal scholarship have evolved continually, and the scholarly work of law professors has changed considerably.

Legal books by law professors reflect a similar evolution and one that also shows the imprint of technological developments. In prior generations, treatises and casebooks were the preeminent books written by leading law professors; many early giants in the legal academy are best known and remembered for work on treatises and casebooks.<sup>4</sup> But once electronic databases made it far easier for practicing lawyers to find and access original sources, treatises more commonly became a project for an industrious practicing attorney or even a commercial service, and many law professors moved on to writing long monographs for academic presses. Again, we see technology contributing to changes in the norms of legal scholarship and the scholarly activities of law professors.

These observations provide a historical precursor to modern developments well known to everyone involved in the bloggership conference: blogs and other Web technologies already have impacted—and will surely continue to impact—the norms of traditional legal scholarship and the scholarly activities of law professors. The evidence of these realities comes not only from this conference and our collective online activities, but also from some recent law review developments. Orin Kerr and others have sensibly suggested that blogs have played a role in many journals' new article length policies,<sup>5</sup> and the *Harvard Law*

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3. Similarly, the context of Harvard Law School's scholarly productivity has also evolved in each generation: Harvard Law School had zero "specialty" journals in 1950. By 1975, three specialty journals had emerged. A total of eleven specialty journals were publishing scholarship in 2000. (I lacked the energy to count total pages and footnotes in the collective Harvard Law School journal corpus, but I suspect a similar geometric growth would be observed from that data as well.)

4. See, e.g., ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS (1950); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941); JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (1923); SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (1920–22).

5. See generally Posting of Orin Kerr to The Volokh Conspiracy blog, <http://volokh.com/posts/1114052538.shtml> (Apr. 20, 2005, 11:02 p.m.).

*Review's* new Appendix and the *Yale Law Journal's* new Pocket Part also obviously reflect our brave new online world.<sup>6</sup>

Before turning to whether we should embrace or recoil from the transformative potential of blogs and other Web technologies on legal scholarship, I want to consider briefly the value of legal scholarship and its role in the activities of law professors. Or, to be more precise, I want to highlight that it is surprisingly hard to provide a fully satisfying answer for why legal scholarship is considered an essential part—perhaps the most essential part—of a law professor's vocation. Of course, an instrumental answer is readily available: engaging in scholarly research and writing enhances our ability to serve our law students in the classroom and to serve the legal profession outside the classroom. Interestingly, my own school's faculty rules seem to justify a commitment to legal scholarship in these teaching and service terms:

There are diverse reasons underlying a scholarship criterion [for promotion and tenure]. First, there is a close relationship between teaching and scholarship. A faculty member who is enthusiastically committed to investigating important legal problems and to formulating useful insights concerning them will find this enthusiasm carried over into teaching. Research also improves the quality of teaching by broadening and deepening knowledge of a subject and by increasing a teacher's confidence in the classroom. Second, . . . [f]aculty status is . . . a privilege that provides the time to investigate important issues and permits access to outstanding research facilities and support. The privilege of a faculty position entails the correlative obligation to enlarge the body of knowledge about law and legal institutions and processes. Third, research and publication contribute to a greater understanding and the fairer and more effective functioning of the legal system. Finally, through publishing the results of research, a teacher extends the reach of his or her teaching beyond the College and University. It follows from all of these reasons that all faculty members should regard research, writing, and publication as integral parts of their professional lives.<sup>7</sup>

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6. See generally Posting of Douglas A. Berman to Sentencing Law and Policy blog [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2006/10/yet\\_another\\_not.html](http://sentencing.typepad.com/sentencing_law_and_policy/2006/10/yet_another_not.html) (Oct. 4, 2006, 9:04 p.m.) (discussing proliferation of on-line journal companions).

7. The Ohio State University Moritz College of Law, Faculty Rule 14.06(B)(2), available at [http://moritzlaw.osu.edu/registrar/docs/faculty\\_rules.pdf](http://moritzlaw.osu.edu/registrar/docs/faculty_rules.pdf).

I had a hard time finding extended discussions of the purposes and value of legal scholarship in other schools' faculty rules, but those I did find also tended to link a commitment to legal scholarship to teaching and service.<sup>8</sup> My point here is to highlight that, when forced to justify explicitly our commitment to scholarship, we often return to the supposedly distinct teaching and service missions of law schools and law professors.<sup>9</sup>

Noticing the potential synergies between scholarship, teaching, and service adds an additional perspective to the evolution of legal scholarship over the last few generations. The connections between professors' scholarship and their teaching and service were quite tangible and consequential at a time when professors were writing treatises, casebooks, and relatively short articles (with only essential footnotes) focused on doctrinal topics. These forms of scholarly work necessarily fostered—indeed, depended upon—lots of engagement and professional interplay between law professors and judges, practitioners, and policymakers. But, as the norms of “traditional” legal scholarship morphed, the links between scholarship, teaching, and service became attenuated. Now that professors are primarily writing books for academic presses and long, footnote-laden articles focused on theoretical or interdisciplinary topics, our engagement and professional interplay is primarily with the work of other academics (both legal academics and those of other disciplines).<sup>10</sup>

At this point, surely readers hear echoes of Judge Harry Edwards's famous complaints about “‘impractical’ legal scholarship” and the “disjunction between legal education and legal practice.”<sup>11</sup> Back in 1992, in a widely discussed *Michigan Law Review* article, Judge Edwards championed what he called “practical scholarship,” and he lamented that “there are too few books, treatises, and law review articles now that

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8. Notably, we rarely actually judge legal scholarship in terms of teaching students and service to the profession. In the promotion and tenure process, we only ask for other professors' opinions of a piece of scholarship; the law students we teach and the legal profession we serve never get a chance to weigh in. Moreover, when professors opine on the merits of a piece of scholarship, rarely is there serious consideration of whether the piece may have contributed to the author's development as a teacher or as a professional servant.

9. A cynical realist might have a cutting (and accurate?) account for law professors' collective affinity for legal scholarship: perhaps we fetishize a commitment to scholarship in order to justify and legitimize having our summers off, light teaching loads, and regular sabbaticals.

10. The recent move in some quarters away from student-edited law reviews to peer journals also is an aspect (and reflection?) of the evolution of modern legal scholarship. As theoretical and interdisciplinary topics eclipse doctrinal work in legal scholarship, it makes less and less sense for law students with little or no training in broad legal ideas to be the primary editors of scholarly work.

11. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34–35 (1992).

usefully ‘chart the line of development and progress’ [of the law] for judges and other governmental decisionmakers.”<sup>12</sup> Expressing concern that “too many important social issues are resolved without the needed input from academic lawyers,” Judge Edwards called upon law professors to produce more “articles or treatises that have direct utility for judges, administrators, legislators, and practitioners.”<sup>13</sup>

I do not wish to replay here the lively debates that followed Judge Edwards’s critiques of the substance of modern legal scholarship. But I will transition to my blogging observations by suggesting a technological addendum to Judge Edwards’s points. In our modern so-called information age—where legal developments take place in hyperspeed (or cyberspeed) and in which everyone struggles with information overload—simply the form of most legal scholarship now keeps much of what law professors produce from being very useful to judges, administrators, legislators, and practitioners. The modern timelines of law review production and book publication, combined with the current norms of traditional legal scholarship, entail that even those articles and books that might be “practical” as a matter of content often still will be impractical as a matter of form. These realities mean that frequently only academics will have the time and inclination to read most traditional forms of legal scholarship.

## II. ON LAW PROFESSORS AND THE DYNAMICS OF BLOGGING

My reflections on the evolution and value of legal scholarship, along with my own blogging experiences, inform my views on the power, possibilities, and pitfalls of academic blogging and why I believe blogging should be an accepted part of our modern conception of a law professor’s vocation.

### A. *The Power of Blogging by Law Professors . . .*

#### 1. *For Expressing Scholarly Ideas*

My affinity for blogging stems in part from the technology’s tendency to work against the worst excesses and most confining aspects of traditional forms of legal scholarship for the expression of scholarly ideas. Traditional forms of legal scholarship encourage every scholarly idea to be expanded to seventy-five pages and to be festooned with copious footnotes

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12. *Id.* at 34, 50.

13. *Id.* at 36.

and citations. But many important ideas do not need or deserve more than a few pages or even a few paragraphs. Blogs not only provide a medium to express smaller ideas, but also usefully encourage law professors to think seriously about which ideas justify seventy-five pages and which might only need 750 words.

The blog medium also, thankfully, does not readily allow encumbering ideas with endless footnotes and citations. Legal writing and legal writers can be usefully liberated by authoring a whole paragraph without having to type “See, e.g.,” at the bottom of a page. Of course, bloggers can provide citations, in a sense, through links in blogs, and linking highlights another virtue of blogs as a means of developing and expressing scholarly ideas. Because of linking, blogs facilitate a more direct and immediate engagement with original legal materials—whether cases or legislation or briefs or reports or articles—for both the law blogger and the blog reader. Through linking, blogs also obviously facilitate a more direct and immediate engagement with other bloggers and other persons setting forth ideas online. Dean Griswold’s personal correspondence that occupied the first twenty-two pages of the January 1951 issue of the *Harvard Law Review*<sup>14</sup> should remind us that unexpected and unique scholarly ideas often can emerge from informal exchanges. Blogs are far more likely to foster the development and insights of these exchanges.

## 2. *For Engaging in a More Robust and Diverse Scholarly Community*

More than any other form of communication, blogs enable a law professor to reach and interact as cyberpeers with an extensive and extraordinarily diverse audience. My blog work facilitates the exposure and scrutiny of my legal ideas to a national and international readership that includes not only judges, policymakers, and practitioners at all levels in many jurisdictions, but also academics from other disciplines, journalists of all stripes, many nonlawyers interested in criminal justice issues, and also—perhaps most valuably—the real people whose lives are most impacted by the policies and doctrines that I discuss.

In part as a result of my diverse, engaged, and interactive readership, I am informed about legal developments that I never would have discovered, and I hear about legal and nonlegal ideas and experiences that I never even could have imagined. I regularly receive from readers not only news of recent rulings and reports, but also many first-hand accounts

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14. See Rex G. Baker & Erwin Griswold, *Percentage Depletion—A Correspondence*, 64 HARV. L. REV. 361 (1951).



of personal experiences with the criminal justice system. In this way, blogging has become for me an extraordinary and unique research tool for all my other professional work: I truly have learned more about my field and gained more original insights during two years of blogging than during a previous decade of traditional research.

### 3. *For Respecting the Diversity of Scholarly Production*

In the evolution of legal scholarship, seemingly new and radical approaches to the craft—from legal realism to empirical work to critical work to narratives—often get absorbed into the mainstream. An expansive view of the proper content for legal scholarship shows a healthy respect for the reality that different scholars have different ways to best express different ideas. For similar reasons, respect also should be given to different *forms* of legal scholarship. Some law professors are great at writing books and longer articles, but others are more comfortable and capable of writing shorter articles or commentaries or op-eds or blog posts. Law professors ought to be actively encouraged to develop scholarly works in diverse mediums. There are always unexpected connections between form and function; new insights are often only discovered in the process of trying to express ideas in new and different forms.

I personally experience the value of diversity in forms of legal scholarship not only through my blog, but also by having the good fortune to coedit two unique journals. Through my work on the *Federal Sentencing Reporter*, a peer journal that solicits pieces written for a judicial audience, and the *Ohio State Journal of Criminal Law*, a peer journal with a symposium in each issue along with nontraditional commentaries, I regularly see how distinct scholarly forms can result in distinct scholarly insights. Especially as new technologies make it cheaper and more efficient to experiment with new types of scholarly expression—not just Websites and blogs, but also podcasts and video files—I am hopeful the legal academy will have the courage to explore and embrace new forms of traditional scholarly fora (like different kinds of law journals) and seemingly radical new scholarly fora (like blogs). There cannot and should not be one-size-fits-all answers to the development and dissemination of legal ideas. For some topics at some moments, the traditional law review article or book may be ideal. For other topics at other moments, a distinctive medium like blogs may be fitting. Because great legal ideas have no Platonic form, we should recognize that

conventions about what “counts” as scholarship are not only artificial, but potentially harmful to the broader marketplace of ideas.

#### *4. For Reconnecting Scholarship to Our Teaching and Service*

As noted earlier, the current traditional forms of legal scholarship tend to disconnect our scholarly mission from our teaching and service missions. Perhaps some professors find effective ways to bring their hundred-page articles into the classroom, but I never have. However, in sharp contrast, I have discovered remarkable and valuable synergies between my blogging and my teaching and service. My teaching often stimulates new blogging ideas and perspectives, and vice versa. I have used my blog in various ways in various classes, and I am quite pleased that many of my students (and students from other law schools) are regular readers and occasional commenters. Similarly, when preparing to speak to judges or lawyers, the blog always helps me prepare my lecture outline. And the engagements and feedback from audiences at these lectures regularly find their way back into my blogging.

Indeed, I have come to realize that my affinity for blogging largely results from the fact that blogging is the only activity that enables me to engage simultaneously in the troika of scholarship, teaching, and service. Put another way, blogging has reminded me that law professors really do not have three distinct missions, but rather just the singular mission of improving the understanding, development, and workings of the law and legal institutions. I like to call blogging “scholarship in action” because that hackneyed slogan spotlights that blogging can be among the most effective and efficient ways to serve this mission.

#### *B. The Possibilities of Blogging by Law Professors . . .*

The virtues of blogging by law professors detailed above flow from the present forms and conventions of legal blogging. But freeing one’s mind from current formats reveals additional possibilities. The flexibility of Web technologies and the absence of many limiting conventions suggest a host of new ways in which blogs can improve the development and dissemination of scholarly ideas by law professors.

##### *1. For Interdisciplinary Collaborative Scholarship*

The fascinating Becker-Posner Blog highlights most clearly how a blog can directly foster interdisciplinary collaborative scholarship. Many other law professor blogs (such as, for example, blackprof and Mirror of Justice)

also foster, somewhat more indirectly, a scholarly dialogue among disciplines. Though I have long been interested in working with colleagues in other disciplines, I have regularly encountered practical problems when trying to do traditional scholarship with academics in other fields. Blogs present a unique and promising medium for facilitating interdisciplinary conversations, which in turn should catalyze more traditional or nontraditional interdisciplinary scholarship.

### 2. *For Professor-Student Collaborative Scholarship*

The tradition of professors working closely with research assistants and even student coauthors has probably been enhanced by the modern move toward longer, footnote-laden forms of legal scholarship. Nevertheless, the realities of traditional scholarship entail that only wannabe academics are likely to be seriously interested in collaborating with professors on scholarly projects. But work on a blog—because it is more immediate and diverse—necessarily enables a richer and more robust set of opportunities for professor-student collaborative scholarship. Ian Best of 3L Epiphany<sup>15</sup> was my student and my research assistant. His engagement with my blog as a student led me to encourage him to develop his own blog as an independent study project, and I have profited greatly from the amazing metablogging that he has done at 3L Epiphany. Though we are not formally coauthoring a blog or a piece of traditional legal scholarship, I believe we are constantly enhancing each others' insights and production through our work together.

### 3. *For Supplemental Scholarship (Especially for Casebooks)*

My blog initially emerged from my interest in providing a dynamic resource for law professors teaching from my casebook, *Sentencing Law and Policy: Cases, Statutes, and Guidelines*.<sup>16</sup> Thanks primarily to the U.S. Supreme Court's work in *Blakely v. Washington*,<sup>17</sup> my blog transformed into a hub for information and commentary about criminal doctrines and constitutional issues that were developing at a rapid pace. But I still believe blogs have extraordinary potential as scholarly supplements—or to ape the *Yale Law Journal's* clever title for its new

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15. The blog has since been retitled Law Blog Metrics.

16. NORA DEMLEINTNER ET AL., *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* (2004).

17. 542 U.S. 296 (2004).

online form of supplemental scholarship, electronic pocket parts—to books and articles of all sorts. I doubt blogs will make traditional supplements obsolete, but I can readily envision blogs becoming a kind of super-supplement to casebooks and serving in other ways as a common form of follow-up scholarship.

#### *4. For Web-Treatises*

I sometimes view my blog as a continuously updated treatise on developments in the field of sentencing law and policy. Though the current blogging software does not readily facilitate creating Web-treatises, I could see—and hope we will see—Web technologies emerging that would foster converting effective blog posts into Web-treatises. (I suppose we could call these bleatyses or Webitises or perhaps just e-treatises.) A distinguished group of my colleagues at Ohio State did extraordinary work in the run-up to the 2004 election through a Web-based project known as Election Law @ Moritz. In addition to having blog-like updates on election law developments, the project created an “e-book” of short, legal-encyclopedia-like entries that provided accessible but sophisticated accounts of election law issues and doctrines. I know that the emergence and impact of the legal blogosphere contributed to the creation and success of this innovative online scholarly project.

#### *5. For Professor-Practitioner Collaborative Scholarship*

Blogs can—indeed, almost necessarily do—foster professor-practitioner collaborative scholarship. My review of old *Harvard Law Reviews* reminded me of the rich tradition of professor-practitioner collaborative scholarship; blogs can jump-start such collaborations again. Through my blog work, I have had wonderful new opportunities to work with practitioners drafting briefs and congressional testimony and brainstorming about new ideas that might be tried in courtrooms. This engagement has not only enhanced my own scholarly insights, it also has fueled a new interest in exploring opportunities for different types of professor-practitioner collaborative scholarship.

#### *C. The Pitfalls of Blogging by Law Professors . . .*

After this extended account of current and potential pros of blogging, I would be remiss if I did not canvass some cons. Here is a quick account of some pitfalls I have encountered in my own blogging experiences.

### *1. As a Time Suck and Addiction*

I often struggle to balance the time I spend working on my blog with other professional and personal commitments. I find the medium so engaging and satisfying that some days I am annoyed that I have other things to do. And yet, I will be the first to concede that all blogging, all the time, can be professionally and personally unhealthy. The synergy between blogging and other work as a law professor runs both ways—blogging informs a lot of what I do in the classroom and in other writing, but I also get so much from actually doing other things. My affinity for blogging is fundamentally grounded in a belief in the virtues of professional balance and diversity, but an addiction to blogging can defeat these goals rather than serve them.

### *2. As a Distorting Popularity Contest*

Because law professors get so little feedback from other work we do, blog feedback—comments, trackbacks, links, and hit counts—can take on cosmic significance. I hate that I get bothered when my hit count goes down or when few readers are commenting, but the reality is that I do. This reality, in turn, can sometimes harmfully shape both my agenda and my expression.<sup>18</sup> When readers comment or e-mail with complaints about my blogging, I am often influenced. Importantly, I believe the reception and popularity of one's writings can be an appropriate consideration for a scholar. But when popularity starts to distort a scholar's agenda or expression, trouble lurks. This risk of distortion seems potentially pervasive in the current blogging environment.

### *3. As Limitation Rather than Liberation*

Some days, blogging feels more like a burden than a blessing. Especially for solo bloggers, there is often a nagging feeling about the need to feed the beast. Especially when I have many other professional and personal commitments, I struggle with feelings of obligation and guilt if I do not cover some big new development in my field extensively on my blog. The flexibilities and freedoms of blogging should always keep the task from feeling onerous, but the unceasing presence of the cybersoapbox can sometimes turn blogging into more of a chore than it should be.

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18. I have blogged a lot on recent Supreme Court confirmation battles, not only because they were interesting and I had things I wanted to say, but also because they seemed to increase my traffic.

### III. THE REST OF THE ICEBERG

The terrific papers from this conference have reinforced my sense that the blog-as-scholarship debate is the tip of an iceberg regarding the mission of law schools and the activities of law professors. The papers demonstrate that our discussion of legal scholarship is not a descriptive debate over different forms of legal writing; it is a prescriptive debate over how law professors should spend their time. In the modern marketplace of the legal academy, the label “serious legal scholarship” is a normative conclusion that we affix to preferred forms of law professor activity and deny to less preferred forms of law professor activity.<sup>19</sup> Seeing the blog-as-scholarship debate now as the tip of our professional iceberg, I want to say a bit more about the rest of the iceberg and how I see blogs fitting into a broader debate over the missions of law schools and law professors.

Stated in crude terms, law schools—especially elite law schools—have been drifting away from being trade schools in legal practice toward becoming graduate programs in legal ideas. Law professors—and especially elite law professors—are now less concerned about training lawyers and advancing legal doctrines than about exploring law-related insights and advancing theories about the law. It was these changes that led Judge Edwards to lament the “growing disjunction between legal education and the legal profession,”<sup>20</sup> but his complaints have not slowed the drift of law schools and law professors away from legal practice and doctrines and toward law-related theories and ideas.<sup>21</sup>

Unlike Judge Edwards, I do not view the drift in the mission of law schools and the activities of law professors as entirely problematic. I believe the legal profession and society are well served when law schools and law professors have a vision and goals beyond the training of practicing lawyers: we should embrace a broad and diverse conception of how law professors inside and outside the classroom can improve the understanding, development, and workings of the law and legal

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19. Outside the blog debate, this reality is most apparent in discussions about whether casebooks or hornbooks or commentaries ought to “count” as legal scholarship.

20. Edwards, *supra* note 11, at 34.

21. The symposium papers by my co-panelists, Kate Litvak and Larry Solum, document these developments in various ways. Kate notes, for example, the “influx of JD-PhD’s (and PhD’s without a JD) into the legal academy” and the “closer incorporation of law schools into their universities” in her review of recent law scholarship trends. Kate Litvak, *Blog as a Bugged Water Cooler*, 84 WASH. U. L. REV. 1061 (2006). Larry indicates that some (many?) law professors are only interested in having their work read by a particular “community of high-quality readers—tenured and tenure-track academics.” Lawrence B. Solum, *Blogging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071 (2006).

institutions. And yet, there are some troublesome aspects of the drift of law schools and law professors, and I have come to realize that my affinity for blogging stems from the technology's potential to help serve both our teaching and scholarship.

*A. The Incomplete Drift in Teaching*

Changes in law school curriculum and classroom teaching document the evolution of law schools away from a narrow trade school focus. There are now few required upper-level courses, and the standard first-year program has moved away from full-year courses in contracts, property, torts, and civil procedure. Law professor teaching loads continue to shrink, and most skills training is delegated to clinicians, legal writing instructors, and adjuncts. Law professors now bring more theoretical, political, and interdisciplinary perspectives into the classroom in traditional courses; we also have greater freedom to develop specialty courses that look far beyond the doctrinal issues that occupy most practicing lawyers.

I applaud these developments, especially because they reflect the practical realities and particular strengths of modern law schools and law professors. The practice of law has become complicated and intricate in many specialized fields, and important skills for practicing lawyers evolve rapidly because of technology and other forces.<sup>22</sup> The institutional and economic structure of the modern law school is poorly designed to be an effective trade school; the professional background and inclinations of the modern law professor provide a poor foundation for effective instruction in legal practice skills. Consequently, it makes sense for law schools and law professors to embrace a broad vision of appropriate law school instruction and to avoid defining their missions only in terms of training practicing lawyers.

However, in curricular reform and classroom teaching, the evolution away from a trade school philosophy has been woefully incomplete. Private law comprises a disproportionate part of the first-year curriculum if our true goal is to introduce students to a range of important legal ideas and modern trends. Grant Gilmore told us over thirty years ago that contract was dead,<sup>23</sup> but contracts remains the archetype first-year course.

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22. When I was still in practice less than ten years ago, no one even conceived of developing a computer simulation for a trial; sophisticated courtroom technology involved an easel and a blown-up document on a poster board. But now modern trial lawyers need to be quite tech-savvy to serve clients effectively in modern wired courtrooms.

23. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

Guido Calabresi highlighted more than twenty years ago that we now live in an age of statutes,<sup>24</sup> and yet the central text in nearly all courses remains a *casebook*, not a *statutebook*. Very few law schools require students to be exposed to issues concerning the work of legislatures and administrative agencies, or to alternative dispute resolution systems and international developments, or to economics, politics, and other social sciences that impact the law and legal institutions.

In short, though we no longer believe the law school program is about teaching a trade, we have barely started the kind of curricular reform required to ensure our teaching and the overall classroom experience expose students to the most important legal ideas and modern trends they will encounter no matter how they end up utilizing their law degrees.

### *B. The Excessive Drift in Scholarship*

Although teaching realities in law schools still unduly reflect our trade school history, scholarship realities for law professors now unduly reflect a graduate school affinity. Formally and informally, law professors are discouraged from researching and writing on doctrinal issues. The forms and content of the most praised (and the most questioned) types of legal scholarship push law professors—especially pretenure law professors—to focus on big, abstract issues that will interest other academics, and to avoid working on small, concrete issues that concern practitioners, judges, and policymakers.

For some current and future law professors, the modern conception of “serious legal scholarship” is a cause for celebration. For those who enjoy researching and writing about big and abstract issues, the current norms of legal scholarship justify spending a lot of professional time on favored activities. But for those interested in the development of legal doctrines and legal practice, the modern professorial equation is much different. Indeed, the emphasis on certain types of scholarship not only discourages working on doctrinal issues, but also rewards law professors for maximizing time spent with other academics and minimizing time spent with students and practitioners. In the law professor marketplace, strong student evaluations or a major bar lecture is nice, but a workshop at Chicago or a conference at Harvard is golden. Lengthy articles, especially if well placed and well cited, lead to raises; innovative teaching materials

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24. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).



or an effective amicus brief lead to inquiries about how a traditional article is progressing.

### *C. The Healthy Impact of Blogging on Teaching and Scholarship*

These observations about the modern state of law teaching and legal scholarship highlight additional reasons why I see blogging as a valuable activity for law professors. As suggested before, blogging produces an extraordinary synergy and connection between teaching and scholarship (and service, too). I have used my blog in different ways in six different classes I have taught in recent years. Blog posts have provided the stimulus (and some text) for much of the “traditional” scholarship I have recently produced.<sup>25</sup> Blogging has directly and indirectly played a role in a broad array of service opportunities and activities. Indeed, my most thoughtful posts often at once serve as innovative teaching materials, an effective amicus brief, and the start of a traditional article.<sup>26</sup>

Through using my blog in the classroom and by having students as regular readers and occasional commenters, I can ensure that my teaching and student engagement does not unduly reflect our trade school history. Through the topics I choose to cover, the issues I choose to emphasize, and the materials I choose to link, I expose students to important legal ideas and modern trends in my field. And by using my blog for the development and expression of scholarly ideas, I also help ensure that my scholarship does not unduly reflect a graduate school affinity. Through the topics I sort out, the issues that now come to my attention, and the materials sent to me (and found on other blogs I frequent), I am necessarily influenced by legal ideas and modern trends central to modern legal practice.

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25. In my experience, blogging has fueled my traditional scholarship, rather than taken time away from it. Cf. Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089 (2006) (suggesting that blogging is not a good way of “spending one’s time if one is interested purely in discovering or in doing”). Perhaps because I have gained so many new insights and thus have many new things I want to say, I have actually been more productive (and efficient) outside the blogosphere since starting my blog.

26. The paper by Christine Hurt and Tung Yin discusses one recent (shorter) post of mine ruminating on gender disparity in sentencing and kindly suggests that “there is definite value to the academic (and practicing) community to have these thoughts posted.” Christine Hurt & Tung Yin, *Bloggling While Untenured and Other Extreme Sports*, 84 WASH. U. L. REV. 1235 (2006). Cf. Larry E. Ribstein, *The Public Face of Scholarship*, 84 WASH. U. L. REV. 1201 (2006) (suggesting that “[b]logs thus may enable academics to climb down from the ivory tower, while bringing some of their purer air with them”); D. Gordon Smith, *A Case Study in Bloggership*, 84 WASH. U. L. REV. 1135 (2006) (suggesting that a series of related thoughtful blog posts serve many purposes and that blogging might “count” as both service and scholarship).

Initially, I thought the best word to explain my affinity for blogging was diversity: the distinct form of expression inherent in blog technology expands the perspective and insights of a legal scholar.<sup>27</sup> And I still believe diversity considerations best justify giving blogging by law professors—or at least some types of blogging by law professors—the normative label “scholarship” given to preferred forms of law professor activity.

But, after further reading and reflection, I now think the best word to explain my affinity for blogging is synergy: the positive connections between teaching, scholarship, and service facilitated by blogging ensures the medium can positively impact the work of law schools and law professors inside and outside the classroom. Of course, if we think law schools should still embrace a trade school philosophy or if we aspire for law schools to become true graduate programs, then perhaps blogging should not be considered a preferred form of law professor activity. But I have always conceived of law schools as professional schools that should embrace a broad and diverse conception of how law professors can improve the understanding, development, and workings of the law and legal institutions. It is with such a model in mind that I advocate blogging being seen—along with “serious legal scholarship”—as a preferred form of law professor activity.

#### CONCLUSION

Let me close by explaining my primary goal in this bloviating about blogging. Though I sincerely hope blogs can become a more respected and accepted medium for law professors to develop and disseminate scholarly ideas, I certainly do not want blogging to become a burdensome professional obligation for those who do not enjoy the medium. Nor do I want any particular blog form to emerge as the defining standard for the work of law professors online. But, for now, I see far more opportunities than limitations flowing from the legal academy embracing blogging as an integral part of a law professor’s vocation. Notably, at last year’s Association of American Law Schools (AALS) session about blogging, junior professors needed to be reassured that it is okay to blog before tenure. I think the development and dissemination of important legal ideas—and thus the overall health of the law and the legal profession—

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27. Ann Althouse’s contribution to this symposium, *Why a Narrowly Defined Legal Scholarship Blog Is Not What I Want: An Argument in Pseudo-Blog Form*, 84 WASH. U. L. REV. 1221 (2006), is truly an extended paean to diversity of expression and the benefits that can follow.

will be advanced when this paradigm is flipped and junior professors at AALS need to be reassured that it is okay *not* to blog before tenure.