

# AN INTRODUCTION TO *THE POST*

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To state the obvious, lawyers and law professors are a wordy bunch. For better or worse, they love to share what's on their minds, and they embrace new technologies, like blogs, to do so. The most popular legal blogs draw millions of visitors per year,<sup>1</sup> a readership that even the most widely read law reviews can envy.<sup>2</sup> The explosion of legal blogs in the last ten years or so<sup>3</sup> inspires us to ask: What constitutes good legal blog writing? And is it possible to identify the best of the best? In that spirit, we introduce *The Post*.

## THE ELEMENTS OF GOOD LEGAL BLOGGING

### *Blogging*

In showcasing the best of legal blogging – and we use “blogging” loosely to include whatever other digital platforms the future holds for short-form, real-time, public writing – we embrace blogging for what it is, no more and no less. We intentionally do not venture into larger debates about whether legal blogging, even at its best, rises (or descends, or congeals, or metastasizes) to the level of legal scholarship, and we accept that they are two different things, at least for now. We are, however, inspired by the debate.

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<sup>1</sup> Paul Caron, *Law Prof Blog Traffic Rankings*, Tax Prof Blog, [http://taxprof.typepad.com/taxprof\\_blog/2011/06/law-prof-.html#tp](http://taxprof.typepad.com/taxprof_blog/2011/06/law-prof-.html#tp) (June 14, 2011).

<sup>2</sup> Davies, Ross E., *The Dipping Point: Law Review Circulation 2010*, Green Bag Almanac and Reader, 547-554 (2011); George Mason Law & Economics Research Paper No. 11-01, available at SSRN: <http://ssrn.com/abstract=1738530>.

<sup>3</sup> Early-adopter legal blogs that continue to thrive include Overlawyered (founded in 1999), Volokh Conspiracy (2002), and How Appealing (2002).

Five years ago, a number of prominent legal academics (most of them also rock-star bloggers) convened at Harvard Law School for a symposium<sup>4</sup> dedicated to the question of blogging as scholarship. A rough agreement emerged (with one dissent from the lone non-blogger) that legal blogging can seed and nurture “micro-discoveries”<sup>5</sup> or “pre-scholarship”<sup>6</sup> that has the potential to bloom into the longer-form, more sophisticated, more mediated, and more “mulled”<sup>7</sup> over scholarship than is typically featured in law reviews. They agreed on the shorthand “bloggership”<sup>8</sup> to describe this kind of proto-scholarly blogging. That concept of legal blogging fits nicely with the founding mission of the *Journal of Law*: to incubate promising ideas in the hope that a subset will merit and inspire further development by someone, somewhere.<sup>9</sup>

We therefore don’t presume to elevate blogging into something it’s not. Not every idea or observation merits 100 pages as an article, but some can influence courts, academics, practitioners, law-makers, and the public nonetheless. (And then there are the ideas and observations that do not merit 100 words, or even ten, and yet find their way onto reputable blogs.) The aspects of blogging that

<sup>4</sup> “Bloggership: How Blogs are Transforming Legal Scholarship” symposium held at Harvard Law School on April 28, 2006. Papers available at SSRN: <http://www.ssrn.com/link/Bloggership-2006.html>.

<sup>5</sup> Eugene Volokh, *Scholarship, Blogging and Trade-offs: On Discovering, Disseminating, and Doing [Very Early Draft]* (April 2006). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference Paper; UCLA School of Law Research Paper No. 06-17, at 8. Available at SSRN: <http://ssrn.com/abstract=898172>.

<sup>6</sup> D. Gordon Smith, *A Case Study in Bloggership* (May 15, 2007). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference Paper; Univ. of Wisconsin Legal Studies Research Paper No. 1017, at 5; Washington University Law Review, Vol. 84, 2007. Available at SSRN: <http://ssrn.com/abstract=898178>.

<sup>7</sup> Orin S. Kerr, *Blogs and the Legal Academy* (April 14, 2006). GWU Law School Public Law Research Paper No. 203, at 6; Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference. Available at SSRN: <http://ssrn.com/abstract=896994>.

<sup>8</sup> Paul L. Caron, *Are Scholars Better Bloggers?* (November 1, 2007). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship; Washington University Law Review, Vol. 84, at 1025 (2006); U of Cincinnati Public Law Research Paper No. 07-12. Available at SSRN: <http://ssrn.com/abstract=947637>.

<sup>9</sup> Ross E. Davies, *Like Water for Law Reviews*, 1 J.L. 1 (2011).

arguably make it unsuitable for traditional scholarly publishing – its public stream of consciousness, its cheerful engagement with the wider world (however unsophisticated, from the perspective of academia), the trade-offs inherent in quick thinking and quick writing – those, we argue, are features rather than bugs.

For the same reason, we are also receptive to blog posts that nurture further discussion *after* and in response to publication of a true-blue law review article. Many law reviews are still Web 1.0 creatures: they put content up on their websites, and that's the end of their engagement with the wider world within those four corners. It's not common, as of now, for law reviews to provide a 2.0 experience, by putting up content and inviting conversation in the form of a discussion board or comments section. So as excited as we are about proto-scholarship that is born on a blog and matures into full scholarship in a law review article, we're also curious about the reverse: law review articles that inspire conversation which by necessity must migrate over to a blog to find a receptive online home for discussion.

### *Noteworthiness*

Even if one accepts the merits of our project in principle, how does one determine good, let alone the *best*, legal blogging?

While we hope to keep an open mind about different approaches to legal blogging, most fundamentally we are looking for blog posts that pose an interesting question or make a novel observation worthy of longer-term notice. (Blogs are like supermodels: as a practical matter, their longevity must be measured in dog years, and any single blog post that continues to make an impression even months later is something special.) That means we are looking for the best of “bloggership,” but also for posts that do not necessarily aspire to become law review articles when they grow up. While scholars need to worry primarily, and perhaps solely, whether their academic colleagues find their ideas worthwhile, *The Post* will also take note if, for example, a court finds a blog posting persuasive or on point,<sup>10</sup>

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<sup>10</sup> “Most law professors want their law review articles to influence courts . . . . Yet law clerks, I’m told, often read blogs.” Volokh, *supra* note 5, at 5. However, it is probably

or a legal blog post inspires rambunctious and interesting conversation among astute commenters. The sphere of influence and audience is naturally wider for blogs than it is for long-form scholarship, and we embrace that wider radius.

### *Writing Style*

We are also suckers for good writing in and of itself. It requires no daring to note that law review writing can verge on the sclerotic, the pompous, and the incomprehensible. By featuring the great writing that some bloggers manage to produce on the fly, we hope to inspire more writers and editors working on traditional platforms to adopt and encourage a fresher, more accessible writing style.

### *Authorship*

And who is a legal *blogger* for our purposes? There we will also look beyond the boundaries of academia. Law school professors are prolific bloggers, but so are practitioners, and they too can have micro- and macro-discoveries worthy of notice. We welcome their observations about the law shaped by their experience in the trenches.

### *Subject Matter*

By *legal* blogging, we mean blogging that relates to the law (in the capital-L sense), specific laws, or legal systems, as opposed to writing about the ins and outs of legal practice, the state of law school education, and other ancillary topics. There is much fine blogging to be found in that wider radius of subject matter, but *The Post* will focus on writing about law and laws and legal systems, full stop. The intended audience should also be legally trained rather than an educated public at large.

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worth keeping in mind the possibility that “[t]o be cited by a court on an issue laden with political implications is not to have influence, but to be used.” Paul D. Carrington, *Stewards of Democracy: Law as a Public Profession* 70 (1999).

*Format*

We will take different approaches with format. Sometimes interesting ideas emerge within a single blog posting, but other times the real action happens in the back-and-forth of the comments section. Blogging beautifully takes care of Socrates' pre-2.0 objection to putting thoughts down in writing: Every word, once written, "is bandied about, alike among those who understand and those who have no interest in it" and "has no power to protect or help itself."<sup>11</sup> Perhaps only the smallest minority of blog comments rise to the level of Socratic dialogues, but the blog medium at least enables a written idea to evolve in dialectical fashion, assuming there's sufficient momentum and expertise among its readership. Perhaps Socrates would have cheered blogging? Who knows? Alternatively, perhaps the law-blogsphere is now so large and energetic that its denizens are participating in the legal equivalent of the Shakespearean Infinite Monkey Theorem.<sup>12</sup> We'll use our judgment in deciding whether to showcase blog postings in their stand-alone form, or to excerpt the most salient parts of longer, organic conversations.

OUR ESTEEMED JUDGES

Because the blogosphere is vast (even when restricted to law-related blogs), we rely on a small group of editor-experts to help us identify the posts that are likely to hold up, age well, and influence legal thinking in one way or another. These experts represent a mix of academics and practitioners, have some experience blogging themselves (although they will not be encouraged to nominate their own writing), and – most importantly – are voracious, appreciative, and intelligent consumers of legal blogs. They are donating their good judgment and eagle eyes in helping to curate our selections. Throughout the year, they will be nominating posts to be

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<sup>11</sup> Plato, *Phaedrus* 275e (Fowler translation), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0174%3Atext%3DPhaedrus%3Asection%3D275e>.

<sup>12</sup> *Virtual Monkeys Write Shakespeare*, <http://www.bbc.co.uk/news/technology-15060310> (September 26, 2011).

voted on by the panel; as editor-in-chief of *The Post*, I will determine how many votes are required for a post to be featured here, and I will aim to stay within a yearly range of 5-20 featured posts with a minimum of arbitrariness or capriciousness.

Beyond those guidelines, we won't try to circumscribe the elements of "best legal blogging" any further *ex ante*, but rather hope to distill a definition over time as our experts deduce the features that tie the finest examples together. We view *The Post* as a start-up to be incubated in its own right, and there will be course corrections and refinements along the way. There's a big, dynamic world of legal blogging out there, and through *The Post*, we hope to find and feature the best. //