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Online Legal Scholarship: The Medium and the Message

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On July 13, 2006, my fellow blogger, Marty Lederman, sent me a copy of a proposed surveillance bill drafted by Senator Arlen Specter’s office. For months, Marty and I had been covering the controversy over the National Security Agency’s (NSA) domestic surveillance program on our group blog, Balkinization. We argued repeatedly that the NSA program was illegal. The Supreme Court’s Hamdan v. Rumsfeld decision in June only seemed to confirm our conclusions.

The mass media reported that Senator Specter had finally reached a compromise with the Bush Administration that would settle the NSA controversy once and for all. According to the papers, the bill would create a judicial procedure for reviewing the NSA program and future programs like it, and the Administration would agree to bring the program under judicial supervision.

As Marty and I studied the bill, it was clear to us that all this was false. The bill was no compromise; it was a complete sell-out. It would insulate the President from judicial review whenever he chose and it largely exempted him from the obligations of the Foreign Intelligence Surveillance Act. After studying the bill, we reported our conclusions on Balkinization. Other bloggers

 bibliography entries:

were not far behind. Orin Kerr, who studies cybercrime, and Steve Vladeck, who studies separation of powers, offered their own analyses. The bill was a fiasco, but the reporters who covered the story didn’t have the time or the expertise to figure out how they had been snookered.

Our stories, and others like them, soon gained the attention of the blogosphere and the reporters who regularly read law blogs. The next day, Representative Jane Harman, who serves as the ranking Democrat on the House Select Intelligence Committee, sent us an e-mail. Would we mind if she wrote her views on Balkinization? We were of course delighted.

Within a few days, reporters began portraying the bill quite differently. Responding to mounting media criticism, Senator Specter defended his bill on the editorial page of the Washington Post. The quality of his arguments, Marty joked, was “proof positive that Senator Specter doesn’t read Balkinization.” Perhaps he didn’t. But it was clear that somebody had read what we were writing, and by process of osmosis, our arguments had reached congressional staffers and journalists who covered the NSA controversy. Hence Congresswoman Harman’s remarkable decision to reach a particular policy audience by blogging on our site. The NSA controversy continues. We have no idea how it will end. But blogging by legal experts has intervened in the debate in a new way, helping to inform not only the public but also the mainstream media and key players about complicated issues.

This story encapsulates many of the most important effects online media will have on legal scholarship. It shows how digital technologies affect the style, subject matter, tempo, intermediaries, and audience for legal scholarship, and how online media will shape the diffusion of legal expertise and the incentives for producing legal knowledge.

In my “official” (i.e., non-blogging) legal scholarship, I’ve argued that Internet speech has two key characteristics. It routes around traditional media gatekeepers and it gloms onto existing cultural sources, appropriating them for its own purposes rather than displacing them. A similar analysis applies to the production and diffusion of legal expertise.

Both online media like the Social Science Research Network (SSRN) and blogging route around the traditional gatekeepers of legal scholarship: law journals. Instead of waiting months (or in some cases years) to publish your article, you can post it on SSRN, as well as your personal website. You can write short essays on a blog. In both cases, you control the editing and the style. If you write about law for Wikipedia, you might be edited, not by law students, but by the other members of the Wikipedia community, and you can respond in kind.

Routing around changes the audience for legal scholarship, because non-lawyers also have access to legal articles on personal websites and SSRN and to legal commentary on blogs. It changes the sources of legal scholarship because non-law professors and even non-lawyers can upload articles or write blog postings about legal issues. Perhaps few legal scholars will much care what they say. But these same features also affect other disciplines, making it easier for law professors to find scholarship and commentary from these disciplines, which they can incorporate into their own work. (Indeed, SSRN collects articles from several different disciplines, and Wikipedia gives capsule summaries of concepts from economics, history, political science, and the sciences, as well as from law.) Equally important, online media favor interactivity; people not only link to blog posts, they also comment on them in the blog itself. Being able to write on the blog you read creates loyalty and community. It makes authors feel in touch with readers, and therefore more directly responsible to them.

Routing around can also change the style of legal scholarship. Articles posted online still have a traditional style because most of them are destined for traditional law reviews. But blog postings tend to be short and informal. Unlike law review articles, they don’t comprehensively review previous scholarship, and they don’t have lots of citations. They use hyperlinks to cite to information, producing a cultural ethos of “see for yourself.”

Routing around also changes the tempo of legal scholarship and the rate of diffusion of legal knowledge. Law professors don’t have to wait for months to


comment on important legal developments—they can post immediately on their blogs. Other law professors can respond almost instantaneously. Legal bloggers now rush to comment on important new cases the day they come down. The end of each year’s Supreme Court Term brings a veritable orgy of blogging.

This change in tempo has both benefits and disadvantages. On the one hand, it moves the conversation and analysis of legal issues forward at a much faster pace. On the other hand, it rewards instant commentary, which may be less thoughtful. It pushes legal scholars to form quick reactions and publish them to attract readers and, equally important, links from the new intermediaries—the most popular blogs and aggregator sites like Technorati and Memeorandum. Increased tempo makes legal scholarship more like journalism. That may not be all bad; many interesting insights about new case law are fairly easy to generate in the hothouse of blogger conversations, producing most of the basic ideas scholars might offer months or even years later. Because all of the low-hanging fruit is picked more quickly, the conversation is driven forward earlier, and that may improve the quality of later scholarly work. Many minds competitively working on a problem over a relatively short period may make more progress than a single person working alone over many months. Often that may be a good bargain, but for some issues and for some disciplines, it may not.

Routing around changes the relationship between legal experts and the public, and particularly journalists. Online media make it easier for journalists to find expert coverage of legal events. The most popular blogs and aggregator sites like Technorati link to stories from less well-trafficked blogs and advertise them to a larger audience. Journalists quickly learn which blogs have the most interesting commentary on the issues they care about. The members of my own blog, Balkinization, have specialized in legal issues concerning executive power, torture, and the war on terror. Reporters view us as a source of expert commentary, and several of them read us regularly. We, in turn, give them ideas for new stories. The NSA story is a good example. Our blog diffused legal expertise into the mainstream media—and hence into policy conversations—much more quickly than legal scholarship could before. Similarly, when Laurence Tribe wanted to criticize the ABA’s report on Presidential Signing

statements, he chose *Balkinization* as a platform, knowing that he would reach a fairly significant segment of the audience he sought to influence.\(^9\) At first reporters simply used blogs to locate experts to interview. Now many of them quote what we have written on the blog instead of wasting their (and our) time with lengthy phone interviews from which only a single sentence or two might be used.

Routing around shapes the subject matter and the message of legal scholarship in multiple ways. Online media—and particularly blogging—drive legal writing toward issues that are timely and particularly important to practitioners, policy analysts, journalists, and politicians. Blogging allows law professors to comment on successive drafts of pending legislation both in Congress and in state governments—something that traditional legal scholarship can almost never do. It allows focused commentaries on recent state and lower federal court decisions that most law professors would not want to spend an entire law review article addressing, and that most student-edited law reviews—which tend to focus on constitutional and other “hot” topics—would not be interested in publishing.

Blogging’s quick response time could discourage commentary that is not timely, that takes the longer view of a problem, or concerns an issue or a field of law unrelated to current controversies. Legal bloggers who write about topics with no connection to current events won’t get large audiences; they will have to content themselves with niche audiences of specialists. Fortunately, online media are perfect for niche publications. They reduce the cost of publication and data storage, and they lower the costs of speakers and audiences finding each other. Hence online media have two interesting and opposing effects: they drive legal commentary toward timely issues for bloggers who seek a mass audience, and they create a friendly venue for specialized legal commentary aimed at smaller audiences who can now easily form communities of interest. Both SSRN and niche blogs are partial antidotes to the skewed focus of student-edited journals, which provide too little coverage of business law and statutory questions that are most useful to lawyers and judges. In fact, there are now niche legal blogs on almost every conceivable subject, from corporate law to disability law.

Over a decade ago, Judge Harry Edwards, himself a former legal academic, complained that legal scholarship—and especially interdisciplinary scholarship—was becoming too isolated from the everyday concerns of lawyers and judges.\(^{20}\) Online scholarship—and especially blogging—would seem to be

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the answer to Judge Edwards’s prayers. Blogging pushes law professors to
analyze contemporary legal issues instead of high theory; equally important, it
drives them toward doctrinal analysis that lawyers and judges can use. I have
felt these effects myself. Before 2003, when I started my blog, most of my
“official” scholarship was nonprescriptive and interdisciplinary. But most of
my blogging has been normative, offering lawyerly arguments about the merits
of legislation, executive actions, and judicial decisions. That result may be
overdetermined, as my scholarly interests have changed in the past decade. But
if online media have helped turn a deconstructionist into a doctrinalist,
imagine what they will do to everyone else.

But what about quality? Won’t online media generate a veritable Tower of
Babel of half-baked legal arguments that nobody wants to listen to? Online
media don’t just route around traditional gatekeepers. They also glom onto
them—they depend on them rather than displace them. This is the second of
the two effects of online media I mentioned earlier. The old gatekeepers don’t
go away entirely, and new ones arise that partially supplement and partially
compete with them. The proliferation of law reviews and the rise of text-
searchable databases like Lexis and Westlaw mean that one type of gatekeeping
no longer really exists; most law professors already can publish their work
somewhere, and most other law professors can find it. Quality is signaled by
the journals where articles are placed, as well as by the author’s name and
institution. The marketplace of scholars determines which pieces gain
prominence and which are forgotten. Hiring and tenure committees act as
further guarantors of quality, and help construct academic reputations.

None of these traditional methods of quality assurance will disappear
anytime soon. In fact, online repositories like SSRN are partially parasitic on
them. Hiring committees and other legal scholars still use law journal
placements as signals of importance and quality, even if they download copies
from elsewhere. Nevertheless, online scholarship disaggregates one important
method of credentialization—law review placement—from methods of
distribution (blogs, SSRN). In the long run, that will make law journals’
credentialing function less important. Along with Lexis and Westlaw, which
have been around for some time, online media produce new methods for
establishing quality and reputation—citations, links, page views, and
downloads, all of which have the superficial appeal of being objectively
measurable.

Here, in fact, is the real cause for concern. I’ve argued previously that
citation counts are notoriously unreliable as guarantors of scholarly quality.21

21. J.M. Balkin & Sanford Levinson, How To Win Cites and Influence People, 71 CHI.-KENT L.
howtowincitesandinfluencepeople.pdf.
Links, page views, and downloads of SSRN articles may be even worse. Nevertheless, they will, I predict, gradually be layered on top of existing methods of assessing quality and generating scholarly reputations; and they will, over time, merge with and influence them. Some day hiring committees may pay less attention to journal placements and more attention to page views. The optimistic story is that we will transcend these rudimentary measures and develop peer-production methods for measuring scholarly quality; these will leverage the power of digital networks and divide the work of quality assessment into discrete units that many people can perform over time. The pessimistic story is that citations, links, page views, and downloads are the best we will get. Law professors now agonize over whether blogging constitutes legal scholarship and what this will do to the legal academy. They needn’t bother. The real threat to quality comes not from the medium of blogging itself but from using citation counts, links, page views, and downloads as measures of merit. People won’t just apply these criteria to judge blogs. They will also apply them to standard-form legal scholarship online.

Blogging, in fact, is sui generis. It blurs the traditional boundaries between scholarship, teaching, and service because it transcends the normal audiences and expectations of legal scholarship. Over the years, legal scholarship has become an increasingly self-contained community where scholars write only for each other. Bloggers have burst out of that model: they talk to many different audiences, they teach the world about law, and they perform a public service by drawing attention to the legal and policy issues of the day.

Blogging may give scholars publicity that gets their work a look. But it will not by itself generate a scholarly reputation or make a scholarly career—at least, that is, until social and technological change thoroughly reconstitute our standards of merit. In the short run, blogging won’t get you a job in the legal academy by itself any more than teaching or public service ever did. That is because the current generation of law professors made their reputations by traditional means, not by blogging. At most, blogging may give you public prominence, but in the world of the legal academy, being well-known often leads people to conclude that you are not entirely serious.

The wrong question to focus on is whether hiring committees should count blogging as legal scholarship. The right question is how we should re-imagine our vocation as professors of law in light of new online media. Should we continue to speak mostly to ourselves and our students, or should we spend


more time trying to teach and influence the outside world? That choice will
determine whether we increasingly value blogging or stick with traditional
forms of scholarship. There are many possible paths to choose from, but if you
don’t know where you are going, almost any road will get you there.

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