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BLOGS AND THE LEGAL ACADEMY

ORIN S. KERR*

Everyone who writes about the legal implications of developing technology faces a basic dilemma. Technology is a moving target, which means that no one knows exactly what it will look like tomorrow. You face a choice: either write about what the technology looks like today or else imagine what the technology might look like tomorrow. If you write about the technology today, you risk mistaking a temporal trait for an inherent one. If you speculate about what the technology may become, you risk ignoring reality by simply assuming problems away. To get around this problem, you need either a crystal ball or exceptionally good luck.

I don't have a crystal ball, unfortunately, and my luck is only so-so. Given that, I'd like to focus on today's technology and ask whether blogs as we know them today are conducive to advancing scholarship. My conclusion is that relative to other forms of communication, blogs do not provide a particularly good platform for advancing serious legal scholarship. The blog format focuses reader attention on recent thoughts rather than deep ones. The tyranny of reverse chronological order limits the scholarly usefulness of blogs by leading the reader to the latest instead of the best.

This doesn't mean that blogs can't advance scholarship. The impact of any blog depends on what its author decides to post. But the format of blogs makes it relatively hard to sustain a deep conversation about an important legal issue. As a result, blogs can play an important role in the dissemination and critique of scholarship, but, on the whole, they tend to provide lighter fare than other media. My best guess is that blogs will probably have the greatest impact on legal scholarship at the student level: student scholarship published in law reviews has often focused on recent developments, and blogs may eventually usurp that role.¹

My second point is that blogs provide a promising platform for law professors interested in being public intellectuals.² Law professor blogs

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1. See Stephen I. Vladeck, *That's So Six Months Ago: Challenges to Student Scholarship in the Age of Blogging*, 116 YALE L.J. POCKET PART (2006), http://thepocketpart.org/index.php?option=com_content&task=view&id=56&Itemid=6.

2. See Gail Heriot, *Are Modern Bloggers Following in the Footsteps of Publius? (And Other Musings on Blogging by Legal Scholars . . .)*, 84 WASH. U. L. REV. 1113 (2006).

allow professors to participate in and influence broader debates on law-related topics. This role isn't new, but it's an interesting new spin on an old role. Blog posts have some important advantages over more traditional forms of public speech, such as op-eds, magazine articles, and TV or radio appearances. The opportunities aren't specific to law professors, of course. Anyone can start a blog, and anyone can use a blog to become a public intellectual. But the legal field is particularly conducive to this kind of role, and law professors are in a good position to take advantage of it.

I. THE POOR FIT BETWEEN BLOGS AND LEGAL SCHOLARSHIP

Before I consider the role of blogs in the advancement of legal scholarship, let me clarify two key terms. The meaning of "legal scholarship" is a big topic, and I cannot do it justice here. For the purpose of this essay, I will assume that legal scholarship refers to research into and writing about the legal system in an attempt to shed light in an important and lasting way on the function, purposes, meaning, and impact of the legal system and the role of law in society. There are many ways to achieve that goal. Legal scholarship can draw from many approaches, whether analytical, empirical, critical, historical, interdisciplinary, doctrinal, narrative, something else, or some mix of all of the above. What the various approaches share is an effort to identify and explore some kind of important role, function, or aspect of the legal system that helps us better understand the law. They seek to shed light, to take a complex and difficult system and to reveal some aspect of its nature.

Further, I assume that legal scholarship—or what I will somewhat arbitrarily call *serious* legal scholarship—normally is designed to be lasting. That is, serious legal scholarship usually will aim to reveal something about the legal system that is true for more than just a few hours or days. The time horizon is a matter of months, years, or decades. The idea is to reach some lasting insight, to find some kernel of truth about how the legal system works.

Dan Gilmour has helpfully defined a blog as "an online journal comprised of links and postings in reverse chronological order, meaning the most recent posting appears at the top of the page."³ A blog is basically just a website, albeit a website running software that permits the author to post new material easily in sequential order. The basic currency of a blog is the post, which consists of the message and a title. Many blogs

3. DAN GILMOUR, MAKING THE NEWS (2005). This definition isn't needed in 2006, at least for the audience that is likely to read this article.

also permit comments from readers, which usually can be viewed by clicking on a link at the bottom of the post. Most blogs also include a “blogroll,” a list of recommended blogs that the reader may find of interest. Finally, many blogs include some kind of counter that permits readers to view the amount, source, and type of traffic visiting the blog both recently and over the past several months.⁴

So, can blogs help advance legal scholarship? I think the answer is that they can but that the format isn’t well-suited for the job. The problem is the tyranny of reverse chronological order (“RCO”). RCO means that blog visitors see the most recently posted material at the top of the page. A visitor may see one or two posts on the screen, but normally he must scroll down to see earlier posts. This isn’t the only way to visit a blog. Readers can follow direct links to earlier materials, get direct feeds, or can search through archives (or search engines) for particular materials. But this is relatively rare. For the most part, blogs direct readers to the most recent post first.

The tyranny of RCO explains the popularity of legal blogs. Thanks to RCO, visiting a frequently updated blog is a little like talking to someone with many interests but a short attention span. When you visit, you’re likely to find something new at the top. The format is ideal for reporting and commenting on legal news: important legal developments occur every day, and blogs make it easy to check out the latest. If you want a running commentary about the latest news in the legal field in short, easily-digestible chunks, blogs are perfect. The popularity of many legal blogs suggests that many people enjoy this format. Although the circulation of the most popular law review, the *Harvard Law Review*, is about 8000 per issue, the most popular legal blog, The Volokh Conspiracy, presently receives about 25,000 visits *every day*. The comparison between journal circulation and blogsite visits is highly imperfect, of course, but the basic point remains: lots of people are interested in news and commentary about the law, and RCO makes it easy to feed readers quick commentary on new developments.

At the same time, RCO’s focus on the latest instead of the best makes it difficult for blogs to advance scholarly ideas. In my experience, at least, the advancement of scholarly ideas requires frequent and recurring mulling. You start with an idea and mull it over until you begin to see something interesting. In an intellectual sense, you take the idea and pick

4. See, e.g., Site Meter: Counter and Statistics Tracker, <http://www.sitemeter.com>. The presence of counters makes blogging addiction a serious risk for regular bloggers, as it means that they can check in at any time to see how many people are reading—dangerous stuff.

it up, spin it around, look at it from all sorts of angles, and then put it down again. You repeat the process and look for new insights and angles until a picture gradually emerges that reveals something new. You then begin to write down what you've found. For many authors, myself included, the writing process is iterative: as you think through the argument, the argument changes. Over time, you end up with a developed statement of the new idea that reflects frequent mulling over a long germination period. The process usually takes weeks or months, and in some cases, years.

The typical schedule for writing and publishing law review articles is well adapted to this mulling process. Law review articles provide the opportunity to refine and debate an argument over several months before publication, and that opportunity is a critical part of creating lasting scholarship with real depth. A typical law professor might start an article in the summer; work on it through the fall; share drafts with other colleagues in the winter; rework it in response to comments in February; send it out in March; present it at conferences or workshops in April; have it accepted at a journal in May; rework it in response to comments in June and July; start the editing process in August; present it at another scholarly workshop in September; rework it and refine it several times during the editing process; and then finish up the final version in January. From start to finish, the process might take a year and a half. During that time, the author has many opportunities to test various approaches and settle on the best one after weeding out ideas that seemed good at first but didn't last.

RCO makes it difficult for blogs to support the repeated mulling that tends to foster serious scholarship. An author might work on a post for an hour or two, giving it one or two good "mulls." But once an item is posted, and one or more posts follow it, the post scrolls off the bottom and is mostly forgotten. An author can return to the topic, and add a new perspective that was missing before, but that new perspective will quickly drop off the page as well. Because new posts push old ones off the page, it is difficult to sustain a running discussion or to develop a complex argument. The format encourages bite-sized nuggets with a quick time horizon. A good blog post stimulates, entertains, and inspires, all in a paragraph or two. Once posted, however, it doesn't last for long.

Thanks to RCO the difference between blog posts and law review articles is something like the difference between short-term and long-term memory. Blog posts tend to be about what happened today, yesterday, maybe last week. They are quick reactions to current events and current issues, and for the most part are forgotten a few days after they have been posted. In a sense, blog posts end up as an online equivalent to faculty

lounge conversation: they tend to be quick thoughts, comments, and perspective that offer an interesting tidbit about a broader question.⁵ Posts might plant the seeds of a future article or stimulate readers to think of old questions in new ways. But the time horizon is short. Blog posts can support and influence traditional scholarship just as short-term memory can work its way into long-term memory. But the two are usually quite distinct.

This does not mean that blogs will have no *influence* on legal scholarship, of course. My sense is that blogs will influence legal scholarship in a number of ways. As this question isn't the focus of my essay, let me offer just two examples. First, my guess is that blog posts will become the first draft of commentary on new legal developments. If "journalism is the first rough draft of history,"⁶ blog posts are likely to become the first rough draft of legal scholarship on new developments. Relatedly, blogs will encourage traditional law reviews to adopt a longer time horizon. Readers will no longer need to rely on student notes and case comments to learn of the latest developments. By the time a law review publishes an article on a new development, the development often is no longer new. Traditional journals simply can't compete with blogs on this front. I suspect that this will have particularly important implications for student-written scholarship. Student notes and comments have long relied on the steady stream of new decisions for topics, and blog posts on new decisions may come to "occupy the field" of new case commentary.

II. LAW PROFESSOR BLOGGERS AS PUBLIC INTELLECTUALS

Although legal blogs have limited potential to advance scholarship, they are promising outlets for legal scholars interested in becoming public intellectuals. The term "public intellectual" originated with Russell Jacoby in 1987,⁷ and in legal circles it generally evokes Richard Posner's controversial book, *Public Intellectuals: A Study in Decline*.⁸ I will use the term "public intellectual" in a broader sense than does Posner. Posner's book attempts to analyze the market in intellectual work, and it defines a fairly specific set of individuals and publications that count for the

5. See Kate Litvak, *Blog as a Bugged Water Cooler*, 84 WASH. U. L. REV. 1061 (2006) (discussing the analogy).

6. This statement is often accredited to Philip Graham.

7. See RUSSELL JACOBY, *THE LAST INTELLECTUALS: AMERICAN CULTURE IN THE AGE OF ACADEME* 5–6 (1987).

8. See RICHARD POSNER, *PUBLIC INTELLECTUALS: A STUDY IN DECLINE* (2001).

purposes of measurement.⁹ I have more general goals and therefore use the term in a more general sense. For my purposes, a public intellectual is a commentator who offers an unusually deep or thoughtful analysis of public affairs or social trends that is read by a relatively wide audience.

Law professor bloggers can assume the role of public intellectual in two relatively distinct ways. The first is as a generalist. Legal scholars tend to be generalists, both in training and interests, and are somewhat more likely than others to closely follow public affairs and current events. Lots of us have opinions about pretty much everything. We are particularly well suited to offer commentary on the legal topic *du jour*. Alexis de Tocqueville famously observed that in America all political disputes eventually turn into judicial disputes.¹⁰ This creates considerable demand for legal commentators who can offer insight on the latest cases and legal questions.

The generalist role extends beyond commenting about legal developments. Consider *Instapundit*, Glenn Reynolds's wildly popular blog. Glenn blogs about legal topics only rarely, and almost never in depth; his blog is more about links than analysis. At the same time, Glenn's selections of what he finds noteworthy, combined with his endorsement or criticism of various trends and recent stories, can focus the attention of 100,000 readers.

Although I can't claim to have Glenn's influence, I have also found that blogging on nonlegal topics at *The Volokh Conspiracy* can spark a number of interesting conversations. For example, in the last two years I have posted on the Iraq War, Hurricane Katrina, and other political issues. I'm not very comfortable blogging on those topics, as they're far beyond my area of expertise, but my sense is that the demand for general political blogging by law professors is higher than the demand for blogging about law. I doubt I have changed any minds, but such posts tend to draw an unusually high number of comments and trackbacks. The Internet provides an audience, and that audience can have very wide interests law professors can engage.

Of course, opportunities such as this existed long before the Internet. Law professors could always (and can always) write an op-ed or appear on TV or the radio. But blogs offer two related benefits over these more traditional forms of media. First, blogs don't require a prior relationship or connection with an established media outlet. For the most part, op-eds and

9. *Id.* at 25.

10. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 109–14 (1856).

TV appearances go to those with established reputations and preexisting relationships with editors. No such relationship is needed for a blog to become influential. Indeed, blogs can be excellent vehicles for establishing such credentials: a journalist or reporter who reads a blog post may later contact the author looking for commentary.

Second, blogs are unfiltered. Depending on the context, this can be a strength or a weakness. It offers an important advantage for aspiring public intellectuals however; they can reach a public audience quickly without getting a second opinion. There are no boards to impress or editors to comment. Traditional media requires a writer to pass through several screens, such as the publication's editorial slant or the editing process itself. It takes time and luck. In contrast, a blogger with something to say can simply write up the post and hit "send." The post appears a second or two later.

Blogs also create a niche for a second type of public intellectual: the subject-matter expert. Some might question whether this role fits into the "public intellectual" mold, but I think it does. The Internet lets people connect with others who share specific interests. In most fields of law, a small group follows the field closely, including practitioners, academics, journalists, law clerks, and, in some cases, judges. A good blog focused on a specific area can provide a common forum within that field. Doug Berman's *Sentencing Law & Policy* is perhaps the premier example;¹¹ *SCOTUSblog* is another.¹² The traffic of such blogs may not match that of more general interest blogs, but the specialized blog can reach the key players in the field. The blogger who provides the content will help set the terms of the debate.

Finally, blogs may help improve the market for public intellectuals, both in the limited context of subject-matter legal blogs and the broader role of more general blogging. In his book on public intellectuals, Judge Posner laments the low quality of academic public intellectualizing. Posner attributes the low quality to the lack of feedback mechanisms and easy exits for poor public-intellectual work:

Neither the public intellectual's academic peers, nor the audience for his public-intellectual work, disciplines his output. The media through which the public intellectual reaches his audience perform virtually no gatekeeping function. The academic whose errors of fact, insight, and prediction in the public-intellectual market are

11. <http://sentencing.typepad.com> (last visited Feb. 20, 2007).

12. <http://scotusblog.com> (last visited Feb. 20, 2007).

eventually detected can . . . abandon the market, returning to full-time academic work, at slight cost.¹³

Blogging is different. Feedback is almost immediate, thanks to comments and trackbacks. Corrections are common, at least by any blogger who wants to maintain credibility with his audience. Bloggers have to maintain their credibility in every post. The blogger gains an audience by impressing readers repeatedly rather than by once impressing a *New York Times* editor with his fancy title or pedigree. Further, the audience is not easily abandoned, as the audience of most academic blogs includes other academics. An academic blogger who makes repeated errors does so in front of his colleagues; such a relationship makes the line between scholarly work and blogging a blurry one. The rule is *caveat blogger*, and that exerts pressure to keep quality high.

III. CONCLUSION

Five years ago, a symposium on the latest technology impacting legal academia would have trumpeted the transformative technology known as listservs. (Come to think of it, I'm kind of surprised that there was no conference on "Listservship.") Today, most listservs are relatively quiet: their traffic and influence have dropped off, perhaps partly in response to the growth of blogs. The lesson, I think, is that technology is a moving target. This makes predictions tricky; blogs are new, and it's too early to tell what their impact on the legal academy might be. Interest remains high right now, but we don't know whether it will last—or what technology might take its place ten or twenty years from now. So it may be that blogs change, and that those changes render moot everything I have said in this essay. Like a blog post, the ideas here are necessarily a glimpse of a long-term work in progress.

13. Posner, *supra* note 8, at 389.