

# IN DEFENSE OF THE BIG TENT: THE IMPORTANCE OF RECOGNIZING THE MANY AUDIENCES FOR LEGAL SCHOLARSHIP

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Professor Bernard Schwartz is a model for all who aspire to be legal scholars. He was astoundingly prolific over a long career and he wrote a wide array of different types of materials, ranging from casebooks and treatises to books for the general public. He wrote with exceptional grace and clarity and made countless original contributions to legal analysis. It is only fitting that he be paid tribute with this symposium on legal scholarship.

Several years ago, United States Court of Appeals Judge Harry Edwards wrote a scathing indictment of current legal scholarship.<sup>1</sup> Judge Edwards argued that legal scholarship, especially at elite institutions, has become increasingly focused on abstract theory at the expense of doctrinal analysis more likely to be useful to judges.<sup>2</sup> Judge Edwards claimed that “many law schools—especially the so-called elite ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.”<sup>3</sup>

Judge Edwards’ critique produced a number of responses from prominent scholars and judges.<sup>4</sup> Some challenged Edwards’ description and argued that doctrinal scholarship continues to be produced. Professor Robert Gordon, for example, had a research assistant, Ariela Gross (now a professor at the University of

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

2. *Id.* at 34-36.

3. *Id.* at 35.

4. *See, e.g.*, Derrick Bell & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 MICH. L. REV. 2025 (1993); Lee C. Bollinger, *The Mind in the Major American Law School*, 91 MICH. L. REV. 2167 (1993); Robert W. Gordon, *Lawyers, Scholars, and the Middle Ground*, 91 MICH. L. REV. 2075 (1993); Louis H. Pollak, *The Disjunction Between Judge Edwards and Professor Priest*, 91 MICH. L. REV. 2113 (1993); Richard A. Posner, *The Deprofessionalization of Legal Training and Scholarship*, 91 MICH. L. REV. 1921 (1993); James Boyd White, *Law Teachers’ Writing*, 91 MICH. L. REV. 1060 (1993).

Southern California Law School), search the contents “of three major law reviews in 1910 and every tenth year thereafter, to sense historical trends; and of five major law reviews in the law five years, to sense current trends.”<sup>5</sup> Gordon concluded that theoretical or interdisciplinary articles were most common during the 1920s and 1930s, at the height of the legal realist movement, and increased during the late 1980s and early 1990s.<sup>6</sup> However, he found that doctrinal articles remained frequent during this latter time.<sup>7</sup> Dean Lee Bollinger similarly disputed Judge Edwards’ claim by pointing to the extensive doctrinal scholarship by faculty members at his school, the University of Michigan Law School.<sup>8</sup>

Others agreed with Judge Edwards’ descriptive statement that doctrinal scholarship was being replaced by theoretical writings, but challenged his normative conclusion that this was undesirable. Professor George L. Priest, for example, argued that social science and philosophy theory do provide practical assistance because they analyze the effects of law on the citizenry, the values embedded in the law, and how the public interest may best be achieved.<sup>9</sup> Likewise, Judge Richard Posner responded by defending the utility and desirability of theoretical, interdisciplinary scholarship.<sup>10</sup>

After reading Judge Edwards’ article and the many replies, we had several reactions. First, the authors had a remarkably elitist focus, concerned only with scholarship at the most prestigious law schools and as published in the most elite law reviews. Judge Edwards, for example, based his claims on a survey of his former law clerks, themselves likely drawn primarily from elite law schools, and Edwards expressly focused on scholarship produced by the faculty at these schools. His critics have this same focus. For example, Professor Gordon surveyed legal scholarship by looking at a handful of the most prestigious law reviews.

Assessing legal scholarship requires attention to more than just the faculties at the “top” five, ten, or twenty law schools. Especially over the last twenty years, law schools of every type have increasingly expected high quality scholarship from their faculties. Perhaps this is a result of the tremendous pool of talent seeking positions as law teachers over the last two decades. Although our conclusion is impressionistic, we see schools that previously tenured faculty members with little or no expectations of scholarship that now are quite demanding in requiring significant publications as a prerequisite for tenure. Evaluating legal scholarship requires attention to the output from all schools and as published in all journals. There is plenty of doctrinal scholarship ably addressing the issues of concern to judges, but one sometimes must be willing to read law reviews other than those published by the students at Harvard, Yale, Stanford, Michigan, Chicago, and Berkeley to find it. To

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5. Gordon, *supra* note 4, at 2099-2100.

6. *Id.* at 2100.

7. *Id.*

8. Bollinger, *supra* note 4, at 2168-69.

9. George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929, 1943 (1993).

10. Posner, *supra* note 4, at 1925-26.

the extent that the lament is premised on the ideas that only elite law reviews can publish good doctrinal scholarship and only elite law faculties can write it, the premise is simply unfounded.

Second, in reading the arguments of Edwards and his critics, we have the sense that, to a large extent, they are all correct. In the past two decades, elite law schools have emphasized theoretical, interdisciplinary scholarship. This is reflected in their entry-level hiring; at U.S.C., for instance, almost all faculty members hired in the last decade have had Ph.D.s in other disciplines. It also is reflected in lateral hiring. A faculty member trying to move to an elite law school is more likely to attract attention and receive offers if he or she is engaged in theoretical, interdisciplinary work. Also, simply perusing the table of contents of law reviews—from elite and non-elite institutions—it is obvious that there are a significant number of abstract articles being published.

Yet, the critics of Edwards also are correct: doctrinal scholarship continues to be produced. Faculty members, including at the most prestigious law schools, continue to write legal treatises that describe and critique legal doctrines.<sup>11</sup> Law reviews, as Professor Gordon's survey showed, continue to include doctrinal articles, even as they also are including more abstract scholarship.

Finally, in reading Edwards and his critics, we had a sense that some key questions were alluded to, but not fully examined. It is these questions on which we will focus. First, who should be the audience for law professors' writings? Judge Edwards was explicit in his assumption that the desirable audience for legal scholarship is judges who decide cases and can benefit from doctrinal analysis. Many of his critics, implicitly or explicitly, challenge this premise. In Part I of this article we argue that attention to audience is crucial and that a wide array of audiences, including judges, lawyers, scholars, students, and the public, should be valued.

Second, in light of these many different audiences, what should count as legal scholarship? Every faculty in tenure decisions and post-tenure evaluations must decide what counts. In Part II, we argue that in evaluating faculty members, especially for tenure, writings that contribute original ideas about the law should be required. However, we argue that schools should be broadly inclusive in what counts as such scholarship, valuing both doctrinal and theoretical work.

Finally, in Part III we conclude by addressing the basic question all faculty members, and indeed all others, face: Why write? From the perspective of the individual faculty member, rather than from the vantage point of the school or the profession, the question each of us confronts is why use scarce time to put words on paper. Beyond the obvious answers—writing for tenure, writing for professional recognition, writing for merit salary raises or summer bonuses, writing to influence the law—we believe that the basic reason for writing should be simple: the scholar has something to say.

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11. For the sake of full disclosure, it should be revealed that one of us is the author of two legal treatises, *see* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (1997); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* (3d ed. 1999).

### I. WHO SHOULD BE THE AUDIENCE FOR LEGAL SCHOLARSHIP?

Judge Edwards is clear that he believes that the primary audience for legal scholarship is judges deciding cases. He bemoans what he sees as a decrease in doctrinal scholarship likely to be useful to judges. Others, too, have accepted this as the appropriate goal for law professors' writings. For example, Louis J. Sirico, Jr. and Beth Drew counted citations to legal periodicals in federal court of appeals decisions.<sup>12</sup> Sirico and Drew concluded that federal court of appeals cite law reviews infrequently, which they argued shows that current "legal scholarship makes only a modest direct contribution to the daily practice of law" and is "overwhelmingly an academic endeavor of little immediate perceived value to the rest of the profession."<sup>13</sup> The obvious assumption underlying this study is that legal scholarship should be written to be useful to judges.

Professor Edward L. Rubin, in writings on the topic, expressly defined legal scholarship as "normative prescriptions addressed to judicial decisionmakers."<sup>14</sup> In fact, even some who disagreed with Judge Edwards responded by arguing that theoretical analysis has value to judges. Judge Posner, for instance, argued that law and economics has contributed significantly to the field of antitrust law and "to the deregulation movement, which has transformed the legal landscape in a number of fields of law, such as transportation law and communications law."<sup>15</sup> Indeed, Judge Posner gave a long list of other ways in which law and economics has influenced many areas of legal doctrine, ranging from family law to torts, environmental law, employment law, and bankruptcy.<sup>16</sup>

The assumption, expressly stated or implicit, is that the appropriate audience for legal scholarship is judges. We believe that the flaw in these writings is its failure to justify this premise. Why should writings be deemed valuable scholarship only if it is potentially useful to judges deciding cases?

We contend that this is a much too narrow definition of the appropriate audience for legal scholarship. Indeed, there are at least five different audiences that might benefit from law professors' writings. We recognize that there is a separate question of whether writings for all of these audiences should be called "legal scholarship." We address that issue in Part II. Here we simply wish to suggest that there are many audiences that can benefit from what law professors write and publish, something that

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12. Louis J. Sirico, Jr. & Beth Drew, *The Citing of Law Reviews By the United States Court of Appeals: An Empirical Analysis*, 45 U. MICH. L. REV. 1051 (1991). A few years earlier, Professor Sirico, with a different co-author, published an article that counted the number of citations to law reviews in Supreme Court opinions. Louis J. Sirico, Jr. & Jeffrey B. Margulies, *The Citings of Law Reviews By the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131 (1986).

13. Sirico & Drew, *supra* note 12, at 1056-57.

14. Edward L. Rubin, *What Does Prescriptive Legal Scholarship Say and Who Is Listening to It: A Response to Professor Dan-Cohen*, 63 U. COLO. L. REV. 731, 732 (1992); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847-1853 (1988). It should be noted that, as discussed below, Professor Rubin argues that legal scholarship should be written for other public decision makers.

15. Posner, *supra* note 4, at 1925.

16. *Id.* at 1926.

has been largely ignored in the writings about legal scholarship by Edwards and others.

In no particular order, possible audiences for law professors' writings include the following:

A. *Students*

Above all, we believe that law professors are educators of students and that professors can educate students at other institutions by what they write and publish.<sup>17</sup> Casebooks, obviously, are materials written to educate students about the particular field of law. Treatises, for example, often find students seeking a clear exposition of the law as a primary audience. Additionally, a whole range of student practice materials exist to supplement casebooks and explain the law to students. As we discuss in Part II, the extent to which this should be regarded as scholarship for purposes of tenure, promotion, and evaluation depends on the original analysis contained within the material. As with all types of writings, there are enormous variations in quality. The point is simply that students matter as an audience for law professors' writings. They matter because students are future lawyers, judges, policymakers, legislators, and academics whose views of the possibilities and limits of the law are profoundly shaped by what they learn in law school.

B. *The General Public*

Law professors have the opportunity to educate a wider audience about the law than just law students. The public can be educated about the legal system and the law. For instance, in recent years, several superb biographies of key figures in the law have been published and marketed to a wide audience. Gerald Gunther's biography of Learned Hand,<sup>18</sup> Dennis Hutchinson's biography of Byron White,<sup>19</sup> and John Jeffries' biography of Lewis Powell, are examples.<sup>20</sup> Even though these books did not analyze doctrine, were not of practical use to judges, and were sold to the general public, they all unquestionably made important contributions. Lawyers and judges, academics in law and other fields, and members of the reading public learn from and enjoy reading biographies. Although those trained in the law may have a slightly different standard than the public has for what in judicial biography makes

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17. Professors, of course, also educate students through the materials that they prepare for their own courses and many professors spend a great deal of time doing this. However, our focus is on published material and thus do not consider materials for one's own course within the scope of our analysis. Although a definition of scholarship limited to published materials can be criticized, particularly at the margins, it remains a useful guideline. Most schools expect (rightly, in our view) that professors will engage in scholarship, teaching, and service to the university and/or the community. The accepted definition of the distinction between teaching and scholarship regards the materials one prepares only for one's own students to be part of one's teaching obligations. Scholarship involves publishing materials available to all. We accept this definition.

18. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994).

19. DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998).

20. JOHN JEFFRIES, JR., *JUSTICE LEWIS F. POWELL, JR.* (1994).

a novel contribution to understanding of the law, one can write a book that educates both the public as well as the bench, bar, and academy about who judges were, why they did what they did, and how they influenced the shape of American law and government.

Also in recent years, several books about the Supreme Court have been written for the general public, such as Edward Lazarus' *Closed Chambers*,<sup>21</sup> David Savage's *Turning Right*,<sup>22</sup> and James Simon's, *The Center Holds*.<sup>23</sup> Each of these books offered the public significant insights into the operations of the Supreme Court, an important institution of American government. Even if these books are not of use to judges deciding cases, they serve the salutary purpose of educating the public about the law and legal institutions. The public's understanding of the law affects the legitimacy of law and government, it may affect the public's decision to vote and to become involved in politics, and knowledge of how government (including courts) operate is important in maintaining the accountability that is part of a democratic society. Apart from these instrumental benefits of educating the public, there are intrinsic values as well. Surely one measure of the richness of society is the availability to the public of a wide variety of knowledge about the world around it. If those trained in the law wish to write for a general audience, the life of the mind available to them is that much richer for it.

### C. *Government Decision-Makers*

Many in government besides judges can benefit from writings by law professors. Legal scholarship can help to guide legislators and legislative staffs in devising and revising legislation. Similarly, writings by law professors can assist regulators in drafting and implementing regulation in many fields. The focus by Edwards and others on courts ignores the extent to which other government institutions are in the constant process of making decisions about the content of the law.<sup>24</sup>

An anecdote illustrates the potential value of such writings and often their absence. One of us, Erwin Chemerinsky, spent the last two years chairing an elected commission to rewrite the Los Angeles City Charter. The exercise was one of legal drafting and required consideration of countless legal issues: What is the most desirable allocation of power between the mayor and the City Council; should the mayor have the authority unilaterally to fire department heads; should the City Attorney be elected or appointed; what criteria should be used in drawing election districts for the City Council; should power be decentralized and delegated to elected neighborhood councils? These are issues quite similar to those faced in United States constitutional law concerning separation of powers and federalism. Early in the

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21. EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLE INSIDE THE SUPREME COURT* (1998).

22. DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992).

23. JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995).

24. Professor Rubin also has made the point of the potential value of legal scholarship to legislators and regulators. See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847-53 (1988).

process a research assistant was asked to search for writings on how other cities and other charter reform efforts have dealt with these topics. Even in the literature on local government law, relatively little was found. Many major cities, including Detroit, New York, and New Orleans, have revised their charters in recent years. Scholarship by law professors could be of great value to those engaged in the process, but very little was found.

*D. Other Law Professors and Professors in Other Disciplines*

Judge Edwards implicitly deprecates writings that have as a primary audience other legal scholars. The primary audience for abstract, theoretical scholarship that he criticizes are other academics in the field. He is certainly not alone in advancing this criticism. Professor Mary Ann Glendon, in an essay in the *Wall Street Journal* titled, "What's Wrong With the Elite Law Schools," objected that the "ratio of 'practical' to 'theoretical' articles has dropped in 25 years from four-to-one to about one-to-one."<sup>25</sup>

Yet, there is potentially great value in writings that advance legal understanding and knowledge, even if the immediate audience is only professors of law or other disciplines. Works of legal history or legal philosophy, for example, may not have practical utility for judges, but contribute to the academy's understanding about the legal system. Knowledge and understanding is desirable, even if it is only part of a scholarly dialogue that informs other academics.

Scholars in many fields study subjects more or less directly related to law. Historians of the labor movement study the extent to which legal institutions shaped the strategies of labor. Scholars of literature study novels that focus, to greater and lesser degrees, on legal topics (think of Charles Dickens' great novel, *Bleak House*, for example). Professors of history and African-American studies focus on the many ways in which the legal regimes of slavery and Jim Crow shaped and continue to influence African-American life and culture in the United States and elsewhere. Political scientists study the legislative process. Economists analyze in a variety of ways the effect that legal rules have on economic behavior. Psychologists study human behavior that is shaped to greater and lesser degrees by the law and legal institutions—police, prisons, the nature of legal rights. The list of legal issues of significance to non-law academics is enormous. To the extent that scholarship by law professors today seeks to join these debates, rather than the debates between and among lawyers and judges, surely the quality of non-lawyer scholarship is improved, enriched, or at least changed.

Moreover, it often is difficult to know what works of seemingly abstract theory or interdisciplinary empiricism might in some way have practical usefulness. An analogy can be drawn to the distinction between basic and applied science. The immediate audience for basic science is usually other scientists, but others might apply it in ways with great practical results. An example in law is the Coase

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25. Mary Ann Glendon, *What's Wrong With the Elite Law Schools*, WALL ST. J., June 8, 1993, at A16.

Theorem, which as developed was theoretical, but which has been applied in many fields to make practical arguments about the desirable formulation of legal rules.

### *E. Judges*

Certainly, we do not want to omit judges as an important audience for legal scholarship. Treatises that summarize the law can benefit generalist judges delving into a case in an unfamiliar field. Works that deeply analyze doctrine in specific areas can be useful to judges deciding cases presenting novel and difficult issues. Even works that criticize doctrine more than manipulate it can remind judges to step outside the doctrine box and think about the consequences of their methods and decisions. Our point, of course, is not to argue that courts are an unimportant audience for legal scholarship, only that they should not be regarded as the primary or most important target. Why, for example, believe that guiding judges is more important than helping legislators?

Our central thesis is that all of these should be valued as audiences for law professors' writings. A narrow definition—either Judge Edwards' or those in elite schools who value only abstract writings for other scholars—should be rejected. There is much that legal scholarship can offer to many different types of readers. No one—neither judges, students, nor academics—benefits from a notion that only a certain kind of scholarship addressed to a certain audience is valuable. All of us may not be equally interested in all kinds of scholarship, but none of us is the only reader of legal scholarship.

## II. WHAT SHOULD COUNT AS LEGAL SCHOLARSHIP?

Although writings for all of these audiences can make an important contribution, law school faculties face a more specific question: what types of writings should count as scholarship, especially for purposes of promotion and tenure evaluation? Imagine that a tenure candidate comes forward with a long list of op-ed pieces in newspapers and popular press magazine articles, all of which do an excellent job of explaining legal issues to a mass audience. Should these be counted as legal scholarship and deemed sufficient for tenure? What if the faculty member instead came forward with a series of excellent short articles written in bar journals for practitioners that summarize recent developments in a particular area of the law? Should these be counted as legal scholarship and deemed sufficient for tenure?

While there is no doubt that such writings have value and faculty members should be encouraged to write them, we would argue that they should not be regarded as legal scholarship in the promotion and tenure process. Legal scholarship should be regarded as writings that make an original contribution to the analysis and understanding of those engaged in the field of law. The ultimate test that should be applied to any writing is what it adds to the knowledge of those in the field. Will those reading the piece learn something that is not available in any other source?

If a writing makes a significant, original contribution to knowledge about the



law, then it should be regarded as scholarship regardless of the audience for whom it is written and regardless of whether it is doctrinal or theoretical writing. In terms of the audiences discussed in Part I, some types of writings for each of these categories of readers might be considered legal scholarship. For example, some casebooks and treatises written primarily for student audiences contain significant original analysis that those researching in the field could learn a great deal from. Each of us can think of casebooks and treatises that articulated a vision of a field of law that reflected an original and significant understanding. Some might put Hart and Wechsler's casebook on federal courts,<sup>26</sup> Tribe's treatise on constitutional law,<sup>27</sup> and Derek Bell's casebook on race and American law,<sup>28</sup> among many other books, in this category. In contrast, other casebooks and treatises are mainly summaries of the law and, while very useful, are not scholarship in the sense of an original contribution. The distinction between them is simply the extent of creativity and original analysis that underlies the always prodigious (but not necessarily creative) work of research, summary, and editing. Likewise, books written for a wide audience, such as judicial biographies or examination of Supreme Court decisions, also can make a substantial original contribution benefiting those in the field as well. There is no requirement that writing be inaccessible in order to count as scholarship.

In other words, our view is that law schools should be inclusive as to what they count as scholarship, so long as the writing offers original insights and ideas about the law. Whether a piece is doctrinal or theoretical should not matter. Indeed, we view the debate over the merits of these two types of writings as a misguided effort to make a false choice. Both have an important role to play in understanding about the law, just as both basic and applied science are important. Law school faculties should have a large enough tent to accommodate members who do both and, in fact, are likely to be enriched by the diversity of scholarly endeavors.

The obvious question is, why limit the definition of legal scholarship, at least for the tenure and promotion process, to that which makes an original contribution to understanding about the law? The answer lies in the distinction between scholarship and teaching. The latter is oriented to educating people—students, the bar, the bench, the public—about the law. The former, in contrast, is about advancing understanding. Scholarship should be required of all of us in the legal academy because we, having learned and thought about the law, are in the best position to advance the understanding of those who have also learned and thought about the law. To the extent that legal change can improve the law and thereby society, and to the extent that legal change is most likely to be effectively accomplished by those who are knowledgeable in the law, it is the obligation of law professors to use their resources of time and knowledge to engage in scholarship.

An analogy can be drawn to one of the reasons that freedom of speech is protected as a fundamental right: the belief that the exchange of ideas furthers the

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26. RICHARD H. FALLON, JR., ET AL., EDs., *HART AND WECHSLER'S: THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (4th ed. 1996).

27. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988).

28. DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980).

search for truth. Justice Oliver Wendell Holmes invoked the powerful metaphor of the “marketplace of ideas” and wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”<sup>29</sup> The argument is that truth is most likely to emerge from the clash of ideas.

John Stuart Mill expressed this view when he wrote that the “peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation - those who dissent from the opinion, still more than those who hold it.”<sup>30</sup> He said that an opinion may be true and may be wrongly suppressed by those in power, or a view may be false and people are informed by its refutation. Justice Brandeis embraced this view when he said that the “fitting remedy for evil counsels is good ones” and that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>31</sup>

Although there are strong criticisms of the marketplace of ideas metaphor,<sup>32</sup> the basic notion is that the exchange of ideas advances understanding. This is what should be expected of legal scholarship: that it contributes original ideas and advances understanding. Again, this is not to say that this is the only type of writing with value; rather just it is a type that should be required of all faculty members.

Of course, faculties also must evaluate the quality of scholarship. Most schools have tenure standards that require excellence in both teaching and scholarship for tenure. Professor Rubin has suggested that four criteria should be used in evaluating scholarship: (1) clarity, the extent to which the work identifies and explains its normative premises; (2) persuasiveness, the extent to which the evaluator believes the work should convince the public decisionmakers whom it addresses; (3) significance, the extent to which the work relates to the ongoing developments in the field; and (4) applicability, the extent to which the evaluator believes that the work contains an identifiable thought that can be used by other legal scholars.<sup>33</sup> Although we might quibble with aspects of these criteria—such as the requirement that scholarship be addressed to policymakers as opposed to other audiences—Professor Rubin provides the best set of criteria that we have seen for evaluating the quality of scholarship.

Our discussion thus far has established that law professors can and should write for one or more of a number of different audiences and that law schools should be open-minded (more so than some faculties now are) about which audiences count in evaluating the value of legal scholarship. But many law professors have the delectable luxury of not needing to worry much about what their colleagues think of their scholarship. For them the question about the different voices of and audiences

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29. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

30. JOHN STUART MILL, *ON LIBERTY* 76 (1859).

31. *Whitney v. California*, 274 U.S. at 357, 377 (Brandeis, J., concurring).

32. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

33. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

for legal scholarship is a different question: how to choose what to write and whom to address? Indeed, why write at all?

### III. CONCLUSION: WHY WRITE?

The remarkable career of Bernard Schwartz is a source of inspiration to all of us who write, for his life and career as a prolific scholar and public intellectual. What motivated him to write so much over such a long period of time? He obviously long ago received tenure and enormous professional recognition. Certainly, these external incentives—writing for tenure, writing for professional recognition, writing for merit salary raises or summer bonuses—often are the reasons the people write. But for Professor Schwartz, as for most of us at some point in our careers, these likely no longer provide the answer.

Obviously, we write in the hope of improving the law. Scholarship is in a sense an act of faith that writing can make a difference. Yet, all of us know that the reality is that most of what is written in law reviews is read by relatively few people. Occasionally, there is an article like “The New Property” that dramatically changes the way an area of the law is regarded and causes a reform in the law.<sup>34</sup> But such articles are rare. Perhaps more common, a body of articles, over a period of time, cause a change in the law. It is impossible to estimate what percentage of legal scholarship has such an impact, but likely the number is relatively small.

Why, then, should a person use scarce time to put words on paper? Writing comes at the expense of time with one’s students and family, it comes at the expense of working with colleagues and on pro bono or community service projects. We are not so presumptuous as to suggest a universal reason why all of us write, or even why all of us ought to write. Yet, we suspect for most of us who write the answers are the same: a deep belief that ideas matter and that scholarly exchanges, over time, can advance understanding and perhaps sometimes even make a difference.

This answer, though, seems too instrumental and too incomplete. It omits a fundamental reason why all of us write: because we have something to say. In that sense, legal scholarship mirrors not only the instrumental justifications for protecting freedom of speech, but also the arguments that freedom of speech is regarded as fundamental because of its intrinsic benefits to the individual.<sup>35</sup> As Justice Thurgood Marshall observed, “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”<sup>36</sup>

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34. In a classic article, Professor Charles Reich argued that the rights-privileges distinction is an anachronism in an era where people depend on government for so much that is essential for survival. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964); see also Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *YALE L.J.* 1245 (1965). By the end of the 1960s, this view was accepted by a majority of the Supreme Court. In the landmark case of *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Supreme Court held that individuals receiving welfare have a property interest in continued receipt of benefits and the government must provide due process before it terminates benefits.

35. See, e.g., Martin Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982) (arguing that self-realization should be regarded as the exclusive value of the First Amendment).

36. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

Writing, even in the often stilted tones of law review articles, is an act of self-definition. What we choose to write about, the voice we employ, the points we choose to make, all are important expressions of self. Few of us have the creativity or genius of the painters, poets, or physicists we most admire, but if we analogize legal scholarship to the creative works of other fields we see how significant an aspect of self it is to be able to choose what we want to say. The freedom matters particularly when the medium is one that will endure on the shelves of a library and in computer databases, and be used by researchers, long after we are gone. But it matters on a daily basis as well. What we write about determines what we read, what we think, with whom we communicate, and how we are understood by others. The topics we address often have intensely personal significance, whether we write about matters of economic equality, identity, the structure and power of government, or the workings of business transactions. The most pernicious consequence of the argument—whether in Judge Edwards' article or in the promotion and tenure process at a law school—that only some forms of scholarship addressed to only some audiences are worthy, is that it denies the autonomy of those who would choose to write in a different voice for a different reader.

Bernard Schwartz's magnificent career is a reminder of the promise of legal scholarship. His books and articles will be read for decades to come and will inspire, educate, and challenge the many different audiences for legal scholarship.