

## FOREWORD: WHY WRITE?

*Erwin Chemerinsky\**

### INTRODUCTION

This wonderful collection of reviews of leading recent books about law provides the occasion to ask a basic question: why should law professors write? There are many things that law professors could do with the time they spend writing books and law review articles. More time and attention could be paid to students and to instructional materials. More professors could do pro bono legal work of all sorts. In fact, if law professors wrote much less, teaching loads could increase, faculties could decrease in size, and tuition could decrease substantially.

The answer to the question “why write” is neither intuitive nor obvious. Nevertheless, as a professor who has been writing for almost thirty years, much of which likely never has been read by anyone,<sup>1</sup> I find myself inevitably asking what is worth writing about and for whom. As a new dean (of a new law school), I have begun to think of this question in a more institutional context: what faculty behaviors should a law school encourage and reward?

The answer to this question seemed far easier earlier in my academic career, as it probably is for most faculty members beginning in the academy. I was writing to establish my academic reputation (and to get tenure). I knew that writing that impressed other academics was the key to advancing in my chosen profession—pleasing those within my institution, opening the door to moving to other schools, and fostering my reputation so that I would receive recognition such as being invited to speak at conferences and being thought well of by my peers in academia.

As I observe my more junior colleagues, I realize that they are far more sophisticated than I was in working toward these goals. They spend far more time than I did in making strategic choices about topics that will lead to prominent placements and taking actions to gain recognition. They focus much more than I ever did on the hierarchy of law reviews and trying to draw fine distinctions among them in deciding where to publish. It is now common for faculty to send out hundreds of reprints to other academics. I never have sent out reprints; it always felt like uncomfortable self-promotion.

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1. I confess that I never have done a citation count of any article that I have written. I prefer not to know the reality that some of what I have written almost surely never has been read or cited.

I, of course, do not mean to deprecate faculty members choosing to write to advance their careers. The reality is that being an outstanding teacher has great rewards within one's own institution, but I don't know that I have ever heard of an instance of a professor being recruited to a more prestigious school because of his or her reputation as a teacher. Doing pro bono work—even handling high profile cases—does not, at this point in the history of legal education, bring much in the way of status or advancement.<sup>2</sup> I often felt that my colleagues looked at my appellate pro bono cases the way they would regard the mountain climbing of another colleague on weekends: vaguely interesting, but unsure why someone would do it. A young faculty member wanting to establish an academic reputation and perhaps “advance” to more prestigious schools would have to be advised that pro bono advocacy is not the path to get there. That path unquestionably is scholarship.

Although writing for professional advancement might be an adequate answer at the individual level, it raises a question for the legal academy more generally. Why should law schools require and encourage scholarship, and what types of writings deserve recognition?

There are superficial answers to this that have a kernel of truth, but that ultimately aren't very helpful. Law schools are usually part of universities, and a key aspect of being a faculty member in a university is scholarship. Most universities have some form of campus-wide review of promotions and tenure, and there would be serious problems if law faculty did not publish. But this just shifts the question of why write to another level and asks why universities put so much emphasis on faculty scholarship.<sup>3</sup>

There is also the superficial answer that law faculty members don't have enough to do with their time if they don't write. Law school classes generally meet twenty-eight weeks of the year. Teaching loads are light compared with many other departments in universities. Even including the weeks of grading, teaching law still leaves professors with a good deal of time without professional obligations. Yet there are many things faculty could do with this time that would have professional benefit and likely enhance their teaching, such as doing pro bono work; why should a university encourage scholarship over these other activities?

In my opinion, as legal academics, we write to add significant, original ideas to the analysis and understanding of the law; as people, we write to understand ourselves and the world in which we live. Ideally, scholarly writing offers insights that are useful to others, but at the very least, it helps the

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2. I am speaking here of appointments for traditional academic tenure-track positions. Obviously, clinical faculty often are hired for their litigation experience.

3. As a new dean, I have been very surprised by the large number of applications for faculty positions that I have received from senior lawyers, often senior partners at major law firms or supervising attorneys in district attorneys' and public defenders' offices. Many are shocked, even to the point of rudeness, to learn that they will not be considered for a tenure-track academic position without substantial academic writing. They are baffled why their extensive experience at the highest levels of the profession doesn't make them more qualified to be a law professor than an academic with many publications, but little practice experience. The answer that the law school is part of a university and academic publications are required for tenure and tenure-track positions generally is not persuasive to them.

author understand an area better and clarify his or her thoughts. Frequently, that greater knowledge and understanding helps in teaching as well.

A good place to begin examining more fully the question of why we should write is with a heated debate engendered by Judge Harry Edwards, who questioned the value of the direction of contemporary legal scholarship. The debate over Edwards's article produced the most analysis in recent years on the question of why law professors should write and what the focus of their legal scholarship should be. After describing this debate, I turn my attention to the unstated crucial question in this debate: for whom should law professors write? Strikingly, most of the books in this review issue are written for other academics. There are not reviews of new casebooks written for students or treatises written for judges and attorneys. Ultimately, the greatest force of Edwards's critique of legal scholarship is that the audience of law students, lawyers, and judges is no longer particularly valued. The recognition of the multiple audiences of legal scholarship is important because it helps in seeing the benefits of writing. However, academic writings, including the books reviewed in this issue, can serve many different audiences and meet many different goals: helping law students, aiding judges and lawyers, and advancing knowledge and insight. Achieving these goals is the answer to the question of why write. But it is a mistake if the academy values scholarship directed to only some of these audiences or accepts only some of these goals as appropriate. Finally, I examine the role of writing in our personal lives, recognizing that we write for ourselves and to discover the world around us. It is through our writing that we communicate both to one another and to ourselves.

### I. THE HARRY EDWARDS DEBATE

Several years ago, United States Court of Appeals Judge Harry Edwards wrote, in these pages, a scathing indictment of current legal scholarship.<sup>4</sup> 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>5</sup> 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>6</sup> Coming from Edwards, this was a particularly compelling critique. He was an esteemed professor specializing in labor law before being appointed to the United States Court of Appeals for the District of Columbia Circuit.<sup>7</sup> He knows the academy and trends in legal scholarship, as well as obviously knowing what is useful for those on the bench.

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

5. *Id.* at 34–36.

6. *Id.* at 34.

7. *A Conversation with Judge Harry T. Edwards*, 16 WASH. U. J.L. & POL'Y 61, 62 (2004).

Edwards's critique produced a number of responses from prominent scholars and judges.<sup>8</sup> Some challenged Edwards's description and argued that doctrinal scholarship continues to be produced. Professor Robert Gordon, for example, had his research assistant, Ariela Gross (now an eminent professor at the University of 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 last five years, to sense current trends."<sup>9</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>10</sup> However, he found that doctrinal articles remained frequent during this latter time. Dean Lee Bollinger similarly disputed Edwards's claim by pointing to the extensive doctrinal scholarship by faculty members at his school, the University of Michigan Law School.<sup>11</sup>

Others agreed with Edwards's 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 do provide practical assistance because they analyze "the effects of law on the citizenry, the values imbedded in the law, and how the public interest may best be achieved."<sup>12</sup> Likewise, Judge Richard Posner responded by defending the utility and desirability of theoretical, interdisciplinary scholarship.<sup>13</sup>

In one sense, this debate was far too narrowly focused on the elite of the academy, concerned only with scholarship at the most prestigious law schools and as published in the most elite law reviews. Edwards, for example, in part based his claims on a survey of his former law clerks, themselves drawn primarily from elite law schools,<sup>14</sup> and he expressly focused on scholarship produced by the faculty at these schools. His critics have shared this focus. For example, as mentioned above, Gordon's survey of legal scholarship looked only 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

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8. 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. 1970 (1993).

9. Gordon, *supra* note 8, at 2099 (footnotes omitted).

10. *Id.* at 2100.

11. Bollinger, *supra* note 8, at 2168–69.

12. 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).

13. Posner, *supra* note 8, at 1925–26.

14. Edwards, *supra* note 4, at 41–42.

high-quality scholarship from their faculties. Perhaps this is a result of the tremendous pool of talent seeking positions as law professors over the last two decades. There was a time when there were many law schools that required little or no scholarship for tenure.<sup>15</sup> I know of none today where this is true. 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, Chicago, Berkeley, and Michigan to find it. To 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.

Also, in reading the arguments of Edwards and his critics, I 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. A significant percentage of those now hired to teach at elite institutions have their PhD in other disciplines. This emphasis is also 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. Additionally, 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 that are unlikely to be useful to judges or lawyers.

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

But overall, I believe that Edwards had the better of this debate, at least as a descriptive matter. Over the twenty-nine years that I have been a law professor there has been a shift. Faculty scholarship has become far more interdisciplinary and more abstract, and interdisciplinary scholarship is more highly valued than traditional doctrinal scholarship, especially at elite institutions. Edwards wrote his critique over fifteen years ago, and I think that the trends that he identified have increased since then. The reality is that legal scholarship, especially from elite faculty and in elite law reviews, is even more disconnected from the issues that judges and lawyers face. Obviously, this is a generalization; there are countless counterexamples. Yet I

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15. My first teaching job was at DePaul College of Law in 1980. It was a truly wonderful place, and I learned a tremendous amount from my senior colleagues that has benefited me throughout my career. It was, at that time, a school in transition. There were senior colleagues who had been hired at a time when writing was not expected and who had not written. But there also was a substantial group of faculty who were very much engaged in terrific scholarship. Not surprisingly, there were tensions as the latter group sought to reorient the expectations for faculty members. I know of many other schools that have gone through similar transitions over the past few decades.

don't think that there would be substantial disagreement that overall, law faculty, in both their teaching and writing, are less connected to the profession and the issues it confronts.

## II. THE AUDIENCE?

Ultimately, the debate between Judge Edwards and his critics raises the question I posed at the outset: why should law professors write? Answering this question requires attention to the basic issue of who should be the audience for a law professor's writings.

### A. *Expanding Our View*

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.

This is where I think that Edwards's critique has its greatest force. The legal academy—especially the elites—have increasingly come to value scholarship directed primarily or exclusively at law professors (and maybe those in other disciplines). Correspondingly, the legal academy places little value on books or articles written for students, for lawyers, for judges, for the general public. Consider just the books reviewed in this prestigious Book Review issue of the *Michigan Law Review* (or those in the Book Review issues over the last several years). How many could realistically be said to have as their audience other academics as opposed to law students, lawyers, judges, or the general public?<sup>16</sup> When was the last time that a casebook was reviewed here? When was the last time that a treatise was reviewed?

I will openly admit my bias here. I am the author of two casebooks and two treatises.<sup>17</sup> But my point is not that this type of scholarship is better than other types, such as most of that reviewed in these pages. Rather, I believe that what has occurred is that scholarship directed at the audience of law students and practitioners (and I regard casebooks and treatises as a form of scholarship) is no longer highly valued in the academy. If I were advising a young colleague who wanted to advance within or move to an elite

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16. In fairness, it is important to note that two of the books reviewed in this issue of the *Michigan Law Review* have been reviewed in the *New York Times*, an indication that they are of interest to a wider audience. Edward K. Cheng, *Will Quants Rule The (Legal) World?* 107 MICH. L. REV. 967 (2009) (reviewing IAN AYRES, *SUPER CRUNCHERS: WHY THINKING-BY-NUMBERS IS THE NEW WAY TO BE SMART* (2007)); Gene R. Nichol, *Establishing Inequality*, 107 MICH. L. REV. 913 (2009) (reviewing MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* (2008)). Additionally, the review of the Carnegie Commission report on legal education does not fit the pattern that I describe. Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009) (reviewing SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007)).

17. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* (2d ed. 2005); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (3d ed. 2006); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* (5th ed. 2007); ERWIN CHEMERINSKY & LAURIE L. LEVENSON, *CRIMINAL PROCEDURE* (2008).

institution, I would frankly say that there are many rewards to doing casebooks and treatises, but recognition within the academy of law professors is not among them. Time and again as I have heard appointments candidates discussed, no weight whatsoever has been given to casebooks or treatises in the evaluation. Writing for the audience of law students and practitioners just doesn't count.

### B. *The Many Audiences to Consider*

Who are the possible audiences for writing by law professors? First, as alluded to above, there are students. Above all, law professors are educators of students, and professors can educate students at institutions beyond their own by what they write and publish. 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. Of course, practitioners and judges can also use treatises. Additionally, a whole range of student practice materials exist to supplement casebooks and explain the law to students.

I should be clear that I am not saying that all writing is to be taken equally. There must be quality determinations, and quality certainly should be assessed based on the amount of original analysis. My point is simply that this is a relevant audience, but one not generally given much weight today in the legal academy (or at least in its elite circles).

A second possible audience is the general public. Law professors have the opportunity to educate a wider audience about the law than just law students. 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<sup>20</sup> are examples of such books written by academics. 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, 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 a judicial biography makes a novel contribution to the 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 by academics, such as Cass R. Sunstein's

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

*Radical in Robes: Why Extreme Right-Wing Courts Are Wrong for America* and Mark Tushnet's *The Rehnquist Court and the Future of Constitutional Law*. There also have been influential books on the war on terrorism such as David Cole's *Enemy Aliens*, Joseph Margulies's *Guantanamo and the Abuse of Presidential Power*, and John Yoo's *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*. Each of these clearly was intended to appeal to multiple audiences, both academics and mainstream readers. 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 also affect the public's decision to vote and to become involved in politics. Further, knowledge of how government (including the judiciary) operates 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.

Third, writing can be for 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>21</sup>

An anecdote illustrates the potential value of such writings and often their absence. A decade ago, I spent 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?<sup>22</sup> These are issues quite similar to those faced in U.S. constitutional law concerning separation of powers and federalism. Early in the process, I asked a research assistant 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, we found relatively little. Many major cities, including Detroit, New York, and New Orleans, had revised their charters in recent years.

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21. 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).

22. Interestingly enough, some of these issues surfaced recently for a Michigan court forced to interpret the Detroit city charter and the interplay between the city council and then-mayor Kwame Kilpatrick. *Court blocks Detroit council's plan to oust mayor*, REUTERS, Aug. 18, 2008, available at <http://www.reuters.com/article/politicsNews/idUSN1847713620080818>.



Scholarship by law professors could be of great value to those engaged in the process, but very little exists. Even in the voluminous literature on local government law, city charters and the legal issues surrounding them were almost entirely ignored.<sup>23</sup>

A fourth possible audience is other law professors and professors in other disciplines. Edwards implicitly deprecates writings that have as a primary audience other legal scholars—the primary audience for abstract, theoretical scholarship that he criticizes is 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* entitled “What’s Wrong With the Elite Law Schools,” objected that the “ratio of ‘practical’ to ‘theoretical’ articles has dropped in 25 years from over four-to-one to about one-to-one.”<sup>24</sup>

Although I share Edwards and Glendon’s lament that doctrinal scholarship is much less valued today than in prior generations, I don’t agree with their criticism of books and articles that are directed primarily to other academics.<sup>25</sup> 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 they 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’s 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-legal 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-legal scholarship is improved, enriched, or at least changed.

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23. The effort in Los Angeles was successful. We proposed a new Charter, and the voters approved it in June 1999.

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

25. Here, too, I admit my bias in that some of what I have written has primarily been for this audience. For example, I have written two books, including one very recently, that have other professors as their primary intended audience. ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008); ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* (1987).

Moreover, it is often 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 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.

A fifth possible audience is judges. I believe that Edwards's implicit point was a concern over the decrease in scholarship useful to and being written for judges. I speak often at conferences of federal and state judges, and on countless occasions I have heard them complain over how infrequently scholarship deals with the cutting edge issues they confront. Treatises that summarize the law can benefit generalist judges delving into a case in an unfamiliar field. And works that deeply analyze doctrine in specific areas can be useful to judges deciding cases that present 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.

Of course, writing does not have to be directed at just one of these audiences; the same book or article can appeal and be useful to multiple audiences for multiple purposes. But my most important point is that all of these should be valued as audiences for law professors' writings. A narrow definition—either Edwards's 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.

Academic freedom—a focus of many of the books and the book reviews in this issue—serves the interests of all of these audiences. It is academic freedom that allows faculty members to put forward their ideas without fear of losing their jobs. Whether I am writing for judges or other academics or the general public, I can express my views, however inflammatory, without worrying about adverse consequences. Academic freedom is thus not incidental, but integral to being able to serve the needs of all of these audiences.

### III. WHAT COUNTS?

The identification of audiences for legal scholarship goes a long way to answering the question posed by this Foreword: why write? It can be argued that expressing ideas is intrinsically valuable and thus that law review articles and books about law have inherent value. But without even needing to establish that proposition, it is clear from the above discussion that writing has instrumental value for many different audiences. As a faculty member, I have written for each of these audiences at various times. As a dean, I would encourage and reward high-quality scholarship directed at any of these audiences.

However, even if it is accepted that writing for all of these audiences can make an important contribution, law school faculties then 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? Should writing on blogs, some of which is quite sophisticated and some of which isn't, count? 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 when compared with complex theoretical articles written by other professors?

While there is no doubt that such writings have value and faculty members should be encouraged to write them, I am skeptical that they should all be regarded as legal scholarship in the promotion and tenure process. Such writings certainly can be a positive factor in evaluating a faculty member, but I don't think that they are *per se* legal scholarship.

Legal scholarship can be defined as writings that make an original contribution to the analysis and understanding of those engaged in the field of law. The ultimate test for tenure and promotion 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 above, 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> Laurence Tribe's treatise on constitutional law,<sup>27</sup> and Derrick 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 examinations of Supreme Court decisions, can also

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26. HENRY M. HART, JR. & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1st ed 1953).

27. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1st ed. 1978).

28. DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (1st ed. 1973).

make a substantial original contribution benefiting those in the field. There is no requirement that writing be inaccessible to count as scholarship.

The obvious questions are: 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? Why treat law review articles as scholarship, but not blogs? The answers are not intuitively obvious. They cannot be about the form of the publication, since increasingly there are journals that are entirely electronic in their form. Nor can they be about length; longer is not inherently better, and a collection of blog writings can be quite voluminous.<sup>29</sup> With that, the very short nature of op-ed pieces or bar journal articles does not lend itself to in-depth analysis that is characteristic of excellent scholarship.

Ultimately it is difficult to draw a distinction based just on form. For example, I find it hard to explain why an amicus brief containing lengthy and original analysis of a legal issue does not count as scholarship, but that same brief repackaged and published as a law review article is deemed scholarship. The traditional answer likely was that scholarship must be published in some form. But now briefs are electronically accessible and there are some law review articles that are only accessible electronically. If writing for judges can count as scholarship, why not an amicus brief directed at a particular court?

Having struggled with this question of what counts, I think that perhaps it is best to avoid focusing on form and instead look at quality. In other words, any format might lend itself to writings that “count”; it just depends on what is written. This, of course, just shifts the question to evaluation of quality. But schools inevitably must make such determinations. Most schools have tenure standards that require excellence in both teaching and scholarship. Professor Edward 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 development[s] of 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>30</sup>

Although I would quibble with aspects of these criteria—such as the requirement that scholarship be addressed to policy-makers as opposed to other audiences—Rubin provides the best set of criteria that I have seen for evaluating the quality of scholarship. For me, ultimately, the question is whether

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29. One distinction is that scholarship is generally selected for publication by others; blogs are self-published. Indeed, faculty in disciplines outside law are sometimes skeptical that law reviews should count as scholarship because they are not selected through a peer-review process. Blogs generally require no external review at all.

30. Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 962 (1992).

the work adds substantially to the body of literature that already exists. Has the author made an important, original contribution? If so, it is excellent scholarship, whatever its audience and whatever its form.

#### IV. WHY WRITE?

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. Even many scholarly books have a limited audience (though being reviewed in these pages undoubtedly increases the audience for these fortunate books). 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>31</sup> But such articles are rare. Perhaps more common, a body of articles, over a period of time, causes 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, and it comes at the expense of working with colleagues and on pro bono or community-service projects. I am not so presumptuous as to suggest a universal reason why all of us write, or even why all of us ought to write. Yet I 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. 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>32</sup>

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

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31. 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, a majority of the Supreme Court accepted this view. 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, which means that the government must provide due process before it terminates benefits.

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

we want to say. That 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 Edwards’s 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.

#### CONCLUSION

The *Michigan Law Review* Annual Survey of Books is important because it brings to attention a collection of books that otherwise might be missed. It facilitates the exchange of ideas through a reviewer critically engaging with the author’s thesis and project. It thus helps to inform and advance ideas. And ultimately isn’t that why we do and should write?