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Blog As a Bugged Water Cooler

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BLOG AS A BUGGED WATER COOLER

KATE LITVAK*

I. PUTTING THINGS IN PERSPECTIVE

Legal academics like to think that everything they write is scholarly. There is no surer way to offend a colleague than to suggest that some of his public musings are—gasp!—not scholarship. So, I will not debate whether someone's remarks on the Enron trial, or "gotcha" comments on the quality of the *New York Times* reporting, or critique of a recent Michelle Malkin book, or teaching notes thinly disguised as encyclopedic entries qualify as "scholarship." For the purpose of these remarks, "scholarship" is anything that satisfies your budget committee.[1]

A safer (and more productive) inquiry is what we mean when we say that blogs are "transforming" something. If we define "transforming" very broadly ("Does blogging have some—however infinitesimal, speculative, indirect, removed in time—impact on legal scholarship?"), the answer is surely yes. But trivial and speculative impacts are not good excuses for a conference. The interesting question is whether blogging has a *meaningful* (or, as an empirical type might put it, a substantively and statistically significant) impact on legal scholarship.

The answer, I believe, should start with "as compared to what?" To keep a sense of proportion, let's take a look at things that have had real impact on legal scholarship in recent years.

A. Communications Technology

Research is now faster, more thorough, and more productive. Some old skills and specialized knowledge became less valuable; other skills grew in importance. Correspondingly, some people are losing influence, while others are gaining it. A classic beneficiary is my Texas colleague Calvin Johnson, a tax scholar who found massive historical archives on the Internet, which included original documents undiscovered by professional historians. Calvin, who ended up writing a well-received book on

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1. Please do not read into this paragraph more than it says. I, in fact, express no opinion on whether any of the above writings classify as scholarship. I resolved to abstain from making controversial conference remarks until I am offered the presidency of Harvard.

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constitutional history, likes to say that with the Internet, the research that used to take an experienced historian several years can now be done by an amateur within half an hour. The influx of talented energetic amateurs, who were not socialized into a discipline through years of graduate schooling, challenges old ways of doing things and introduces new voices and approaches.

B. Popular Archives of Working Papers, like SSRN, Bepress, or NBER

The communications boom has triggered another important wave: the growth of electronic archives. One effect of the Social Science Research Network (SSRN) and its ilk is well known: they help create a new scholarly culture, where early distribution of work is not only acceptable, but expected. This reduces the potential waste of duplication, fosters mutual learning, and creates communities of like-minded academics. Another effect of SSRN is subtler. Legal academy used to rely on law reviews for distribution of scholarship sans quality control. SSRN has now taken over this role, highlighting the oddity of the decades-old system that allowed young barbarians with no stake in the outcome to evaluate (and to a significant degree shape) legal scholarship. The declining relevance of law reviews as distributors of legal scholarship impacts (a) the ways in which legal scholarship is written (length and heavy footnoting are no longer signs of quality); (b) the subjects of legal scholarship (narrow, technical, and quantitative work is gaining, while the grand-theory stuff, especially in disciplines taught to 1Ls, is losing); and (c) the ways in which placement of legal scholarship is treated for promotions and other purposes (e.g., it is becoming increasingly déclassé to mention the name of a law review as a shorthand for the quality of an article).

C. Long-Distance Co-Authorship

With the growth of communications technology, it is now possible not only to find like-minded people outside your geographic area, but also to write with those people. I have a coauthor who lives 1500 miles away and whom I've never met in person; we have been working productively together for almost a year. Some of my Texas colleagues have coauthors who live in Russia, India, Korea, Brazil, and England. A generation ago, this would have been extraordinary.

D. Internationalization of Legal Scholarship

Although U.S. law is still clearly the dominant subject of legal scholarship, treatment of foreign and international law is no longer relegated to third-tier specialty journals. The number of people whose work has an international or comparative angle is growing, and much of it is quantitative work coauthored with economists and political scientists.

E. Internationalization of Law Faculties

It is well known that hard sciences and "harder" social sciences, like economics and finance, have been overtaken by foreign-born junior academics and foreign graduate students. Many top departments in those fields barely have one U.S.-born junior professor. This has not happened yet to law faculties, but the trend is starting. My home institution, University of Texas Law School, now has four non-tenured professors—three of whom are foreign-born and the fourth spent several years living in Europe and conducting research there. The growth of J.S.D. programs further contributes to this trend. The influx of foreign-born academics impacts legal scholarship in many ways—from the obvious (more people are knowledgeable in foreign legal systems) to the less obvious (new perspectives on U.S. law from people who were not bred through the standard system of U.S. undergrad, top law school, clerkship, practice).

F. Coauthorship Across Disciplines

Academics outside law schools do not normally read law reviews. SSRN and other public depositories of working papers have opened legal scholarship to people from adjacent departments—economics, finance, accounting, sociology, and political science. Now, we consult each other's papers and cite across disciplines as if formal barriers didn't exist. This in turn provides opportunities for joint work with people outside law schools.

G. The Influx of J.D.-Ph.D.'s (and non-J.D. Ph.D.'s) into the Legal Academy

As the legal academy becomes more specialized and more interdisciplinary, formal training in fields other than law becomes more valuable. This shift is particularly pronounced among junior faculty, partly because juniors react more swiftly to changing markets, and partly because entry-level hiring is now increasingly based on published work, which gives substantial advantage to candidates with formal degrees outside law.

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As a result, in many top schools, juniors now barely resemble seniors—different interests, different approaches to scholarship, different skills. This trend weakens the links between generations of legal scholars, possibly jeopardizing learning and mentorship. In exchange, it creates new links—where few existed a generation ago—between law schools and other academic departments and professional schools.

H. Closer Incorporation of Law Schools into Their Universities

As legal academics grow closer to academics in other departments (in training and in interests), various formerly foreign practices become more familiar and thus more likely to be adopted, at least in part. This might directly affect the content of legal scholarship: for example, law-and-economics and law-and-political-science groups in law schools go through the same waves as economics or political science departments do, like the fascination with formal models or the shift toward more rigorous empirical testing. There is also an indirect impact, through changes in the attitudes toward non-peer-reviewed publications, views on the proper ways to structure a conference, tenure standards, the value of outside grants, methods of teaching (farewell, poor much-maligned Socratic method!), the power of deans and committees, and so forth.

I. Legal Scholarship Is Becoming More Technical

Gone are the days of camping in a mainframe computer lab: the same work is now done in minutes, on basic family laptops, and requires much less prior training. The dramatic growth in computational technology, together with the influx of Ph.D.'s into the legal academy, gives rise to new genres of legal scholarship—most notably, empirical legal studies. This trend is especially striking in areas outside business law—such as criminal law and procedure, administrative law, environmental law, alternative dispute resolution, or disability law—which used to be dominated by the (often proudly) mathematically challenged. An interesting exercise is to look at the list of this year's participants at Cornell's Young Empirical Scholars Conference. Out of the seven invited presenters, only one (me) is a classic business law type. The rest are known for their work in criminal procedure, discrimination, employment law, courts and juries, legislation, and so forth.

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J. Legal Scholarship Is Becoming More Resource-Intensive

Empirical work is expensive. Databases are expensive. Statistical software is expensive. Research assistants are essential and expensive. Faculty need to be trained in research techniques and software/database use, and training is expensive. All of which affects legal scholarship in many ways. First, this leads to reshuffling of resources from old groups of claimants (mostly those who rely on fancy brick-and-mortar libraries) to new ones (those who rely on computer centers, databases, and research assistants). This, in turn, might affect the prestige of different fields and therefore the supply of new brains to those fields. Second, as scholarship becomes more expensive to produce, people working in rich schools will have a competitive advantage over their compatriots in schools with smaller endowments. This might make the current practice of "writing your way up into the top league" more complicated—if at all possible (at least in some fields)—replicating the reality of other resource-intensive academic disciplines, like experimental physics or chemistry. As the opportunities for upward movement decline in some fields but not others, the hiring, promotion, and compensation practices are likely to change as well.

K. The Practicing Bar has Developed a Set of Institutions to Produce and Distribute Relevant Knowledge Outside the Academy

In the meantime, important complementary trends are emerging outside the academy. Practitioners have now largely moved to the self-help system: leading treatises in many fields are written by practicing attorneys, not top academics. A competent attorney regularly consults practitioner journals and law firm publications, but rarely picks up a law review. This, of course, might be a reaction to the academy's shift away from being of practical value to attorneys. But it might also be an independent trend triggered by the same specialization and distribution of labor that changed the legal academy. As legal practice grows more complex and specialized, it becomes increasingly more difficult for a nonpracticing outsider to contribute something valuable; the deep, specific, and up-to-date knowledge of a top practicing attorney is often more useful than the broad, theory-based knowledge of an academic. As practitioners develop their own institutions of production and distribution of knowledge relevant to the bar, the demand for such knowledge generated in the academy declines, which further pushes the academy toward theoretical and interdisciplinary work.

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To summarize, a lot of new developments have been transforming legal scholarship lately. New technologies. Availability of data. Rapid distribution of current research. Coauthorship. Internationalization of scholarship and faculties. Growing ties with other disciplines. The influx of people with Ph.D.-level training. Increasing compartmentalization and specialization of academic disciplines. The rise of resource-intensive fields. The shift of practitioner-oriented work to practitioner authors.

As compared to all this, how important do you think blogs are?

II. THE ATTRACTION OF A BUGGED WATER COOLER

The way I posed the question is, of course, not entirely fair. Blogging is a very recent phenomenon. Today, the impact of blogging might pale in comparison with, say, the impact of data availability or long-distance coauthorship. But what about tomorrow?

The usual argument in support of blogging impact goes like this: Sure, blogs themselves are not a particularly suitable venue for presenting nuanced, careful, sophisticated legal scholarship. Thus, their scholarship distribution value is not terribly high—at least it is not high among academics, who strive to stay updated on their colleagues' work via SSRN, workshops, and conferences, and for whom the marginal value of blogs in scholarship distribution is negligible.[2] But blogs might impact scholarship indirectly, yet still significantly. After all, a lot of things impact scholarship indirectly but significantly. Post-workshop dinners. Hallway meetings at conferences. Water cooler conversations. What if blogs eventually turn into giant water coolers, where new ideas are tried out, developed, criticized, and ditched? Wouldn't that role qualify as "transformative" for legal scholarship?

Very appealing idea. Except there is one feature of a blog that is not present at a normal water cooler: water cooler conversations are not transmitted to the world. They are private. They generate private behaviors. To understand why this matters, let's strip down the deceiving gloss of blogs' high-tech wrapping and use a correct metaphor. A blog is in fact very much like a water cooler. But it's a *bugged* water cooler—an informal gathering place that is openly and clearly outfitted with a giant microphone.

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2. Blogs might well affect the distribution of legal scholarship among nonacademics (including students), but we were asked to talk about blogs' impact on scholarship, not their impact on education, politics, or culture.

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Suppose you work in a law school building where some water coolers are bugged and others are not. Everyone knows which is which. Nobody is confused. Building dwellers can eavesdrop on bugged conversations in the privacy of their own offices by turning their receivers on and off. People can listen in real time; they can record conversations and listen in the future; they can pass records to third parties. The diligent set may compile portfolios of water cooler exchanges and then pester tenure committees with boxes of old tapes.

When you want to try out a new idea, you have two options—you can go to either a bugged or an unbugged water cooler. What kind of people would you expect to do their scholarship-related chat around a bugged water cooler? Why would they do so? Would you expect some scholarship-related conversations to be taken to unbugged water coolers? Why?

Most important for our purposes, how would the option to gather around a bugged water cooler transform legal scholarship?[3]

I have a theory. There are two broad settings that promote exchanges of uncooked ideas. The first setting is deeply private. The second one is public, but involves very clearly assigned roles that punish nonparticipation. A bugged water cooler does not fall into either category and therefore is doomed.

In the first (private) setting, you throw your idea at a specific colleague or group of colleagues and ask for comments. There is a set of requirements that must be satisfied before you do so, and all these requirements work against a bugged water cooler venue. First, you want to be able to speak freely, without worrying that your raw idea might damage your scholarly image. You expect all feedback to be given to you privately, not announced during the NPR pledge hour. Second, you want honest feedback, complete with devastating critique if necessary. Third, your interlocutor wants his criticisms to be kept private, to avoid accusations of "noncollegiality" that are easily dispersed by the gelatinous sob brotherhood of the legal academy.

Finally, you want to make sure that your idea will not be stolen. The fear of preemption is rarely discussed in the legal academy, but is nonetheless real; this fear largely shapes the way things are done in hard sciences, economics, and finance. Essentially, if you don't guard your clever idea tightly, it can be picked up and developed by the competition,

3. And the inevitable follow-up: if you think the effect would be positive, why hasn't anyone thought of installing mics in faculty lounges?

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which you will learn only after you've sunk considerable time and resources into the project. This problem has not yet crippled the legal academy, but it is growing as we move toward the social science model where "being there first" is the key. The threat of preemption further intensifies as we seek to publish (or at least present) our work in peer-reviewed outlets, where the fact of "not being there first" will be caught quickly. While pretty much any verbose recitation of old wisdoms can be sold to law review editors as "original work," it is rather hard to persuade an academic referee that your result, which closely replicates someone else's known result, is worth publishing.

In sum, if the option of a bugged water cooler were available, I would expect mostly bland pimple-on-the-pimple ideas to be aired there. Anything risky, counterintuitive, or easily preemptible would have probably been taken to unbugged corners.

But wait, you'll say. What about conferences and seminars, where people present raw papers and hear critical comments? What about the famous University of Chicago law and economics workshop, where speakers barely get three minutes of uninterrupted presentation before they are showered with comments (sometimes unrelated to the paper, but always immensely entertaining)?

Remember, I said there are two settings that allow productive airing of early-stage ideas. The private setting was one. The highly structured public setting, complete with assigned roles and tasks (such as a formal conference or workshop), is the other.

The weakness of the private setting is that it usually involves two-party exchanges (the author and the commentator) and therefore loses the value of an interaction among commentators. The great strength of a private setting is the pressure it puts on the commentator to say something useful.

The public setting has the opposite problem (in addition to the above-mentioned problems of possible embarrassment, suboptimally understated criticisms, and preemption): it creates value through collaborative commentary of multiple parties, but destroys value by reducing people's incentives to bother with commenting. Clearly specified roles are essential to generate thoughtful participation. That's why conferences use official commentators and why good workshops have unspoken rules of faculty attendance and requirements of at least one comment per participant. I submit that successful conferences and workshops cannot exist if participants are not put in the environment where the failure to say something interesting makes a participant look dull, uncreative, and lacking brain power.

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Thus, a bugged water cooler is not "just like a workshop." It's just like a disjointed sloppy workshop where the audience has no incentives to participate intelligently. Take away the institutional pressure of "I am *supposed* to say something," and you'll get a modern legal blogosphere, where political and cultural discussions are laden with provocative ideas, but discussions of scholarship are dull, dull, dull. At least this is the case in my field, business law and law and economics, where sharp social commentary cannot be translated easily into a publishable paper.

So, my grand theory has a lemma: blogs cannot turn into cyberworkshops unless they can punish a potential commentator's *silence*. And I don't think they can do that. I also have a corollary: if a blog cannot turn into a real cyberworkshop, the value of keeping exchanges public is not high enough to justify the costs (which are, again, possible embarrassment, understated criticisms, and preemption). Thus, in most cases, bloggers seeking a forum for their early ideas are better off asking for comments privately.

I have some anecdotal evidence in support, too. Every now and then, you'll see a guest blogger taking the stage on the Conglomerate or Prawfs or Coop, hoping to generate workshop-like comments on a raw paper idea. This almost invariably fails. The quality of comments that such posts generate is very low—not even close to something you can hear at a conference or read in a referee report. (Again, this only refers to posts and comments in the fields I know; constitutional law types might well be thrilled with the commentary, in which case my theory is field-specific.) I suspect that posters would have gotten better comments if they turned to the unbugged water cooler alternative and sent out e-mails to plausible colleagues, describing their ideas and asking for feedback.

The good folks at the Conglomerate supply more data by hosting annual Junior Scholars Workshops. With few exceptions, the only comments worth reading are the "official" remarks from assigned commentators—which is exactly what my theory would predict. Remarks from appointed commentators might have been very helpful to authors, but the question is why those exchanges are more productive at a bugged water cooler, rather than an unbugged one. Worse yet, even when a rare unsolicited commenter betrays more familiarity with a paper than a thirty-second run through the abstract, we still don't see a multi-party discussion. All threads are dominated by bilateral exchanges—a comment followed by an author's reply; an unrelated comment followed by a reply; a third unrelated comment, and so forth.

Again, all these exchanges might have been helpful to authors, but what is the point of taking them public? If comments fail to engage anyone

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but the author, an unbugged water cooler strictly dominates (recall that private exchange is more likely to produce more honest criticisms).

Another interesting experiment is the faculty blog at the University of Chicago. I've long thought that the bugging of Chicago's law and economics workshop would have been a splendid idea; but that workshop, of course, is fantastic exactly because of the strong culture of reading papers upfront and thinking carefully about them.

The faculty blog, on the other hand, confirms my theory. It almost never generates scholarly discussions in the comments, and the interplay across posts is minimal. The same people who never stop talking during workshops are conspicuously absent from each other's comments sections.

A brief final note: lawyers like to fetishize technology. We know that law and politics cannot change human nature, so we want to believe that technology can. We may suspect that a bugged water cooler wouldn't transform legal scholarship, but a *high-tech* bugged water cooler is just too appealing to pass up.

Indeed, blogs can do wonders. They can educate the public. They can create communities. They can influence politics. They can entertain. What they cannot do is transform legal scholarship.

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