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BLOGGERSHIP: HOW BLOGS ARE TRANSFORMING LEGAL SCHOLARSHIP

ARE SCHOLARS BETTER BLOGGERS? BLOGGERSHIP: † HOW BLOGS ARE TRANSFORMING LEGAL SCHOLARSHIP ††

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Admiral James Stockdale, Ross Perot's Independent Party running mate in 1992, famously opened the vice-presidential debate by asking, "Who am I? Why am I here?"¹ I would like to take a few minutes to

† I am grateful to my colleague Rafael Gely, a recovering blogger (he launched the popular Workplace Prof Blog (http://lawprofessors.typepad.com/laborprof_blog) before deciding that blogging was not his cup of tea), who coined the term "bloggership" in early discussions about the organization of this Symposium.

†† These are the edited remarks I delivered at the opening of the Symposium on *Bloggership: How Blogs Are Transforming Legal Scholarship* at Harvard Law School on April 28, 2006. Unless otherwise noted, the sources and data are current as of that date.

Podcasts of the proceedings are available for download at The Berkman Center for Internet & Society Podcast, Apr. 28, 2006, [http://blogs.law.harvard.edu/mediaberkmancenter \(search "bloggership"\)](http://blogs.law.harvard.edu/mediaberkmancenter/search%3Dbloggership). The agenda is available at The Berkman Center for Internet & Society, <http://cyber.law.harvard.edu/home/bloggership/agenda>. The papers and commentaries are hosted at Social Science Research Network, <http://www.ssrn.com/link/Bloggership-2006.html> (last visited Feb. 10, 2007).

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I want to thank the folks at the Berkman Center for Internet & Society at Harvard Law School who helped make the Symposium such an enjoyable event: Tim Armstrong, Colin Maclay, Charles Nesson, John Palfrey, and Arielle Silver. I am grateful for the financial support of the Berkman Center, Microsoft, the University of Cincinnati College of Law, and the Harold C. Schott Foundation. Special thanks to Drew Marksity, research assistant extraordinaire.

1. A transcript of the debate is available at The 1992 Vice Presidential Debate (Oct. 13, 1992), <http://www.pbs.org/newshour/debatingourdestiny/92debates/vp1.html>. A video clip of Admiral Stockdale's opening remarks is available at Allan Loudon, Political Debates Video Clips,

describe who I am and what I am doing here, and then describe who our twenty-three panelists are and what they are doing here.

I. WHO AM I? WHY AM I HERE?

As a tax professor, I rarely have so many people voluntarily gathered, both in person and virtually, to hear me talk about tax law. So I am tempted to use my time this morning to talk about the intricacies of this recent tax case.² But I will resist the temptation to engage in a bait-and-switch and instead explain how some of my recent tax work has led me to stand before you today.

After several forays into using technology to further tax scholarship,³ I launched TaxProf Blog⁴ on April 15, 2004,⁵ as a source of permanent resources and links on, as well as daily news and information about, tax law. The goal of the blog is to create a virtual tax community among tax professors, students, and practitioners who come to the site each day to both access the vast array of tax resources available on the Internet and to learn of new tax developments.⁶ Because the site far exceeded my most optimistic expectations, with over 1.5 million visitors in just two years of operation,⁷ I created, with Joe Hodnicki, the Law Professor Blogs Network⁸ to replicate TaxProf Blog in other areas of the law school

<http://www.wfu.edu/~louden/Political%20Communication/PresDebateClips/Stockdale1.rm>.

2. See *Tribune Co. v. Comm'r*, 125 T.C. 110 (2005), *supplemented by* 91 T.C.M. (CCH) 678 (2006). This case has been illustrated nicely by the tax firm of Andrew Mitchell, LLC at <http://www.andrewmitchel.com/charts/tribune.pdf> (last visited Feb. 10, 2007).

3. For example, in 1995 I began the TaxProf E-mail Discussion Group (<http://listserv.uc.edu/archives/TAXPROF.html>), which is now the "official" listserv of the AALS Tax Section and boasts over three hundred members. In 1999, I became Co-Editor of the SSRN Tax Law & Policy Abstracting Journal (http://www.ssrn.com/update/lsn/lsn_tax-law-policy.html) started by Joe Bankman, and I later launched sister International (http://www.ssrn.com/update/lsn/lsn_intl-tax-law.html) and Practitioner (http://www.ssrn.com/update/lsn/lsn_tax-practice.html) tax journals. In 2003, I created the Tax Stories web resources page (<http://www.law.uc.edu/taxstories>) to accompany the publication of our book, *TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES* (Paul L. Caron, ed., 2003), which spawned the *Law Stories* series of books patterned after *Tax Stories*. See Paul L. Caron, *Back to the Future: Teaching Law Through Stories*, 71 U. CIN. L. REV. 405 (2002).

4. Tax Prof Blog, <http://taxprof.typepad.com>.

5. The date, of course, has particular resonance for a tax blog.

6. The daily news and information, and permanent resources and links, are categorized into a variety of topics including bar groups, cases, colloquia, conferences, government reports, graduate tax programs, news, professional organizations, rankings, rulings, scholarship, sources of tax law (federal, state and foreign), and think tanks.

7. See Tax Prof Blog Site Summary, Visits, <http://www.sitemeter.com/?a=stats&s=sm3taxprof> (last visited Feb. 10, 2007). As of September 2007, the number of cumulative visitors has grown to over 3.2 million. *Id.*

8. Law Professor Blogs, <http://www.lawprofessorblogs.com>.

curriculum. We now have over thirty blogs edited by professors at law schools around the country, with 3.4 million visitors over the past twelve months.⁹

II. WHO ARE THE PANELISTS? WHY ARE THEY HERE?

Who are our twenty-three panelists? Twenty-one of them are law professors, one is a lawyer, and one is a journalist. All but one maintain a blog.¹⁰ Why do they do it? Why do they take time out of their busy schedules each day to post entries on their blogs? One possible answer was suggested by Daniel Henninger in the Wall Street Journal last week:

I don't think the blogosphere is breeding cannibals. But it looks to me as if the world of blogs may be filling up with people who for the previous 200 millennia of human existence kept their weird thoughts more or less to themselves. Now, they don't have to. They've got the Web. Now they can share.¹¹

Our panelists have gathered to do more than share their “weird thoughts” with you. They are here to explain how their blog work fits into their professional lives as legal scholars and teachers.

A perennial debate in higher education in general,¹² and in legal education in particular,¹³ is whether a robust scholarly life helps or hurts a professor's teaching performance. Taking inspiration from panelist Jim Lindgren's work, *Are Scholars Better Teachers?*,¹⁴ which concludes that

9. As this Article goes to press, the number of blogs has increased to over fifty, and the number of visitors has increased to 5.3 million in the most recent twelve-month period ending August 31, 2007.

10. The one non-blogger among us is a frequent commenter on many of the blogs represented here today. See *infra* note 56.

11. Daniel Henninger, *When Blogs Rule, We'll All Talk Like - - -*, WALL ST. J., Apr. 21, 2006, at A17, available at <http://www.opinionjournal.com/columnists/dhenninger/?id=110008265>.

12. See, e.g., FACULTY TEACHING AND RESEARCH: IS THERE A CONFLICT (John M. Braxton ed., 1996); Kenneth Feldman, *Research Productivity and Scholarly Accomplishment of College Teachers as Related to their Instructional Effectiveness: A Review and Exploration*, 26 RES. HIGHER EDUC. 227 (1987); John Hattie & H.W. Marsh, *The Relationship Between Research and Teaching: A Meta-Analysis*, 66 REV. EDUC. RES. 507 (1996); Herbert W. Marsh & John Hattie, *The Relation Between Research Productivity and Teaching Effectiveness: Complementary, Antagonistic, or Independent Constructs?*, 73 J. HIGHER EDUC. 603 (2002).

13. See, e.g., James Lindgren & Allison Nagelberg, *Are Scholars Better Teachers?*, 73 CHI-KENT L. REV. 823 (1998); Deborah Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI-KENT L. REV. 765 (1998). After the Symposium, Benjamin Barton posted on SSRN a draft of *Is There a Correlation between Scholarly Productivity, Scholarly Influence and Teaching Effectiveness in American Law Schools? An Empirical Study* (July 1, 2006), available at <http://ssrn.com/abstract=913421>.

14. Lindgren & Nagelberg, *supra* note 13.

better scholars are perceived by students to be better teachers,¹⁵ I would like to ask, using our panelists as guinea pigs, “*Are Scholars Better Bloggers?*” As a tax guy, I like numbers, so let’s look at both scholarship and blogging data to begin to answer that question.

A. *Scholarship Data*

In a recent article I co-authored with Bernie Black, we surveyed four methods for ranking the scholarly performance of law faculties: reputation surveys, publication counts, citation counts, and SSRN download counts.¹⁶ The existing work on reputation surveys¹⁷ and publication counts¹⁸ focuses on law school faculties as a whole and not on individual law professors. As a result, there are no hard data in these areas on individual law professors. Yet anyone familiar with the law school world would agree that our panelists comprise a glittering array of influential and prolific legal scholars.¹⁹

In contrast, there are available data on the two other measures of scholarly performance. Using the citation count methodologies deployed by others,²⁰ our participants include some of the most heavily-cited legal scholars:

15. *See id.* at 832–33, stating:

[T]he odds of being in the top half among instructor ratings is 1.9 times higher for heavily cited scholars [at Boston University, The University of Chicago, and The University of Colorado] than it is for infrequently cited scholars. . . . [T]he odds that those with low numbers of citations to their scholarly work will be in the bottom 25% in instructor ratings are 2.9 times higher.

16. Bernard S. Black & Paul L. Caron, *Ranking Law Schools: Using SSRN to Measure Scholarly Performance*, 81 IND. L.J. 83 (2006).

17. *See, e.g., American’s Best Graduate Schools 2007*, U.S. NEWS & WORLD REP., Apr. 10, 2006, at 44–47 (peer assessment score); Leiter’s Law School Rankings, Faculty Quality Rankings: Scholarly Reputation, 2003–04 (Mar. 25, 2003), http://www.leiterrankings.com/faculty/2003faculty_reputation.shtml.

18. *See, e.g., James Lindgren & Daniel Seltzer, The Most Prolific Law Professors and Faculties*, 71 CHI.-KENT L. REV. 781 (1996); Leiter’s Law School Rankings, Top 50 Faculties: Per Capita Productivity of Books and Articles, 2000–02, available at http://www.leiterrankings.com/faculty/2000faculty_product_all.shtml (last visited Feb. 10, 2007).

19. My research assistant compiled the panelists’ publication records, which comprise hundreds of books and articles, published by the most prestigious publishers and in the most prestigious law reviews. (Of course, the reputation of the journal in which an article is published is no guarantee of the article’s quality. *See* Andrew S. Oswald, *An Examination of the Reliability of Prestigious Scholarly Journals: Evidence and Implications for Decision-Makers*, 74 ECONOMICA 21 (2007) (concluding that the “best” article in a medium-quality journal “routinely” has more impact than the “poor” article in a more prestigious journal).)

20. *See, e.g., Theodore Eisenberg & Martin T. Wells, Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373 (1998); Leiter’s Law School Rankings, Faculty

Panelist	Citations
Eugene Volokh	1,473
Randy Barnett	1,439
Larry Ribstein	1,351
Michael Froomkin	848
Glenn Reynolds	604
Larry Solum	584
Paul Butler	557
Jim Lindgren	513
Ann Althouse	470
Ellen Podgor	380

These citation statistics understate the scholarly impact of our panelists, as the citation-count measure favors more senior faculty and emphasizes older work that accumulates citations over time,²² while our panelists are considerably younger than the law professorate at large.²³ Indeed, three of our panelists are included in Brian Leiter's listing of the fifty most-cited young legal scholars (with Eugene Volokh at number three, Michael Froomkin at number eight, and Paul Butler at number twenty-six).²⁴

Our panelists also fare quite well in the SSRN rankings of the Top 1,500 Law Authors as measured by the number of downloads of their scholarship:

Quality Based on Scholarly Impact, 2005 (April 2006), http://www.leiterrankings.com/faculty/2005faculty_impact_cites.shtml.

21. My research assistant compiled this table by using the methodologies described in *supra* note 20.

22. See Black & Caron, *supra* note 16, at 93.

23. The median age of our law professor panelists is 46, compared to the 52 median age of law professors generally. See Eric A. Lustig, *Who We Are: An Empirical Study of the Tax Law Professoriate*, 1 PITT. TAX REV. 85, 94–95 (2003).

24. Leiter's Law School Rankings, Top 50 Most Cited Faculty Who Entered Teaching Since 1992, http://www.leiterrankings.com/faculty/2002faculty_impact_newprofs.shtml (last visited Feb. 10, 2007).

Panelist	Rank (Out of 1,500)	Number of Downloads
Orin Kerr	15	16,993
Dan Solove	17	15,244
Larry Solum	20	12,911
Larry Ribstein	23	12,615
Randy Barnett	26	11,737
Gordon Smith	116	3,729
Paul Caron	128	3,455
Eugene Volokh	143	3,168
Kate Litvak	164	2,771
Eric Goldman	245	1,765

B. Blogging Data

According to the most recent data, there are more than 34.5 million U.S. blogs,²⁶ 600 law-related blogs,²⁷ and 235 law professor bloggers.²⁸ Our panelists run many of the most popular law-related and law professor blogs.

For example, Roger Alford of *Opinio Juris* has compiled a ranking of the twenty-five most popular law blogs,²⁹ based on traffic reports on *The Truth Laid Bear*.³⁰ Seven of the top ten law blogs under this measure are represented in this Symposium:

25. My research assistant compiled this table from the data at Social Science Research Network, SSRN Top 1,500 Law Authors, <http://www.ssrn.com> (last visited Feb. 10, 2007), follow "Top Authors" hyperlink, then follow "Top Law Authors" hyperlink (free registration required).

26. Technorati Weblog, State of the Blogosphere (Apr. 17, 2006), <http://www.technorati.com/weblog/2006/04/96.html> (tracking through April 2006 and noting that the Blogosphere doubles about every six months).

27. Ian Best, A Taxonomy of Legal Blogs, Law Blog Metrics [formerly 3L Epiphany] (Mar. 28, 2006), http://3lepiphany.typepad.com/3lepiphany/2006/03/a_taxonomy_of_1.html (listing legal blogs by topic).

28. Posting of Daniel J. Solove to Concurring Opinions, "Law Professor Blogger Census (Version 4.3)," http://www.concurringopinions.com/archives/2006/03/law_professor_b_4.html (Mar. 15, 2006).

29. Posting of Roger Alford to *Opinio Juris*, "Most Popular Law Blogs," <http://www.opiniojuris.org/posts/1141753686.shtml> (Mar. 7, 2006, 12:48 p.m.).

30. *The Truth Laid Bear*, <http://truthlaidbear.com/TrafficRanking.php> (last visited Feb. 10, 2007). These traffic statistics are incomplete in several respects. For example, the statistics do not cover law blogs without publicly-available site meters (e.g., *Legal Theory Blog*, *The Right Coast*) and

Blog	Traffic	
	Law Rank	Overall Blog Rank
The Volokh Conspiracy	1	50
How Appealing	2	127
TaxProf Blog	4	294
Sentencing Law & Policy	6	382
Concurring Opinions	7	397
Discourse.net	9	496
Conglomerate	10	529
Ideoblog	16	982
Health Law Prof Blog	24	1852

The raw traffic numbers from publicly-available site meters also illustrate the popularity of our participants' blogs:

Blog	Total Visitors
InstaPundit	142,700,000
The Volokh Conspiracy	17,000,000
Althouse	4,425,000
How Appealing	4,250,000
TaxProf Blog	1,550,000
Sentencing Law & Policy	1,250,000
Discourse.net	1,100,000
Conglomerate	675,000
White Collar Crime Prof Blog	425,000
Concurring Opinions	375,000

do not measure RSS feeds. In addition, Professor Alford excludes several "blogs by law professors that are not true law blogs" (e.g., Althouse (<http://althouse.blogspot.com>), InstaPundit (<http://instapundit.com>)).

31. My research assistant compiled this table by using the Truth Laid Bear and Opinio Juris sources listed in *supra* note 30.

32. My research assistant compiled this table by using data from the publicly available site meters on the panelists' blogs.

Blog	Monthly Page Views
InstaPundit	4,500,000
The Volokh Conspiracy	1,040,000
Althouse	560,000
How Appealing	320,000
TaxProf Blog	160,000
Sentencing Law & Policy	110,000
Concurring Opinions	100,000
Conglomerate	60,000
Discourse.net	60,000
White Collar Crime Prof Blog	50,000

Putting together the cumulative data from both the scholarship and blogging fronts, one is struck by the sharp increase in the data points under the newer measures:

Rank	Scholarship Data		Blog Data
	Citations	Downloads	Visitors
1	1,473	16,933	142,700,000
2	1,439	15,244	17,000,000
3	1,351	12,911	4,425,000
4	848	12,615	4,250,000
5	604	11,737	1,550,000
6	584	3,729	1,250,000
7	557	3,455	1,100,000
8	513	3,168	675,000
9	470	2,771	425,000
10	380	1,765	375,000

33. My research assistant compiled this table by using data from the publicly available site meters on the panelists' blogs.

34. My research assistant compiled this table by using data from Table 1, Table 2, and Table 4.

Of course, these data do not conclusively answer the question raised: *Are Scholars Better Bloggers?* But they do prove that we have gathered together an impressive array of scholar-bloggers to address the subject of this symposium: *How Blogs Are Transforming Legal Scholarship*.

III. BLOGGERSHIP: HOW BLOGS ARE TRANSFORMING LEGAL SCHOLARSHIP

Our twenty-three participants gathered on April 28, 2006, at Harvard Law School in the first scholarly conference on the impact of blogs on legal scholarship. The papers and commentary presented at the event and recorded in these pages reflect an array of perspectives on the relationship of blogs and legal scholarship. In the pages that follow, I am confident that you will agree that we have lived up to the billing of the Symposium:

Web logs (“blogs”) are transforming much of American society, including government, politics, journalism, and business. In the past few years, blogs have begun to affect the delivery of legal education, the production and dissemination of legal scholarship, and the practice of law. We are delighted that over twenty of the nation’s leading law professor bloggers have agreed to join with us for the first scholarly conference on the impact of blogs on the legal academy.³⁵

The Symposium papers and commentary make an enormous contribution to our understanding of blogs and their impact on legal scholarship. At the April 28, 2006, event, following a welcome from John Palfrey, Executive Director of the Berkman Center for Internet & Society at Harvard Law School, and this Introduction, we organized the papers and commentary into four panels: (1) Law Blogs as Legal Scholarship,³⁶ (2) The Role of the Law Professor Blogger,³⁷ (3) Law Blogs and the First

35. The Berkman Center for Internet & Society, Bloggership Symposium (Apr. 28, 2006), <http://cyber.law.harvard.edu/home/bloggership>.

36. Articles: Douglas A. Berman, *Scholarship in Action: The Power, Possibilities, and Pitfalls for Law Professor Blogs*, 84 WASH. U. L. REV. 1043 (2006); Kate Litvak, *Blog as a Bugged Water Cooler*, 84 WASH. U. L. REV. 1061 (2006); Lawrence B. Solum, *Blogging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071 (2006); Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089 (2006) (paper only; remarks delivered in third panel, *infra* note 38).

Commentary: Paul Butler, *Blogging at Blackprof*, 84 WASH. U. L. REV. 1101 (2006); James Lindgren, *Is Blogging Scholarship? Why Do You Want to Know?*, 84 WASH. U. L. REV. 1105 (2006); Ellen S. Podgor, *Blogs and the Promotion and Tenure Letter*, 84 WASH. U. L. REV. 1109 (2006).

37. Articles: 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); Orin S. Kerr,

Amendment,³⁸ and (4) The Many Faces of Law Professor Blogs.³⁹ Now, with the benefit of having heard the presentations and read the final drafts of the papers and commentary, we depart from this organization in places in this Introduction and in the publication of the papers and commentary in this issue to better match the content and themes of the panelists' contributions.

A. Law Blogs as Legal Scholarship

Doug Berman⁴⁰ cautions that this panel—and indeed, the Symposium as a whole—should avoid the silly debate over “whether law blogs can be legal scholarship. . . .”⁴¹ Because blogs are simply a medium of communication, they can be used to advance legal scholarship in the same way as articles and books can. But the blogging phenomena raises bigger (and “scarier”) questions about why legal scholarship is an essential part of a law professor’s vocation and whether blogging should be an accepted part of that vocation. Professor Berman makes a powerful case for both the power⁴² and possibilities⁴³ of blogging by law professors, but he also sounds a cautionary note about some potential pitfalls.⁴⁴

Blogs and the Legal Academy, 84 WASH. U. L. REV. 1127 (2006); D. Gordon Smith, *A Case Study in Bloggership*, 84 WASH. U. L. REV. 1135 (2006).

Commentary: Randy E. Barnett, *Caveat Blogger: Blogging and the Flight from Scholarship*, 84 WASH. U. L. REV. 1145 (2006); A. Michael Froomkin, *The Plural of Anecdote is “Blog”*, 84 WASH. U. L. REV. 1149 (2006).

38. Articles: Eric Goldman, *Co-Blogging Law*, 84 WASH. U. L. REV. 1169 (2006); Glenn Harlan Reynolds, *Libel in the Blogosphere: Some Preliminary Thoughts*, 84 WASH. U. L. REV. 1157 (2006); Eugene Volokh, *Extraordinary Speech Protections: Is Blogging Covered?*, 40 CREIGHTON L. REV. ____ (forthcoming 2007) (remarks delivered at Symposium (Apr. 28, 2006), available for download at <http://blogs.law.harvard.edu/mediaberkman/2006/08/14/bloggership-2006-law-blogs-and-the-first-amendment>).

Commentary: S. Elizabeth Malloy, *Anonymous Bloggers and Defamation: Balancing Interests on the Internet*, 84 WASH. U. L. REV. 1187 (2006); Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 WASH. U. L. REV. 1195 (2006).

39. Articles: Ann Althouse, *Why a Narrowly Defined Legal Scholarship Blog Is Not What I Want: An Argument in Pseudo-Blog Form*, 84 WASH. U. L. REV. 1221 (2006); Christine Hurt & Tung Yin, *Bloggging While Untenured and Other Extreme Sports*, 84 WASH. U. L. REV. 1235 (2006); Larry E. Ribstein, *The Public Face of Scholarship*, 84 WASH. U. L. REV. 1201 (2006).

Commentary: Howard J. Bashman, *The Battle Over the Soul of Law Professor Blogs*, 84 WASH. U. L. REV. 1257 (2006); Peter Lattman, Remarks (Apr. 28, 2006), available for download at <http://blogs.law.harvard.edu/mediaberkman/2006/08/14/bloggership-2006-the-many-faces-of-law-professor-blogs>.

40. Sentencing Law and Policy, <http://sentencing.typepad.com>.

41. Berman, *supra* note 36, at 1043.

42. The power of law professor blogs includes their role as a new means of expressing scholarly ideas, engaging in a more robust and diverse scholarly community, respecting the diversity of scholarly production, and reconnecting our scholarship to our teaching and service. *Id.* at 1048–51.

43. The possibilities of law professor blogs include their role as a medium for interdisciplinary

Orin Kerr⁴⁵ sees a more modest role for law professor blogs. He argues that “blogs do not provide a particularly good platform for advancing serious legal scholarship” because of the “tyranny of reverse chronological order”⁴⁶ feature of blogs. As posts are continually pushed further and further down the page, blogs reward writers and readers with short attention spans and preclude the “mulling over” process essential to the production of thoughtful scholarship.⁴⁷ But just as “journalism is the first rough draft of history,” blog posts can be viewed as the “first rough draft of legal scholarship.”⁴⁸ Professor Kerr sees an important role for blogs in providing “promising outlets for legal scholars interested in becoming public intellectuals.”⁴⁹

Larry Solum⁵⁰ argues that law professor blogs are not transforming legal scholarship but instead are an important indicator of three transformative trends.⁵¹ He chronicles the shift in legal scholarship from: (1) the “long form” to the “short form”;⁵² (2) exclusive rights to open access;⁵³ and (3) intermediaries to disintermediation.⁵⁴ Professor Solum sees blogs 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.”⁵⁵

collaborative scholarship, professor-practitioner collaborative scholarship, professor-student collaborative scholarship, follow-up scholarship (especially for casebooks), and web-treatises. *Id.* at 1051–53.

44. The pitfalls of law professor blogs include their role as a time suck and addiction, distorting popularity contest, and limitation rather than liberation. *Id.* at 1053–54.

45. The Volokh Conspiracy, <http://www.volokh.com>, and OrinKerr.com, <http://www.orinkerr.com>.

46. Kerr, *supra* note 37, at 1127.

47. *Id.* at 1130.

48. *Id.* at 1131.

49. *Id.*

50. Legal Theory Blog, <http://lsolum.typepad.com/legaltheory>.

51. Solum, *supra* note 36, at 1071.

52. He notes the shrinking size of law review articles and the emergence of short forms such as the idea paper, blog post, and wikipedia articles. *Id.* at 1075–76, 1082–83.

53. For example, he notes the declining importance of copyright in legal scholarship and the emergence of the open access movement and SSRN. *Id.* at 1076–78, 1084.

54. For example, he notes the decline in importance of source intermediaries standing between authors and audiences (law reviews and peer-reviewed journals, legal and academic presses, and search intermediaries such as card catalogs, the Index to Legal Periodicals, Westlaw and LexisNexis) and the disintermediation wrought by SSRN and Google. *Id.* at 1078–82, 1085–86.

55. *Id.* at 1086.

Kate Litvak, the only panelist without a blog and a widely-quoted blog skeptic,⁵⁶ opens her paper by asking “what we mean when we say that blogs are ‘transforming’ something.”⁵⁷ She says:

If we define “transforming” very broadly (“Does blogging have some—however infinitesimal, speculative, indirect, removed in time—impact on legal scholarship?”), the answer is surely yes. But trivial and speculative impacts are not good excuses for a conference. The interesting question is whether blogging has a *meaningful* (or, as an empirical type might put it, a substantively and statistically significant) impact on legal scholarship.⁵⁸

She contends that the impact of blogging on legal scholarship pales in comparison to other recent developments (e.g., the availability of data, influx of Ph.D.’s into the legal academy, long-distance and cross-disciplinary co-authorship, internationalization of legal scholarship and faculties, and the shift of practitioner-oriented scholarship to practitioner authors). Professor Litvak argues that because blogs lack privacy and establish rules punishing the silence of participants, they cannot succeed in fostering cyberworkshops.⁵⁹

The commentators take a more optimistic view of the role that blogs can play in legal scholarship. Jim Lindgren⁶⁰ concedes that “[v]ery few

56.

An increasing number of law professors are using blogs . . . to break free from traditional modes of legal scholarship. With an immediacy and ability to reach millions of readers, blogs are proving an attractive vehicle among legal scholars for spouting and sharing ideas.

But they are also raising concerns that they may lead to a dumbing down of the profession.

“They have nothing to do with scholarship,” said Katherine Litvak, a professor at the University of Texas School of Law. . . .

. . . .

. . . Litvak and others . . . see the need for new ways to publish legal scholarship but say blogs are not the answer.

. . . .

The amount of time professors devote to blogging is not the real problem with blogs, said Litvak, of the University of Texas. She added that if faculty members want to pass the time on nonscholarly pursuits, they will find a way to do it, blogging or not. Calling the traditional law review system “fundamentally corrupt,” she said that scholars might better spend their time writing for peer-reviewed journals, though the numbers of those kinds of publications are limited. . . .

Leigh Jones, *Blogging Law Profs Assault Ivory Tower: Is It legal Scholarship, or a Cyber Chit-Chat?*, NAT’L L.J., Feb. 27, 2006, at A1, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1140775513856>.

57. Litvak, *supra* note 36, at 1061.

58. *Id.*

59. *Id.* at 1067–69.

60. The Volokh Conspiracy, <http://volokh.com>.

blogs or blog posts have the same form, style, and content as traditionally published legal scholarship[.]" but he explains that "if one looks closer at law blogs, one can see that blog posts often serve the same purposes as traditional legal scholarship: to generate and disseminate knowledge about the law and legal institutions."⁶¹ Ellen Podgor⁶² suggests that blogs can "count" as both scholarship and service for purposes of a promotion and tenure letter.⁶³

B. The Role of the Law Professor Blogger

Gail Heriot⁶⁴ says that we should not quibble over whether blogging constitutes legal scholarship but instead should ask whether law schools should encourage faculty to blog.⁶⁵ She finds value in law professors using blogging to serve as public intellectuals, with a proud history tracing back to the Federalist Papers written by Alexander Hamilton, John Jay, and James Madison.⁶⁶ Professor Heriot believes that law schools should support faculty blogging because "it both provides useful commentary on pressing contemporary legal issues of a kind that would be available nowhere else and helps to prevent hyper-scholasticism in the legal academy."⁶⁷

Gordon Smith⁶⁸ uses blogging about *The Walt Disney Company Derivative Litigation*⁶⁹ to illustrate the potential of blogging as a scholarly medium.⁷⁰ Although blogs can serve a "pre-scholarship" function in germinating and developing ideas that eventually flower into traditional long-form scholarship, the public nature of blogs makes them more akin to presenting at an academic conference or publishing an op-ed.⁷¹ Professor

61. Lindgren, *supra* note 36, at 1108.

62. White Collar Crime Prof Blog, http://lawprofessors.typepad.com/whitecollarcrime_blog.

63. Podgor, *supra* note 36, at 1110–11.

64. The Right Coast, <http://rightcoast.typepad.com>.

65. She notes that this is "no more useful a question than that perennial conversation stopper, 'Yes, but is it art?' It doesn't matter whether [blogging] gets called 'scholarship' or 'Fred.'" Heriot, *supra* note 37, at 1125

66. *Id.* at 1113–15.

67. *Id.* at 1125.

68. Conglomerate, <http://www.theconglomerate.org>.

69. *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693 (Del. Ch. 2005).

70. *See* Smith, *supra* note 37.

71. Professor Smith notes:

The term "bloggership" in the title of this essay and conference is a useful neologism because it distinguishes this sort of scholarship from the traditional, long-form scholarship that appears in law reviews and scholarly journals and because it distinguishes blogging that has scholarly aspirations from other forms of blogging.

Id. at 1139–40.

Smith argues that “[i]f scholarship is about making a ‘contribution to knowledge,’ and the receptacle for that contribution is a scholarly community, then blogs seem well positioned to serve as delivery mechanisms.”⁷²

Eugene Volokh⁷³ questions how much time he should spend composing posts for his blog, which attracts 20,000 unique visitors per day, compared to writing law review articles, whose readership is substantially less.⁷⁴ He explains that blogs can further the academic functions of discovering,⁷⁵ disseminating,⁷⁶ and doing.⁷⁷ Blogging also produces a “prominence dividend,” which increases the likelihood that people will read the blogger’s law review articles, law review editors will accept his next article and invite him to participate in symposia, staffers will seek his input on legislation, and lawyers will seek his assistance on interesting cases.⁷⁸ But he doubts that blogging is “even close to the most efficient way of spending one’s time if one is interested purely in discovering or in doing. . . . If you just want to write more law review articles and place them in more prominent places, spend your time thinking about articles and writing articles, not blogging.”⁷⁹ Professor Volokh concludes that “we blog because we enjoy it. . . . And we blog because of the possibility, however rarely realized, that we might actually persuade someone.”⁸⁰

The commentators offer very different perspectives on this topic. Randy Barnett⁸¹ fears that blogging may contribute to a “flight from scholarship” as law professors use blogging as an excuse to flee from the arduous task of doing long-form scholarship.⁸² Michael Froomkin⁸³ first cautions that “[w]e should be careful to avoid being carried away by our

72. *Id.*

73. The Volokh Conspiracy, <http://volokh.com>.

74. Volokh, *supra* note 36, 1089.

75. *Id.* at 1089–90. Discovering knowledge fits within the scholarship triad. *Id.* at 1090 n.1.

76. *Id.* at 1089–90. Disseminating knowledge fits within both the teaching and service triads. *Id.* at 1090 n.1.

77. Doing (e.g., litigating landmark cases, helping to draft statutes) fits within the service triad. *Id.*

78. *Id.* at 1092–93.

79. *Id.* at 1100.

80. *Id.*

81. The Volokh Conspiracy, <http://volokh.com>.

82. Barnett, *supra* note 37, at 1146. Professor Barnett observes, “[t]here is a dirty little secret in the legal academy: most law professors do not like doing legal scholarship,” because “it is hard, it is very hard to do well, and it is extremely hard to do well enough to receive much external recognition for having done it.” *Id.* at 1146, 1147.

83. Discourse.net, <http://www.discourse.net>.

new toys,” and he bemoans the absence of blogs dedicated to awareness of, and reactions to, topical legal scholarship.⁸⁴

C. Blogs, First Amendment Law, and Co-Blogging Law

Glenn Reynolds⁸⁵ explores the odd phenomenon of the paucity of blog-related libel cases despite the proliferation of blogs.⁸⁶ He attributes this to a variety of factors, including the lack of deep blogger pockets in most cases, the difficulty of obtaining personal jurisdiction over out-of-state bloggers, and the shield provided to bloggers by the Communications Decency Act⁸⁷ for defamatory comments by readers published on blogs as comments.⁸⁸ He also explains that the blogging community frowns upon libel suits and that the blog medium allows fast correction of incorrect information.⁸⁹ But as blogs mutate and become more commercial and journalistic, such defamation suits are likely to increase. Professor Reynolds argues that courts should employ the more deferential legal standard applied to slander (spoken defamation) because of the special characteristics of blogs.⁹⁰

The commentators contend that the First Amendment rights of bloggers should yield to other interests. Dan Solove⁹¹ believes that the free speech rights of bloggers should be balanced against the legitimate privacy interests of those written about on blogs by holding bloggers to a reasonable standard of care to avoid revealing private information on the Internet.⁹² Betsy Malloy⁹³ argues that defamation victims should be given greater rights to bring lawsuits against anonymous bloggers.⁹⁴

84. Froomkin, *supra* note 37, at 1151. Professor Froomkin is developing a new online blog-based journal to provide this service—the Journal of Things We Like Lots (Jotwell), <http://jotwell.com>.

85. InstaPundit, <http://www.instupundit.com>.

86. *See* Reynolds, *supra* note 38.

87. 47 U.S.C. § 230(c)(1) (2000).

88. Reynolds, *supra* note 38, at 1157–59.

89. *Id.* at 1159–60.

90. Professor Reynolds argues that courts should set the threshold of reputational harm fairly high; treat swift correction as remedying the problem; take into account the ease with which plaintiffs can get their own story out; and recognize that the blogosphere is “a rough-and-tumble world, not a place where Marquis of Queensbury rules apply.” *Id.*

91. Concurring Opinions, <http://www.concurringopinions.com>.

92. *See* Solove, *supra* note 38. He makes this case through “A Tale of Two Bloggers”—Symposium participant Eugene Volokh’s *The Volokh Conspiracy* blog and Senate staffer Jessica Cutler’s *The Washingtonienne* blog. Professor Solove concludes:

We often speak and think of blogging with a romantic image of scholars like Eugene in mind. But for many bloggers, blogging has nothing at all to do with scholarship. Therefore, when we think about the legal regulation of blogging, we should not just have the Eugenes in mind, but we should also be thinking of the Jessicas.

Eric Goldman⁹⁵ discusses the special legal problems faced by bloggers who work collaboratively with other bloggers.⁹⁶ After defining “co-blogging,” he explores the legal characterization of co-bloggers as partners, employers-employees, co-authors of joint works under copyright law, and independent contractors.⁹⁷ He then discusses the legal liability faced by co-bloggers for copyright infringement, misappropriated trade secrets, and other claims, as well as co-bloggers’ interests in copyright, domain names and trademarks, and advertising revenue.⁹⁸ Finally, Professor Goldman offers specific recommendations to co-bloggers.⁹⁹

D. The Many Faces of Law Professor Blogs

The papers and commentaries in this panel present a wide array of perspectives. Ann Althouse¹⁰⁰ argues that law professor blogs should not be constrained by the conventions of legal scholarship and should be allowed to flower in a playful, spontaneous fashion.¹⁰¹ Writing in “pseudo-blog form,” she notes, “[b]logging sounds rather dangerous for a scholar But dangerous things are exciting, and if you do them, you’ll feel daring.”¹⁰² Professor Althouse concludes, “[b]logging is *life*—in writing, in public. It’s not a job or a break from a job. It’s everything you might think about. Blogging is *art*.”¹⁰³

Christine Hurt¹⁰⁴ and Tung Yin¹⁰⁵ argue that the benefits of pre-tenured blogging can outweigh the costs.¹⁰⁶ They first recount the conventional wisdom that blogging can be hazardous to an untenured professor’s career

Id. at 1200.

93. Health Law Prof Blog, http://lawprofessors.typepad.com/healthlawprof_blog.

94. See Malloy, *supra* note 38. Professor Malloy concludes, “It is important not to silence communication on the Internet, but it is just as important not to silence victims of defamation.” *Id.* at 1193.

95. Technology & Marketing Law Blog, <http://blog.ericgoldman.org>, and Goldman’s Observations, <http://blog.ericgoldman.org/personal>.

96. See Goldman, *supra* note 38.

97. *Id.* at 1171–74.

98. *Id.* at 1174–82.

99. *Id.* at 1182–85.

100. Althouse, <http://althouse.blogspot.com>.

101. See Althouse, *supra* note 39.

102. *Id.* at 1223.

103. *Id.* at 1228. Professor Althouse notes that her blog “is an unpredictable mélange of subject matter, but it allows [her] to maintain a public profile that leads to other writing projects.” *Id.* at 1230. She argues that “by presenting a competing model of scholarly expression, [blogs] can raise the standards for law reviews.” *Id.* at 1231.

104. Conglomerate, <http://www.theconglomerate.org>.

105. The Yin Blog, <http://yin.typepad.com>.

106. See Hurt & Yin, *supra* note 39.

and then distinguish among four types of law blogs: single purpose law blogs, legal blogs with personality, personality blogs with legal aspects, and non-legal blogs.¹⁰⁷ They quantify the risks of pre-tenured blogging¹⁰⁸ but contend that the risks are outweighed by the advantages in the increased exposure and contributions that blogging can make to traditional scholarship.¹⁰⁹ Professors Hurt and Yin conclude, “[f]or the majority of pre-tenured law professors, blogging may be a great way to become a part of the dialogue in a given area. And is that not why we became law professors in the first place?”¹¹⁰

Larry Ribstein¹¹¹ explores the relationship of academic blogs to journalism.¹¹² He describes the role of law professor bloggers as amateur journalists in four different types of blog posts: recreational expression, short scholarly writing (“blogicles”), self-promotion, and publicly-engaged academic posts (“PEAPs”).¹¹³ He then describes how PEAPs are likely to affect professional journalism and concludes that law professor bloggers “may help both reshape professional journalism and motivate traditional scholarship. Blogs thus may enable academics to climb down from the ivory tower, while bringing some of their purer air with them.”¹¹⁴

The commentators provide an outsider’s perspective and attest to the powerful potential of law professor blogs.

As the only non-law professor appearing in these pages,¹¹⁵ Howard Bashman¹¹⁶ notes “[f]or me and many others outside of the legal academy who enjoy reading law-related blogs, the battle over whether law professor blogs should count as scholarship or public service borders on the irrelevant.”¹¹⁷ What matters is that “the law professor segment of the law blog world generates a great deal of interesting content on a daily basis.”¹¹⁸

107. *Id.* at 1241–42.

108. These risks include spending excessive amounts of time blogging, being controversial, and being wrong. *Id.* at 1242–46.

109. *Id.* at 1247–48. They also provide practical advice on how to explain blogging to a tenure committee. *Id.* at 1253–55.

110. *Id.* at 1255.

111. Ideoblog, <http://www.ideoblog.org>.

112. *See* Ribstein, *supra* note 39.

113. *Id.* at 1202–05.

114. *Id.* at 1220.

115. As noted earlier, Peter Lattman of the Wall Street Journal’s Law Blog (<http://blogs.wsj.com/law>) offered commentary at the Symposium but declined an invitation to publish his remarks here. *See supra* note 39.

116. How Appealing, <http://howappealing.law.com>.

117. Bashman, *supra* note 39, at 1260.

118. *Id.*

Paul Butler¹¹⁹ explains that he and his co-bloggers searched “[f]or the illusion of safety [as] we ran from this law school to that People of Color Conference, hoping at some point we would locate the one group of really cool people we could trust with our stuff.”¹²⁰ He says that “[a]t some point before we arrived at BlackProf, we realized we were never going to be safe.”¹²¹ He argues, “Blogs are walking up to legal scholarship and slapping it in the face. Blogs say to legal scholarship: ‘How dare you! Evolve or Die!’”¹²² He notes, “Blogging is not a luxury. At its best it’s a way of bringing power to the people.”¹²³

119. BlackProf.com, <http://www.blackprof.com>.

120. Butler, *supra* note 36, at 1102.

121. *Id.*

122. *Id.* at 1101.

123. *Id.* at 1103.