

## OPENING REMARKS

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# AN IRONY OF ELECTRONICS

ON A FORM OR TWO OF SERIOUS LEGAL SCHOLARSHIP

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This opening essay begins with welcomes to new journals and contributors. It then wanders back to a topic touched on in the first issue of the *Journal of Law* – the relationship between ink-on-paper and on-line publication of legal scholarship. But first a reminder about the form and function of the *Journal of Law*: it looks like a conventional law review, but it is really a bundle of small, unconventional journals, all published together in one volume. It is an incubator of sorts, providing legal intellectuals with something akin to what business schools' incubators offer commercial entrepreneurs: friendly, small-scale, in-kind support for promising ideas for which (a) there might be a market, but (b) there is not yet backing among established, deep-pocketed powers-that-be.

Welcome to Matt Bodie (of St. Louis University), whose own opening essay follows this one. Blogging at PrawfsBlawg, he has had a lot of interesting things to say recently about the production and distribution of legal scholarship.<sup>1</sup> We asked him to expand on some of that work in a series of essays appropriate for our “Opening Remarks” section. His piece beginning on page 223 of this issue is the first of them.

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<sup>1</sup> See, e.g., *Yes, law students select and create legal scholarship*, [prawfsblawg.blogs.com/prawfsblawg/2011/06/students-and-scholarship.html](http://prawfsblawg.blogs.com/prawfsblawg/2011/06/students-and-scholarship.html) (vis. Oct. 23, 2011); *Law Review Submissions: Superstitions and Expeditions*, [prawfsblawg.blogs.com/prawfsblawg/2011/04/law-review-submissions-superstitions-and-expeditions.html](http://prawfsblawg.blogs.com/prawfsblawg/2011/04/law-review-submissions-superstitions-and-expeditions.html) (vis. Oct. 23, 2011).

Welcome also to *Chapter One: A Journal of Law Books*. As promised, we have here the inaugural installment, and as I explained before:

*Chapter One* is a project of Robert C. Berring of Boalt Hall, in which he reintroduces underappreciated classic law books by publishing the first chapter of a book in the company of one or two or a few good essays about it. His hope is that access to a convenient and unintimidating portion of a great book, combined with accessible analyses of it, will lure readers into the whole book, or at least to give them some direct familiarity with slices of that original work and some of the best thinking about it.

The first beneficiary of Berring's attention is Benjamin N. Cardozo's *The Nature of the Judicial Process*. Lecture I of Cardozo's classic book is featured beginning on page 329, preceded by a foreword by Andrew Kaufman (of Harvard) and followed by old-but-still-good reviews by Learned Hand, Max Radin, and Harlan Fiske Stone.

In addition, we have another new journal: *The Post*. Editor-in-chief Anna Ivey and her editorial colleagues – Howard Bashman (of *How Appealing*), Adam Bonin (of Cozen O'Connor), Bridget Crawford (of Pace), Thom Lambert (of Missouri), David Schleicher (of George Mason), and Tung Yin (of Lewis & Clark) – have developed *The Post* as a vehicle for “showcasing the best of legal blogging.”<sup>2</sup>

The first issue of *The Post* features the work of Randy Barnett (of Georgetown), Mitch Berman (of Texas), Rick Hills (of NYU), Richard Pildes (of NYU), Lawrence B. Solum (of Georgetown), and Josh Wright (of George Mason). I encourage you to pepper the editors of *The Post* with your own suggestions about what ought to appear in future issues of that journal. But only if your suggestions are good and you can explain why they are good.

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**I**t is the arrival of *The Post* that prompts a return to the topic of online versus ink-on-paper in the publication of legal scholarship, and in particular to the status of blogging. Why? Because *The Post* is

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<sup>2</sup> Anna Ivey, *An Introduction to The Post*, 1 J.L. (1 THE POST) 367 (2011).

so obviously designed to blur whatever boundaries exist between blogging and traditional legal scholarship.

As I pointed out in the first issue of the *Journal of Law*, “the reluctance that greets calls to include such material [as blog posts] in, for example, promotion and tenure decisions suggests that while things other than law review articles (and books) might be interesting and even useful, the legal academy in general is not comfortable with funny-looking scholarship.”<sup>3</sup> But what is to be done with a scholarly and moderately lengthy blog post, especially when its links are converted to footnotes and the whole thing is published in an ink-on-paper law review? What happens, in other words, when a substantively worthy blog post is dressed up to look like a law review article, and it passes?

*The Post* poses a serious challenge for devotees of the traditional law review form – a challenge that reminds me of a story retold by Richard Friedman (of Michigan), when he was puzzling through a discussion of change in American constitutional law:

I thought of the story told me by my old colleague Leo Katz about the boy who had an irrational fear of kreplach, a Jewish dumpling that makes many mouths water. His mother, determined to overcome the problem, showed him the ingredients. “See,” she said, “this is just meat and dough.” The boy watched with equanimity as his mother folded one corner of the dough over the meat, and then a second and a third. Then the mother folded over the final corner. The boy’s face turned red. “Kreplach!” he screamed, and ran in terror from the room.<sup>4</sup>

The editors of *The Post* are (admirably) too modest or too prudent to admit it,<sup>5</sup> but that may well be what they are doing with the good

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<sup>3</sup> Ross E. Davies, *Like Water for Law Reviews*, 1 J.L. 1, 3 (2011) (comparing Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 891 (2009), with Ellen S. Podgor, *Blogs and the Promotion and Tenure Letter*, 84 WASH. U.L. REV. 1109, 1110 (2006), and citing *Symposium, Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025-1261 (2006); Robert S. Boynton, *Attack of the Career-Killing Blogs: When academics post online, do they risk their jobs?*, SLATE, Nov. 16, 2005).

<sup>4</sup> Richard D. Friedman, . . . *A Rendezvous with Kreplach*, 5 GREEN BAG 2D 453, 458 (2002).

<sup>5</sup> See Ivey, *An Introduction to The Post*, 1 J.L. (1 THE POST) at 368-69.

work of professors Barnett, Berman, Hills, Pildes, Solum, and Wright – refolding it into law-review kreplach. Read it. Is it genuine legal scholarship, or not? You make the call.

And then, conversely, there is my experience over the past year or so with the launching of the *Journal of Law*. Most people I have approached about this project have been supportive. They like the idea of lending ink-on-paper credibility to innovative, promising approaches to the presentation of legal scholarship. But in almost every case that support has come with some version of this cautionary question-and-comment:

Is this journal going to be on Westlaw? No one wants to put their work in something that isn't available on-line.

It seems that in the modern legal academy – or at least in substantial parts of it – legal writing is serious scholarship if it appears first in an ink-on-paper law review and then in a reputable electronic database. But writing that follows a different path is, well, something else.

And so I am pleased and relieved – and proud, even – to report that the *Journal of Law* will indeed be on Westlaw.

Now the *Journal of Law* can claim to be a legitimate, full-fledged ink-on-paper law review, in part because it is available on-line. And maybe selected works posted on-line by professors Barnett, Berman, Hills, Pildes, Solum, and Wright can qualify as legitimate, full-fledged legal scholarship now that they are appearing in print in a journal whose legitimacy is buttressed by its presence on-line. Crazy world. There is a great deal more that could be said about all of this, of course. Maybe later.<sup>6</sup>

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Finally, thanks to Trevor Morrison and Jim Ho for putting together a second fine issue of *Pub. L. Misc.* (It starts on page 231.) That makes them the editors of our first genuine periodical.

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<sup>6</sup> What, for example, will Stephen Bainbridge's experiment with direct-to-Kindle publication reveal? See Larry Ribstein, *Bainbridge's e-book experiment*, [truthonthemarket.com/2011/07/14/bainbridges-e-book-experiment/](http://truthonthemarket.com/2011/07/14/bainbridges-e-book-experiment/) (vis. Oct. 25, 2011). Or what of [ssrn.com](http://ssrn.com)?