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THE BATTLE OVER THE SOUL OF LAW PROFESSOR BLOGS

HOWARD J. BASHMAN*

Unbeknownst to most of us outside the legal academy, there apparently is some disagreement over whether blogs that law professors operate should be regarded as legitimate scholarship and public service, or should be dismissed as a frivolous waste of time that detracts from the more traditional scholarly pursuits of writing massive law review articles and pontificating to the mainstream media on legal issues of public interest.

As so often is the case, the answer to this conundrum is “It depends.” A law professor’s blog post or series of blog posts certainly can constitute scholarship or public service. But, merely because a blog post is written by a law professor does not guarantee that what results ought to be regarded as scholarship or public service, nor does every law professor blogger intend for every post, or even a majority of their posts, to constitute either scholarship or public service.

If one thing is for sure, it is that blogs written by law professors run the gamut from scholarship to commentary to frivolity. The most popular law professor blogs demonstrate this point nicely. InstaPundit,¹ written by Professor Glenn Harlan Reynolds of the University of Tennessee College of Law, is one of the most popular blogs on the entire internet. Its focus is primarily on matters of politics, public policy, and other current events of wide interest, with only a secondary focus (if that) on legal issues. And The Volokh Conspiracy,² founded by Professor Eugene Volokh of the UCLA Law School and his brother Sasha, is now the second highest trafficked law professor blog.³ It is a group blog to which more than a dozen law professors contribute, and its focus is largely, but far from exclusively, on law-related issues.

More recently, the Law Professor Blogs Network,⁴ which today consists of more than thirty separate blogs, has come into existence. This

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1. Instapundit.com, <http://instapundit.com>.

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

3. See The TTLB Blogosphere Ecosystem, <http://truthlaidbear.com/ecotraffic.php> (last visited Jan 29, 2007) (ranking blogs by number of visits per day).

4. Law Professor Blogs: Resources, News & Information for Law School Professors, <http://lawprofessorblogs.com>.

group of law professor blogs traces its origin to when the network's founder, Professor Paul Caron of the University of Cincinnati College of Law, started the TaxProf Blog⁵ in April 2004. The blogs within the Law Professor Blogs Network each tend to focus on a specific area of the law or legal education, such as the highly acclaimed Sentencing Law and Policy⁶ blog by Professor Douglas A. Berman of the Moritz College of Law at The Ohio State University. Those blogs, while not denying their authors the ability to reveal non-law-related aspects of their personalities, tend to contain only posts that are relevant to each blog's particular subject-matter focus.

The Sentencing Law and Policy blog stands as the epitome of a law professor blog that deserves to be viewed both as scholarship and public service. The blog reports in a timely manner on significant state and federal court rulings in the area of criminal sentencing. The blog also regularly posts to the Internet copies of legislative reports, briefs, and even court opinions that otherwise would not be readily accessible online.

Perhaps for these reasons, Sentencing Law and Policy is the blog that has thus far been cited most frequently in court opinions⁷ and law review articles.⁸ Yet, notwithstanding the blog's focus on a particular legal subject matter, the blog's author, Professor Berman, frequently reveals his passion for sports and popular culture. The site proves beyond any doubt that a law professor's blog that deserves to count as scholarship and public service need not be bereft of personality or pop culture.

At the opposite end of the spectrum from the Sentencing Law and Policy blog stands Professor Ann Althouse's blog, Althouse.⁹ Its author teaches at the University of Wisconsin Law School, but the blog often appears to focus more avidly on pop culture than on serious legal issues. By choosing to blog about her life and what she finds of interest generally, Professor Althouse has created the opposite of what one might envision a law professor's blog to be. But unexpected does not equal unpopular, and Professor Althouse's blog appears to be the third most visited law professor blog now in existence.¹⁰

5. Taxprof Blog, <http://taxprof.typepad.com>.

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

7. Law Blog Metrics [formerly 3L Epiphany], http://3lepiphany.typepad.com/3l_epiphany/2006/08/cases_citing_le.html (Aug. 6, 2006) (listing opinions that have cited legal blogs).

8. Law Blog Metrics, http://3lepiphany.typepad.com/3l_epiphany/2006/08/law_review_arti.html (Aug. 16, 2006) (listing law review articles that have cited legal blogs).

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

10. See The TTLB Blogosphere Ecosystem, *supra* note 3.

Another category of law professor blogs that I particularly enjoy consists of law professors who blog about legal issues of general interest in a way that is both insightful and yet readily accessible to nonexperts in the field. These blogs, although not focused on particular narrow law-related subject matter, such as tax law or sentencing law, do tend to focus on law-related issues as compared to politics or popular culture.

Two examples from this genre are PrawfsBlog,¹¹ a group blog founded by Professor Dan Markel of the Florida State University College of Law; and Concurring Opinions,¹² a group blog founded by Professor Daniel J. Solove of the George Washington University Law School.

If my four years of operating a popular law blog have taught me anything, it is that the key to having a successful law-related blog is choosing a subject or range of topics that the author knows a great deal about and has particular enthusiasm for. Over time, a blog that offers thoughtful commentary or easy access to interesting legal news and case developments can generate a readership numbering in the thousands to tens of thousands per day, far outstripping the number of people who are likely to read the typical law review article.

For three reasons, law professor blogs offering posts that qualify as scholarship or public service can have even greater impact than more traditional scholarship or public service pursuits. First, a blog posting usually will be much more timely than a formal law review article or published newspaper op-ed. It is not unusual for law professors to offer detailed, substantive, and thought-provoking blog commentary about newly-decided judicial decisions just hours after the decisions have issued.

Second, blog posts are much more widely available than traditional legal scholarship, which tends to be confined to law reviews. Many law reviews do not make new articles freely available online, and most of the general public lacks access to subscription-required databases of legal writings. By contrast, judges, lawyers, other law professors, and the general public can easily access a law professor's blog. All that's required is an Internet connection.

Third, and perhaps most importantly, law professor blog posts tend to be accessible to readers of ordinary intelligence in a way that a highly technical and citation-laden law review article may not be. This makes it possible for the blog post to have a more widespread impact than traditional scholarship or public service.

11. PrawfsBlawg, <http://prawfsblawg.blogs.com>.

12. Concurring Opinions, <http://concurringopinions.com>.

Two recent federal court rulings that cite law professor blog posts demonstrate how such blog posts can have an immediate impact on the adjudication of pending cases in a way that more traditional legal scholarship cannot. On July 31, 2006, Ninth Circuit Judge Diarmuid F. O'Scannlain, in an opinion dissenting from that court's denial of rehearing en banc in the case of *Harper v. Poway Unified School District*,¹³ cited to an April 20, 2006 blog post from Professor Eugene Volokh describing the Ninth Circuit three-judge panel's majority opinion in the case¹⁴ as "a dangerous retreat from our tradition that the First Amendment is viewpoint-neutral."¹⁵

And on August 1, 2006, U.S. District Court Judge William G. Young of the District of Massachusetts issued a lengthy and thought-provoking opinion¹⁶ discussing the role of the jury in federal criminal sentencing proceedings now that the U.S. Sentencing Guidelines have been rendered merely advisory. Judge Young's opinion cited extensively to the Sentencing Law and Policy blog and a related PrawfsBlog post from late June 2006.¹⁷

The frequency with which law professor blogs have been cited in judicial decisions¹⁸ establishes beyond dispute that such blogs certainly do qualify as scholarship and public service. Indeed, I anticipate that those who look back on this debate in the near future will be surprised to learn that not too long ago some apparently thought that a law professor's law-related blogging might not properly be characterized as scholarship or public service.

For 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. What we, the readers of law blogs, hope to find is interesting content. Fortunately, the law professor segment of the law blog world generates a great deal of interesting content on a daily basis. And because law professors are not immune from the addiction of blogging to an audience

13. 455 F.3d 1052, 1055 (9th Cir. 2006) (O'Scannlain, J., dissenting from denial of reh'g en banc).

14. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006).

15. Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1145577196.shtml> (Apr. 20, 2006, 7:53 PM).

16. *United States v. Kandirakis*, 441 F. Supp. 2d 282 (D. Mass. 2006).

17. Posting of Dan Markel to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2006/06/the_indispensab.html (June 26, 2006, 3:36 AM).

18. See 3L Epiphany, *supra* note 7.

of enthusiastic readers on subjects of mutual interest, I am confident that they will keep doing so regardless of how the current debate is resolved.