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### Why Blogs Are Bad for Legal Scholarship

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# THE YALE LAW JOURNAL POCKET PART

BRIAN LEITER

## Why Blogs Are Bad for Legal Scholarship

The best legal scholarship is increasingly interdisciplinary in nature, and its successful production, evaluation, and distribution generally requires multi-disciplinary expertise at a reasonably high level. Unfortunately, the Internet in general, and blogs in particular, eviscerate and obscure expertise because the Internet's most distinctive feature is the elimination of mediating boundaries: of distance, experience, education, and intelligence. While the elimination of the first is an advantage, the elimination of the others poses problems for serious scholarship.

I am going to focus on blogs, rather than the Internet generally, because the Internet has some advantages for legal scholarship, largely related to its capacity to make geographic distance irrelevant. I can post a paper on the Social Science Research Network (SSRN) and get helpful feedback from fine scholars I have never met and to whom I otherwise likely never would have thought to send my work. With e-mail, I can have a modest dialogue with these same scholars, even if we never have occasion to meet in person.

Blogs differ from other Internet services because they combine three characteristics: they are unmediated (like so much of what is on the Internet), public (like SSRN), and normative (like much e-mail about scholarly topics). It is this conjunction that makes blogs special, and especially dangerous—at least for *legal* scholarship. (Philosophy, my other academic field, is less vulnerable on this score, for reasons I'll return to in a moment.) Any second-rate scholar can have an opinion, however ignorant or confused, about the merits of someone's work, and express that opinion in an e-mail to a colleague elsewhere. Now imagine that same ignorant or confused opinion broadcast to thousands: that is what blogs make possible. Indeed, blogs do more than that: they make possible the repeated and systematic broadcast of non-expert opinions, opinions that can then be picked up and amplified by other non-expert blogs. The result is often what Timur Kuran and Cass Sunstein would call an "availability cascade," that is,

a self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse. The driving mechanism involves a combination of informational and reputational motives: Individuals endorse the perception partly by learning from the apparent beliefs of others and partly by distorting their public responses in the interest of maintaining social acceptance. Availability entrepreneurs—activists who manipulate the content of public discourse—strive to trigger availability cascades likely to advance their agendas.<sup>1</sup>

The underlying speculative psychology here may or may not be accurate, but the phenomenon seems real enough: an opinion that appears to be informed gains credibility by virtue of being repeated and thus becoming current in discourse.

The relevance to the blogging phenomenon should be clear enough. Imagine that the author of the widely read *Generic Law Blog* runs a glowing post on Monday morning declaring his good friend's new article to be "an excellent discussion, much worth reading." By Monday evening, all those who either think *Generic Law Blog* knows what it is talking about, or who want to be part of the network of blogs that *Generic Law Blog* links to and promotes, will have echoed that opinion, and soon enough there will be a genuine blogospheric buzz about an article that, as far as any expert might be concerned, is not worth the paper it is written on.

A blogospheric "buzz" is one thing, of course, and real scholarly impact is another. But here is where legal scholarship is especially vulnerable. For availability cascades won't work in other disciplines where those receiving the message are, themselves, experts or quasi-experts. If, on my widely read philosophy blog,<sup>2</sup> I tried to create an availability cascade on behalf of the claim that Derrida was the most important figure in late-twentieth-century philosophy, the main result would be that people would stop reading my blog. Philosophy faculty and graduate students have enough expertise to know that Derrida is an intellectual fraud, and my opining otherwise would change nothing.

Unlike philosophy blogs, law blogs are susceptible to availability cascades, and for two reasons. One reason is that the *legal academy* often lacks expert mediators. To be sure, there are plenty of experts who read law blogs and who

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1. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683 (1999).
  2. Leiter Reports: A Group Blog, <http://www.leiterreports.typepad.com>. The site averages well over 4000 visits per day.

can tell right away when the half-baked tripe of *Generic Law Blog*'s good friend is being passed off as a "significant" contribution. The problem is that reputational effects in the legal academy are mediated by two institutions whose primary arbiters are not, themselves, experts or even quasi-experts, and so are especially vulnerable to availability cascades. First, one of the major venues for legal scholarship remains the student-edited law reviews, and the student editors of these journals are only irregularly and by happenstance in a position to offer expert resistance to an availability cascade initiated by the law blogs. Second, the legal academy, because of the enormous public interest in law, is more susceptible to the journalistic reception of legal ideas, and journalists are, with rare exceptions, not experts. Even those journalists who regularly cover law tend to be especially susceptible to what *apparently* more expert law professors with blogs have to say. With scholarly discourse in law hostage, at least partly, to these two non-expert mediating devices, the potential for availability cascades to lead to the dissemination of weak scholarship is high.

Of course, there is another culprit in this story, namely, the blogs themselves. If the leading law blogs were written only by the leading scholars, the availability cascades that occur would be more likely to raise, rather than lower, the level of scholarly discussion. But that is, unsurprisingly, not the case. The most visible and highly trafficked law-related blogs have one, and only one, thing in common: they were started relatively early in the "blog boom," that is, in 2001 or 2002. (Many, but not all, also tilt noticeably to the right.) Latecomers, like the *Becker-Posner Blog*<sup>3</sup> or the *University of Chicago Law Faculty Blog*,<sup>4</sup> which generally have much higher intellectual content, get nothing like the traffic of the early arrivals. As the economists like to say, the "barriers to entry" to the Internet in general, and the "blogosphere" in particular, are low, and not just in monetary terms. One need not be a good scholar, or an intellectual heavyweight, to have a blog, and if one got into the blog game early enough, one can thrive, especially with an audience of non-expert consumers.

Larry Solum, who performs a valuable service with his *Legal Theory Blog*,<sup>5</sup> has also commented thoughtfully on the role of the Internet in scholarship. He notes that "the dissemination of legal scholarship has traditional[ly] been dominated by intermediaries— institutions that stand between the author and audience,"<sup>6</sup> but that the Internet— whether it is blogs or SSRN or Google— is

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3. The Becker-Posner Blog, <http://www.becker-posner-blog.com>.

4. The University of Chicago Law Faculty Blog, <http://uchicagolaw.typepad.com>.

5. Legal Theory Blog, <http://lsolum.blogspot.com>.

6. Lawrence Solum, *Blogging, Legal Scholarship, and Academic Careers*, Legal Theory Blog, Jan. 9, 2006, [http://lsolum.blogspot.com/archives/2006\\_01\\_01\\_lsolum\\_archive.html#113683990156732487](http://lsolum.blogspot.com/archives/2006_01_01_lsolum_archive.html#113683990156732487).

changing all that. I agree with Professor Solum that this is a “significant” rather than a “trivial” phenomenon, though not, ironically, for his reasons. He acknowledges the importance of legal scholarship’s mediating institutions, such as they are:

One such argument [for why the changes caused by the Internet are trivial] focuses on the idea that only a few specialists are capable of understanding, digesting, evaluating, and interacting with “high level legal scholarship”—the kind published by the best peer-reviewed journals and student-edited law reviews. Of course, there is something to that! The blogosphere may degrade the “signal to noise ratio” of feedback on legal scholarship.

But Professor Solum then praises what he considers the blogs’ significant positive role:

I have been astonished by the thoughtful and genuinely informative comments and blog posts that have come from nonacademic sources. I’m proud to be an academic and I believe in the value of academic institutions. But I think it is both wrong and silly to think that credentials matter more than content.

I wonder whether Professor Solum has overstated the positive significance of these developments. There are, to be sure, many non-academic experts, so opening up discourse to non-academics is plainly not the issue. And one must, of course, agree that “content” matters more than “credentials.” What is “significant” about these developments, but in a way potentially deleterious for scholarship, is that they conspire to create availability cascades that result in inferior work getting the most scholarly attention and, in the process, lowering the general quality of scholarly discourse.

This view of the role of blogs in legal scholarship puts me at odds with a more Panglossian picture, well articulated by Richard Posner in his Hayekian gloss on the blogosphere:

Bloggging is a major new social, political, and economic phenomenon. It is a fresh and striking exemplification of Friedrich Hayek’s thesis that knowledge is widely distributed among people and that the challenge to society is to create mechanisms for pooling that knowledge. The powerful mechanism that was the focus of Hayek’s work, as of economists generally, is the price system (the market). The newest mechanism is the “blogosphere.” There are 4 million blogs. The internet enables the instantaneous pooling (and hence correction,

refinement, and amplification) of the ideas and opinions, facts and images, reportage and scholarship, generated by bloggers.<sup>7</sup>

The familiar problems with Hayek's utopianism about markets afflict this extension of his utopian fantasies to the blogosphere. The marketplace, through the price mechanism, may give us knowledge of what people want, but what people want is hostage to their ignorance and irrationality, the latter two characteristics often exploited by the marketplace. The knowledge we gain from markets, in consequence, is of a peculiar kind: it is not knowledge of what makes people better off or of what makes for good lives, but rather knowledge of the current psychological condition, stunted or manipulated or otherwise, of the populace.

Blogs, like markets, are hostage to the ignorance and irrationality of their most visible proprietors, as well as to that of their readers, and the costs of those cognitive limitations are greatest when blogs purport to critique serious scholarship, a task in which the ability to sort wheat from chaff often turns on intellectual skills that are not widely distributed, even among academics. My guess is that Judge Posner has not, understandably, spent much time actually reading the blogs that are out there. I have seen relatively little evidence of correction and refinement of ideas, facts, and scholarship, and much more amplification and repetition of existing prejudices and ignorance, or, occasionally, feeding frenzies on trivial mistakes in the mainstream media.<sup>8</sup>

One might hope, to be sure, that blogs that have scholarly pretensions would prove to be better mediators, but I have seen little evidence of that either, though I have certainly seen plenty of self-congratulation by like-minded academic bloggers pleased with their ability to make what seem to them to be intellectual advances.

People who run blogs tend to respond badly, indeed harshly, to the suggestion that blogs are not as important as their proprietors think they are. Be that as it may, my sense is that blogs have been bad for legal scholarship, leading to increased visibility for mediocre scholars and half-baked ideas and to a dumbing down of standards and judgments.

Two mechanisms still exist for counteracting these developments. First, more first-rate scholars may enter the blogosphere, and use their pre-Internet *gravitas* to shift the terms of discussion. Second, the shift to peer-refereed publications in the legal academy – most of the best work in law and economics

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7. Richard Posner, *Introduction to the Becker-Posner Blog*, The Becker-Posner Blog, Dec. 5, 2004, [http://www.becker-posner-blog.com/archives/2004/12/introduction\\_to\\_1.html](http://www.becker-posner-blog.com/archives/2004/12/introduction_to_1.html).

8. See, e.g., Brian Leiter, *The Real Story About Eason Jordan the Bloggers Missed*, Leiter Reports: A Group Blog, Sept. 15, 2006, [http://leiterreports.typepad.com/blog/2006/09/the\\_real\\_story\\_.html](http://leiterreports.typepad.com/blog/2006/09/the_real_story_.html).

and law and philosophy, for example, now appears in faculty-edited journals—will ameliorate the significance of availability cascades on non-expert mediators like students and journalists.

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