

SCHOLARSHIP, BLOGGING, AND TRADEOFFS: ON DISCOVERING, DISSEMINATING, AND DOING

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HOW WE SHOULD SPEND OUR TIME

Sometimes, when I'm in the middle of a heavy blogging spurt, I ask myself: Shouldn't I be spending this time writing law review articles instead?

But maybe, when I'm in the middle of writing a law review article, I should ask myself: Shouldn't I be spending this time blogging instead? My blog gets about 20,000 unique visitors each weekday; I don't know how many people read my articles, but I'm pretty sure it's far from 20,000.

True, the article readers are presumably more likely to be the ones we scholars want to influence with what we write. But how much more likely? Just how much influence do our law review articles actually have? Given this uncertainty, and the suspicion that a typical law review article's influence is far from vast, just how much should we value our "traditional scholarship," and what fraction of our years should we devote to it? These are not rhetorical questions; I honestly want to know the answers, and I suspect many other academic bloggers do too.

The academic's job has long been understood as involving at least three components:

- (1) *Discovering* (or, if you prefer, creating) knowledge.
- (2) *Disseminating* knowledge and ideas, both (a) those discovered by oneself and (b) those discovered by others. This is often done by applying the knowledge and ideas to recent events, for instance when appearing on a radio program, writing an op-ed, or talking to a reporter.
- (3) *Doing* things in the sense of affecting law, culture, or the physical world—for instance, litigating landmark cases, helping draft statutes, translating scientific discoveries into products, helping fight environmental problems, and the like. Much doing is a

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result of disseminating your views to the right people; but most disseminating never quite amounts to doing.

All these have long been seen as fitting within the “scholarship, teaching, service” triad on which academics are often evaluated.¹ When we praise someone’s creativity or originality, we’re generally praising his ability to discover, which is often thought of as the highest calling of a scholar. But people also often praise people’s writing or teaching ability, which chiefly relate to disseminating. We admire (or at least envy) “public intellectuals,” who achieve prominence through effective commentary, including commentary that helpfully applies others’ discoveries rather than their own. And most of us, I’d wager, also admire scholars who are able to change the world (or even a little corner of the world), even if they change the world mostly using others’ ideas.

Before blogging, most of us spent relatively little of our time disseminating ideas or knowledge to the public. The bulk of our time was likely spent in scholarship (discovering). A good deal was spent in teaching (dissemination to students). For some of us, but likely not most of us, a good deal was spent in doing (chiefly consulting on cases). And while we’d sometimes talk to reporters or write op-eds, this took up a small part of our day.

Yet while this was partly influenced by professional norms—you’ll get tenure, promotion, and colleagues’ respect more easily through law review articles than through op-eds—it was also largely shaped by the way the media works. Writing an op-ed is, I’ve found, a limiting and unpleasant experience. You need to write 650 words, generally not substantially more and not substantially less. The piece needs to be closely tied to a current news event; even a few days’ delay can make your piece unsellable. Some topics aren’t very sellable regardless of whether there’s a news hook.

You also need to spend time pitching the piece to newspaper editors, one at a time, until you either get an acceptance or your news hook fades away. Even someone who wants to disseminate his ideas to the public

1. See, e.g., Scott Baker, Stephen J. Choi & Mitu Gulati, *The Rat Race as an Information-Forcing Device*, 81 IND. L.J. 53, 58 n.9 (2006). Discovering generally corresponds to “scholarship.” When we praise a scholar’s creativity or originality, we’re usually praising him as a discoverer. Disseminating fits both within “teaching” and within part of the “service” that people do: popularizing one’s work for the public, writing op-eds, giving speeches to professional groups, civic groups, or high school students, and the like. Effectively disseminating a work to colleagues (for instance, by writing well, and by taking the trouble to present the work at conferences and workshops) also helps increase the influence of one’s scholarship within the scholarly community. Doing fits within “service” as well, though in some disciplines—such as classics or pure mathematics—there are generally few opportunities for pure doing, as distinguished from discovering and disseminating.

might not want to go through this hassle. “Should I spend my time discovering legal knowledge or disseminating legal knowledge to the public?” wasn’t much of a question for most of us.²

Then along came blogging, and the question became much more important. Blogging is fun, something no one ever accused op-ed writing of being. It takes work, like all writing does, but the ratio of interesting work to scutwork is much higher. You write about whatever you want; never mind whether there’s a news hook, never mind whether only five percent of your readers will find it interesting,³ never mind whether it’s only 100 words long or maybe 1000.

You don’t need to please, or even deal with, an editor. You don’t even have to proofread and polish as much. Polished work is more effective, but people forgive typos and other little lapses more than they would in print: readers realize that many academic bloggers will be willing and able to blog—or at least blog timely and often—only if they can do so with a minimum investment of effort.

And, to my surprise, when you blog you actually create and interact with a community—naturally not a community of friends but at least a community of friendly acquaintances. My op-eds in the *Wall Street Journal*—which has an official circulation of over two million⁴—would occasionally lead to a couple of e-mails from readers. Before I had comments, blog posts would sometimes get me dozens of messages, some hostile but many friendly, thoughtful, and even flattering. Now that I’ve enabled comments, I get fewer e-mails, but I still get some, sometimes arguing with me, sometimes complimenting me, often pointing me to other interesting stories to cover; and the comments themselves end up being a conversation triggered by our posts, and often responding in thoughtful ways to our posts.

I suspect this means that many of my blog readers read my work more carefully, and take it more seriously, than do the readers of my occasional op-eds. Naturally, newspaper readers can’t e-mail me as easily as can blog readers; but “Eugene Volokh” isn’t hard to find with a quick Google search. I’d bet the main reason for the vast difference in the readers-to-e-

2. I say this as someone who, despite all this, wrote over forty op-eds, in publications from the *Wall Street Journal* to the *Topeka Capital-Journal*, before I went into blogging, and a few dozen more since I went into blogging.

3. Well, maybe “mostly never mind.” I know that if I keep writing stuff that only a few of my readers find interesting, eventually they’ll turn off. But if I post such niche material—math puzzles, abstruse doctrinal discoveries, and the like—every so often, no one will complain.

4. Audit Bureau of Circulations, Top 200 Newspapers by Largest Reported Circulation (2006), <http://www.accessabc.com/reader/top150.htm>.

mailers ratios among the media is that people who read my blog posts read them because they're *mine*, and not just something they stumbled on. They feel a connection with me, and thus, I hope, are more likely to be open to being persuaded by what I say.

What's more, their feeling and acting on a connection with me makes me feel more of a connection with them. I suspect that most bloggers, especially those who allow comments, like the feeling that they've built this odd relationship with a bunch of often interesting and thoughtful strangers—the feeling that they've “pioneer[ed] a new patch of common ground” that they and people like them can enjoy together.⁵ It's hard to get that from an op-ed.⁶

So now, more than ever before, we legal academics have to, at least in some measure, choose. Should we spend the bulk of our time discovering, with the reputational, professional, and emotional benefits that this produces? Or should we spend more of the time disseminating, mostly disseminating views that are our own but are based on others' discoveries, with the very different reputational, professional, and emotional benefits that this produces?

Sure, it's our choice, at least once we have tenure. But how should we exercise that choice? Yes, we're probably better off both discovering and disseminating, if we're good at both and enjoy both. But how much of both?

THE PROMINENCE DIVIDEND?

One good way of solving either/or problems is to find synergies rather than reconciling oneself to tradeoffs. Can we, at least sometimes, use blogging as a way of advancing our discovering and doing?

Here's a tempting speculation: blogging makes you better known, and blogging on legal issues makes you better known among law students, lawyers, law clerks, and legal academics. And being well-known:

- (1) increases the likelihood that people who stumble across a law review article with your name on it—for instance, in the results of a Westlaw or Lexis query—will actually read it;

5. Dar Williams, *When Sal's Burned Down*, on Dar Williams, *The Honesty Room* (Razor & Tie 1995).

6. Maybe it's easier to get it from a regular column, but those are even more work, and more scutwork, than op-eds.

- (2) slightly increases the likelihood that law review articles editors will like your next submission, and will push it hard to their colleagues if they do like it;
- (3) increases the likelihood that law review editors will invite you to important symposia in your field;
- (4) increases the likelihood that legislative staffers will call you to get your advice on drafting and revising proposed statutes;
- (5) increases the likelihood that lawyers will call you for help on interesting cases.

This would work best if the decisionmakers routinely read and like your blog, and feel like they're part of the blog's reader community. But it might also work if the decisionmakers have just visited your blog on occasion, or if friends have told them about it. And if this speculation proves accurate, then this means that blogging can help promote your discovering, and advance your doing.

The trouble is that this is all speculation. It sounds reasonable to me, but I can't even provide personal anecdotal evidence for it. I had decent article placements, a decent amount of citations to my articles, and a decent number of calls from legislative staffers before I started blogging; I've had a decent amount after. I'd like to think that blogging can pay a prominence dividend. But does it?

THE BLOG AS A TOOL FOR DISSEMINATING ONE'S OWN DISCOVERIES

Regardless of whether blogging pays a prominence dividend, it gives the blogger an extra audience for posts about his own discoveries. Such disseminating of one's own research has long been seen as an important part of an academic's scholarly (rather than just teaching or service) role; if one has invested all this effort in discovering, it makes sense to spend at least some effort to help the discovery do as much good as possible. And while one can make the discoveries but leave the disseminating to others, in practice few people will be as interested as we are in publicizing our work.

Blogging lets one potentially reach a lot of readers, both lay and professional, who would otherwise not have seen the original work. The cheapest option is just putting up an abstract (perhaps one you've already written) with a link to the paper. A second option is to post the Introduction, post excerpts, or even serialize much of the article by posting an excerpt every few days. The most effective option is also the costliest, though still easier and more flexible than writing an op-ed: summarize

your main arguments, and reframe them in a way that lay readers—or perhaps lawyer readers who are nonetheless not that familiar with the article’s subject matter—better understand.

Now this might seem obvious at some level. But I find that I don’t do as much of this as I probably should. I tend to blog something about my new articles; but while I’ve had success serializing portions of some of my articles, I probably should do this more. And I’ve done little to post key insights from my past articles, insights that might still be fresh to many of my readers even though they’re years old for me.

Should we, as bloggers and scholars, make it a practice to go over our past scholarship, identify the key nuggets of added value, and blog briefly about them? Should we urge our junior colleagues who are bloggers to do the same?

THE BLOG’S READER COMMUNITY AS A RESEARCH TOOL

A blog can also help the blogger discover things. First, a blog is a useful tool for some kinds of research. If you want to find examples of a certain argument or a certain phenomenon, for instance, a Lexis query might not get you far. But if you have thousands of readers—especially ones who feel a sense of community with you, and are thus pleased to help you—some of them might be willing to draw on their own memories, or even their own research skills, to help you. If even one percent can give you examples, that might do the job. And this is especially so if the phenomenon isn’t itself a legal one, but rather a historical or a scientific one: many of your readers may have specialized knowledge in these fields that you, your research assistant, and your research librarians lack.

Such posts (often called “blegging,” referring to a mix of blog and blegging⁷) are pretty common; and I’ve gotten some useful feedback this way.⁸ I’ve also wondered whether we can combine a blog community and a faculty community so that nonblogger colleagues can take advantage of

7. Thanks to John Derbyshire, who apparently coined this word, and to James Fulford, who responded to my own bleg on the subject and pointed me to Derbyshire as the likely originator of the word. See John Derbyshire, *July Diary*, NAT’L REV. ONLINE, Aug. 1, 2002; Posting of Eugene Volokh to The Volokh Conspiracy, <http://volokh.com/posts/1145423782.shtml>, *Blegging About “Blegging”* (Apr. 19, 2006, 1:16 EST); James Fulford comment on The Volokh Conspiracy, <http://volokh.com/posts/1145423782.shtml#83182> (Apr. 19, 2006, 1:36 EST).

8. One recent example, though involving research for a “teaching” book more than a “scholarship” book: I was updating my *Academic Legal Writing* book to include a chapter on participating in law review write-on competitions; I had some ideas for advice to give students, but I figured that current or recent law review editors would have some good tips that I had missed. I posted a query on the blog, and got a lot of useful input.

the bloggers' audiences—perhaps the blog readers will respond to a blogger's request even if the request comes on behalf of the blogger's colleague. This seems like a useful tool to experiment with, at least if one doesn't experiment often enough to alienate the blog's readers.

Second, a blogger can, at least in theory, use the blog to get feedback on the arguments that he's putting in his articles. Blog readers might provide useful counterarguments, or at least identify places where the blogger's argument is less persuasive than he'd like it to be.

Most blog readers won't be interested in taking the time to read one's arguments (either the whole article or even a short excerpt), and most won't be knowledgeable enough to provide very useful reactions. Reactions from colleagues, or reactions on academic discussion lists, are likely to be more helpful. But as we know, it's always hard to get readers for one's drafts, and beggars can't be choosers. Offering the article for commentary by blog readers (some of whom will be scholars or at least relatively knowledgeable professionals or students) might provide at least some extra feedback, though, in my experience, not a vast amount.

THE BLOG AS A TOOL FOR DOING: BLOGGING ABOUT PENDING CASES

Most law professors want their law review articles to influence courts. We hope our articles get cited by lawyers, and read by judges and their clerks. We sometimes even send reprints of our articles to the chambers of judges who are deciding cases to which the articles are relevant.

Unfortunately, we rarely have articles that are squarely on point. At best, we may have an article that is relevant to a case, but the relevance might take some explaining. More likely, we may have ideas about a pending case that we haven't yet fully expressed in an article.

We can, of course, write an article tailored to the pending case, but then we have to get the article published in time; and, after the case is decided, chances are the article will be obsolete. If the article influences the court, we can feel good and get credit. But if the court ignores the article (always the likelier scenario), we'll have done a lot of work for nothing. We can also write amicus briefs—but that's at least moderately time-consuming, and often involves some modest expense and hassle.

Yet law clerks, I'm told, often read blogs. I suspect *How Appealing* is the most commonly read one, but I imagine that *InstaPundit* and even *The Volokh Conspiracy* have at least some law clerk readers. Especially when a case is being considered by a many-member court, such as the Supreme Court, chances are good that at least one of the clerks on the court will read any posts on the case that are linked to by *How Appealing*. And even

if the clerks who read the posts aren't working on the case themselves, they might pass it along to their friends who are.

If the blog post is really interesting, it might make its way to one of the judges, either directly or by influencing the clerk's analysis. One piece of evidence for this is that blog posts have been cited over thirty times in court decisions.⁹ Presumably even more blog posts have been read by the judges or clerks, and in some measure influenced their thinking, but haven't been cited.

A blog post is thus a less reliable way of reaching judges and clerks than is an amicus brief—an amicus brief will be read by someone in each chambers, and a blog post might not be. But it's much easier and quicker to produce than an amicus brief; it's often all we can do, since in many cases we know that we won't take the time and trouble to write a brief; and it does double duty as a way of disseminating the blogger's views to the public as well as to the judges. (In fact, the blog post has to be written as a message to all the blog's readers; I'm pretty sure that a blog post that obviously aims to reach the judges or clerks working on a case will be looked down on, though I'm not exactly sure why.¹⁰)

Here, however, is an interesting data point: as of August 6, 2006, 24 of the 32 court citations to blogs refer to one blog, Professor Douglas Berman's Sentencing Law and Policy.¹¹ The Volokh Conspiracy has been cited twice, and once was just for the lyrics of a humorous song that we posted. Other blogs have likewise been cited for their posts no more than once.¹² Douglas Berman is doing something right, at least if his goal is to be read by judges and clerks, and influencing court decisions. I'm not sure that the rest of us are.

BLOGGING AND MICRO-DISCOVERIES: A GAP IN THE LEGAL PUBLISHING SYSTEM

So far, I've assumed that blogging involves disseminating preexisting ideas. A blogger might, for instance, describe how existing legal doctrines or concepts apply to current events. Or he might use existing legal tools,

9. Law Blog Metrics [formerly 3L Epiphany], http://3lepiphany.typepad.com/3l_epiphany/2006/08/cases_citing_le.html, *Cases Citing Legal Blogs—Updated List* (Aug. 6, 2006).

10. There'd be no violation of the rules of legal ethics: A blog post is no more an *ex parte* communication than a published law review article or an op-ed in the *New York Times*.

11. Law Blog Metrics, *supra* note 9.

12. Some have been mentioned more often than that as examples of blogs, but not as sources of information or arguments.

whether precedent or certain analytical structures, to critique recent court decisions.

But the process of applying existing principles to new fact patterns or new cases may itself involve “micro-discoveries”: original thinking that isn’t big-think or even middle-think, but that is still a valuable contribution. For example, some time ago there was a bunch of news stories about legislatures trying to ban funeral picketing.¹³ Several readers e-mailed them to me, and suggested I blog about this topic.

Eventually, I cobbled together a short piece that I published in the National Review Online,¹⁴ but that I could have easily done as a post instead. Much of the analysis is pretty banal application of basic First Amendment doctrine, but there are some nonobvious observations within it. For instance, while most lawyers who know anything about First Amendment law will quickly think of the analogy between funeral picketing bans and residential picketing bans, many lawyers don’t realize that *Madsen v. Women’s Health Center*,¹⁵ an abortion clinic picketing case, also had something to say about residential picketing. And because of *Madsen*, bans on residential picketing—and, by analogy, funeral picketing—are probably constitutional only if they are limited to picketing that’s right in front of the home or cemetery that’s being picketed, or perhaps very near. Three-hundred- or five-hundred-foot bubble zones around cemeteries, a favorite of recent funeral picketing bills, are thus likely unconstitutional.

This might be at least a slightly useful micro-discovery.¹⁶ Many law professors wouldn’t want to take the time and trouble to turn it into a full-fledged law review article; there’d be too little payoff for the work involved. Yet there is some value, I think, in the observation. Authors of future articles on funeral picketing (probably law students more than law professors) might benefit from seeing it. So would lawyers who are drafting the laws, or litigating their constitutionality. It’s the sort of

13. The proposed bans were largely responses to the unlovely Fred Phelps, who began by picketing funerals of gays with signs saying things like “God Hates Fags,” and then moved on to picketing funerals of soldiers with signs saying things like “Thank God for 9/11” and “Thank God for Dead Soldiers” (the theory being that God is punishing America for its toleration of homosexuality). Eugene Volokh, *Burying Funeral Protests*, NAT’L REV. ONLINE, Mar. 23, 2006.

14. See Volokh, *supra* note 13.

15. 512 U.S. 753 (1994).

16. A later search revealed to me that a 2000 article on a different topic noted this point in a footnote; but my piece discussed this in a little more detail, and in any event the broader point remains: If it weren’t for the 2000 piece, this would have been a novel, nonobvious, and useful point, though one that’s too slight to turn into a separate law review article.

observation that should be published, and should be preserved for future scholars.

The same is true of many blog posts I've seen—only a small fraction of all law-related blog posts, but a large absolute number. Nonobvious commentary on recent cases, observations about how two seemingly different legal principles have something in common, and discoveries of interesting tidbits in long-forgotten cases or legal documents can all be of some use to future scholars, and are therefore worth preserving for them. One piece of evidence for this is that as of August 2006, there were nearly 500 citations to blog posts in law review articles,¹⁷ and over thirty in court decisions.¹⁸

Yet while blogging makes it easier for these micro-discoveries to be disseminated, this dissemination is ephemeral. Readers will read such blog posts; some other bloggers might even discuss them. But a few months later, they'll be largely forgotten and largely unfindable (though not entirely so, as the citations to blog posts prove), at least so long as Westlaw's JLR database and Lexis's LAWREV database are the main legal research tools.¹⁹

So the law review article system is good at preserving substantial discoveries, but it's not useful for preserving the micro-discoveries. Blogging is good at disseminating micro-discoveries, but it too is bad at preserving them in a way that can help future researchers. So while my co-blogger Orin Kerr is right that blog posts tend to be better than student casenotes at discussing recent cases, and that they *should* eventually largely supplant such casenotes,²⁰ I doubt that they can effectively do so, so long as blog posts aren't memorialized in publications searchable through Westlaw's JLR and Lexis's LAWREV.

It seems to me that there's a good solution to this problem: have some online "publication" that republishes those blog posts (and even op-eds) that actually do contain potentially useful micro-discoveries. This publication—let's call it Law Notes—would have to be filtered by some editor, but this could involve a relatively light screening. And while

17. Law Blog Metrics, http://3lepiphany.typepad.com/31_epiphany/2006/08/law_review_arti.html, *Law Review Articles Citing Legal Blogs* (Aug. 16, 2006).

18. See Law Blog Metrics, *supra* note 9.

19. Many blogs, including my own, are now available on Lexis in the NEWS;CURNWS file; a service called Newstex syndicates them and sells them to Lexis, where they go into the NEWSTX file and from there into CURNWS. But legal researchers looking for legal analyses understandably look in the LAWREV database; searching through the mostly non-legal-analysis NEWS;CURNWS file is too likely to find false positives.

20. Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127 (2006).

scholars who submit posts to it will probably want to polish the posts a little, this too could be a quick and easy task compared to the law review editing process.

Law school appointments committees won't and shouldn't see Law Notes "articles" as serious publications. Nor would publishing in Law Notes give a piece the imprimatur that publishing in a top-ranked law review provides (rightly or wrongly). But the point of publishing in Law Notes wouldn't be to build your publication record, or to add credibility to your piece. It would just be to preserve your ideas in a way that helps future scholars—what the academic publishing process is supposed to be about, but without the hassles of that publishing process. To the extent a Law Notes piece ups some professional counter of yours, it would be your citation count, not your article publication count.

I'm pretty sure that Westlaw and Lexis would be willing to include Law Notes in their publication list. Their business is providing access to publications that are potentially useful to their subscribers, and I'd think that Law Notes would be at least as useful to subscribers as are many legal journals.

The tougher question is whether someone or some group will be willing to invest the time needed to screen submissions, and to deal with blowback from rejections. This should be a modest investment, since the point of Law Notes is to be quite unselective. But it's an investment that won't pay much of a personal return (being the editor of Law Notes is never going to be prestigious), so it may well be an investment that won't be made.

Yet if I'm right, then if the investment isn't made, lots of micro-discoveries made by bloggers will be lost, and will have to be rediscovered by future scholars. And, of course, we law professors won't get as many citations as we could: a tragedy, a travesty, a disaster.

BACK TO HOW WE SHOULD SPEND OUR TIME

So I've talked briefly about ways in which our disseminating ideas through blogging can help us in discovering and doing; and of course discovering and doing can help us in disseminating, for instance by building our credentials as scholars, which can in turn help us draw readers. I've also talked about how blogging can itself involve micro-

discoveries, though I agree with others who say that more serious discoveries are likely to come through attempts to write in other media.²¹

Yet even if I'm right about all this, I doubt that blogging is even close to the most efficient way of spending one's time if one is interested purely in discovering or in doing. Starting a blog is easy and not very time-consuming. Building a blog that's successful enough to give you some of the benefits I describe is extremely time-consuming. If you just want to write more law review articles and place them in more prominent places, spend your time thinking about articles and writing articles, not blogging.

No, we blog because we like it. Sometimes we even blog because it's a pleasant way to procrastinate instead of engaging in the often painful process of writing articles. We blog because we enjoy the feeling that people are listening to our ideas, ideas that are ours in the sense that we hold and express them, though usually not ours in the sense that we pioneered them. And we blog because of the possibility, however rarely realized, that we might actually persuade someone.

So the question remains: how much should we value that, compared to the traditionally recognized value of discovering genuinely original knowledge? I wish I knew the answer.

21. See, e.g., Kerr, *supra* note 20; Randy Barnett, *Caveat Blogging: Blogging and the Flight from Scholarship*, 84 WASH. U. L. REV. 1145 (2006); Kate Litvak, *Blog as a Bugged Water Cooler*, 84 WASH. U. L. REV. 1061 (2006); Lawrence B. Solum, *Bloggging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071 (2006).