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BLOGGING AND THE TRANSFORMATION OF LEGAL SCHOLARSHIP[†]

LAWRENCE B. SOLUM*

I. INTRODUCTION: THE WRONG QUESTION

Will blogging somehow *transform* legal scholarship? That is the wrong question. The thesis of this essay is that blogging is essentially epiphenomenal—an effect and not a cause. Blogging is merely a particular medium—a currently popular form of Web-based publishing. Nonetheless, the emergence of academic legal blogging is an important indicator of other trends—real causes that are driving significant transformative processes. These trends include the emergence of the short form, the obsolescence of exclusive rights, and the trend toward the disintermediation of legal scholarship. Those forces and their relationship to blogging will be the primary focus of this paper.

But first, a word about the relationship of blogging to legal scholarship. Let me begin with a caveat or two. First caveat: it seems to me obvious that this relationship is in its early formative stages. The sergeants-at-law might have thought that the printing press had nothing to do with the practice of law—after all, law is almost entirely an oral activity, isn't it? The late-nineteenth-century legal practitioner might have thought that law reviews have almost nothing to do with legal scholarship—after all, it's all about treatises, isn't it? The mid-twentieth-century law professor might have thought that peer-reviewed journals and academic presses have nothing do with legal scholarship—after all, it's all about law reviews and the legal presses, isn't it? And the early-twenty-first-century scholar might think that blogs have nothing to do with legal scholarship—after all, it's

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all about interdisciplinary, peer-reviewed journals, and the academic presses, isn't it? To the extent that blogs have anything to do with legal scholarship, the relationship has just begun to emerge. Undoubtedly it will change.

A second caveat is important. These remarks about blogging and legal scholarship are not the product of systematic study or theorizing. Much of what follows is based on personal impressions and anecdotal evidence. As a participant observer at the interface between blogging and scholarship, I have formed a variety of impressions, but many of these are hunches and speculative hypotheses.

With those caveats in mind, there are, of course, plenty of indicators that blogs do have "something to do" with legal scholarship. Take, for example, the survey of citations to legal blogs conducted by Ian Best and posted on his blog 3L Epiphany.¹

Seventy-five blogs were cited, and the citing publications included the *California Law Review*,² the *Columbia Law Review*,³ the *Cornell Law Review*,⁴ the *Harvard Law Review*,⁵ the *Michigan Law Review*,⁶ the *New York University Law Review*,⁷ the *Texas Law Review*,⁸ the *University of Chicago Law Review*,⁹ the *University of Pennsylvania Law Review*,¹⁰ the

1. 3L Epiphany [now Law Blog Metrics], http://3lepiphany.typepad.com/3l_epiphany/files/law_review_articles_citing_legal_blogs/index.html (Aug. 16, 2006).

2. Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1476 n.228 (2004) (citing How Appealing, <http://legalaffairs.org/howappealing>).

3. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1160 n.36 (2004) (citing (The Return of) Ignatz, <http://sheldman.blogspot.com>).

4. W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 76 n.20, 78 n.26 (2005) (citing Balkinization, <http://www.balkin.blogspot.com>).

5. Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance through Global Governance Networks*, 118 HARV. L. REV. 1255, 1286 n.48 (2005) (reviewing ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) and citing Legal Theory Blog, <http://lsolum.blogspot.com>).

6. Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1968 n.72 (2005) (citing Sentencing Law and Policy, <http://sentencing.typepad.com>).

7. Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberations, and Information Markets*, 80 N.Y.U. L. REV. 962, 1022 n.293 (2005) (citing Lessig Blog, www.lessig.org/blog).

8. J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 530-31 n.33 (2004) (citing Legal Theory Blog, <http://lsolum.blogspot.com>).

9. Michael C. Dorf, *After Bureaucracy*, 71 U. CHI. L. REV. 1245, 1263 n.59 (2004) (reviewing MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003) and citing Balkinization, <http://www.balkin.blogspot.com>).

10. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 86 n.18, 151 n.220, 153 n.223 (2005) (citing Sentencing Law and Policy, <http://sentencing.typepad.com/>).

Virginia Law Review,¹¹ and the *Yale Law Journal*.¹² Best also has a collection of cases citing blogs,¹³ and the list of courts includes the United States Supreme Court and the United States Courts of Appeals for the Second, Ninth, and Eleventh Circuits, as well as numerous federal trial courts, state supreme courts, and state intermediate courts.

Two stories about my own blog—Legal Theory Blog—are illustrative of the ways in which blogs can “relate” to legal scholarship. The first story concerns an eight-part series of posts entitled “Legal Theory Bookclub: *Free Culture* by Lawrence Lessig,”¹⁴ At the request of the editors of the *Texas Law Review*, these posts were collected, lightly edited, and published as a sixteen-thousand-word review of Lessig’s book.¹⁵ Whatever the merits of the posts and the review, they both clearly are “legal scholarship” by any reasonable definition of that term.

The second story concerns a series of exchanges with Jack Balkin, who at the time ran Balkinization as a solo blog. In response to a column by Eddie Lazarus¹⁶ I posted a detailed reply,¹⁷ prompting Jack Balkin to publish a post entitled “Good Judging and ‘Following the Rules Laid Down.’”¹⁸ I countered with “A Neoformalist Manifesto,”¹⁹ followed by Balkin’s “Good Judging and ‘Following the Rules Laid Down,’ Part II.”²⁰ The exchange ended with my “Fear and Loathing in New Haven.”²¹ The exchange, conducted over the course of four days, runs almost fourteen thousand words. Without characterizing my own contributions, I believe

11. Steven M. Haas, Note, *Toward a Controlling Shareholder Safe Harbor*, 90 VA. L. REV. 2245, 2278 n.161 (2004) (citing ProfessorBainbridge.com, <http://www.professorbainbridge.com>).

12. Kevin S. Schwartz, Note, *Applying Section 5: Tennessee v. Lane and Judicial Conditions on the Congressional Enforcement Power*, 114 YALE L.J. 1133, 1136 n.11 (2005) (citing SCOTUSBlog, <http://www.scotusblog.com>).

13. 3L Epiphany, http://3lepiphany.typepad.com/3lepiphany/2006/08/cases_citing_le.html (Aug. 6, 2006).

14. Legal Theory Blog, http://lsolum.blogspot.com/archives/2004_03_01_lsolum_archive.html#108057665667719921 (Mar. 29, 2004, 10:10 a.m.) (with links to seven additional posts).

15. Lawrence B. Solum, *The Future of Copyright*, 83 TEX. L. REV. 1137 (2005).

16. Edward Lazarus, *A Recent Dissent by Federal Appellate Judge Alex Kozinski Offers Rare Candor About the Political Nature of the Judicial Process*, FINDLAW, May 15, 2003, <http://writ.news.findlaw.com/lazarus/20030515.html>.

17. Legal Theory Blog, http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200304841 (May 17, 2003, 2:20 p.m.).

18. Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com/2003_05_18_balkinarchive.html#94523316 (May 18, 2003, 12:21 a.m.).

19. Legal Theory Blog, http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200307682 (May 18, 2003, 3:00 p.m.).

20. Posting of Jack Balkin to Balkinization, http://balkin.blogspot.com/2003_05_18_balkin_archive.html#94561782 (May 18, 2003, 11:26 p.m.).

21. Legal Theory Blog, http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200315303 (May 20, 2003, 11:17 a.m.).

that it is fair to say that Balkin's contributions to the exchange were eloquent, powerful, and intellectually rigorous. Balkin's side of the exchange gave me the sense that the possibilities of blogging transcended the one-paragraph post; Balkin's blogging blurred the lines between conventional legal scholarship and bloggership. No one who read the exchange would be likely to conclude that it had nothing to do with legal scholarship.

So it is clear that blogging has something to do with legal scholarship, but in my opinion, that something is really beside a more important point. The blog or weblog is really just a form of publication on the Internet that utilizes the World Wide Web and software to reduce the costs of self-publishing. Everything that can be done on a "blog" can be done using other tools and formats. Indeed, many "home pages" share most of the characteristics of blogs. The important set of questions isn't about the relationship between blogs and legal scholarship. The important set of questions concern the fundamental forces that have produced academic blogging.

In this essay, I shall explore three important trends in legal scholarship: the transition from the long form to the short form, the transition from exclusive rights to open access, and the transition from mediation to disintermediation. This exploration will be organized as follows. Part II will establish a baseline by sketching the ancien régime—the world of legal scholarship as it existed before the Internet and as it continues to exist today. Part III explores the current trends that point in the direction of new forms of legal scholarship and new practices for its dissemination. Part IV returns to the topic at hand: the relationship between blogs and legal scholarship.

II. THE ANCIEN RÉGIME: LONG FORM, EXCLUSIVE RIGHTS, AND INTERMEDIARIES

In order to understand the transformative potential of blogging, we need to take a look at the world before blogs—the fading landscape of the long form, exclusive rights, and intermediaries. Legal scholarship's past is the world of law reviews and treatises, peer-reviewed journals and university press books.²²

22. Parts II and III of this essay draw substantially on my *Download It While It's Hot: Open Access, Intermediaries, and the Dissemination of Legal Scholarship*, 10 LEWIS & CLARK L. REV. (forthcoming 2006).

A. *The Long Form and its Long Tail*

Law review articles are long. We all know that! But in a certain sense, the law review article was the “short form” of its era. Before there were law reviews there were treatises, and the most influential legal scholars were the treatise writers—the heirs of Blackstone and Chancellor Kent. The names are still famous: Corbin, Davis, Moore, Nimmer, Wigmore, Williston, and Wright. The multivolume treatises were and are long. Really long! Dozens of volumes. Millions of words. Cases in the tens of thousands.

By comparison, law review articles are short. A mere sixty to one-hundred pages was considered a respectable length for a serious piece of legal scholarship—one that took a doctrinal topic and turned it inside out and upside down, comprehensively surveying the literature and the authoritative legal materials. But long-form legal scholarship was not read much. In part, this was intentional. The treatises were not meant to be read straight through because they were really encyclopedias, not monographs. Law review articles were intended to be read straight through, but aside from a few success stories, it seems likely that even moderately successful law review articles are read by small (albeit important) communities of scholars. Even more distressing, it seems likely that some (perhaps many) law review articles had and have virtually no readers beyond their authors, editors, and those assigned to evaluate the work if it is relevant to a tenure decision or lateral hire.

Even though long-form legal scholarship may have very few “top to bottom” readers, many of these articles have readers of another sort. Full-text electronic searching has dramatically reduced the costs of locating relevant passages in long articles that address many topics. When articles were located via the Index to Legal Periodicals, it surely must have been the case that many an author published without knowing that two or three paragraphs in a prior article had already addressed some particular argument, doctrinal development, or theoretical construct, but Westlaw and Lexis make the discovery of such passages very inexpensive.

Of course, the many hundreds or thousands of law review articles with only a few readers each may cumulatively have many readers—the proverbial “long tail.”²³ And this “long tail” is important—because it signals the importance of microaudiences and microcommunities of

23. See Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, <http://www.wired.com/wired/archive/12.10/tail.html>.

scholars. It would be a mistake to believe that a flourishing legal academy could or should produce only “hits” with broad appeal both in and out of the academy. Work that reaches only a few in the short run may come to have a big impact in the long run. Work on narrow topics may nonetheless make a substantial contribution to knowledge about the law and its foundations. The long form had and continues to have a long tail.

So the long form is alive and well, but even before the advent of open access and the Internet, legal academics were moving toward short-form legal scholarship. Some law reviews began to encourage the submission of “essays,” essentially short law review articles.²⁴ Recently, several prominent law reviews issued a “Joint Statement on Article Length,” which stated, “The vast majority of law review articles can effectively convey their arguments within the range of 40–70 law review pages, and any impression that law reviews only publish or strongly prefer lengthier articles should be dispelled.”²⁵ Of course, by the standards of many disciplines, forty pages of small-type law review pages would be considered extraordinarily long.

By any standard, legal scholarship is long. Treatises, law review articles, and even articles in peer-reviewed journals are long, and because they are long, accessing them is costly.

B. Copyrights: Exclusive and Exclusionary

Long-form legal scholarship is associated with another important feature—exclusive rights. Copyright law provides exclusive rights to copyright owners. The most important of these is the right to control copying—which includes the right to control the making of electronic copies. Traditional legal scholarship was copyrighted. The publishers of treatises hold the copyright or exclusive licenses that provide the equivalent rights of exclusion. The typical law review publication agreement involved an assignment of copyright from the author to the law review (or educational institution of which the law journal was a part).

It made perfect sense that treatises were copyrighted and that those copyrights would be enforced. Treatises were (and are still) published by for-profit enterprises. The economics of intellectual property required

24. See Yale Law Journal Submissions, <http://www.yalelawjournal.org/submissions.html> (last visited Mar. 9, 2006) (describing distinction between “articles” and “essays” and stating, “Essays are usually significantly leaner than Articles: in general, they occupy fewer pages and rely on less voluminous citation.”).

25. See Joint Statement on Article Length, http://www.yalelawjournal.org/joint_statement.html (last visited Mar. 9, 2006).

copyright, because exclusive rights create the incentives to invest in the creation and dissemination of new works. The theory is that without copyright, the treatises would have been “ripped off” by some entrepreneurial outfit that would have had lower production costs because it would not have had to pay either Wigmore or Little Brown’s editorial staff.

Copyright made less sense in the world of law review articles. Very few law review article copyrights have any economic value. I have never had an offer from anyone to buy the copyright in one of my articles. *Have you?* I can’t imagine that I would find any takers if I were offer to sell at any nontrivial price. There are some indicators that law review articles have an economic value. Law reviews do charge for subscriptions, but it seems unlikely that copyrights are necessary to protect that income stream. For one thing, law reviews operate with free labor and subsidized direct costs. It’s not clear that a for-profit enterprise—which would have to pay for labor and the costs of capital—could compete. Or to put the same points somewhat differently: law schools (and not law review readers) pay legal academics to produce legal scholarship.

Copyright is problematic for another reason. Exclusive and exclusionary rights in law review articles create access and dissemination problems. A famous example is Lon Fuller’s famous article, *Positivism and Fidelity to Law—A Reply to Professor Hart*,²⁶ published in the *Harvard Law Review* in 1958. Fuller retained the copyright, but after his death, obtaining permission to use the article in course packets and anthologies became impossible—the orphan work problem.²⁷

Legal academics want to be read, but exclusive rights are barriers to readership. Even if permission is freely granted, seeking it is costly. If identification of the rights’ holder is difficult, then the transaction costs are likely to pose an insurmountable barrier. It is not clear the copyrights increase the supply of legal scholarship and it does seem clear that they reduce the demand for it.

There are signs that the model of exclusive rights is beginning to give way. Many student-edited law reviews have begun to permit open access. I now insist on open access as a condition of publication, and my experience is that most law reviews are willing to modify their publication agreements

26. Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

27. The facts related in text are based on personal experience. So far as I know, no published source documents the status of Fuller’s estate.

to permit open access. Many law reviews now routinely post open-access versions of the articles they publish on their Web sites.

But peer-reviewed journals are different. Most peer-reviewed journals are published by academic or for-profit presses that view the content of these journals as their intellectual property and as a potential source of revenue. Increasingly, peer-reviewed journals are available in electronic form, via JSTOR or other closed, proprietary electronic databases, but access to these databases is expensive. Very expensive. Just ask a librarian. Individual articles may be available for download in exchange for payment of a one-time fee, but these fees may be cost-prohibitive. Thirty dollars for a single copy of a single article is a typical fee.

So I will not publish in any peer-reviewed journal without open access. And that means that for all practical purposes, I will not publish in most peer-reviewed journals. They are dinosaurs. Magnificent beasts, to be sure. But they will evolve or become extinct.

C. Intermediaries: Source and Search

The ancien régime of legal publication stood on three legs—the long form, exclusive rights, and *intermediation*—the institutions and individuals that controlled access to legal scholarship. Let's take a hard look at the intermediaries. One way to slice the intermediation pie is to distinguish between “source intermediaries” (publishers) and “search intermediaries” (indexers). Both were important. First, let's take a look at source intermediaries.

1. Source Intermediaries

Source intermediaries are individuals and institutions that stand between authors and audiences. For reasons both historical and economic, the form of intermediation varied depending on whether the mode of publication was serial or monograph.

a. The Law Reviews and Peer-Reviewed Journals

With respect to serials, let's distinguish between law reviews and peer-reviewed journals. Law reviews were (and are) edited by law students—an arrangement that was (and is) unique in the academy and the source of much consternation. The reasons for the consternation are obvious and familiar. Second- and third-year law students are not experienced legal scholars. They are likely to reject important new scholarship when they fail to comprehend its significance. They are likely to accept bad

scholarship that “sounds impressive” or addresses a “hot topic.” Because students are not well acquainted with the literature, they are likely to favor scholarship that rehearses old arguments before adding a new point. Of course, law students aren’t stupid. They are likely to understand their own limitations, and that creates another problem. If student editors cannot trust their own judgment, then they are likely to rely on “proxy variables,” such as the institutional affiliations of authors or their prior record of publication.²⁸ This means that important new scholars at obscure institutions can have a terribly difficult time “breaking in” to the prestige law reviews. And, even worse, it means that established scholars with a “track record” can coast—publishing unimportant, derivative, and unoriginal scholarship in the most prestigious venues for years and years.

The law reviews have been increasingly supplanted by peer-reviewed journals—although it is important not to overstate what is still a small exception to the general rule. The upside of peer-reviewed journals is sophisticated judgment. Experienced academics are better equipped to separate the wheat from the chaff.

Despite their advantages, peer-reviewed journals come with a set of problems. Unlike law review editors, peer editors are embedded in social networks of professional affiliation. Although some editors meet the very highest standards of personal integrity and critical self-awareness, enabling them to transcend almost all bias, most academics suffer from the usual human foibles. They favor the theories and research of their friends and are harshly critical of the views of their professional enemies. Some editors favor work of young scholars who are the former students of the powerful and ignore those who have studied with the unpopular or the obscure. Review that is “blind” in theory may involve “taking a peek” in practice.

Intermediation can create delays. In this regard, student-edited journals have a significant advantage over peer-reviewed journals. Student-edited journals permit multiple simultaneous submissions. This creates competition between journals to make rapid decisions about the most sought-after articles. (I have had an article accepted within six hours of submission, and I am sure that is nowhere near the record.) But peer-reviewed journals generally require exclusive submissions—in order to reduce the burden on readers, who are themselves prominent and busy academics. Student-edited journals can make decisions in days or even

28. See generally Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power—Student Editors*, 59 S.C. L. REV. 465 (forthcoming 2008).

hours. Peer-reviewed journals take weeks or months. When combined with exclusive submission, this means that the publication of an important article can be delayed for years. And if you have been around the business in fields where peer-reviewed journals provide the only outlets, you know about articles—really fine ones—that simply sit in a drawer after two or three rejections (and getting to the drawer may have involved two or three years of waiting for rejection letters).

b. Legal and Academic Presses

Intermediation takes a slightly different form in the case of monographs. Until recently, most academic legal monographs were published by for-profit legal publishers. The for-profit legal publishers aimed solidly at their most important and profitable market—practicing lawyers. That was all well and good in the era of doctrinal scholarship. But once interdisciplinarity took hold of the legal academy, the for-profit, practitioner-oriented publishers simply did not provide an outlet, prestigious or otherwise, for the kinds of books that sophisticated legal academics wanted to write. That was because these books were not aimed at practitioners. They were aimed at other legal academics.

Enter academic legal monographs and the academic presses. Of course, there were law books by academic presses even in the heyday of the treatise. But it seems clear that the legal academy today is more focused on the academic press than it was two or three decades ago. The goal of the ambitious law professor is to publish a 300-page monograph with a prestigious academic press; it is most assuredly not publication of a multivolume treatise.

There is an irony here. The academic press monograph provides a substitute for the long-form law review article. What one would once have published as a 150-page law review article, one now publishes as a 300-page book from a university press. There are certainly advantages to the monograph form. Monographs can be a bit longer, and university presses encourage writing that can reach a multidisciplinary audience.

The trend to substitute monographs for long law review articles has not been cost free. Whatever was formerly the case, most university presses must now “float on their own bottom.” That is, they are expected to turn a profit or at least break even. Whereas the law reviews published short monographs as articles without regard to the bottom line, the academic presses cannot afford this luxury. Obscure areas of law without interdisciplinary appeal are poor candidates for book contracts. At least one prestigious press has recently discontinued its law and philosophy

series—too few sales. And the bottom-line orientation of university presses makes open access difficult, if not impossible.

2. *Search Intermediaries*

The old world involved a second form of intermediation—the role played by what I call “search intermediaries.” Once again, the status quo consists of a mix between a vanishing set of old-fashioned tools (card catalogs and indexes) and the now familiar high-tech tools for searching and manipulating electronic texts.

a. *Card Catalogs and the Index to Legal Periodicals*

Card catalogs no longer consist of three-by-five cards. They have been replaced by electronic databases. Like card catalogs, the databases facilitate subject-matter-based searches with the Library of Congress classification scheme providing the primary organizational system. It is not clear whether many legal scholars use electronic card catalogs as a research tool. To speak from my own experience, I make very occasional use of electronic catalogs. The typical situation involves my having identified a monograph published by a traditional for-profit legal publisher. Because those books are usually quite expensive, I am more likely to borrow them from a library than I am to buy a copy from Amazon.com. I am not sure that I have used an electronic card catalog for the primary purpose of doing research for more than a decade—although I have sometimes found myself using the research capacity of a card catalog when I first accessed it for another purpose.

Another old-fashioned search intermediary is the Index to Legal Periodicals. Again, I am not sure there is any data about usage patterns, but in my own case, I no longer use the Index to Legal Periodicals for any purpose and have not used it for more than a decade. My guess is that I would now find the Index (and similar indexes) to be a very crude tool when compared to full-text searching.

b. *Westlaw and Lexis-Nexis*

Functionally, indexes and card catalogs have been replaced by closed electronic text databases. There were (and are) two in the United States—Westlaw and Lexis-Nexis. These databases store vast quantities of legal text—cases, statutes, regulations, law review articles, and treatises. The data permits the generation of what is called a concordance, which correlates words with locations. The existence of a concordance permits

Boolean searching. For example, I can search for the word “Coase” immediately preceding the word “theorem” and get all instances of the phrase “Coase theorem” in a given database. The logical operators “AND,” “OR,” and “NOT” are permitted, as are proximity variables, such as “Coase” within two words of “theorem.” Boolean searches are powerful.

But the world of Westlaw and Lexis-Nexis is not nirvana because these databases are proprietary and closed. They are proprietary—access to the search engines is expensive. They are closed—the databases are not searchable by Internet search engines such as Google. That means that only a tiny fraction of the global population of academics and students has meaningful access to these systems. Of course, the fraction that does have access is important—it includes most of the legal academics in the North Atlantic and Commonwealth democracies. But the group of excluded scholars is enormous. Even in the United States, many institutions without law schools ration access to Westlaw and Lexis. Outside of Europe and North America, access is severely restricted.

III. THE FUTURE OF LEGAL SCHOLARSHIP: THE SHORT FORM, OPEN ACCESS, AND DISINTERMEDIATION

So what will the future look like? Prediction is always perilous, but I will go out on a limb. The future, arriving as you read these words, will emphasize the short form over the long, open access over proprietary rights, and disintermediation over traditional intermediaries. The future will be short and free with very little between the author and the reader.

A. *Short Form*

Legal scholarship today is moving toward the short form. What will the short form look like? I think the best strategy is to briefly canvass the possibilities:

- The idea paper—Idea papers have actually been around for a long time. In the early stages of a project, you have “the idea”—the central thesis that will be the part of the article that is actually new and moves the literature forward. So you write a very short paper—perhaps twenty double-spaced pages—that sets out the idea. In the old days, the idea paper might be presented at a “brown bag” or “early stage workshop.” But these days, the idea paper can be thrown up on the Social Science

Research Network (SSRN). And that has important consequences. It allows the author to “stake out” the idea—to establish “ownership” for the purpose of determining “who came up with it first.” And SSRN allows wide circulation. And because short papers are short, they may attract readers who would find the long-form version to be too costly to assimilate.

- The blog post—Blogs are a very flexible vehicle for publication. Although some blog posts are very short—a sentence or paragraph—nothing precludes blog posts that range from a few hundred to a few thousand words—long enough to develop a significant new idea or argument. One example of an innovative use of the blog form is University of Chicago law professor Randy Picker’s Picker MobBlog,²⁹ which produces online symposia about various topics and articles. SCOTUS blog³⁰ has done some very interesting things by inviting scholars and practitioners to produce an online discussion about new Supreme Court cases on the day they are handed down.³¹
- The Wikipedia article—Wikipedia itself is a collaborative, open-source, open-access encyclopedia.³² The technology underlying Wikipedia is the wiki—an engine that permits collaborative authorship on the Web. Another model for an online collaborative encyclopedia is the Stanford Encyclopedia of Philosophy. The Stanford project is closed—you must be invited to write an article—but it does provide something close to “open” access to content of an extremely high quality. One can imagine some hybrid emerging as a substitute for the traditional treatise. Dozens of scholars might collaborate on an online wiki-driven Contracts treatise, with all the advantages of massive, parallel editing and input.

By providing a list, I do not mean to predict the future of the short form. Just a few years ago, I didn’t even know that blogs and wikis existed. Moreover, wikis and blogs are engines—they are the platforms

29. Picker MobBlog, <http://picker.typepad.com/>.

30. SCOTUSblog, <http://www.scotusblog.com/movabletype/>.

31. See Posting of Sam Bagenstos to SCOTUSblog, <http://www.scotusblog.com/movabletype/archives/2005/06/05-week/> (June 6, 2005, 9:20 p.m.). This is the first of a series of posts on *Gonzales v. Raich*, 541 U.S. 1 (2005).

32. Wikilaw, http://wiki-law.org/mwiki/index.php?title=Main_Page, has not had much impact as of the date of this writing.

that allow for innovation in the development of the short form. It may be that these platforms have already created the space in which the “normal” version of short form legal scholarship will emerge. It may be that new platforms will open up possibilities for the short form that we cannot yet see.

B. Open Access

The old world was exclusive rights. The new world is open access. Open access is important because it reduces the cost of legal scholarship to readers. In the old world, you had to go to the library, get the volume of the law review off the shelf, and make a photocopy. That was costly. If you were a law professor, some of these costs might be subsidized. You might be able to shift the costs from your research budget to the library. Or you could have a research assistant do the fetching and copying. But it was costly enough that you did not want to have to do it twice, and we all accumulated photocopies by the hundreds, neatly organized in files or piled up in huge disorganized stacks. If you were not a law professor, the costs were considerably higher, and every law student from a certain era will remember taking copious notes and copying out passages by hand. Very costly.

Open access means doing an online search and then downloading the article. When you’re done, you might save it on your hard drive or you might just delete it because you can always find it and download it again in a matter of minutes or even seconds. There is a digital divide, and not everyone has high-speed Internet access, but most academics and students do, almost universally in the most developed world and selectively elsewhere. Wherever there is high-speed Internet, open access dramatically reduces the cost of accessing and using legal scholarship.

As a practical matter, the most common form of “open access” in the legal academy (in the United States, and increasingly among scholars who write in English throughout the world) is created by the posting of Articles on SSRN. But, of course, posting on SSRN is not true and full open access. Articles posted on SSRN are available on the Internet and can be downloaded, but unless the article itself grants further permissions, the downloaded version cannot be recopied or reposted. SSRN abstracts can be crawled, but SSRN does not currently permit full-text searching. And this final point is quite important. Because SSRN does not permit full-text searching, it falls short of the full promise of open access. Which brings me directly to my next topic.

C. Disintermediation

The disintermediation of legal publication is a very recent development. Just a few years ago, almost all legal scholarship was published after screening by an intermediary, for example, a student editorial board, a peer editorial board, or the editors of an academic or legal press. Disintermediation involves replacing these intermediary institutions with “thin intermediaries” or no intermediary at all. The most familiar example of a thin intermediary is SSRN. SSRN mimics the form of the peer-reviewed journals—but with thin rather than thick review. You cannot just post anything to SSRN. It is “peer-reviewed.” But SSRN does not have space constraints. So the threshold for “acceptance” is low. You cannot post your recipe collection or a rant about people who use cell phones in public places on SSRN. But you probably can post an article that advances a fairly kooky legal theory. (Of course, you could probably have gotten it published in a law review as well.) SSRN circulates (by e-mail) abstracting journals, organized by subject matter and institution. These perform a mediating function, but there is no pretense of selecting only the “best” pieces. Everything written by serious academics will be abstracted in the appropriate journal.

SSRN involves thin intermediation, but the Internet creates opportunities for total disintermediation. Legal academics do not need SSRN to make their work available on the World Wide Web. Almost every college or university provides facilities for the creation of a personal home page and server space that can host downloadable papers and articles. The linked paper then becomes accessible to Web crawlers, which then can provide the full text to the database of a search engine such as Google. In some ways, this solution is superior to SSRN because SSRN does not facilitate full-text searching. But SSRN has advantages as well. Even though it is absurdly easy to create your own web page and upload articles, many law professors do not have a clue as to how these simple tasks can be accomplished. SSRN provides an institutional framework for posting on the Web, and many law schools provide administrative support for those who find SSRN’s simple interface to be daunting.

The importance of Web-based publication is dramatically enhanced by the search engine. There are many search engines, but Google dominates that business and provides a convenient focus for discussion. Google is not a perfect search engine. It does not produce a concordance of the Internet and therefore it cannot provide the full range of Boolean searches offered by Westlaw and Lexis. Google provides only two Boolean operators

(“AND” and “OR”), and Google does not permit proximity searching (such as a search of the form “blog” within five words of “constitutional”).

Despite Google’s limitations, Google is one of the driving forces for the disintermediation of legal scholarship. Google itself is accessible to anyone who has access to the Internet. Google is very easy to use. Google is fast. Google is free. The combination of Google with open access is incredibly powerful because it allows for a “direct connection” between authors and readers. I put the phrase “direct connection” in scare quotes, because, of course, Google itself is an intermediary. Google doesn’t present links in random order. It rank orders search results, and the precise method for producing the rank order is a trade secret. But Google’s success depends on the value delivered by the rank ordering. Google wants to get the most relevant and useful results to the top of the rank ordering. Indeed, Google offers users the option of searching with the “I’m Feeling Lucky” option that will take the user directly to the number one link in the rank ordering.

If you are old-fashioned like me, it may bother you that we are about to enter an era when all research will be done on Google or the rival that beats Google to the development of the next great search technology. Well, not all research, of course. Westlaw and Lexis-Nexis are not going away tomorrow. PhD candidates, students writing their law review notes, and young associates at big firms will all be required to do exhaustive searches using multiple techniques. But undergraduates, ordinary folks, and even professionals are increasingly becoming reliant on Google as the primary (and perhaps the only) method for doing ordinary, down-and-dirty research.

IV. CONCLUSION: THE TRANSFORMATIVE POTENTIAL OF BLOGGING

Having surveyed the past of legal scholarship and speculated about its future, we can return to the questions with which we began: Do blogs have something to do with legal scholarship? Could blogs *transform* legal scholarship in some way? I have argued for the proposition that blogs are symptoms of the larger forces at work in the world of legal scholarship. The importance of blogs, if any, is as the medium (or technology) through which the incentives and institutional forces that are pushing legal scholarship toward the short form, open access, and disintermediation are doing their work. If it had not been blogs, it would have been something else. If someone invents a medium that provides a more effective or less costly mechanism through which the forces can operate, then blogs will recede and that medium will take their place. It’s not about the blogging.

And when I say it's not about the blogging, I also mean that alternatives to blogs are already on the scene. We already have Wikipedia and the "wiki," the technology that drives open access, open authorship, and massively collaborative scholarship.³³ Less radical are the closed authorship online encyclopedias—the *Encyclopedia of Law and Economics*³⁴ or the Stanford Encyclopedia of Philosophy.³⁵ Online paper repositories like SSRN and the Berkeley Electronic Press (bepress) are already significant forces in the dissemination of legal scholarship.

So if blogs will play a role in the transformation of legal scholarship, it will be a modest one. It seems to me that blogs can function in two ways that contribute to the emergence of the new order of short-form, open-access, disintermediated legal scholarship. First, blogs themselves can serve as the medium by which short-form scholarship is written and disseminated. That is, blog posts can be legal scholarship. If anyone ever thought otherwise, they simply were not paying attention. Blogs can be legal scholarship because anything that can be written can be written as a blog post. Blogs lend themselves to very short pieces—but blog posts of over one thousand words are not uncommon and even longer pieces can be broken into several posts. Second, blogs can serve to introduce and disseminate legal scholarship. In this regard, the interaction between SSRN and the blogosphere is instructive. On Legal Theory Blog, I mention or discuss several hundred SSRN papers every year. Other blogs interact with SSRN in similar ways. A similar point can be made about the blogosphere and other forms of legal scholarship. For example, the "Legal Theory Calendar" is a feature of Legal Theory Blog. The calendar publicizes talks, workshops, and conferences that may be of interest to academics who work in legal theory. Because many workshop, colloquium, and conference Web sites have a Web page that includes links to the papers that will be presented, blogs can link both to the event and to the downloadable paper—once again creating a new channel for the dissemination of legal scholarship. Moreover, each individual legal scholar can create her own blog—which can serve as vehicle for the promotion of the scholar's own work.

One might think that blogs are replacing or supplementing the traditional intermediaries. There is something to that thought. I am not

33. See Wikipedia, Wiki, <http://en.wikipedia.org/wiki/Wiki> (last visited Apr. 20, 2006).

34. ENCYCLOPEDIA OF LAW AND ECONOMICS, (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) available at, <http://encyclo.findlaw.com> (last visited Apr. 20, 2006).

35. Stanford Encyclopedia of Philosophy (Edward N. Zalta, Spring 2006 ed.), <http://plato.stanford.edu/> (last visited Apr. 20, 2006).

arguing that the old intermediaries will disappear. Blogs serve as an alternative channel of information about legal scholarship—an alternative form of “peer review” that is more competitive, open, and transparent than the traditional peer review processes. Blogs are more competitive for obvious reasons. Peer-reviewed journals are expensive to produce and their boards of editors are self-perpetuating; although some fields have many competing peer-reviewed journals, the editorial boards frequently interlock. By contrast, the entry barriers to starting a blog are low, and each new blogger is free to compete for readers. Blogs are more open and transparent—except for anonymous blogs—because their assessments of legal scholarship are available to the whole world via the Internet. By contrast, most peer-reviewed journals keep the identity of reviewers secret and reveal only which articles were accepted. The reasons for acceptance and rejection (but not the identity of the reviewers) are usually communicated to the author (or rejected aspirant), but are rarely disclosed to others. Of course, competition and transparency can cut in multiple directions. Some bloggers may compete for readers by emphasizing the accessible and eschewing complex ideas that are difficult to understand. Some bloggers may respond to transparency by self-censorship—blogging only when they have “something nice” to say. But precisely because blogging is transparent, such behaviors are likely to be noticed by readers. Blogs, like journals, acquire reputations that affect readership and the ways that readers use the information they glean from blogs.

Prediction is perilous, and I have no special knowledge of the future of legal scholarship. But I do have an opinion: we are moving in the direction of open access to disintermediated short-form legal scholarship. I am much less confident about the specific forms and institutions the future will take. But I do have an opinion: blogs will play only a modest supporting role in the future of legal scholarship. Scholarship is about “papers,” not “posts.”