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DOWNLOAD IT WHILE IT'S HOT:
OPEN ACCESS AND LEGAL SCHOLARSHIP*

by
Lawrence B. Solum**

This Article analyzes the shift of legal scholarship from the old world of law reviews to today's world of peer reviews to tomorrow's world of open access legal blogs. This shift is occurring in three dimensions. First, legal scholarship is moving from the long form (treatises and law review articles) to the short form (very short articles, blog posts, and online collaborations). Second, a regime of exclusive rights is giving way to a regime of open access. Third, intermediaries (law school editorial boards, peer-reviewed journals) are being supplemented by disintermediated forms (papers on the Internet, blogs). Blogs and internet conversations between academics are expanding interdisciplinary legal scholarship and increasing the avenues of communication among legal scholars, practitioners and a wide array of interested laypersons worldwide.

I.	INTRODUCTION: A BLOGGER'S TALE.....	842
II.	THE OLD WORLD: LONG FORM, EXCLUSIVE RIGHTS, AND INTERMEDIARIES.....	847
	A. <i>The Long Form</i>	847
	B. <i>Exclusive Rights</i>	848
	C. <i>Intermediaries</i>	850
	1. <i>Source Intermediaries</i>	850
	a. <i>The Law Reviews and Peer-Reviewed Journals</i>	850
	b. <i>Legal and Academic Presses</i>	852
	2. <i>Search Intermediaries</i>	852

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** John E. Cribbet Professor of Law, University of Illinois College of Law. I owe special thanks to Larry Ribstein with whom I have had many illuminating conversations about blogging. See Larry E. Ribstein, *Initial Reflections on the Law and Economics of Blogging* (Univ. of Ill. Coll. of Law, Law & Econ. Working Paper No. 25, 2005), available at <http://law.bepress.com/uiuclwps/papers/art25/>.

	a. <i>Card Catalogs and the Index to Legal Periodicals</i>	853
	b. <i>Westlaw and Lexis-Nexis</i>	853
III.	THE NEW WORLD: SHORT FORM, OPEN ACCESS, AND DISINTERMEDIATION	854
	A. <i>Short Form</i>	854
	B. <i>Open Access</i>	856
	C. <i>Disintermediation</i>	857
IV.	THE ECOLOGY OF THE LEGAL ACADEMY	859
	A. <i>The Economics of Legal Scholarship</i>	859
	1. <i>Supply Side: Intrinsic and Extrinsic Rewards</i>	859
	2. <i>Demand Side: Source Costs and Search Costs</i>	860
	B. <i>The Role of Intermediaries</i>	861
	1. <i>Screening</i>	861
	2. <i>Certification</i>	861
	3. <i>Dissemination</i>	862
	4. <i>Targeting</i>	862
	5. <i>Feedback</i>	862
	C. <i>Dissemination</i>	863
	1. <i>Dissemination One: The Globalization of the Legal Academy</i> ...	863
	2. <i>Dissemination Two: Legal Scholarship Wants to be Free</i>	863
	3. <i>Dissemination Three: Disintermediation and Immediacy</i>	864
	4. <i>Dissemination Four: An Objection and an Answer: "I Only Want to be Read by the 'Right People'"</i>	865
V.	CONCLUSION: A SCHOLAR'S TALE	865

I. INTRODUCTION: A BLOGGER'S TALE

In September of 2002, I started a blog.¹ On a whim. I barely knew what a blog was, and I certainly didn't know what to do with one. Like a lot of bloggers, at first I didn't even know that the word "blog" was short for web log. And I had no clue as to what a web log was—beyond the obvious, that is was some kind of "log" on the world wide "web." To be candid, I had started to notice the word "blog" popping up in "cool" venues, and I hated the idea that I was already "behind the curve." So, I looked at a few blogs. I don't remember which ones, but I began to understand that a blog consisted of "posts" or entries that formed a kind of online diary or journal. I got the sense that blogs could be about almost anything—serious, frivolous, political, cultural, personal, techie. Whatever. I posted some posts, got busy with other things, and let the blog lie dormant until January of 2003, when I started to post again on a regular basis.

I called the blog "Legal Theory Blog." I knew that other law professors had blogs—I think that I knew about the Volokh Conspiracy,² a group blog organized by Eugene Volokh of the University of California at Los Angeles

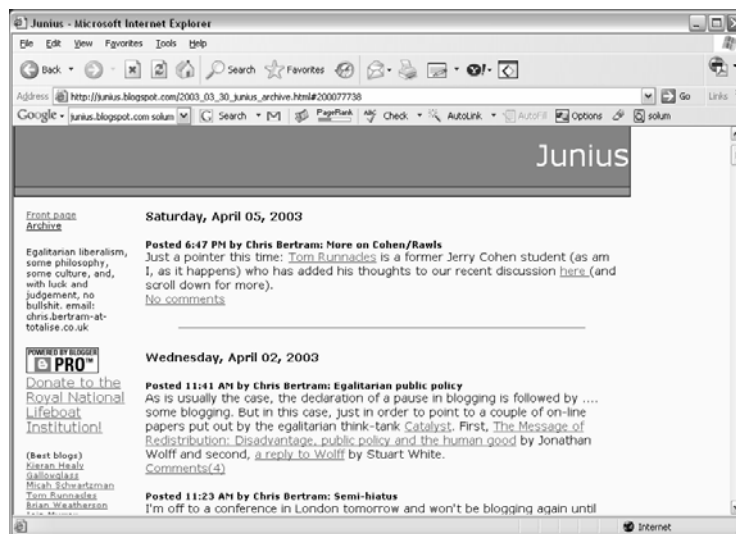
¹ See Lawrence B. Solum, Legal Theory Blog, http://lsolum.blogspot.com/archives/2002_09_01_lsolum_archive.html (Sept. 1, 2002).

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

Law School and I might have been aware of “Instapundit,”³ a solo effort by Glenn Reynolds of the University of Tennessee Law School. I had a certain idea about what the blog might accomplish, based on something else that I was just beginning to use extensively as a research tool—the Social Science Research Network (SSRN),⁴ a website and service that provides access on the Internet to scholarly papers in a variety of disciplines including law. I wanted to do a blog with a focus on “legal theory” broadly conceived as encompassing a variety of interdisciplinary approaches to normative and positive legal scholarship. What a geek.

I thought to myself: “I’m reading these papers on SSRN in draft. I could blog about some of the papers that I read.” It seemed to me that there might be half a dozen potential readers, who would be interested in my postings about legal theory papers. Secretly, I hoped that if the blog were a giant success it might attract a few dozen readers on a semi-regular basis. And I said to myself, “What the heck, if no one reads it, I’ll just stop doing it.” As I recall, my expectations were rather low: I believed that it was “too late” for entry into the blogging market—which was already dominated by a few “big blogs.”

Were it not for some positive feedback, I’m almost sure my career as a blogger would have ended a few weeks into my second foray. At first the feedback came in tiny dribs and drabs. I can actually name the two people who are most responsible for the continued existence of “Legal Theory Blog.” Chris Bertram and Nathan Oman had blogs of their own at the time. Chris Bertram is a philosopher at the University of Bristol in the United Kingdom—he had a blog called “Junius” and he later became a founding member of a widely read, mostly academic group blog called “Crooked Timber.” I don’t remember exactly what Bertram said or why, but whatever it was, it made me think that



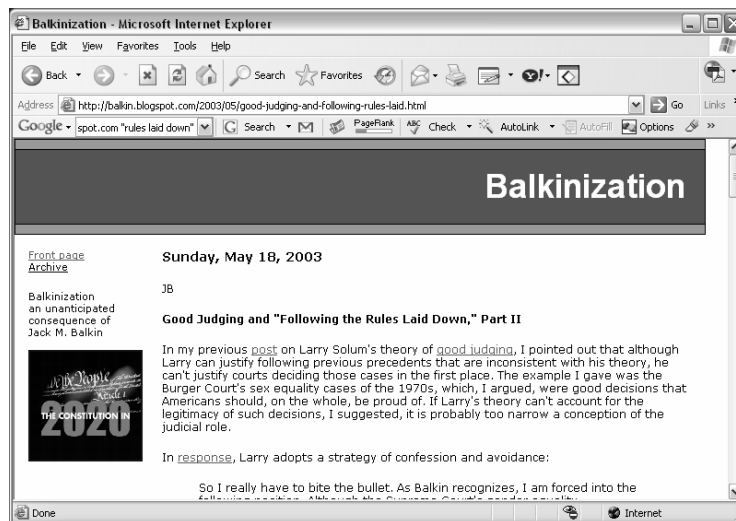
³ See Instapundit.com, <http://instapundit.com/>.

⁴ See Social Science Research Network (SSRN) Home Page, <http://ssrn.com/>.

what I was doing might be appreciated by thoughtful readers. Nate Oman recently became a law professor at the College of William and Mary in Virginia. At the time, Oman was a first year law student at Harvard with a blog called "A Good Oman." And like Bertram, Oman provided thoughtful and appreciative feedback. Bertram and Oman opened my eyes to the blogosphere as a distinctive form of social and intellectual interaction—a space for communicating about serious ideas. Thanks guys.

And then something else happened. I read an op/ed in the New York Times about a judicial nominee. The editorial focused on a case involving the application of the doctrine of *res judicata* (claim preclusion) to a case involving the tort of spoliation (destruction) of evidence. Well, I've written a treatise with a chapter on claim preclusion⁵ and another treatise with a chapter on the spoliation tort.⁶ So I read the case. And it struck me that the editorial was a hatchet job or incompetent or both. So I blogged about the editorial. And then the blogosphere took over—producing dozens and dozens of "links" to my post and thousands and thousands of "visits" to Legal Theory Blog.

This really wasn't the kind of attention I was looking for. I get no kicks from TV—especially being on it. But there was a lesson in my fifteen minutes of fame—an illustration of the awesome power of the Internet for rapid dissemination of information. Within a few weeks, Legal Theory Blog had hundreds of regular readers. When the readership began to climb into the thousands, I realized that an obsession with readership was adding to the not inconsiderable burden of getting out the blog on a daily basis. I stopped counting.

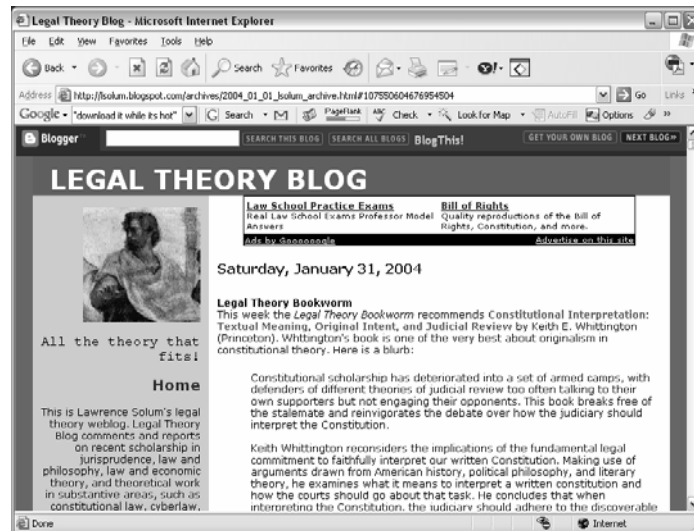


I learned another lesson about the power of the blogosphere from a series of exchanges with Jack Balkin, who then ran Balkinization as a solo blog. I had

⁵ 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ch. 131 (3d ed. 1997).

⁶ JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE (1989).

posted a detailed reply⁷ in response to a column by Eddie Lazarus,⁸ prompting Jack Balkin to publish a post entitled “Good Judging and ‘Following the Rules Laid Down.’”⁹ I countered with “A Neoformalist Manifesto,”¹⁰ followed by Balkin’s “Good Judging and “Following the Rules Laid Down,” Part II.”¹¹ The exchange ended with my “Fear and Loathing in New Haven.”¹² The exchange, conducted over the course of four days, runs almost fourteen thousand words. Balkin’s contributions to the exchange were eloquent and powerful. They 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.



Eventually, Legal Theory Blog evolved a fairly standard format. Lots of the content consists of links to new papers on SSRN and elsewhere. Every week, there is a “Download of the Week” which frequently ends with the tag line: **download it while its hot!** Another weekly feature is a book recommendation—called the “Legal Theory Bookworm.” Many law schools,

⁷ Lawrence B. Solum, Legal Theory Blog, Judicial Integrity, Legal Realism and the Second Amendment: A Commentary on Lazarus and Kozinski (May 17, 2003), http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200304841.

⁸ 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/scripts/printer_friendly.pl?page=/lazarus/20030515.html.

⁹ Jack Balkin, Balkinization, Good Judging and “Following the Rules Laid Down” (May 18, 2003), http://balkin.blogspot.com/2003_05_18_balkin_archive.html#94523316.

¹⁰ Lawrence B. Solum, Legal Theory Blog, A Neoformalist Manifesto (May 18, 2003), http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200307682.

¹¹ Jack Balkin, Balkinization, Good Judging and “Following the Rules Laid Down,” Part II (May 18, 2003), http://balkin.blogspot.com/2003_05_18_balkin_archive.html#94561782.

¹² Lawrence B. Solum, Legal Theory Blog, Fear and Loathing in New Haven (May 20, 2003), http://lsolum.blogspot.com/2003_05_01_lsolum_archive.html#200315303.

post open access versions of workshop papers on the web—Legal Theory Blog links to those in a weekly “Legal Theory Calendar,” which is reposted day-by-day, Monday through Friday. Once a week, I post an entry in the Legal Theory Lexicon, which covers topics like “The Coase Theorem,” “Ex Post and Ex Ante,” and so forth.

By now, you will have recognized that this blogger’s tale is just as much about open access as it is about blogs. The idea of open access scholarship may have begun with arXiv.org¹³—an open access repository for papers in Physics, Mathematics, Computer Science and Quantitative Biology that has blossomed in myriad ways.¹⁴ The concept of open access can be articulated in a variety of ways, and its particular forms have changed, but the Budapest Open Access Initiative Declaration provides a handy definition:

By “open access” to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.¹⁵

Open access is what makes Legal Theory Blog possible. The core idea of the blog is that open access legal scholarship creates an opportunity for a new kind of conversation about, besides, and around the conventional scholarly paper. Academic blogs themselves are a form of open access scholarship—a leading edge of the emerging “short form.”

The story of Legal Theory Blog is an introduction to the real work of this paper—to investigate in a systematic way the transformation of legal scholarship that is being prompted by the open access movement. Oh yeah. I almost forgot. This is legal scholarship, so the last paragraph of the introduction needs to be a roadmap. The investigation begins in Part II, which outlines crucial features of the old world of closed access legal scholarship. The old is contrasted with the new in Part III, an investigation of crucial features of the emerging world of open-access legal scholarship. This contrast is theorized in Part IV, which looks at open access from a variety of theoretical perspectives. I return from the theoretical to the personal in Part V, which recounts the transformative effects of open access on the form and substance of my own scholarly work.

¹³ Cornell University Library, arXiv.org E-Print Archive, <http://arxiv.org/>.

¹⁴ See Peter Suber, Timeline of the Open Access Movement, <http://www.earlham.edu/~peters/fos/timeline.htm>.

¹⁵ Budapest Open Access Initiative (Feb. 14, 2002), <http://www.soros.org/openaccess/read.shtml>.

II. THE OLD WORLD: LONG FORM, EXCLUSIVE RIGHTS, AND INTERMEDIARIES

I'm trying to get at the transformative potential of open access legal scholarship. That requires a bit of background—a portrait of the *ancien regime*, the old world of treatises and law reviews. The portrait will focus on three features of the fading landscape—the long form, exclusive rights, and intermediaries.

A. *The Long Form*

Legal scholarship is notorious for the long form. Really long! Back in the day, the most influential legal scholars were the treatise writers—the heirs of Blackstone and Chancellor Kent—you know the names: Corbin, Davis, Moore, Nimmer, Wigmore, Williston, and Wright. And let us not forget the last great modern treatise—Tribe's *American Constitutional Law*—an attempt to revitalize a dying tradition by infusing old-fashioned case crunching with new-fangled theory. 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 seem blissfully short. Oh sure, there was the occasional multipart law review article that ran to hundreds of pages and thousands of footnotes. But a mere 60 to 100 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.

There was, of course, a terrible dirty secret about long form legal scholarship. No one read it. Of course, the treatises weren't meant to be read straight through. They were giant encyclopedias of doctrine. The reader was invited to dip into the treatise on a particular topic and read a section or even a few. No one was supposed to read the whole thing. And because the treatises were comprehensive, but legal problems cluster, it is likely that some sections of the treatises had very few readers even when cumulated over a number of years—numbered perhaps in the dozens, perhaps in the single digits. Of course, a really successful treatise had readers aplenty—thousands and tens of thousands of lawyers, judges, academics, and students who wanted to know what “the rule” was on this or that topic.

But the law review articles! Readers? That one word question is its own best answer. Question: “Readers?” Answer: “Readers??” Don't get me wrong. There were success stories. A few law review articles drew amazing readerships. Many law review articles are read by small but important scholarly communities. But the vast majority of long form law review articles had very few readers. Some had none—except maybe their authors and editors. That's hardly a surprise. Law review articles are published by the thousands, but their length and density is forbidding. And because law review articles are selected by students, legal academics tend to rehearse well-known arguments at length in order to enable the student editors to understand the new contribution that

the article makes. Very long articles on obscure topics are rarely worth reading, and so they aren't read.

Paul Caron has made this point in an article that appears in the Yale Law Journal's online adjunct, *The Pocket Part*. Caron writes:

Does the long tail theory apply to the market for legal scholarship? Data from Tom Smith's ongoing research project, *The Web of Law*, paints legal scholarship as a hit-driven market, in contrast to the long tail theory's predictions. Smith's data from LexisNexis's Shepard's database of 385,000 articles published in 726 law reviews reveals a classic 80/20 distribution of citations in cases and other law review articles: the top 17% of articles get 79% of all citations. The head of the tail is enormous, as the top 0.5% of articles get 18% of all citations, and the top 5.2% of articles get 50% of all citations. The tail ends abruptly, as 40% of articles are never cited at all.¹⁶

The long form is alive and well, but even before the advent of open access, legal academics were moving towards short form legal scholarship. Some law reviews began to encourage the submission of "essays," essentially short law review articles.¹⁷ 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."¹⁸ Of course, by the standards of many disciplines 40 pages of small-type law review pages would be considered extraordinarily long.

B. *Exclusive Rights*

The old world was a world of exclusive rights—especially the exclusive right to make copies. That is, the old world was the world of copyrights. And these rights were usually held by publishers, although sometimes they were retained by authors. The publishers of treatises hold the copyright or exclusive licenses that provide the equivalent rights of exclusion. And 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).

But there is something funny about that pattern. Something odd. It makes perfect sense that the treatises were copyrighted and that those copyrights would be enforced. Treatises were (and are still) published by for-profit enterprises. In the old world, publication was Expensive—with a capital E.

¹⁶ Paul L. Caron, *The Long Tail of Legal Scholarship*, 116 YALE L.J. POCKET PART 38 (2006), <http://thepocketpart.org/content/view/59/6/>.

¹⁷ See Yale Law Journal, Submissions, <http://www.yalelawjournal.org/submissions.html> (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.").

¹⁸ See Yale Law Journal, Joint Statement on Article Length, http://www.yalelawjournal.org/joint_statement.html.

Typesetting. Printing presses. Shipping. It got cheaper. Electronic text preparation. Printing presses in China. Containers and UPS. But still, expensive—maybe with a small-case “e.” And we all know the familiar story about the economics of intellectual property. Exclusive rights create the incentives to invest in the creation and dissemination of new works. Without them, Wigmore on Evidence would have been “ripped off” by some entrepreneurial outfit which would have had lower production costs, because it would not have had to pay either Wigmore or Little Brown’s editorial staff.

So the treatise part of the story wasn’t odd, but what about law review articles? Anyone who writes law review articles will tell you that the copyrights in them are virtually worthless. Try auctioning one on eBay or selling it to a publisher. It is true that law reviews charge for subscriptions, but it doesn’t seem likely 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. For another thing, copyrights in law review articles create problems. A famous example is Lon Fuller’s famous article, *Positivism and Fidelity to Law—A Reply to Professor Hart*,¹⁹ 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. And what is the point of that? 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.

One important implication of exclusive rights is directly relevant to open access. Holders of exclusive rights are frequently reluctant to grant open access, because open access makes unauthorized copying virtually costless and undetectable. Academic presses and legal publishers do not permit open access to the monographs they publish.²⁰ 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 to permit open access. Many law reviews now routinely post open access versions of the articles they publish on their websites.

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 data bases, but access to these databases is expensive. Very expensive. Just ask a librarian. Individual articles

¹⁹ Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

²⁰ The exception that proves the rule is Larry Lessig’s *Free Culture*. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004), available at <http://www.free-culture.cc/freecontent/>.

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 peer-reviewed journals. As of today, they are dinosaurs. Magnificent beasts, to be sure. But they will evolve or become extinct.

C. *Intermediaries*

The *ancien regime* 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 and dice the intermediation pie is to distinguish between “source intermediaries” (publishers) and “search intermediaries” or (indexers). Both were important. First, let's take a look at source intermediaries.

1. *Source Intermediaries*

In the old world of legal scholarship, source intermediaries stood 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 thirty years ago and last week. Thirty years ago, the publishers were the law reviews. And the law reviews were (and are) edited by law students—an arrangement that was 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,” e.g. the institutional affiliations of authors or their prior record of publication.

Over the course of the last thirty years, law reviews have increasingly been supplanted by peer-reviewed journals. The upside is sophisticated judgment. Experienced academics are better equipped to separate the wheat from the chaff. But there are downsides as well. The editors of peer-reviewed journals are embedded in social networks of professional affiliation. Although the very best editors may transcend all bias, anyone who has knocked around academia

knows that there is a seamy underside to the world of peer review.²¹ Some theories are favored, others dissed. The former students of the powerful prosper at the expense of those who have studied with the unpopular or the obscure. Deals are made—and as we all know, you can make a deal without ever discussing the terms. A wink and a nod will do.

And then there is the problem of time. One of the really nice things about student-edited law reviews is that they are fast. Student-edited journals permit multiple simultaneous submissions. This creates competition between journals to make rapid decisions about the best articles. (I've had an article accepted within six hours of submission, and I'm sure that's 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 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've been around the business, you know about

²¹ For a rare public airing of these issues, see Brian Leiter, Leiter Reports, Time to End In-House Editing of Leading Philosophy Journals (Aug. 28, 2006), http://leiterreports.typepad.com/blog/2006/09/time_to_end_inh.html:

Patricia Smith Churchland at the University of California at San Diego and Daniel Dennett at Tufts University write with the following apt comments about the editorial practices of some of our profession's most visible journals:

Several of us old guys have often discussed the unprofessional nature of the so-called premier journals in our discipline. We shall restrict ourselves to mentioning *Journal of Philosophy* and *Philosophical Review*. First, both are "in house" journals, meaning, as we understand it, that the editor (at Columbia and Cornell respectively) standardly selects faculty from his/her department to review papers. Papers are not standardly sent out for peer review. This makes the journals vulnerable to a certain kind of corruption and cronyism that would not be tolerated in the sciences. We know of no first ranked journal in the natural or social sciences that operates that way, or second-ranked journal either, for that matter. Our casual survey of scientists revealed that the "in house" refereeing system is regarded as completely unprofessional. Obviously the "in house" policy also means that from time to time people who are not particularly competent are reviewing submitted manuscripts. The policy may also partially explain the absurdly long time it takes for manuscripts to be reviewed.

May we also add that the journal—*Philosophical Psychology*—whose editor, Bill Bechtel, is in the department at UCSD, does not operate as an "in house" journal but according to the professional criteria in the natural and social sciences. *Philosophy of Science* also abides by a peer review practice, and its location moves as a function of its term-limited editor, who is selected by the Philosophy of Science Society.

The "in house" practice of refereeing at *Journal of Philosophy* and *Philosophical Review* is likely an innocent relic of earlier times. It is easily corrected.

I recall a time in the early 1990s (around when I cancelled my subscription) when we used to refer to the *Journal of Philosophy* as the *Journal of Philosophy and Decision Theory*, given the preposterously large number of papers on decision theory it published, due to the influence of Isaac Levi, then a senior member of the Columbia department and an influential editor of the *Journal*. Another pernicious, it seems to me, aspect of the in-house editing at J.Phil. in particular is that its rather precious book review space is given over disproportionately to books by Columbia faculty.

articles—really fine ones—that simply sit in a drawer after two or three rejections (and that may have involved two or three years of waiting). Who needs the aggravation?! Why bother?

b. Legal and Academic Presses

As with serials, so with monographs. There was the old world of legal publishers. The once familiar names are fading, even as I write. Where have you gone, Little Brown? Are you still here, West Publishing? Why did you leave me, Matthew-Bender? The new international publishing firms are taking their place. Thompson. Kluwer. LexisNexis. 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 legal publishers simply did not provide an outlet, prestigious or otherwise, for the kinds of books that sophisticated legal academics wanted to write. Because these books were not aimed at practitioners. They were aimed at other legal academics and at philosophers, political scientists, economists, historians, and others.

Enter the academic presses. Of course, there were law books by academic presses even in the heyday of the treatise. “Jurisprudence” was part of the legal academy even before there was “Philosophy of Law.” Constitutional theory crossed disciplines, creating a market for monographs of interest to political scientists, political philosophers, and constitutional academic-lawyers. But in the new millennium, the prestige venue is the academic press. The goal of the ambitious law professor is no longer the treatise published by Thompson. The new goal is the three-hundred page monograph published by a venerated academic press. Harvard University Press. Oxford University Press. Princeton University Press. Cambridge University Press. You know, more or less, how it goes from there.

There is an irony here. Academic legal monographs provide a substitute for the really long law review article. The one hundred page law review article becomes the three hundred page book published by a university press. But there are costs associated with this move. 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. Constitutional law and theory books sell. Contract theory books? Maybe not. 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. And in the era of the fifty-page limit on article length, the question is, “Where do those articles go?” Is the short, specialized legal monograph to be confined to the dustbin of history?

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 the antiquated, card catalogs and indexes, and the once new (but

now newly obsolete), that is closed access full-text searching on Lexis and Westlaw.

a. Card Catalogs and the Index to Legal Periodicals

Card catalogs! As I'm writing this, I have the most wonderful memory of the card catalog of the main library at Harvard University. A giant beast of a catalog. Gone now. The old-old world of 3" by 5" cardstock gave rise to the new-old world of electronic card catalogs. But there is a difference. I still use electronic card catalogs—not every day or every week, but once in a while. Why? Because every so often, I need a book published by a traditional legal publisher. And those books are ridiculously expensive. So I don't order them from Amazon.com. I use the electronic card catalog to find those books on the shelf, but I am not sure that I have used an electronic card catalog to do research in several years.

Remember the *Index to Legal Periodicals*? You were at the mercy of the classification system and the attention span of the classifiers. Who knows how good that system really was? Funny that it still exists. I suppose it carries on because of the momentum of library subscriptions and the increasingly untenable notion that students need to learn to do research the "old-fashioned way" so that they don't become "over reliant" on electronic searches. I used to buy that. Crap. Don't you think?

b. Westlaw and Lexis-Nexis

The old-old world of indexes and card catalogs gave way to the new-old world of closed electronic text databases. There were (and are) two, in the United States anyway—Westlaw and LexisNexis. 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 new-old world of Westlaw and LexisNexis 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 an important fraction—it includes most all of the academics in the North Atlantic and Commonwealth democracies—and hence, most of the "significant" legal scholars. Sorry, civil law gals and guys. We're pretty parochial on this side of the pond.

* * *

That's the old world. Nostalgia. Law review articles and treatises. Exclusive publication rights. Card catalogs. The Index of Legal Periodicals.

Even things that were new, not so long ago, are now like familiar pieces of furniture. Academic press books and peer-reviewed journals. Westlaw and LexisNexis. JSTOR and HeinOnline. But the old world is giving way. Radical change is already upon us—a new world. Short form. Open Access. Disintermediation.

III. THE NEW WORLD: SHORT FORM, OPEN ACCESS, AND DISINTERMEDIATION

Let's get right to it. After all, who wants a long windup for a subsection that is titled . . .

A. . . . *Short Form*

I want to focus on the emergence of short form legal scholarship, but first a disclaimer. I love the long form. I like big fat law review articles. I think the new word limits are idiotic. Some topics need ten thousand words. Some topics need eighty thousand. It all depends on the subject-matter, arguments, evidence, and claims that are being made. Articles should be as long as they need to be—no longer, but no shorter. The assertion that “[t]he vast majority of law review articles can effectively convey their arguments within the range of 40–70 law review pages” is almost surely correct, but that assertion hardly justifies a set of rules that effectively operate to eliminate longer articles. Because even if the majority of law review articles should be under 50 or 70 pages, there is a significant minority that should be longer—especially in subfields where academic publishers see no market for monographs.

Now, for another dirty secret. Getting the length of law review articles “right” was never the motivation for the adoption of the new policy. As any insider to the process will tell you, the real justification was much simpler. The law review editors didn't want to do the work of reading very long articles. They thought that word limits would reduce their workload. Of course, any law professor will tell you what we are doing in response. We can satisfy the word limits. That's easy. The project that would have been one eighty page article is now two fifty page articles. Unintended consequences. You betcha! I will go out on a limb and make a prediction. The word limits will not reduce the total quantity of words produced by legal scholars and hence the total workload of law review editors. Quite the contrary. Fewer words per article means more articles on related topics, and given the overhead, the shared introductory content, the ultimate impact is to increase rather than decrease the number of words written and submitted.

I love the long form, but the long form is *so* yesterday. The new world is the world of the short form. Music videos, not movies. Singles (in MP3 format, of course), not symphonies. Haiku,²² not epic poetry. The short form in legal

²² See Lawrence B. Solum, Legal Theory Blog, Chen, Farber, & Gilmore Write Onlaw Haiku (Sept. 8, 2006), http://lsolum.typepad.com/legaltheory/2006/09/chen_farber_gil.html: These con law haiku

scholarship is just beginning to emerge. But the short form is not the fifty page law review article—that's still the long form. So what will the short form look like? I think the best strategy is to briefly canvass the possibilities:

- The idea paper—One possibility is “the idea paper.” These 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 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.
- The blog post—Another possibility is the blog post. When, I first began to blog, I assumed that blog posts had to follow rules. That they had to be short. That they had to be accessible and or even entertaining. Now I think that the possibilities of the blog (or whatever might replace blogs) have only begun to emerge. For example, I did a series of posts on Legal Theory Blog about a book by Larry Lessig under the rubric, “Legal Theory Bookclub.” At the request of the editors of the Texas Law Review, the series of posts became “The Future of Copyright.” Randy Picker’s Mob Blog, which produces online symposia about various topics and articles, is another innovative form. SCOTUS Blog 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.
- The Wikipedia article—Wikipedia itself is a collaborative, open-source, open access encyclopedia. The technology underlying Wikipedia is the wiki—an engine that permits collaborative authorship on the Web. The Stanford Encyclopedia of Philosophy is closed—you must be invited to write an article—but it provides not quite “open” access content of an extremely high quality. One can imagine some hybrid of these forms 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.
- The listserv message. Should I include this? Listservs are *so* nineties. But some listservs remain vibrant. And listservs that are archived on the web still play a role in creating accessible content that digests new legal developments in real time. Listserv contributions may not be the short form of the future, but they

point to need for interactive scholarship in a space reserved for serious discussion.

This list is not intended to be exhaustive. I suspect that the possibilities of the short form are only beginning to emerge. Wikis and blogs are engines—they are the platforms 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. To me, the shape of the future is still dim. But the length of the future is in clear focus: *ess ache oh ar tee*.

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 didn’t 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 weren’t 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 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; 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 legal scholarship.

The term “open access” is fraught with emotional and ideological overtones, the echoes of the copywars. I would like to suggest that what we might call the “ideal type” of pure open access is a focal point in logical space, around which a variety of hybrid forms of impure openness cluster. Jeez. What a sentence that was. Let me try to break it down.

Let’s start by defining full-blooded or pure open access, using the Budapest Declaration as the starting point. That definition has eleven elements:

1. A price of zero;
2. Availability on the Internet;
3. Permission to download;
4. Permission to copy;
5. Permission to distribute;
6. Permission to print;
7. Permission to do full text searches;

8. Permission to link;
9. Permission to crawl for the purpose of indexing;
10. Permission to pass the text as data to programs or applications;
11. The absence of contractual obligations for users, other than those required “to give authors control over the integrity of their work and the right to be properly acknowledged and cited.”

One can imagine forms of open access that include some, but not all of these eleven requirements. Consider, for example, the form of open access that is embodied in the first footnote of this article, which I shall repeat here:

© 2006 by the Author. Permission is hereby granted to duplicate this paper for scholarly or teaching purposes, including permission to reproduce multiple copies or post on the Internet for classroom use and to quote extended passages in scholarly work, subject only to the requirement that this copyright notice, the title of the Article, and the name of the author be prominently included in the copy or extended excerpt. Permission is hereby granted to use short excerpts (500 words or less) with an appropriate citation and without inclusion of a copyright notice. In the event of the death or permanent incapacity of the author, all claims to copyright in the work are relinquished and the work is dedicated to the public domain in perpetuity.

The permissions created by the footnote fall short of full-blooded open access in several ways. The intent of the footnote is to allow downloading, copying, distribution, and redistribution of this article, but only for limited purposes. For example, I did not intend to give permission to anthologize the article without my permission—at least not until I’m dead or incapacitated. I did intend to allow someone to download the article and then upload it to their own website. I want to preserve the conditions of the copyright notice for reposted or photocopied versions, but not for short excerpts by which I mean the typical “block quote” excerpts that scholars use.

As a practical matter, the most common form of “open access” in the legal academy is created by the posting of articles on SSRN. But, of course, posting on SSRN falls far short of the eleven elements in the Budapest Declaration. 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.

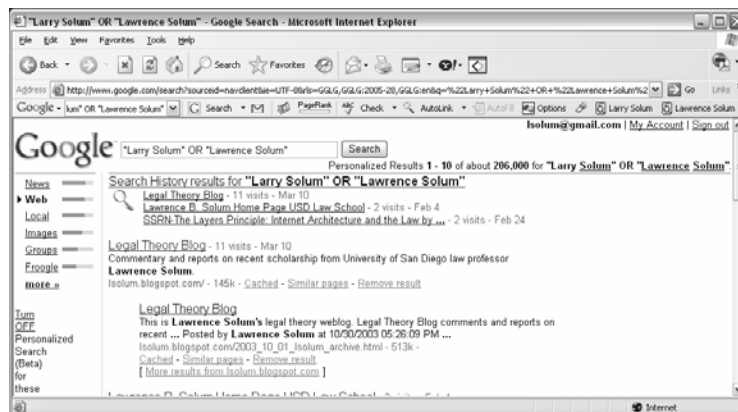
C. Disintermediation

The old world of legal scholarship was a world of intermediaries. Student law review editors. The editorial boards of peer-reviewed journals. The editors and advisory boards of the academic presses and legal publishers. The new world of legal scholarship is about disintermediation, a fancy word for getting rid of the intermediaries. The new world of legal scholarship is

disintermediated. Well, that's not exactly right. Because there are new intermediaries and the old ones haven't gone away.

Consider SSRN. SSRN mimics the form of the peer-reviewed journals—but with thin rather than thick review. You can't just post anything to SSRN. It is "peer-reviewed." But SSRN doesn't have space constraints. So the threshold for "acceptance" is low. You can't post your recipe collection or a rant about people who use cell phones in public places. 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 email) abstracting journals, organized by subject matter and institution. These perform mediating functions, but there is no pretence of selecting only the "best" pieces. Everything written by serious academics will be abstracted in the appropriate journal.

Of course, you don't really need SSRN to put your stuff up on the web. You can upload it to a server and put a link on your personal or institutional home page. The link makes the paper accessible to a web crawler, 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 to a server, many (perhaps most) law professors don't have a clue as to how these simple tasks can be accomplished. SSRN provides a reasonably simple method for posting on the web, and many law schools provide administrative support for those who find SSRN's simple interface to be daunting.



Well, I've been dancing around the "Big Kahuna" of disintermediation: **Google**. At a conceptual level, the real Big Kahuna is the search engine, 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. Other than "AND" and "OR," Google lacks Boolean operators.

But despite Google's limitations, Google is the driving force 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 LexisNexis are not going away tomorrow. Ph.D. 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 in cost-conscious environments are increasingly becoming reliant on Google as the only method for doing ordinary, down and dirty research.

* * *

And the new role of Google has an enormously important consequence. There will come a day when the saying, “If it isn’t on the net, it doesn’t exist,” is true. Open access legal scholarship will be the only legal scholarship that is actually read. Closed access legal scholarship will be the tree that falls with no one in the forest. The correct metaphysics will confirm its existence, but the best epistemology will question the significance (but not the truth) of that judgment.

IV. THE ECOLOGY OF THE LEGAL ACADEMY

So far, my investigation has been most descriptive. I’ve talked about the old and the new worlds of legal scholarship and described the moves from long form to short form, from exclusive rights to open access, and from intermediaries to disintermediation. In this Part of the Article, I want to dig a bit deeper into the why questions. What are the driving forces?

A. *The Economics of Legal Scholarship*

We can begin with the economics of legal scholarship—viewed in a fairly simple and common-sense way. Let’s start with the supply side.

1. *Supply Side: Intrinsic and Extrinsic Rewards*

Why do legal scholars write legal scholarship? Of course, the answer depends on the individual, but almost every really good legal scholar will tell you that they like to think and write about legal problems and issues. We’ve all heard someone say, “I would pay them to let me do this.” I want to call this

motivation “intrinsic.” Legal scholarship is pursued for its own sake because it produces intrinsic rewards. Let’s not worry too much about why this is the case. Maybe it is natural for humans to want to understand their world. Maybe legal scholars are just geeks who got stroked by their parents and teachers for writing boring papers. For my purpose, the important thing about the intrinsic rewards of legal scholarship is that they are not limited to doing the writing. The intrinsic rewards include being read and having an influence on the way that others think about the law. That’s why we get a kick out of being cited, an even bigger kick about being discussed in text, and a real thrill when we persuade others to see things our way.

Of course, legal scholars are flesh and blood human beings. They are motivated by extrinsic as well as intrinsic rewards. Sometimes there is a conflict between the two. Writing the boring treatise may be lucrative, whereas the serious scholarly article may not produce any immediate payoff. The pursuit of recognition is one thing, but the pursuit of fame is another. And the production of scholarship can lead to the conventional rewards that are doled out to successful academics—a bigger salary, more travel money, an endowed Chair, a program or center, even a better office or parking space! (At certain universities, parking spaces are the ultimate academic perk—beyond price.) When these rewards are dished out, readership becomes important for another reason. Universities and other institutions that support legal scholarship reward scholars who are widely read, cited, and discussed. The most prestigious chairs and the highest promotion steps conventionally required evidence of an “international reputation,” which is nothing more than international readership. Scholars whose work is unrecognized and unread are less likely to receive the extrinsic rewards.

So both the intrinsic and extrinsic motivations for doing legal scholarship are responsive to readership. The short form, open access, and disintermediation create opportunities for getting more readers. When I give advice to younger colleagues about scholarship, I always say, “You get readers one at a time.” I still say that, because there is a sense in which it is still true. Good serious readers are frequently the result of personal connections made at conventions and conferences. That’s the retail side of selling one’s scholarship. But the short form, open access, and disintermediation create the possibility of wholesaling—of reaching many, many readers, who stumble across your paper as a result of a Google search or who read a post on your blog that leads them on to your long-form article.

2. *Demand Side: Source Costs and Search Costs*

The flip side of the supply side story is the demand side. Demand curves slope downward and to the right. Lower prices translate into more demand. The short form, open access, and disintermediation all combine to lower prices.

The short form lowers prices by reducing the opportunity costs associated with processing legal scholarship. Reading very long articles takes time which could be spent doing other valuable things—like writing one’s own articles. If the valuable idea can be communicated *via* the short form, then the cost for

others of acquiring the idea is reduced and hence the demand for the idea will increase.

Open access lowers prices in an obvious way. Open access is free. Open access on the Internet does involve costs. Internet access itself is not free, and downloading a paper may take quite some time on a dial-up connection. But once you have access to a high-speed Internet connection, the marginal costs of accessing legal scholarship (e.g. by downloading a paper from SSRN) are likely to be very low, especially in comparison to the costs of accessing closed access sources.

Disintermediation is more ambiguous. In some ways, the old world intermediaries reduced search costs, but in other ways they created barriers to access. This topic requires elaboration and is the subject of the next subsection.

B. The Role of Intermediaries

Intermediaries perform a variety of functions, which interact in different ways with the ecology of the legal academy. Let's make a list.

1. Screening

Most obviously, intermediaries perform a screening function. Editorial boards determine what gets published and what doesn't. This screening function imposes costs on authors. Rejections are time consuming and, for many authors, rejections involve emotional wear and tear. The combination of delay and psychic cost means that screening prevents significant amounts of scholarship from reaching its target audience in a timely fashion. Timing is important, both because legal issues are time sensitive and because scholarly debates are time bound—issues become stale and the attention of scholarly communities moves from old to new topics.

2. Certification

Intermediaries perform a certification function that may reduce search costs. If it's in the Yale Law Journal, it must be good. (Well, no one believes that. But they may believe, "If it's in the Yale Law Journal, there's a good chance it's decent.") If it is in the Journal of Legal Studies, it's probably pretty good—that's actually a good bet. Peer-reviewed journals do a much better job of certifying quality than do student-edited law reviews.²³ Of course, it works the other way as well. There are some peer-reviewed journals that one can

²³ David Luban disagrees:

These are the people who have always bridled at the idea that law students rather than peer reviewers should decide what counts as meritorious scholarship. I have never taken this problem seriously. Comparing the quality of articles in the top student-edited law reviews with the quality of articles in the top peer-reviewed philosophy journals (my own scholarly point of reference), I have never been able to detect superiority in the peer-reviewed philosophy journals. By and large, I think that law review editors—at least at the top law reviews, where the editors have an embarrassment of riches to choose from—have been pretty good gatekeepers.

David Luban, Balkinization, Online Legal Scholarship: Thoughts Provoked by Jack's Essay (Sept. 10, 2006), <http://balkin.blogspot.com/2006/09/online-legal-scholarship-thoughts.html>.

count on to publish utter dreck. We might call this “decertification.” But even less prestigious student-edited law reviews occasionally publish a truly path breaking article.

Certification may reduce search costs, but it has other functions as well. Publication in a prestigious peer-reviewed journal or competitive student-edited law review enhances professional reputation. This certification function may also play a role in promotion and tenure decisions as well as lateral hiring decisions. Extrinsic rewards, such as salary and other perks may depend, in part, on certification.

3. *Dissemination*

Intermediaries also play a role in the dissemination of legal scholarship. The Harvard Law Review and the Yale Law Journal have large subscriber bases, as do some peer-reviewed journals. A good academic or legal press can increase the readership of a monograph with effective promotion. Unmediated open access scholarship is widely available, but availability does not imply dissemination. This is a powerful force that favors the continued existence of those intermediaries that can deliver dissemination.

4. *Targeting*

Another role played by intermediaries is targeting or matching authors and readers. When a paper is published in *Philosophy and Public Affairs*, I know that there is a reasonably good chance that I will find the paper interesting and worth reading. On the other hand, if a paper is published in *Political Theory*, there is a good chance that I will find the paper uninteresting, even if it is on a topic that intrigues me. For many intelligent readers, the push and pull of these two journals will be reversed. This targeting function reduces search costs and hence increases readership.

5. *Feedback*

Intermediaries play another important role. They provide direct feedback to authors. This is especially true in the case of peer-reviewed journals, which can provide high quality feedback that may result in significant improvements to the paper. Of course, working papers also provide the opportunity for feedback, but the amount of feedback received from simply posting a paper on the Internet is likely to be highly variable. Submission to a peer-reviewed journal doesn’t guarantee good comments, but it makes it fairly likely one will get them. Posting a paper on SSRN without some additional promotion creates the possibility of high quality feedback, but my guess is that most papers produce few (if any) unsolicited comments.

* * *

In sum, intermediaries perform a variety of functions, some for good, and others for ill. Some of these functions, and particularly, the certification function, are deeply rooted in academic practices and traditions. Will Google hits ever replace good placements in the scheme of academic rewards? Maybe. But not anytime soon.

C. Dissemination

The final topic in my investigation of the interaction of the short form, open access, and disintermediation and the ecology of the legal academy is dissemination. I have already touched on several of the themes that I raise here, but they need to be made explicit.

1. *Dissemination One: The Globalization of the Legal Academy*

My first point is about globalization. Despite the persistence of the global digital divide, access to the Internet at academic institutions is becoming ubiquitous on a global scale. There was a time when this would have been of little interest to most legal scholars. Comparativists might care, because their work depends on transnational communication. Internationalists might care, because it is in the nature of international law that it transcends national boundaries. And scholars of the traditional common-law subjects might care, because there are still practices of cross-citation and influence among common-law jurisdiction. But in the old world of descriptive doctrinal scholarship, the American legal academy was, for the most part, geographically isolated. Most law was “domestic,” creating a kind of acoustic separation between national communities of legal academics.

But interdisciplinarity has changed all that. Law and economics. Law and philosophy. Law and positive political theory. Legal history. Empirical legal scholarship. Interdisciplinary legal scholarship is practiced transnationally. That means that there is a global audience for contemporary legal scholarship.

Let me tell a story to illustrate this point. In December of 2005, I was at Sun-Yat Sen University in Guangzhou, China. I was speaking at a conference about law and economic development. The conference was aimed at Chinese legal academics, but several graduate and undergraduate law students were in attendance to observe and to serve as translators. At some point in the conference, someone asked me to meet with another group of students who were not in attendance at the conference. It turns out that these students—mostly undergraduates—had downloaded some of my articles from SSRN. They were particularly interested in my work on virtue jurisprudence, because of the affinities between Aristotelian and Confucian legal theory. Some of these students were familiar with Legal Theory Blog, even though it is blocked (because it is hosted by blogspot.com) by the Chinese government.

The globalization of legal scholarship requires open access. Cost barriers are significant even in the United States. For example, as you move from major research universities to regional universities to local colleges, the access of faculty and students to closed electronic databases (Westlaw, LexisNexis, JSTOR, etc.) begins to become very sketchy. In the least-developed countries, such access is virtually nonexistent. Internet access is affordable, but subscriptions to expensive proprietary online services are inconceivable.

2. *Dissemination Two: Legal Scholarship Wants to be Free*

The conventional wisdom is that information should be treated as a toll good. Information isn't a private good because consumption of information is nonrivalrous. Exclusive legal rights can create excludability, and hence,

information can become a toll good. It should be treated as a toll good to create incentives for the creation of new information. Whatever we think about that story as a general matter, it has limited applicability to most contemporary legal scholarship—which is gifted rather than sold by its creators. In other words, legal scholarship wants to be free. Or to put the point less poetically, legal scholars want to be read. Exclusive rights are a barrier to readership. Open access removes the barriers created by exclusive rights. So, legal scholars want (or should) want open access. Q.E.D.

3. *Dissemination Three: Disintermediation and Immediacy*

The combination of the long form with intermediation has a dramatic effect on the pace of legal scholarship. Long form scholarship has long lead times. The traditional multivolume treatise took years or even decades to produce. The old fashioned “major law review article” could—under the best of circumstances—be written in a single year and published a few months later, but it frequently took three or more years from conception to publication. The contrast to short-form open access scholarship can be dramatic. The idea paper can be written and posted on SSRN in days or weeks. The blog post can be written and posted in minutes or hours. Back in the day, scholarly reaction to a Supreme Court decision began with the Supreme Court issue of the Harvard Law Review, published in the November issue, several months after the end of the Supreme Court’s term in late June or early July.

In other words, disintermediation produces immediacy. Duh! It accelerates the speed at which ideas emerge, contend, die, and evolve. Scholarly debates that once took years—literally years—now can take place in days, weeks, or months. The recent controversy over Cass Sunstein and Adrian Vermeule’s article on the death penalty²⁴ is a wonderful illustration. Within days of the articles being posted on SSRN, a full-fledged debate broke out in the blogosphere,²⁵ followed by more traditional debates in the pages of the law reviews.²⁶

A very dramatic example of the importance of immediacy is provided by the way that the blogosphere reacted to Judge Anna Diggs Taylor’s opinion in *ACLU v. NSA*. For example, Jack Balkin wrote, “Although the court reaches the right result—that the program is illegal, [sic] much of the opinion is disappointing, and I would even suggest, a bit confused.” The *New York Times*,

²⁴ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

²⁵ See, e.g., Eugene Volokh, *The Volokh Conspiracy*, Cass Sunstein & Adrian Vermeule for the Death Penalty (March 23, 2005), http://volokh.com/archives/archive_2005_03_20-2005_03_26.shtml#1111616457; Kieran Healy, *Crooked Timber*, Deterrence and the Death Penalty (March 24, 2005), <http://crookedtimber.org/2005/03/24/deterrence-and-the-death-penalty/#comments>; Dan Merkel, *PrawfsBlawg*, Comments on Sunstein and Vermeule’s Death Penalty Paper (May 4, 2005), http://prawfsblawg.blogs.com/prawfsblawg/2005/05/comments_on_sun.html.

²⁶ See, e.g., Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005); Daniel R. Williams, *The Futile Debate over the Morality of the Death Penalty: A Critical Commentary on the Steiker and Sunstein-Vermeule Debate*, 10 LEWIS & CLARK L. REV. 625 (2006).

which had run an editorial lavishly praising the decision,²⁷ then published a front page story that acknowledged the severe beating it had taken in the blogosphere.²⁸

4. *Dissemination Four: An Objection and an Answer: "I Only Want to be Read by the 'Right People'"*

One final point about dissemination. When I talk with other law professors about open access and blogging, I frequently encounter skepticism about the value of dissemination. This reaction takes on a particular form in discussions of the drawbacks of closed access peer-reviewed journals:

"I only want to be read by the 'right people.'"

Let's call this the "right-people thesis." The idea behind the right-people thesis is that peer-reviewed journals create a community of high-quality readers—tenured and tenure-track academics, who have access to these journals both in paper and electronic form. This may create barriers to access—for students, for everyone at non-elite institutions, and for almost everyone outside the most developed nations.

Of course, there is something to the right-people thesis. Sophisticated legal scholarship is frequently technical and inaccessible to readers without extensive and intensive training. Even if it is accessible to readers outside the cognoscenti, it will be rare for someone outside the elite legal academy to make a significant new contribution to the most sophisticated scholarly debates.

Rare. Difficult. Not nonexistent. Not impossible. Especially not now. Because the global Internet, the World Wide Web, and open access scholarship have opened new doors for the intelligent and ambitious. I strongly suspect that there is extraordinary talent located outside the elite legal academy of the most developed nations. The smart and motivated are everywhere. The "right people" are the people who can contribute significant new ideas to scholarly debates. And you never know where you will find them. Maybe in Cambridge, Massachusetts, but maybe in Mumbai, Guangzhou, or Sophia.

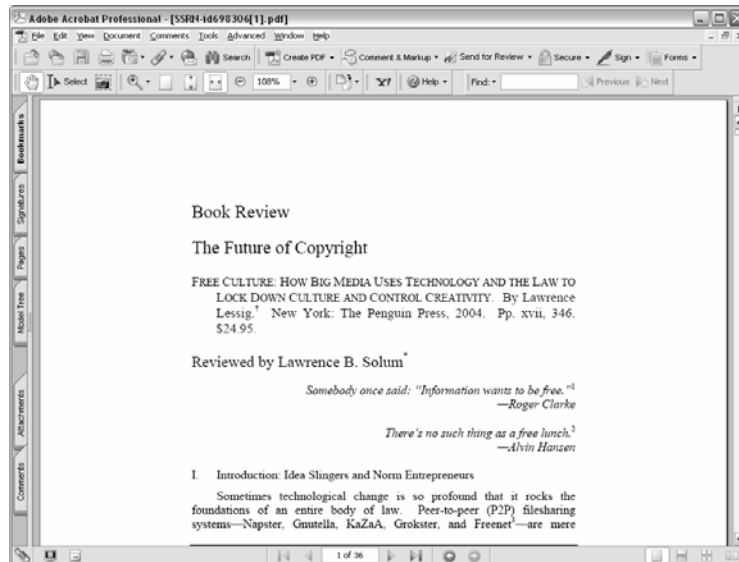
V. CONCLUSION: A SCHOLAR'S TALE

The new world of legal scholarship is the world of the open access, disintermediated, short form. It's the world of short papers on SSRN, blog entries, and wikis. It's an open access world. And that world will be different in ways both simple and profound. It won't just be a cut and paste job. Not just old wine in new vessels.

²⁷ Editorial, *Ruling for the Law*, N.Y. TIMES, Aug. 18, 2006, at A18, available at <http://select.nytimes.com/gst/abstract.html?res=F40D15FE3E5A0C7B8DDDA10894DE404482>.

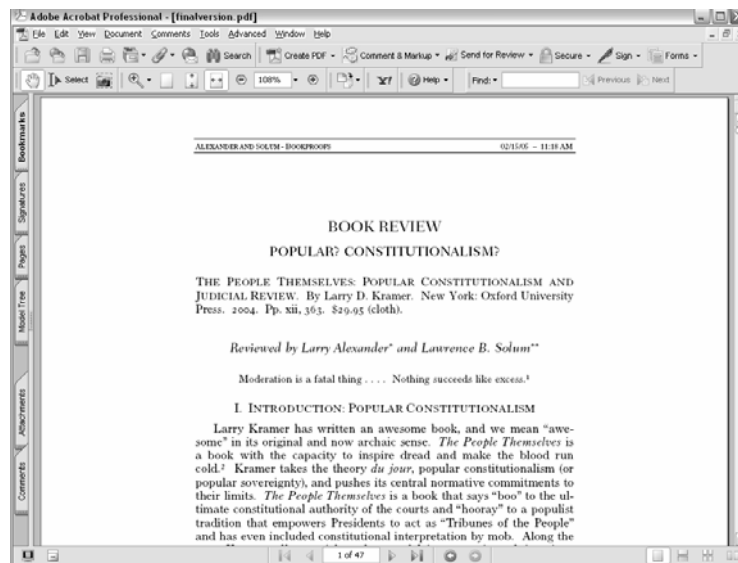
²⁸ Adam Liptak & Eric Lichtblau, *Experts Fault Reasoning in Surveillance Decision*, N.Y. TIMES, Aug. 19, 2006, at A1, available at <http://www.nytimes.com/2006/08/19/washington/19ruling.html?ei=5088&en=5f8f4b2cc84ad621&ex=1313640000&partner=rssnyt&emc=rss&pagewanted=print>.

The new world of legal scholarship will be different in ways that we can only begin to imagine. I can't tell you how that world will look, but I can tell you a story about how the new world of legal scholarship has affected me and the way that I do legal scholarship. Of course, I've been telling you that story all along. If you've read this far, then you've surely picked up on the fact this isn't your father's law review article. Because blogging changed me and the way that I think about writing.



Here's the story. When Larry Lessig published *Free Culture*, I decided that I wanted to blog about the book. Not 50 words, or 100 words, but an extended treatment. The result was a six part series of posts under the rubric, *The Legal Theory Bookclub*. It was blogging—so it was not your typical law review prose. When I blogged, I found a voice that sounded more like me—more like the voice I use when I converse with colleagues about ideas. When the Texas Law Review approached me with the idea of publishing these posts, it seemed like a no brainer. *Why not?* And part of the “why not?” is that the University of Texas students wanted the blog posts—they wanted something that was outside the norm, that involved a more personal voice.

And that experience has carried over to other writing. When I reviewed another one of Larry's books for the *Harvard Law Review* in collaboration with Larry Alexander, the content and style of the review was influenced in myriad ways, both substantively and stylistically by my blogging. How can you keep them down on the farm once they've seen Patee? Once you've experienced the disintermediated short form, the long form will never be the same again. And the disintermediated short form has already arrived.



I don't pretend to know the future of legal scholarship, but I do know this. The future is not the one hundred page law review article. The future is not the editorial board. And one more thing. As Yoda might put it, "Open access, shall the future be."