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The Goldilocks Path of Legal Scholarship in a Digital Networked World

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Traditional legal scholarship often comes under fire. Commentators lament that law review articles are too long, too stuffy, too heavily footnoted—just "too traditional." Legal scholars have responded by seeking out less traditional avenues of publication such as online blogs, social media, and op-eds. These also come with attendant risk—lack of nuance, lack of depth, and statements asserted outside one's area of expertise. I propose the "Goldilocks Path" of scholarship as an optimal method of spreading knowledge and ideas. This Goldilocks Path lies in a balance between producing traditional and nontraditional pieces. Doing so engages academics and broadens their audience, allowing for more diverse readership, an opportunity to obtain early critique of theories, and a chance for scholarship to create a stronger impact. Walking the multi-outlet path, where the nontraditional enhances the traditional, can facilitate a more meaningful dialogue within the legal community and with the public at large.

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INTRODUCTION

This article is about the value of being a tweeting, blogging, op-ed writing, publicly-commenting, TED-speaking #lawprof. My general views on the topic are revealed by action: I am on Twitter (follow

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me @OrlyLobel); I am a permanent blogger on PrawfsBlawg; I serve as a frequent commentator in big media and am frequently quoted by journalists in *The New York Times*, *Fortune*, *NPR*, *Businessweek*, and other outlets.[1] I also enjoy writing op-eds, including in *The New York Times*, *The Wall Street Journal*, and *Harvard Business Review*.[2] I even have a TEDx talk out there.[3] As an academic, I embrace a broader audience to complement my directly scholarly circles. My most recent book, *You Don't Own Me: How* Mattel v. MGA Entertainment *Exposed Barbie's Dark Side*, is an academic-trade crossover—it has won scholarly awards, and it is based on my scholarship and expertise in intellectual property and employment law.[4] But, unlike my law review articles, it is a full character-driven narrative about an epic court battle. Although I received offers to publish the book with top university presses (my previous book was published by Yale University Press),[5] I chose to

1. *See, e.g.*, David Streitfeld, *Plaintiff in Silicon Valley Hiring Suit Maligns Deal*, N.Y. TIMES (May 12, 2014), https://www.nytimes.com/2014/05/12/technology/plaintiff-maligns-deal-in-silicon-valley-suit.html (where I commented on why Apple, Google, Adobe, and Intel likely settled class action suits their employees brought against them); Jeff John Roberts, *How to Stop Rivals from Raiding Your Talent (Using Fair Means or Foul)*, FORTUNE (June 2, 2015), http://fortune.com/2015/06/02/talent-raids-trade-secrets/ (where I argue that the knowledge flow that results from employees moving from one company to another is beneficial, states that ban noncompete clauses are more innovative, and contracts that control human capital must be met with higher scrutiny); Haleema Shah, *You Don't Own Me: How* Mattel v. MGA Entertainment *Exposed Barbie's Dark Side*, WIS. PUB. RADIO (Nov. 14, 2017, 5:30 PM), https://www.wpr.org/you-dont-own-me-how-mattel-v-mga-entertainment-exposed-barbies-dark-side (discussing one of the largest intellectual property lawsuits of the last decade, between Mattel and MGA Entertainment, the makers of Barbie and Bratz dolls respectively, which inspired my book, *You Don't Own Me: How* Mattel v. MGA Entertainment *Exposed Barbie's Dark Side*); *'The Office' as Management Training Tool*, NAT'L PUB. RADIO (Oct. 25, 2006, 6:00 AM), https://www.npr.org/templates/story/story.php?storyId=6380073 (where I explain that I will be using clips from *The Office* in my classes teaching about employment).

2. *See, e.g.*, Orly Lobel, Opinion, *Companies Compete but Won't Let Their Workers Do the Same*, N.Y. TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html (discussing the effects of the growing trend toward noncompetes for all levels of employees and the potential policy responses); Orly Lobel, *Compensation Should Be Guided by Merit*, WALL ST. J. (Jan. 23, 2014, 11:02 AM), https://blogs.wsj.com/accelerators/2014/01/23/orly-lobel-compensation-should-be-guided-by-merit/ (discussing the compensation goals of talented employees and how startup companies can attract talent); Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change (discussing the growing prevalence of NDAs and the danger that they might conceal misconduct or monopolize job markets).

3. Orly Lobel, *TEDxUCIrvine: Too Many Secrets and Too Few Sparks*, YOUTUBE (July 7, 2015), https://www.youtube.com/watch?v=KL3ewVaA4S0.

4. *See generally* ORLY LOBEL, YOU DON'T OWN ME: HOW *MATTEL V. MGA ENTERTAINMENT* EXPOSED BARBIE'S DARK SIDE (2017).

5. *See generally* ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (2013).

publish it with W. W. Norton, which publishes Nobel laureates alongside popular authors like Michael Lewis and Neil deGrasse Tyson. The *Financial Times* described *You Don't Own Me* as a "page-turner," and that made me very happy. The book has also been reviewed by *The New Yorker*, *The Wall Street Journal*, and *The Times Literary Supplement*, among other outlets.

A recent article in *The Atlantic* states, "There comes a time in every writing-inclined person's life when they decide between a few paths. Two common paths are journalism and the academy."[6] But academics, including legal academics, are increasingly drawing on their scholarship to tread the other paths of journalistic engagement. Rather than deciding between paths, many academics supplement traditional academic writing with multiple, often digital, modes of writing, conversing, and spreading ideas. And rather than thinking of the paths as tradeoffs, the paths are revealing themselves as mutually reinforcing.

In this essay, I argue that journalistic modes of engagement, dissemination of ideas, and research are important and enriching for academic scholarship. I argue that the benefits of supplementing traditional publication of research with other modes of writing and online exchanges far outweigh the costs. I suggest that it is possible to tread the paths that are not "too traditional" or "too nontraditional," but instead are just right—the Goldilocks Path. This path is found in the spaces that connect traditional scholarship with additional types of engagement.

I. ACADEMIA IS ABOUT EXCHANGE OF KNOWLEDGE

For law professors, law review articles continue to be the gold standard of scholarship. Despite the many debates and criticism of the law review publication process and the flaws in the law review format, law reviews are the way that a legal scholar establishes her expertise, develops her research methods, and creates a comprehensive and deep body of scholarship. Law review articles allow a scholar to delve into the rich subject matter of her expertise and examine and analyze the issues with rigor and sophistication. The primary audience of a law review article is other scholars in one's field. Occasionally the audience may include judges, attorneys, and policymakers. The article may also be read by academics from other fields and, if one is fortunate, it may be included in course syllabi for students of law and other fields. Most law review articles, however, will only have a limited audience. Still, all of these readership possibilities expand when a law review article receives greater

6. Olga Khazan, *Professors Explain Why It's Hard to Write Online*, ATLANTIC (May 11, 2018), https://www.theatlantic.com/technology/archive/2018/05/four-professors-adorably-sum-up-why-its-hard-to-write-online/560141/.

online visibility.

Increasingly, in our fast-changing world, many scholars are expanding the types of writing, engagement, and dissemination channels to spread and exchange ideas. I argue that the expansion of forums and activities enriches and supports a strong scholarly agenda in at least five ways.

A. Eyeballs & Readership

The most obvious and straightforward benefit of tweeting, blogging, and using other digital means to disseminate one's law review articles is having more eyeballs on your scholarly work. As noted above, scholars face the risk of remaining largely unread if they do not post their work on SSRN, email reprints (save a tree!), or otherwise spread the word about the publication of their scholarly articles. These days, law blogs often discuss recently published articles and hold book symposia. For example, in 2013, *Concurring Opinions* held an online symposium on my book *Talent Wants to Be Free*.[7] Even if one's only goal in publishing a law review article is to be read by other scholars in her field, posting a link to the article on a popular academic blog or on social media increases the likelihood of achieving that goal.

B. Research Network Expansion

By developing an online presence and increasing visibility of scholarship, academics share their work with a more diverse group, including law scholars from other fields, academics from other disciplines, attorneys, judges, journalists, policymakers, and the general public. This is now a primary way by which researchers find collaborators for interdisciplinary work. It also is the way to get read and, in turn, cited in other scholarly writing. Since legal scholarship is in its nature porous to other disciplines, keeping a dynamic and broad research network is particularly beneficial to the legal scholar.[8]

C. Pre-Writing Input

Scholars who write shorter pieces—for example, blog posts—are able to test their theories and arguments early and often. Before the digital age, scholars wanting to exchange half-baked ideas for scholarship were limited to face-to-face workshops, conferences, and the sharing of physical drafts. Today, even before a draft is ready to be posted on SSRN,

7. Orly Lobel, *The Dualities of Freedom and Innovation*, CONCURRING OPINIONS (Nov. 16, 2013), https://concurringopinions.com/archives/category/symposium-talent-wants-to-be-free.

8. *See generally* Orly Lobel, *A Behavioural Law and Economics Perspective: Between Methodology and Ideology When Behavioural Sciences Meet Law*, *in* RETHINKING LEGAL SCHOLARSHIP: A TRANSATLANTIC DIALOGUE 476 (Rob van Gestel, Hans-W. Micklitz & Edward L. Rubin eds., 2017).

scholars can test their arguments and get input on the scope of their topic, the tentative structure of their article, or any particular aspect of their project by writing a shorter piece for a blog and receiving early feedback in the form of comments.

Scholars can often receive ideas for the next natural step in their line of research when their body of work has online visibility. They can also learn more quickly about new developments happening in their field. For example, I write about employment contracts, and, thanks to an expanded readership, I hear about contractual variances, situations, and disputes that I would not have been able to find just by reading the case law or even by collecting field data or conducting surveys about corporate practices.

D. Policy Impact

A central way to put legal scholarship into the hands of policymakers is by presenting it through additional forums and journalistic writing. By putting the research out there for the general public, it is more likely to have an impact on policy and public debates. One early study found that members of Congress only have eleven minutes a day to read, and that time spent reading will focus on writing that assumes the form of summaries, newspaper headlines, and staff memos.[9] Writing short pieces, such as op-eds or blog posts, and doing radio interviews and podcasts are great ways to publicize your research and get it into the hands (or ears) of policymakers.

II. RESEARCH AND POLICY IMPACT

When I wrote *Talent Wants to Be Free*,[10] I argued that noncompetes were used broadly but that no one was paying attention. I further noted that the media and policymakers were debating the scope of intellectual property while ignoring the expansion of other kinds of knowledge and information being confined and propertized through contract. I am not entirely sure why this changed soon after *Talent Wants to Be Free* was published, and I most certainly would not claim to have single-handedly created the interest in the topic. But, soon after the book was published and reviewed by major media like *The Economist*, and after I had published op-eds related to the book, the media began to increase coverage on the topic of noncompetes. I am frequently approached by journalists to comment about such restraints on trade and, in turn, I refer journalists to my books and articles. Then, the journalistic articles often

9. H.R. DOC. NO. 95-232, at 18 (1977).

10. *See generally* LOBEL, *supra* note 5.

quote or link to the books and articles. In 2016, I was invited to speak at the White House about my noncompete research and became part of President Obama's policy team working group on the topic, culminating in a President's Call for Action to the states on noncompetes.[11] A few years ago, I posted some ideas about law review writing and impact on PrawfsBlawg. Orin Kerr left an insightful comment on my post:

> I think it all boils down to the audience you choose. No one work can please every audience, so you just have to pick what audience(s) you care about based on your interests and goals. Some people will care about influencing the courts; others about influencing the legal culture; others about influencing legal academics; and others will just care about expressing their own views apart from their impact on others. Even within these categories, there are subcategories: For example, some will care about influencing subject matter experts in the field, while others might care about influencing generalists or particular schools of thought within the subject matter. It all depends on your interests and goals, I think, which in turn depends on what you value.[12]

I agree with Orin about the multiple audiences and preferences. Of course, the question of the value of complementing traditional scholarship with other paths of writing is directly related to an underlying and even more basic question of the role and value of legal scholarship. But the point here is that often one does not need to choose—treading a Goldilocks Path can allow one to reach multiple audiences and hold multiple visions of impact for her scholarly work.

A quick note about responding to inquiries from journalists as a way to spread your expertise and research: most of the time I am happy to respond to such calls, but there is a risk of being misquoted, or not quoted at all. Recently a journalist from *The Economist* spent over an hour on the phone with me, asking questions about my research on noncompetes, then followed up with questions by email. She eventually published her article without mentioning my name or linking to any of my research. With this in mind, there are clear advantages to publishing one's own short pieces that showcase the larger body of research.

A. Scholarly Writing Style

An additional benefit of writing journalistic pieces is that the scholar must vary her writing style. Publishing shorter popular pieces demands

11. Press Release, Univ. of San Diego Sch. of Law, USD Sch. of Law Professor Orly Lobel Research Impacts White House Call to Action (Oct. 26, 2016), http://www.sandiego.edu/news/law/detail.php?_focus=57717.

12. Orin Kerr, Comment to *Citology*, PRAWFSBLAWG (June 3, 2012, 5:45 AM), http://prawfsblawg.blogs.com/prawfsblawg/2012/06/citology-.html.

that scholars write in an accessible and succinct manner—good qualities for any type of writing. Writing the shorter popular pieces serves as a good reminder for the legal scholar that law review articles are also better when they are written with clarity and charm and do not rely too heavily on professional jargon. JOTWELL is a good example of an online outlet with short essays and lighter writing style that publishes rigorous academic pieces.[13]

B. The Engaged Scholar/Teacher/Institutional Leader

Finally, it is worth noting that, beyond the enrichment of scholarship, there is value to law professors being engaged with the digital world. As scholars, and as teachers and institutional leaders in higher education, law professors can benefit from the richer platform of digital exchanges. Indeed, in our contemporary realities, when the media is increasingly under attack and journalism is labeled "fake news" by those who disagree with facts that do not fit their ideology, the scholar/teacher-expert can play a particularly important role of adding credibility to important topics of the day. I agree with Carissa Hessick's caution about professors speaking with authority on topics outside their area of expertise.[14] This surely dilutes our professional roles as law professors. I wholeheartedly adopt Hessick's suggestions for rules of engagement.[15]

Each of these types of networked exchanges and engagement can contribute to more nuanced research and add to the richness and complexity of the scholarship. This is of course the opposite of the oft-cited counter-risk of engaging with more journalistic styles and forums of exchanges: that the scholar will lose nuance, depth, and complexity. The risk exists, and there are certainly tradeoffs along the way; but overall I believe that more engagement is preferable to less, and that depth comes with increased exposure and exchanges.

One thing to note is that online presence is still very much patterned

13. *See generally* JOTWELL: THE JOURNAL OF THINGS WE LIKE (LOTS), https://jotwell.com/ (hosting several examples of reviews of my recent articles and book). For some examples, see Eli Wald, *The Legal Profession Saga Behind the Toy Story*, JOTWELL (July 26, 2018), https://legalpro.jotwell.com/__trashed/ (reviewing LOBEL, *supra* note 4); Martin H. Malin, *A Framework for Thinking About Regulating Platforms*, JOTWELL (Oct. 23, 2017), https://worklaw.jotwell.com/a-framework-for-thinking-about-regulating-platforms/ (reviewing Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016)); Margot Kaminski, *Disruptive Platforms*, JOTWELL (July 19, 2017), https://cyber.jotwell.com/disruptive-platforms/ (same); Matt Bodie, *We Are What We Work*, JOTWELL (June 5, 2015), https://worklaw.jotwell.com/we-are-what-we-work/ (reviewing Orly Lobel, *The New Cognitive Property: Human Capital Law and Reach of Intellectual Property*, 93 TEX. L. REV. 789 (2015)).

14. Carissa Byrne Hessick, *Towards a Series of Academic Norms for #Lawprof Twitter*, 101 MARQ. L. REV. 903, 906 (2018).

15. *Id.* at 916–23.

by gender. When I joined PrawfsBlawg I was the first, and for a long while, the only, female law professor on the popular blog (out of seven professors in total). Since then others have joined, but the imbalance remains: four women out of fourteen permanent bloggers. This imbalance is pervasive throughout the blogosphere and online platforms. Moreover, women as well as minorities often face disproportionate risks of uncivil attacks on their commentary. As a group of health scientists recently wrote:

> With exposure can come brutality in the form of hate tweets and irate emails. Expect more of them if you stick your neck out. Some of us find this to be a minimal irritant and easily ignored. For others, it could be significant, especially considering the tendency for women and minorities in the public eye to attract Internet trolls.[16]

To me, this imbalance means that there is a special significance in women academics developing and preserving their online voice.

III. THE ICING ON THE CAKE

"One should never assume mass media writing can—or should—replace the normative routes to professional status. It is an 'and,' not an 'or.' A pile of op-eds from an academic without a strong scholarly record will come across as too much icing and not enough cake."[17]

It is difficult to predict the impact an article will have. But we do know, as measured by peer citations, that unsurprisingly some articles have a much greater chance of impact than others. Articles by well-known scholars, as well as articles published in top law reviews, are more likely to receive such attention. Indeed, it is quite rare for any article outside the top five journals to be on the list of most-cited articles each year.

Still, this has not been my own idiosyncratic experience. When I compare results among my own articles, I cannot explain exactly why certain articles become more central as time goes by. *The Renew Deal: The Fall of Regulation and the Rise of Governance*,[18] which I wrote while I was a grad student and published before going into the law teaching market (it wasn't my job talk piece, which I published later), has recently appeared on several most-cited law review lists.[19] In its year, it

16. Austin B. Frakt et al., *The Rewards and Challenges of Writing for a Mass Media Audience*, 53 HEALTH SERVS. RES. 3278, 3281 (2018), https://onlinelibrary.wiley.com/doi/abs/10.1111/1475-6773.12858?af=R&.

17. Khazan, *supra* note 6.

18. *See generally* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

19. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1496 (2012).

is the second-most-cited law review article, in the company of Lawrence Tribe, Harold Koh, Bruce Ackerman, and Mark Lemley.[20] Two years after I published *The Renew Deal* with the *Minnesota Law Review*, I published an article with the *Harvard Law Review*: *The Paradox of 'Extra-Legal' Activism: Critical Legal Consciousness and Transformative Politics*.[21] The article has had some impact, and has been included in several course syllabi, but it has not received the same level of citations as some of my other research.

Imagine my excitement when I saw one day that Justice Breyer cited *The Paradox of Extra-Legal Activism* in an article he wrote for an *NYU Annual Survey of American Law* tribute issue in his honor.[22] I imagined he had found my argument that we should reject skeptics who have turned away from the Supreme Court in struggles for social justice compelling. I imagined he had loved my nuanced analysis of what is meant by those who write about cooptation. I hoped he had loved the seamless threads in which I link *Brown v. Board* to newer cases about gay rights, health care, gender politics, and disability discrimination. But, when I began reading, this is how my article was cited by the Supreme Court Justice:

> I'm also grateful to the *Annual Survey of American Law* for dedicating this issue to me. For one thing, that fact suggests the Law School is interested in the Judicial Branch. And that is a good sign. I realize that journals, like judges, are often under attack. The *New York Times* reported that Chief Judge Jacobs of the Second Circuit recently said, "I haven't opened up a law review in years. No one speaks of them. No one relies upon them." And there is evidence that law review articles have left terra firma to soar into outer space. Will the busy practitioner or judge want to read, in February's *Harvard Law Review*, "The Paradox of Extra-legal Activism: Critical Legal Consciousness and Transformative Politics"?[23]

I think Justice Breyer asked the question rhetorically, assuming the answer. In truth, I had feared the name of the article would deter readers and would not be as catchy as, for example, "*The Renew Deal*." After the article was accepted for publication, during the editing process, I asked

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20. *See generally* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004); Lobel, *supra* note 18; Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004).

21. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 989 (2007).

22. Stephen G. Breyer, *Response of Justice Stephen G. Breyer*, 64 N.Y.U. ANN. SURV. AM. L. 33, 33 (2008).

23. *Id.* (footnote omitted).

the editors at the *Harvard Law Review* to think of alternative titles. The editors and I kept coming back to the original one. We believed, and I still do now, that the title best reflects the article's content and argument. Still, I recognize that a different title might have attracted more readership. The article was translated into different languages, and in Hebrew it received a new and catchier title: *Is Law Dangerous?*

A small footnote: when I told Menachem Mautner, professor of law and former dean at Tel-Aviv University Buchmann Faculty of Law—a beloved former teacher turned colleague and friend—about the Justice Breyer citation, Mautner called it a "badge of honor." He said that the positive shift of legal scholarship in the past few decades has been from a doctrinal mode of writing aimed for the judiciary and practice to a deeper level of academic writing that takes the academic community itself as its audience. Yet, as evidenced by what I have discussed above, I continue to believe we can simultaneously do both: write engaged scholarship that is aimed for other scholars, but also embrace a broader audience. To theorize as well as connect with practice.

I started teaching a little over a decade ago. That same year, my law school classmate Dan Markel began his tenure-track teaching career at Florida State University College of Law. As a new law professor, Dan founded PrawfsBlawg, then one of the first law blogs around. The misspelling of blog as "blawg" obviously refers to law, but "prawfs" has a double reference. First, we were all at the beginning of our teaching careers, and therefore relative newcomers to the world of legal scholarship—we were new, raw law professors. I also believe that Dan wanted to convey that blog writing, as opposed to law review writing, entailed a much more raw, undercooked, and unrefined form. Dan set a model for us for writing more, and writing less, both fast and slow, experimenting with different mediums and styles. He believed in the value of law professors connecting, networking, and sharing their ideas and thoughts more frequently than through the law review system. To this day, his spirit and passion continue to guide his friends in legal academia.

Dan Markel was a brilliant scholar, a gifted writer, a fearless thinker. He knew how to capture the essence of a difficult topic, to understand the underlying logic of current debates, and on his blog, he pushed us all to fine-tune our thinking. He also knew that more important than any one piece of scholarship, however groundbreaking and well-received, are the exchanges and friendships among colleagues. He understood that intellectual engagement cannot be done right without heart, without knowing the people and lives behind the theory and concepts.

This is the real icing on the cake of the Goldilocks Path: legal academic work is often done in isolation, but when traditional scholarly writing is complemented with layers of connections it becomes richer, and the

scholar's professional life fuller. As Daniel Pink has put it in his study of motivation and well-being, people are most happy in their professional lives when three elements coincide: autonomy, mastery, and purpose.[24] For me, being a law professor—the best job in the world—is all the more meaningful when I am engaged, connected, and part of a broader community.

24. *See generally* DANIEL H. PINK, DRIVE: THE SURPRISING TRUTH ABOUT WHAT MOTIVATES US (2009).