IN SEARCH OF HELPFUL LEGAL SCHOLARSHIP, PART 2

SHALL WE DANCE

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In the last issue of the *Journal of Law* I said, "In Part 2 of this paper I will either celebrate the launch of an amicus briefs of scholarship program by the AALS or *JOTWELL* or some other worthy entity, or I will outline a plan that might be used by some other fearless and energetic souls."[1] I have not heard from the AALS or *JOTWELL*. So, here is an outline of a plan that might be used by some other fearless or energetic souls to make legal scholarship more helpful to members of the Supreme Court, and maybe other people too.[2] The plan has four main parts: (1) polling about helpful scholarship (starting now); (2) polling about conventional scholars' amicus briefs (starting sometime soon); (3) amicus briefs of scholarship[3] (starting someday); and (4) a cumulative roster of scholarly amici (also starting sometime soon but perhaps not quite so soon). There will inevitably be tinkering along the way, but I do hope that what follows below is the start of something helpful, and scholarly.

This little article deals with part 1 of the plan: polling about helpful scholarship. More on the other parts later.

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[1] Ross E. Davies, *In Search of Helpful Legal Scholarship, Part 1*, 2 J.L. 1, 10 (2012).

[2] As Professor Stephen Bainbridge has pointed out, scholars who aspire to influence judges should invest where there is some chance of a return, such as courts on which the judges are "engaged with the legal academy." Stephen Bainbridge, *The search for "helpful legal scholarship" ought to start in Delaware*, PROFESSORBAINBRIDGE.COM (July 22, 2012).

[3] Davies, 2 J.L. at 8-10 (describing an "amicus brief of scholarship").

I. THE PROBLEM

One way to view the challenge facing judges and scholars when it comes to the reading (by the former) and writing (by the latter) of helpful legal scholarship is to recall a pair of suggestions made last year, one by a thoughtful judge and one by a thoughtful scholar. Here is Chief Justice John Roberts, responding to a question about whether "our judiciary, on all levels, and the practicing bar are unfortunately too disconnected from our academies, from our law schools":

> There *is* a great disconnect between the academy and the profession. Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I am sure was of great interest to the academic that wrote it, but isn't of much help to the bar. . . . [I]f the academy is interested in having an influence on the practice of law and the development of law, that they would be wise to sort of stop and think, is this area of research going to be of help to anyone other than other academics. You know, it's their business, but people ask me, what the last law review article I read was, and I have to think very hard before I come up with one.[4]

And here is Professor Gerard Magliocca, reacting to Roberts's response:

> I think that everyone in legal academia should start sending reprints of their articles to the Chief Justice until he relents and reads one.☺[5]

Both expressions of half-humorous (but no more than half, I suspect) hyperbolic willfulness are telling. When it comes to scholarship, the judge says "nothing" and the professor says "everything." Neither approach is likely to make judges more knowledgeable or scholars more influential, but each is sustainable by its advocate. So there!

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[4] *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN, www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476-1/ at 28:50 (June 25, 2011).

[5] Gerard Magliocca, *Response, in Sherrilyn Ifill on What the Chief Justice Should Read on Summer Vacation*, CONCURRING OPINIONS, www.concurringopinions.com/archives/2011/07/sherrilyn-ifill-on-what-the-chief-justice-should-read-on-summer-vacation.html (July 1, 2011).

They bring to mind the scene in the 1937 film *Shall We Dance*, in which Fred Astaire famously sings to Ginger Rogers,

> You say either and I say eyether,
> You say neither and I say nyether
> Either, eyether, neither, nyether
> Let's call the whole thing off.
> You like potato and I like potahto
> You like tomato and I like tomahto
> Potato, potahto, tomato, tomahto.
> Let's call the whole thing off . . .

Those lines in turn bring to mind the perhaps slightly less-famous ones that come next:

> But oh, if we call the whole thing off
> Then we must part
> And oh, if we ever part,
> Then that might break my heart
> So if you like pyjamas and I like pyjahmas,
> I'll wear pyjamas and give up pyajahmas
> For we know we need each other so
> We better call the calling off off . . .[6]

That is how Fred saves their marriage: by giving an inch to gain a mile. And who cares if his confidence in his conciliatory move is based in part on what might be a delusion that Ginger needs him as much as he needs her?[7] The ending is happy, and good.

Professor Magliocca (and other scholars) should play Fred to Ginger as played by Chief Justice Roberts (and other judges). There are reasons for optimism about reconciliation between scholars of Bulgarian evidence (and of other subjects of legal scholarship) and the Chief Justice (and other judges who do not read law review articles). For starters, there is the fact that while some Justices do grouse about the alleged uselessness of legal scholarship, all of them – even the Chief Justice – do in fact find some scholarship useful,[8] as well

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[6] George Gershwin and Ira Gershwin, *Let's Call the Whole Thing Off*, *in Shall We Dance* (1937).

[7] *See generally Shall We Dance* (1937). Maybe it is just behavioral economics at work. *See* Ian Ayres, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 653-54 & n.201 (2005).

[8] Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court*

some scholars, even.[9] Then there is the fact that over a long span of years, many reputable legal scholars have acknowledged that "[s]ome scholarship is simply bad,"[10] and therefore presumably should not be imposed on anyone, even judges.

All of which suggests that if reasonable scholars are willing to (1) concede, even if only implicitly, that some scholarship is useless and (2) identify the good and useful stuff – the truly helpful legal scholarship – reasonable Justices will be willing to read it.

II. THE POLLS

Conciliatory triage for scholarship at the Supreme Court points to the need for some way to reach Justices who do not trust scholars' briefs – some alternative for those Justices who seem to have all but given up on scholars as direct participants in litigation. Consider this passage from *Making Your Case: The Art of Persuading Judges*, by Justice Antonin Scalia and legal lexicographer Bryan Garner:

> An increasingly popular category of amicus brief is the academic brief – "Brief on Behalf of Legal Historians," or "Brief on Behalf of Professors of Securities Law." These are usually drafted by a few professors and then circulated from law faculty to law faculty, seeking professorial sign-ups. Advocacy and scholarship do not go well together, which is why many academics never lend their names to professorial amicus briefs. Some judges, however, may give these filings undue weight. An easy way to cut them down to size is to run a literature check under the names of the signatories. You'll often find that most of them have produced no scholarly publication on the point in question or sometimes even in the field at issue. Point this out to the

Justices: An Empirical Analysis, 4 DREXEL L. REV. 399, 409 (2012).

[9] *See, e.g., Bond v. United States*, 131 S.Ct. 589 (2010) ("Stephen R. McAllister, Esquire, of Lawrence, Kansas [and professor of law at the University of Kansas School of Law], is invited to brief and argue this case, as amicus curiae, supporting the judgment below.").

[10] Richard A. Matasar, *Defining Our Responsibilities: Being an Academic Fiduciary*, 17 J. CONTEMP. LEGAL ISSUES 67, 109 (2008); *see also, e.g. (and the many articles, books, and opinions they cite),* Paul Horwitz, *"Evaluate Me!"*, 39 CONNTEMPLATIONS 38, 47-49 (2007); Brian Leiter, *Why Blogs Are Bad for Legal Scholarship*, 116 YALE L.J. POCKET PART 53, 57-58 (2006), Patrick J. Schiltz, *Legal Ethics in Decline*, 82 MINN. L. REV. 705, 788-90 (1998); Stephen L. Carter, *Academic Tenure and "White Male" Standards*, 100 YALE L.J. 2065, 2081-82 (1991).

> court. And if it is so, point out that some academic publications (by professors who remain, perhaps, too immersed in their scholarship to hustle up an advocacy brief) favor your side of the case. If the academic brief seems particularly damaging, you might take the trouble to check the scholarly writings of the signatories; some professors have been know (*O tempora, O mores!*) to join a brief that flatly contradicts their own writings. By noting this, you'll help both the court and the academy.[11]

And it is not difficult to imagine Scalia's clerks getting the message, by order or inference, that treating scholars' briefs this way is an appropriate clerical exercise as well.[12] How then might legal scholars pitch helpful scholarship to Scalia and like-thinking Justices and their clerks without triggering this perhaps insurmountable skepticism?

Maybe by hewing more closely to the scholarship itself – by presenting scholars as scholars and their work as scholarship, rather than scholars as practitioners and their work as partisanship.[13] After all, it does not take a lot of literary sensitivity to read between the lines in the passage quoted above: Scalia thinks more highly of the work of "professors who remain . . . immersed in their scholarship" than he does of the work of professors who "hustle up an advocacy brief." Right or wrong, agreeable or disagreeable, these are distinctions that must be dealt with by a scholar who wants to entice Scalia the judge[14] to read what that scholar believes to be the best scholarship on a controversy that is before the Court.

So why not just tell Scalia and his ilk what they ought to read?

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[11] ANTONIN SCALIA AND BRYAN A. GARNER, MAKING YOUR CASE 104-05 (2008).

[12] *See* EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 742 (9th ed. 2007) (citations omitted): "Not all amicus briefs are read by all the Justices. The number is so great that most of the Justices have their law clerks sift out the briefs or parts of briefs that they think add enough to the parties' briefs to be worth reading."

[13] *See* Richard H. Fallon, *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 265 (2012) ("[W]hen we attempt to influence public matters, we almost inevitably seek to trade on the credibility that we – and our predecessors and colleagues – have earned in the roles of scholar and teacher. Those roles create obligations of responsibility, trustworthiness, and confrontation."); *see also* ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 8 (2012) ("We rely on expert 'knowledge' precisely because it has been vetted and reviewed by those whose judgment we have reason to trust.").

[14] Not Scalia the scholar. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

That is what the "Helpful Scholarship Recommendation Form" on the facing page is designed to facilitate.

The plan is to conduct an ongoing poll of scholars for every case pending before the Court. Actually, it is not just a plan: the polls are open now at the "Helpful Scholarship Project."[15] Here are the basics:

1. For any case before the Court on the merits, any qualified scholar (for now, anyone tenured in a law school[16]) may recommend up to seven works of legal scholarship that the Justices ought to read before deciding that case – up to five works by other scholars and up to two of the scholar's own. (This is no place for false modesty. A scholar whose own works are among the most helpful should say so, for both ethical and practical reasons that require no elaboration here.[17])

2. A scholar makes those recommendations by completing and submitting either the form on the facing page or the online version on the *Green Bag*'s "Helpful Scholarship Project" website.

3. There is no limit to the number of cases for which a scholar may recommend helpful works of scholarship (by submitting a form for each case), nor is there a limit to the number of scholars who may make recommendations for any particular case.

4. Each scholar's recommendations appear in two places: (1) on a webpage for the case for which the recommendations are made, tallied with all other scholars' recommendations for that case, with all works ranked by the number of recommendations they have received, and (2) on a webpage for that scholar, where all of his or her recommendations in all cases are listed.

5. The polls for a case remain open until the Court decides it.

The product of these continually accumulating individual exercises of scholarly judgment will be a convenient, impartial, transparent catalog of up-to-date academic opinion about scholarship likely to be helpful in cases pending before the Supreme Court.

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[15] *See* www.greenbag.org/helpful_scholarship/helpful_scholarship.html.

[16] *See* note * below.

[17] *See, e.g.,* ARISTOTLE, NICOMACHEAN ETHICS, book IV, ch. 7, 1127a21-1127b32, *in* THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION (ca. 350 B.C.; 1984 prtg.) (Jonathan Barnes, ed.; W.D. Ross, trans. (rev. J.O. Urmson)).

HELPFUL SCHOLARSHIP RECOMMENDATION FORM

If you are a law professor,[*] you may use this form to recommend: (A) up to five works of legal scholarship (by authors other than yourself) that ought to be read by any Supreme Court Justice deciding the case you specify and (B) your own best relevant work as well. Your recommendations will be listed on the "Helpful Scholarship Project" page on the *Green Bag*'s website.[†]

Your name: _____

Law school in which you are tenured: _____

Caption and number of a case pending before the Supreme Court:

_____

A. Others' works of helpful legal scholarship (author, title, publisher, date) that will help the Justices decide the case specified above:

1. _____
2. _____
3. _____
4. _____
5. _____

B. Your own most helpful relevant works (author, title, publisher, date):

1. _____
2. _____

Questions? Comments? Ideas? Changed your mind about your recommendations? Please email us at editors@greenbag.org.

Mail to: The Green Bag, 6600 Barnaby St. NW, Washington, DC 20015. If you prefer pixels to paper, please use the online version of this form at www.greenbag.org/helpful_scholarship/helpful_scholarship.html.

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[*] If you are a scholar in a field other than law (or a legal scholar not yet tenured in a law school), please be patient. We are starting small and hope to cover other fields soon. We also hope to come up with or be shown a marker of scholarliness that is more accurate and reliable than tenure. We welcome your suggestions.

[†] *See* www.greenbag.org. To prevent fraud, your recommendations will be posted only after someone from the *Green Bag* emails/telephones you at the address/number we find on your faculty page at your school's website to verify that it really is you who completed this form.

III. PROS AND CONS

Pros and cons of these "Helpful Scholarship" recommendation polls abound. Consider the following, which surely do not exhaust the possibilities but may represent the range:

1. There is no opportunity for the full argumentation or sense of authorship that comes with writing a scholars' amicus brief. True, but there is nothing preventing a scholar from both writing briefs and making recommendations. Perhaps more importantly, for the scholar who is not writing a brief but is instead invited to sign onto someone else's, the "Helpful Scholarship" recommendations route could be a good alternative or additional means of scholarly expression. You are free to endorse only specific works you approve of, rather than having to endorse – all or nothing – a brief that may well be a collection of arguments, authorities, and methods of analysis only some of which you believe in.[18] Even the primary author of a brief written for a committee or crowd might find some value in expressing an undiluted individual opinion as well.[19] And then there is the matter of late-breaking thoughts about a case, including, for example, thoughts expressed in scholarly works completed after oral argument in a case. Chances for amici to file briefs after the initial merits round are nearly nil.[20] Recommendations, however, can be made at any time before a case is decided. And they are cheaper and easier to produce (at least for an expert who knows the relevant scholarship).

2. There is little chance of knowing whether any of these recommendations will matter at the Supreme Court. Probably true, especially given the unlikelihood that a Justice or clerk will reveal any specific reliance on the Helpful Scholarship Project. But that uncertainty has never been a deterrent to knowledgeable, interested scholars, many

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[18] *See, e.g.,* Fallon at 228-235, 257-58, 265. Reasonable minds do differ about the propriety of signing such briefs. *Compare, e.g., id. with* Amanda Frost, *In Defense of Scholars' Briefs* at 4 & passim, papers.ssrn.com/sol3/papers.cfm?abstract_id=1978337.

[19] *Cf.* Fallon at 226 (citation omitted) (pointing out that of the three scholars' briefs cited by the Supreme Court in its 2010 Term, "two . . . were submitted by single law professors on behalf of themselves alone, and the other had only two signatories").

[20] S. Ct. R. 25.5-.6, 27.3(a); *see also* GRESSMAN ET AL. at 744-45; *but see* S. Ct. R. 28.7 (permitting counsel for an amicus to argue by leave of the Court); GRESSMAN ET AL. at 753 (describing Court practice regarding appointed amicus counsel).

of whom speak and write about Supreme Court cases in a variety of ways when appropriate opportunities knock – in litigation itself, in the news media, in public forums and academic ones, and so on. And they engage in those activities knowing both (a) that theirs are only a few of the many voices seeking to be heard by the Court and (b) that influence on the development of the law is tricky to predict and rarely accompanied by public or even private recognition. (If mentions in Supreme Court opinions were issued like merit badges of influence, then Ronald Coase's *The Problem of Social Cost* and P.T. Barnum's admonition about suckers would be equals.[21]) We can only hope that someone at the Court will take note of – and make good use of – a convenient, impartial, transparent catalog of scholarly opinion about relevant scholarship.[22] In addition, there are other audiences – judges on other courts, legislators, bureaucrats, practitioners, journalists, scholars in law and other fields – who, like the Justices, might benefit from "Helpful Scholarship" recommendations and might or might not be in position to acknowledge them.

3. These polls will be susceptible to manipulation, like the U.S. News law school reputation polls. Yes, it is possible to manipulate them. But probably not in the pejorative sense – "[t]o manage, control, or influence in a subtle, devious, or underhand manner"[23] – sometimes associated with the *U.S. News* polls. Those polls feature secret data

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[21] *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 864 n.3 (1975) (Brennan, J., dissenting) (only Supreme Court mention of *The Problem of Social Cost*); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 357 n.2 (1989) (only Supreme Court mention of P.T. Barnum on the birth of suckers). *The Problem of Social Cost* is widely regarded as the most-cited law review article of all time, and one of the most important and influential. *See, e.g.*, Fred R. Shapiro and Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012); William M. Landes and Sonia Lahr-Pastor, *Measuring Coase's Influence*, 54 J. L. & ECON. S383, S396-98 (2011). It has been cited in at least 19 Supreme Court briefs, including a scholars' brief signed by Coase himself, to no citeable avail. *See* Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) at 13 n.17; search in Westlaw's database of Supreme Court briefs for "Coase w/20 'social cost'" conducted several times in July and August 2012 with the same result every time – 19 hits.

[22] *See* Eugene Volokh, *Scholarship, Blogging and Trade-offs: On Discovering, Disseminating, and Doing*, WASH. U. L. REV. 1089, 1095-96 (suggesting similar possibilities for blogs). Maybe their influence, like true love, will be known when it is seen. *See* note 7 above.

[23] manipulate, *v.*, 3. *trans*. a., OXFORD ENGLISH DICTIONARY (online ver. June 2012).

and black-box analysis, enabling the polled to anonymously boost themselves and undercut the competition (and *U.S. News* to manipulate poll results with impunity as well), although of course everything might be on the up-and-up, but that too is impossible to know here on the ignorant side of the *U.S. News* veil of secrecy. Instead, manipulation of "Helpful Scholarship" polls should be of the constructive sort – "[t]o process, organize, or operate on mentally or logically; to handle with mental or intellectual skill"[24] – in which the identities and choices of the polled (that is, the scholars and their recommendations) are public. These polls will enable a Justice (or anyone else) to evaluate and manipulate recommendations based on the characteristics of the recommenders, as well as on the quality of the recommended works and the gross number of recommendations. Conversely, new and not-famous experts may be able to improve their reputations by making recommendations that show they can tell helpful scholarship from dross.[25]

The only source of clearer answers to these concerns and others like them will be a scholars' test drive of, say, five or ten years' duration. Let it begin. Please visit the Helpful Scholarship Project when you have recommendations for the Justices about scholarship they ought to consult before deciding a case. You might do some good.

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In this issue of the *Journal of Law* we present the second issues of three fine journals: (1) *Chapter One* (edited by Robert C. Berring), featuring a chapter of Frederick Hicks's classic *Men and Books Famous in the Law*, accompanied by contemporary and modern commentary; (2) the *Journal of Legal Metrics* (edited by Adam Aft and Craig Rust), featuring what might be characterized as an empirical manifesto for the law school transparency movement; and (3) *The Post* (edited by Anna Ivey), featuring what will become, I hope, its customary selection of eloquent, intriguing, and provocative post-publications.

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[24] manipulate, *v.*, 2. *trans.* a., OXFORD ENGLISH DICTIONARY (online ver. June 2012).

[25] Participation in Helpful Scholarship polling might itself be a fruitful field of study. *Cf.* Lawrence B. Solum, *A Tournament of Virtue*, 32 F.S.U. L. REV. 1365, 1388 et seq. (2004); Michael Abramowicz, *On the Selection of Judges in International Figure Skating*, 6 GREEN BAG 2D 339, 345-48 (2003).