Balkin
Talks
Blogs

Online, Knight Professor of Constitutional Law and the First Amendment Jack M. Balkin is best known for the blog *Balkinization*, a political and legal blog he founded in January 2003. Professor Balkin recently sat down for a Q&A with the *Yale Law Report* to give his thoughts on the legal blogosphere and how it's changing the nature of legal discussion and legal education. To read the interview in its entirety, visit *www.law.yale.edu/ylr*.

YLR: It seems there are several different models as far as the tone and perspective and subjects that legal blogs tackle. What blogs are out there and how do they differ from one another?

JB: There are now dozens if not hundreds of legal blogs. Let me mention just a few that illustrate the various types. *The Volokh Conspiracy* [http://volokh.com/], which was started by Eugene Volokh at UCLA, and *Balkinization* [http://balkin.blogspot.com/], which I started, are group blogs. *The Volokh Conspiracy* has a conservative to libertarian perspective and about ten or so regular contributors. It discusses law and public policy at a very sophisticated level, but it also has discussions of popular culture; it has puzzle contests and jokes, and it's great fun. It's an example of how blogging transcends existing categories and expectations. My blog, *Balkinization*, has a mostly liberal perspective with around five or six regular contributors. It offers fairly serious discussions of constitutional law, legal theory, and politics. That was deliberate; we decided that we wanted a particular voice and a particular style, so we don't have much in the way of gossip or discussions of popular culture. People come to us when they want to read academic views about law and politics at a fairly high level.

The *Becker-Posner Blog* [http://www.becker-posner-blog.com/] is a joint blog by Gary Becker and Richard Posner. Once a week, they pick a topic, and one writes a short essay, and the other responds. People write comments on the blog, and

they respond to them. It's a fairly structured approach to the medium.

Althouse [http://althouse.blogspot.com/], by contrast, is run by a single person, Ann Althouse, a law professor at Wisconsin who talks about law and politics in a very personal way. She's a moderate to conservative pundit who tells you how she feels about things—including popular culture—and she offers some legal analysis in the bargain. *Instapundit* [http://www.instapundit.com/] is run by Glenn Reynolds, who teaches at the University of Tennessee Law School (he's also a YLS alum). He has one of the oldest blogs (he started in 2001) and one of the most widely read, with millions of readers. His blog is pure punditry, from a conservative to libertarian perspective. He offers short snippets—sometimes just a single sentence—of his views on an enormous number of different topics, and he links to stories and articles that

mostly free-standing essays, so our postings can be quite long, up to 5,000 words, but usually they average about 1,000 words to 2,000 words, about twice as long as the average op-ed in a newspaper. On the other hand, on *Althouse* or *Instapundit*, the posts can be really short, perhaps a few sentences or a single paragraph.

Many legal blogs now specialize in particular fields like election law, disability law, corporate law, and tax law. Brian Leiter [http://leiterreports.typepad.com/] at the University of Texas runs *Leiter's Law School Reports*, a blog that's basically professional gossip about who's getting offers and visits and who's moving where.

Lawyers outside of the legal academy also blog, and they make some very valuable contributions. *How Appealing* [http://howappealing.law.com/] is run by Howard Bashman, who's a litigator in Philadelphia. He tells you everything

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he finds interesting or that his readers send to him. The tone is very different than say, *Becker-Posner* and *Balkinization*.

Legal Theory Blog [http://lsolum.blogspot.com/] is a one-man operation run by Larry Solum at Illinois. It is really a tour de force and it must take an enormous amount of work. It's strictly devoted to academics. Any time a new paper comes out on SSRN (the Social Science Research Network—an online depository for drafts of new scholarship) that Larry thinks is interesting, he'll republish the abstract and provide a link. He'll tell you about all the new academic books that have recently been published; he will tell you about academic conferences that are coming up; he gives you basic introductions to important legal and philosophical concepts; he suggests reading lists for particular topics; in short, he's a one-man clearinghouse for the academic world. It's simply amazing what he is able to do by himself, and he performs an invaluable service.

The Georgetown [http://gulcfac.typepad.com/georgetown_university_law/] and Chicago Law [http://uchicagolaw.typepad.com/] blogs are devoted to serious discussion of academic issues along the lines of *Balkinization*. They consist of law faculty at particular law schools who have decided to blog together.

The postings on these blogs, generally speaking, are short. On *Balkinization*, we have adopted a certain style— we do

that's happening in the world of appellate litigation. He links to op-eds on legal topics in the major newspapers, to recent decisions in the circuit courts and the Supreme Court, and to a wide range of legal commentary in the blogosphere. I should also mention *SCOTUS Blog* [http://www.scotusblog.com/movabletype/], which covers Supreme Court litigation and commentary and offers very sophisticated analysis—from the litigator's perspective—of what the Court is doing and why.

If you are looking for legal gossip outside the legal academy, there's *Above the Law* [http://www.abovethelaw.com/], run by YLS alumnus David Lat '99, who began his blogging career under the pseudonym Article III Groupie at a blog called *Underneath Their Robes* [http://underneaththeirrobes.blogs.com/]. These two blogs provide entertaining commentary and bits of gossip about lawyers, judges, and clerks.

Blogging is only one aspect of how legal writing is changing. You can't really understand how online media affect traditional legal scholarship without taking into account the Social Science Research Network (SSRN) and the proliferation of law professors' personal websites. When I write a draft of a new article, I put a copy on my website, [www.balkin.com] and a copy on SSRN. In effect, I've published the draft. This transforms the pace of legal scholarship. People can read the new drafts as soon as I am finished with them.

The final versions may appear in law reviews months or even years later, but why wait for the law reviews when you can publish–and read–scholarship immediately on SSRN? Moreover, intellectual arbitrageurs like Larry Solum will tell you when the new pieces come out and how they fit into the existing scholarly conversation.

How is legal blogging changing legal discussion and legal education?

Blogging changes the relationship between law professors and their audiences because professors can reach more people. It changes the relationship between law professors and journalists because law professors don't need journalists to get their ideas out to the broader public; conversely, blogging makes it easier for journalists to find the right experts to interview. It changes the timing and pace of legal scholarship because law professors can talk about cases the day they come down, driving the discussion forward in a very short time rather than through a series of law review articles that may take years to appear. Just as the Internet collapses the news cycle, it also collapses the publication and discussion cycle. It produces a type of legal writing that is more journalistic, more personal, and more driven by current events.

Compared with traditional legal scholarship, blogging produces a different combination of analysis and opinion. The conversation is more informal, and it progresses very quickly. People also use sources differently: they cite to supporting information or authorities by linking to them, so that you can see the evidence for yourself.

This morning [November 8, 2006] I wrote a post on the South Dakota law banning most types of abortion, which was defeated in a popular referendum. I used the referendum to discuss a recent article written by my colleague Reva Siegel in the online version of *American Prospect*, as well as an article she hasn't officially published yet, providing links to both. In this example I'm not only talking about the news, I'm connecting it to other political commentary and to the latest legal scholarship. It's a kind of legal discussion we haven't seen much of before.

This is the first generation of law students who are going to law school after the rise of the blogosphere. If you went to law school a few years ago, you were totally immersed in the experience of a single law school, and your professors (and the law library) were the main sources of expertise. Now students can hear legal opinions from law professors and their fellow students around the country–and around the world– on almost any topic they desire. The blogosphere becomes part of your legal education. That didn't really exist before.

Legal Blogs

Balkinization balkin.blogspot.com

The Volokh Conspiracy volokh.com

Becker-Posner Blog becker-posner-blog.com

Althouse althouse.blogspot.com

Instapundit instapundit.com

Legal Theory Blog lsolum.blogspot.com

The Georgetown Law Faculty Blog
gulcfac.typepad.com/georgetown_university_law/

The Chicago Law Faculty Blog uchicagolaw.typepad.com

Leiter Reports leiterreports.typepad.com

How Appealing howappealing.law.com

SCOTUS Blog scotusblog.com/movabletype

Above the Law abovethelaw.com

Underneath Their Robes
underneaththeirrobes.blogs.com

Law students are not merely consumers of these blogs, they're also producers. There are at least a dozen students currently writing blogs at Yale Law School. At other law schools, there are probably hundreds of student-run blogs. Some of them talk about the experience of being a law student; others offer legal and political commentary, and still others combine legal analysis with discussions of their hobbies, interests, and personal lives. Student-edited law reviews have been transformed by online legal publishing. Most law reviews have an online presence, many publish articles simultaneously in print and online versions, and several have started online publications that are hybrids between traditional journals and blogs. Blogs are an incredibly creative medium; there's an enormous number of things you can do with them, and they are going to have all sorts of interesting and unexpected effects on legal culture.

Why did you start blogging?

I run the Information Society Project here at Yale and I'm interested in the relationship between the Internet, democracy and free speech… Blogging is both a way of participating in the Internet and a way of learning about it. I have learned more about how the Internet affects public discourse from being a blogger than I would ever have learned

from reading what other people had to say about it. There's no substitute for participating in the medium if you want to understand what the medium does: how it affects your relationships with other people; how it affects the work and the status of law academics; how it affects the dissemination of legal ideas throughout society; how it changes the law professor's calling; how it changes the nature of legal education. It's much easier to see what's happening from a blogger's perspective.

How often do you post to Balkinization? What inspires you to post?

I tend to be driven by what's in the morning news, by what I'm working on in my scholarship, and by what other bloggers and legal scholars are talking about. Take my post on the South Dakota abortion ban. I'd been following the South Dakota referendum, first, because it's in the morning papers, second, because I'm working on a book on *Roe v. Wade*, and third, because Reva Siegel is a colleague and friend of mine who's been working on similar issues. It's a convergence of all three things.

Balkinization did a series of posts on the controversies about torture and the NSA domestic surveillance program, as well as a series of posts on the Military Commissions Act as it was being drafted. Marty Lederman '88 and I got very involved in these issues as a natural outgrowth of our interest in the effect of 9/11 and the War on Terror on civil liberties. Marty is a former Office of Legal Counsel lawyer, and both of us are part of an academic listserv on torture issues that features some of the most interesting people talking about these topics. And the news kept generating legal issues for us to talk about. After a while, we found ourselves caught up in the cycle of events and we tried to give a legal analysis of what was happening more or less in real time.

After a while, people began to send us drafts of the military commissions bill as they were being marked up in Congress. Things were changing in the bill at a fairly rapid pace, and people wanted to know what was actually going on. We tried to explain how the drafts were changing, where the problems were, what parts of the bill to focus on, what was a genuine civil liberties problem and what was not. Legal scholarship could never do this before because you could never do on-the-spot analysis.

In the past you said that blogs help break down partisan divisions. Do you think that's still true?

Blogs simultaneously increase and decrease partisanship. On the one hand, they make it easier for people to find views that they already agree with. If you are a conservative, you

In the long run, I expect, blogging will be viewed not as a new form of scholarship so much as a sort of hybrid of scholarship, teaching, and service.

can find conservative blogs to read; if you are a liberal you can find liberal blogs. Blogs aren't unique in this respect; you can also easily find conservative or liberal books that conform to your views, as well as newspapers, television programs and talk radio. But blogs—and the Web more generally—have this important difference: the way a blog cites to something is by linking to it. When people criticize each other, they're always linking to things they criticize, and this creates the possibility of being exposed to ideas and opinions you wouldn't otherwise have been exposed to…

How would you define the success of your blog?

We consider our blog successful if we can provide serious commentary on legal issues, and if people who want that commentary are getting it. Our audience tends to include lawyers, law professors, law students, judges, judicial clerks, reporters who cover the legal beat, staffers on Capitol Hill, policy people, and people at think tanks. We're happy if they read us and take us seriously…we've been surprised at how many of our regular readers don't fall into any of the categories I just mentioned. They're ordinary citizens who are interested in the law and civil rights, and they just want to know what's going on.

How many readers do you average?

For some time we averaged about 60,000 readers per month, but starting in September 2006, it jumped up to well over 100,000. That was partly because of our coverage of the military commissions bill. *Balkinization* attracts a fair number of readers, but it's by no means among the most popular blogs. We've been averaging 100,000 readers a month recently, but the most popular blogs will get that traffic in a single day…

How long does an average post take you?

It depends. The story I did on abortion this morning took about an hour to write and revise. I once wrote a very long post on *Dred Scott* and *Kelo*, which is about 5,000 words, and it took me a week or more to work on it. It's really a law review article; I just never submitted it to a law review. Marty Lederman has written substantial articles on torture

Bloggers Jack Balkin, Howard Bashman, and Glenn Reynolds '85 were panelists for a December Yale Law School Federalist Society meeting about law blogs.

or military commissions where he's taken days to hone the argument to get it just right, because he's making some very complicated legal analyses. So, the posts can take anywhere from an hour to a week or so.

Do some posts end up as law review articles?
Sure. A lot of things I post eventually wind up as parts of law review articles. I've been working on issues of abortion law, constitutional change, and constitutional interpretation for several years now. Many posts are on these topics. A series of posts on the national surveillance state worked its way into an article that Sandy Levinson and I just published in Fordham, as well as a lecture that I recently gave at the University of Minnesota, which will be published next year. Blogging serves as a scratch pad to test out new ideas that can be polished and later published as part of my "official" scholarship.

Are you ever afraid that if you post an idea, someone will take your idea and run with it?
Actually, the reverse is more like it. Stating an idea in the blogosphere is a way of staking a claim to it, because once you've blogged it, you've published it, and you can prove when you did it. Not only that, but other people can cite to your argument. Law reviews increasingly cite to blog posts just as they cite to news articles or op-eds. Blogging lets you tell the world that you are working on something new and here is the initial formulation…

Do you have anyone who does technical work?
I do most of the technical work, but it's not very difficult… Blogging was designed to be incredibly easy to do. That's its great democratic advantage. You can start your own blog without knowing how to design a web page. In fact, people can write for my blog without knowing anything about computers or computer programming.

How about the evolution of the blog? Where is it going?
Well for one thing there will probably be more video. We've seen the beginnings of this with YouTube. You can now put videos from YouTube on your blogs, and eventually more and more people will create their own videos and put them on their blogs. Podcasting–which essentially involves blogging using audio files–has already existed for some time. The future of the blog is multimedia. Text won't go away–it will just be supplemented.

In the legal academy, you will get an increasing integration between blogs and legal scholarship, between blogs and what you read in law reviews. As I mentioned, law reviews are already experimenting with blogs as adjuncts to their online presence. There will be more connections between blogs and SSRN and other online publications. More and more legal scholarship will occur in blog formats, or link to blogs, or cite to blogs, and the distinctions between blogging and other forms of legal scholarship will begin to blur, even if some important differences remain. As this happens, you'll see the public persona of law professors migrate to their blogs.

All this will take time. As I mentioned before, most law professors still don't view blogging or online publication as particularly important to what they do; indeed, they may see it as a distraction. New media will take hold more quickly among younger professors, and among students, in places where people are trying to gain audiences and give voice to their ideas. Eventually the importance of online media will become clear and the practice will migrate throughout the legal academy. In the long run, I expect, blogging will be viewed not as a new form of scholarship so much as a sort of hybrid of scholarship, teaching, and service. That's the way I tend to think of it: I'm doing a public service–reaching new audiences both inside and outside law schools, talking about legal ideas and conveying them to a mass audience. Over time, online media will change our notion of what a law professor is, what the law professor's vocation is and who his or her audience is… **Y**