

Legal Scholarship, Electronic Publishing, and Open Access: Transformation or Steadfast Stagnation?*

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This article uses a social shaping of technology perspective, which studies the complex interactions between technology and the culture of a discipline, to investigate the evolution of legal scholarship in the digital age, and to determine how the open access movement has influenced various forms of legal scholarship, particularly law reviews, their online companions, and legal blogs.

Introduction	31
Technology, People, and Culture within Disciplines	32
The Law Review	33
Defining Characteristics	33
Weathering Criticism	35
The Digital Revolution	36
Early Impacts	36
Possibilities and Predictions	37
Open Access and Legal Scholarship	40
Open Access	40
Resistance to Change	43
Open Access as a Complementary System to Law Reviews	45
Parallel Systems: Online “Companions” and Electronic Repositories	50
Formal vs. Informal Communication in Legal Scholarship	53
Conclusion	56

Introduction

¶1 New technologies bring with them the possibility for changes in both scholarly communication and the forms of scholarly publication. The changes that actually occur, however, as opposed to the purely technical possibilities, are influenced by the scholarly culture within a particular discipline. Investigating these scholarly cultures involves such questions as: What is the traditional form of scholarly publication? Within the larger discipline, what sub-communities exist? How do scholars within the field communicate with each other, both informally and formally?

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What ties, if any, exist between academic institutions and scholarly publications? What types of publications are seen as most prestigious, and which are seen as most useful in advancing a scholar's career? How do scholars who challenge traditional norms make their voices heard?

¶2 In this article I will argue that it is necessary to undertake an analysis of the scholarly culture within law to explain why scholarly legal communication has taken the direction it has in the digital age. To do this I will draw upon the work of scholars who recognize that the transformative effect of any technology is influenced not just by the technology itself, but by the combined effect of the technology plus social elements of the existing culture.¹ Looking at the discipline of law through this framework explains why law reviews, the traditional form of formal legal scholarship, have persisted relatively unchanged, despite predictions of their demise, why "open access" has created parallel forms to the law reviews rather than replacing them, and finally, why the real change has occurred in the area of informal communication, specifically in the growth of legal blogs.

Technology, People, and Culture within Disciplines

¶3 In order to understand how technology and electronic publishing have influenced scholarly communication and publication in law, it is helpful to examine the work of scholars who have considered how social factors influence the ways in which the technology is adopted and adapted. Two extremes, as delineated by Christine Borgman, are the "revolutionary, discontinuity scenario and the evolutionary, continuity scenario."² The revolutionary, discontinuity scenario is technology-driven, arguing that technologies will result in profound societal change; while the evolutionary, continuity viewpoint believes that change occurs more slowly and people will simply integrate new technologies into current institutions and ways of doing things, just as they have integrated previous technologies.³

¶4 Borgman argues that the more probable scenario falls in between these two extremes, reflecting "a complex set of interactions between people and technology."⁴ This "co-evolutionary" middle ground reflects both the ways that new technologies are adopted and adapted, and how the choices made by individuals and organizations are shaped by their existing practices and cultures.⁵

¶5 In a recent work, Borgman casts the technology-driven extreme as "technological determinism," and the opposing social-driven view as "STS," social studies

1. See CHRISTINE L. BORGMAN, *SCHOLARSHIP IN THE DIGITAL AGE: INFORMATION, INFRASTRUCTURE, AND THE INTERNET* (2007) [hereinafter *SCHOLARSHIP IN THE DIGITAL AGE*]; Christine L. Borgman, *The Premise and Promise of a Global Information Infrastructure*, First Monday, Aug. 2000, http://www.firstmonday.org/issues/issue5_8/borgman/ [hereinafter *Premise and Promise*]; Rob Kling & Ewa Callahan, *Electronic Journals, the Internet, and Scholarly Communication*, 37 ANN. REV. INFO. SCI. & TECH. 127 (2003); Rob Kling & Geoffrey McKim, *Not Just a Matter of Time: Field Differences and the Shaping of Electronic Media in Supporting Scientific Communication*, 51 J. AM. SOC'Y FOR INFO. SCI. 1306 (2000).

2. Borgman, *Premise and Promise*, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*

of science and technology.⁶ Here, the middle ground is “sociotechnical systems,” a perspective “which starts from the premise that technology and society are deeply intertwined and mutually influencing.”⁷ A similar point about the importance of social factors is made by Kling and Callahan, who contrast the “Standard Model,” which focuses on what the technology can do, with the “Socio-Technical Network model,” which is concerned with “the complex interplay between the information processing features” of particular technologies and social behavior.⁸

¶6 As the field of electronic publishing continues to develop, there are still voices predicting that technology will cause rapid, sweeping changes in society. Characterized as the “electronic publishing reform movement,” these voices claim that the universal adoption of electronic media is inevitable and that there will be a convergence in which all fields end up using the same forums for electronic publication.⁹ From this “information-processing perspective,” it is just a matter of time before other fields catch up with the early adopters, due to the features of the technology, which will reduce costs, expand access, and speed communication.¹⁰ However, these scholars do not fully consider the social forces affecting the adoption of technology. In contrast, Kling and McKim advocate a “social shaping of technology” perspective, which acknowledges that the work styles, institutions, and organizational behaviors within scholarly communities will influence the development and adoption of different technologies.¹¹

¶7 A sociotechnical or social shaping of technology perspective is helpful in explaining how technology and electronic publishing have impacted scholarly legal communication. Those taking an information-processing view, focusing on the technical features of electronic media, have either predicted sweeping changes that have not come to pass or are advocating the adoption of technical changes without considering the existing academic culture. In contrast, a focus on scholarly legal culture and the institutions and participants interacting within it explains why certain things (law reviews) have mostly stayed the same, while other forms (electronic repositories, legal blogs) have embraced the possibilities of the available technology. Technology influences legal scholarship and culture, legal scholarship and culture influence technology, and the results require an understanding of both.

The Law Review

Defining Characteristics

¶8 For legal scholars in the United States, the main forum for publication is the law review, and many authors have analyzed its history and unique characteristics,

6. BORGMAN, SCHOLARSHIP IN THE DIGITAL AGE, *supra* note 1, at 37–38.

7. *Id.* at 38.

8. Kling & Callahan, *supra* note 1, at 135.

9. Kling & McKim, *supra* note 1, at 1309–10.

10. *Id.* at 1311.

11. *Id.*

as compared to periodicals in other disciplines.¹² Law reviews have a long history: the *Harvard Law Review* was founded in 1887 and is the oldest continuously published student-run U.S. law review.¹³ Because most law reviews are published by law schools, few commercial publishers are involved.¹⁴ The majority of law reviews are student-run and edited; there is no “peer review,” in the same sense as in most other fields.¹⁵ In comparison to journals in other fields, such as science, technology, and medicine, the cost of law reviews is modest: a year’s institutional subscription to the *Harvard Law Review* costs \$200.¹⁶ There are also a large number of law reviews—more than five hundred student-edited general and special focus law journals.¹⁷

¶9 Unlike other fields, in which scholars submit an article to one journal only, it is common for legal scholars to submit articles to multiple law reviews.¹⁸ In a good example of technology developing to accommodate existing practices, several electronic tools have been created to facilitate the process of multiple submissions.¹⁹ The time between submission and acceptance can be as short as forty-eight hours,²⁰ and although the practice has been condemned by the National Conference of Law Reviews, many law professors engage in the practice of “trading up”—using an acceptance from the first law review as a bargaining tool to request expedited review by other law reviews.²¹ Finally, the association of a law review with its parent institution and the involvement of law students have created a unique culture of

12. See, e.g., Richard A. Danner, *Electronic Publication of Legal Scholarship: New Issues and New Models*, 52 J. LEGAL EDUC. 347 (2002); James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261 (1998); Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996); Matthew Parry & Melinda A. Parry, *Theirs Not to Reason Why, Theirs but to Make Law Review or Die: A Critique of the Law Review System and Annotated Bibliography*, LEGAL REFERENCE SERVICES Q., 2004, no. 4, at 29; Reinhard Zimmermann, *Law Reviews: A Foray Through a Strange World*, 47 EMORY L.J. 659 (1998); Nathan H. Saunders, Note, *Student-Edited Law Reviews: Reflections and Responses of an Inmate*, 49 DUKE L.J. 1663 (2000).

13. Harper, *supra* note 12, at 1263–65; James G. Milles, *Redefining Open Access for the Legal Information Market*, 98 LAW LIBR. J. 619, 631, 2006 LAW LIBR. J. 37, ¶ 39.

14. Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 783 (2006).

15. Milles, *supra* note 13, at 631, ¶ 39. For a discussion of peer review and the slow movement of law reviews to adopt it, see generally Nancy McCormack, *Peer Review and Legal Publishing: What Law Librarians Need to Know about Open, Single-Blind, and Double-Blind Reviewing*, 101 LAW. LIBR. J. 59, 2009 LAW LIBR. J. 3.

16. Harvard Law Review, Ordering Information, <http://www.harvardlawreview.org/order.shtml> (last visited Nov. 6, 2008) (an individual subscription costs \$55, and there are discounted subscriptions for nonprofit institutions).

17. MICHAEL H. HOFFHEIMER, 2006 DIRECTORY OF LAW REVIEWS (2006), available at <http://www.lexisnexis.com/lawschool/prodev/lawreview> (listing 184 general student-edited law reviews and 321 specialty student-edited law reviews, as well as 184 nonstudent-edited peer-reviewed and trade journals).

18. Hibbitts, *supra* note 12, at 643; Milles, *supra* note 13, at 631–32, ¶ 42.

19. See, e.g., Berkeley Electronic Press, ExpressO, <http://law.bepress.com/expresso> (last visited Nov. 6, 2008); SSRN, Legal Scholarship Network, <http://www.ssrn.com/lisn/index.html> (last visited Nov. 6, 2008) (describing SSRN’s eSubmission service).

20. Milles, *supra* note 13, at 632, ¶ 44.

21. Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 WIDENER L.J. 947, 978 (2007).

“law review.” As noted by Richard Danner, law reviews play multiple roles. They disseminate legal scholarship, they contribute to the “branding” of the parent law school, and they provide the law students involved with social, educational, and career-related opportunities.²²

Weathering Criticism

¶10 Despite a multitude of harsh criticisms throughout its more than 100-year history, the law review has survived remarkably intact, both as an institution and a form of publication. Bernard Hibbitts gives a detailed account of the different waves of criticism of the law review, pointing out that law reviews have made some changes in response to various challenges.²³ The first wave of criticism, from approximately 1905 to 1940, criticized law reviews’ “plodding” style, heavy footnotes, “student editorial control,” and lack of legal realism, in addition to the number of law reviews.²⁴ This first wave had a negligible impact on the existing law review structure.²⁵

¶11 The second wave of criticism, in the 1950s and early 1960s, was stronger and incorporated the previous complaints, adding criticisms of the uniformity of law reviews and the elitism of law review membership.²⁶ While law reviews did make some reforms, including opening law review membership to students who won writing competitions as well as those with high first-year grades, for the most part the traditional structure persisted.²⁷

¶12 The third wave of criticism, which began in the mid-1980s (and with respect to some criticisms, continues to the present day) criticized the number of law reviews, the increased length of articles and number of footnotes, simultaneous submissions, the article selection process, student editing after selection, delays in both selection and publication, quality of student editorial boards, the value to students of law review service, and the relevance of law reviews to practicing attorneys and judges.²⁸

¶13 Part of this third wave included criticisms that law reviews were not including voices from emerging fields like critical race theory and radical feminism. For example, Richard Delgado demonstrated that civil rights scholarship was dominated by an “inner circle of twenty-six scholars, all male and white,”²⁹ who cited almost exclusively to each other for support.³⁰ Almost ten years later, Delgado conducted another examination of the civil rights field and found that while “insurgent

22. Danner, *supra* note 12, at 347.

23. Hibbitts, *supra* note 12, at 628–54.

24. *Id.* at 629–31.

25. *Id.* at 631–33.

26. *Id.* at 633–36.

27. *Id.* at 636–37.

28. *Id.* at 637–50. See also, e.g., Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1131 (1995) (criticizing “the law reviews’ failure, and perhaps inability, to adapt to the changing nature of American law and American legal scholarship”).

29. Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1349 (1992).

30. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

scholars” in the fields of critical race theory and radical feminism were teaching at the top law schools and publishing in the most prestigious law reviews, mainstream scholars used various strategies to marginalize their work.³¹ As a result, critical, feminist, and minority writers “are still not being integrated fully or easily into the colloquies, exchanges, and dialogues of legal scholarship.”³²

¶14 One response to the mainstream resistance to outsider scholarship was the creation of “specialty” law reviews focusing on particular topics: for example, the *Harvard BlackLetter Law Journal*, the *Harvard Journal of Law & Gender*, the *Yale Journal of Law and Feminism*, the *Berkeley Journal of African-American Law & Policy*, the *Berkeley Journal of Gender, Law & Justice*, and the *Berkeley La Raza Law Review*, to name just a few.

¶15 Other responses to criticism resulted in limited reforms: “adoption of editorial policies more . . . deferential to faculty authors,” inclusion of “nontraditional styles of scholarship and academic writing,” issues using a symposium format, “spin-off” law reviews marketing to the broader public, and the creation of a few faculty-edited law journals, mostly specialized journals or those using a symposium format.³³

¶16 In summary, while law reviews made limited changes in content and structure, the fundamental structure of law reviews demonstrated a remarkable resistance to multiple waves of criticisms as the digital age began to dawn.

The Digital Revolution

Early Impacts

¶17 The first major impact of electronic communications technologies on legal scholarship was the arrival of the online legal databases LexisNexis and Westlaw, which initially contained only primary source materials—case law and statutes—but began carrying some full-text law review articles in 1982.³⁴ LexisNexis and Westlaw “changed the way[s that] law review material is distributed, accessed, and employed”³⁵ by providing near-immediate, convenient, and guaranteed access. Professors could access the databases from their offices or from home, and did not have to worry that the law review volume they wanted would be checked out of the library.³⁶ LexisNexis and Westlaw also provided wider dissemination of scholarship, because now professors did not have to depend upon the selection of law reviews chosen by their particular law school library.³⁷ Finally, LexisNexis and Westlaw provided keyword searching and, through new search strategies, the ability to check how often specific articles were discussed or cited.³⁸

31. Delgado, *supra* note 29, at 1350–51.

32. *Id.* at 1372.

33. Hibbitts, *supra* note 12, at 650–52.

34. *Id.* at 657–58.

35. *Id.* at 658.

36. *Id.* at 659.

37. *Id.*

38. *Id.*

¶18 However, as Hibbitts notes, while LexisNexis and Westlaw “provide new ways of delivering and accessing legal scholarship, . . . they leave the institutional structure of the law reviews intact. . . . They are, in other words, conservative information technologies which do not fundamentally challenge or improve the present scheme of scholarly communication.”³⁹

Possibilities and Predictions

¶19 In the 1990s, as new information and communication technologies became available, many authors predicted and advocated ways in which these technologies could “fundamentally challenge or improve”⁴⁰ legal scholarly communication. While some authors considered how social factors and academic value systems would influence technology’s impact, others illustrated Kling and McKim’s portrait of the “core group of enthusiasts”⁴¹ within the electronic publishing reform movement, who were evangelists for the technical possibilities of new forms and swept aside any criticisms or cautions.⁴²

¶20 A 1991 article by Peter Martin investigated the impact of new information technologies on legal scholarship by considering four law professor stereotypes or caricatures: “Professor Lawyer, Professor Humanist, Professor Social Scientist, and Professor Internationalist.”⁴³ Martin predicted that information technologies would have different effects on how these different professor types conducted research and distributed scholarship, and that the new technologies would “soon sweep the academic workplace with the same speed and force as word processing.”⁴⁴ While Martin mainly discusses how the different types of law professors might use LexisNexis and Westlaw, he was remarkably accurate in predicting many current-day issues and challenges, including mass digitization projects for works in the public domain, copyright issues, electronic journals and databases, electronic communication with colleagues, and issues of data acquisition, computation, and analysis.⁴⁵ Martin’s nuanced view, which took into account not only social factors within legal academic culture, but also social factors within sub-fields as well as effects on such institutions as the law library and the law school⁴⁶ is a good example of a social shaping of technology approach.

¶21 At the other extreme is Bernard Hibbitts’ 1996 article in which he predicted the death of law reviews and put forth a “modest proposal”—that legal scholars bypass the law reviews and instead self-publish their scholarship on their personal web sites.⁴⁷ In fact, Hibbitts first posted the article on his web site, where it is still

39. *Id.* at 660.

40. *Id.*

41. Kling & McKim, *supra* note 1, at 1309.

42. *Id.* at 1309–10.

43. Peter W. Martin, *How New Information Technologies Will Change the Way Law Professors Do and Distribute Scholarship*, 83 *LAW LIBR. J.* 633, 634 (1991).

44. *Id.* at 634.

45. *Id.* at 635–38.

46. *Id.* at 638–40.

47. Hibbitts, *supra* note 12, at 667–68.

archived⁴⁸ and it was subsequently published in the *New York University Law Review*, which made an exception to its regular policy of accepting only “original works that ha[d] never been published.”⁴⁹ Hibbitts discusses electronic journals briefly, but finds possible editorial structures problematic and not likely to embrace fully the possibilities of the new technology.⁵⁰ In contrast, Hibbitts sees self-publishing as allowing legal scholars to “escape the straitjacket of the law reviews”⁵¹ by taking “complete control of the production and dissemination of their own scholarly work.”⁵²

¶22 Hibbitts responds to what he sees as the six main counterarguments:⁵³ quality control, “unfindable self-published legal scholarship,”⁵⁴ lack of access to the web or difficulties of learning HTML or HTML editors, difficulties of on-screen reading, depriving students of the law review editing experience, and loss of “incidental prestige to authors, editors and institutions.”⁵⁵ Following an admiring discussion of the progress being made with the pre-print archive in the field of high-energy physics,⁵⁶ Hibbitts does acknowledge that “[s]ystems or proposals for reform of scholarly communication that make sense in one or more disciplines admittedly may not be automatically appropriate for another having significantly different traditions, characteristics, or sensibilities.”⁵⁷ However, Hibbitts concludes that his article demonstrates that “internal professional circumstances—and not just the abstract existence of a technology—make Web self-publishing a particularly attractive option for the legal academy.”⁵⁸

¶23 Many scholars reacted to Hibbitts’ proposal, which sparked a special law review symposium issue of responses,⁵⁹ including one by Hibbitts.⁶⁰ Several of these responses took a social shaping of technology approach in arguing why Hibbitts’ proposal was not likely to become reality. They also distinguished between Hibbitts’ endorsement of electronic self-publishing and the electronic publishing of legal journals, whether through the use of pure e-journals or electronic versions of traditional print law reviews. For example, Thomas Bruce commented that Hibbitts “underestimates the tenacity of the existing culture” and argued that “unless merit, tenure, and promotion committees begin to recognize and actively encourage electronic publication, electronic publication will not take place on a useful scale.”⁶¹ Bruce recognized the possibilities of the electronic for-

48. Bernard J. Hibbitts, *Last Writes? Re-assessing the Law Review in the Age of Cyberspace* (version 1.2, Mar. 10, 1997), <http://www.law.pitt.edu/hibbitts/arclw.htm>.

49. Hibbitts, *supra* note 12, at 616.

50. *Id.* at 660–66.

51. *Id.* at 667.

52. *Id.* at 668.

53. *Id.* at 671–79.

54. *Id.* at 675.

55. *Id.* at 678.

56. *Id.* at 680–81.

57. *Id.* at 682.

58. *Id.* at 683.

59. Special Issue, 30 AKRON L. REV. 173–323 (1996).

60. Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes, and the Demise of Law Reviews*, 30 AKRON L. REV. 267 (1996).

61. Thomas R. Bruce, *Swift, Modest Proposals, Babies, and Bathwater: Are Hibbitts’ Writes Right?*, 30 AKRON L. REV. 243, 243 (1996).

mat, but instead of Hibbitts's self-publishing proposal, supported an online form that involved some kind of editing, a traditional issue format to make scholarship easier to locate, and continuing credentialing and experience for students.⁶²

¶24 In another response, David Rier, a professor of sociology and anthropology specializing in social studies of science, drew upon ideas of sociologist Robert K. Merton to analyze the “manifest and latent functions” of law reviews.⁶³ Manifest functions are explicit functions that participants would give as “the main reason[s] for the activity,” while latent functions are implicit and “not necessarily planned or even recognized.”⁶⁴ Rier argues that, compared to publications in science, where the primary purpose is communication of information, and publications are widely consulted by practitioners, “the real importance of legal scholarship seems to lie in its functions of teaching device, promotion criterion, and badge of identity as a scholarly discipline.”⁶⁵

¶25 Like Bruce, Rier considers the importance to professors, especially untenured professors, of publishing in prestigious journals, writing that legal scholarship will appear on the web “[w]hen authors have something to gain—in other words, when the system will reward them for publishing on-line.”⁶⁶ He argues that self-publication is not a good idea for legal scholarship, because some kind of quality control or refereeing is needed, and publication in prestigious journals is important for tenure and promotion.⁶⁷ Rier's suggestions include conversion of traditional law reviews to electronic publications and enhancing informal scholarly communication by taking advantage of the Internet to stimulate the “free exchange of ideas, at early stages of their development.”⁶⁸

¶26 In responding to his critics, Hibbitts focused largely on the benefits and ease of adopting new technologies and dismissed arguments regarding academic and professional prestige obtained from publishing in highly respected journals as “unseemly.”⁶⁹ Regarding institutional pressures, Hibbitts was more optimistic that tenure and promotion committees would recognize and encourage self-publication on the web.⁷⁰

¶27 While Hibbitts' web self-publication proposal was not widely adopted, it stimulated a lively discussion about the nature of legal scholarship and the possibilities inherent in the new electronic medium, which paved the way for the open access movement.

62. *Id.* at 244–47.

63. David A. Rier, *The Future of Legal Scholarship and Scholarly Communication: Publication in the Age of Cyberspace*, 30 AKRON L. REV. 183, 188 (1996).

64. *Id.*

65. *Id.* at 196–97.

66. *Id.* at 207.

67. *Id.* at 204–10.

68. *Id.* at 213.

69. Hibbitts, *supra* note 60, at 275–83, 299.

70. *Id.* at 305.

Open Access and Legal Scholarship

Open Access

¶28 In the current landscape, most stakeholders acknowledge that law reviews will likely be around for a while. Recently, the discussion has shifted to the impact of open-access publishing models on legal scholarship. “Open access” has many definitions, but generally it refers to the idea that scholarly literature should be freely accessible online and contain minimal copyright and licensing restrictions for future use.⁷¹ Examples of open-access strategies are self-archiving—authors depositing journal articles in open electronic archives—and open-access journals—online journals that readers can access and use for multiple purposes free of charge, so long as the author is properly acknowledged.⁷² The self-archiving strategy has been dubbed the “green road” to open-access publishing, while the open-access journal route has been termed the “gold road.”⁷³

¶29 Prior to explicit discussions of “open access,” authors in the legal arena had begun to discuss how best to move law reviews onto the Internet.⁷⁴ These early explorations acknowledged the “young professors’ dilemma”:⁷⁵ the tension between publishing in electronic journals and the worry that tenure committees would not give weight to electronic publication.⁷⁶ However, concerns regarding purely electronic journals were not about the format, but rather the newness of these journals and the consequent lack of prestige compared to journals like the *Harvard Law Review* and the *Yale Law Journal*.⁷⁷ Unlike other fields, in legal scholarship the issue was not peer review, because, ironically, many of the new electronic journals utilize peer review conducted by legal scholars, while the more prestigious traditional law reviews are student-run and edited.⁷⁸

¶30 A solution to the prestige dilemma would be for “traditional” law reviews to publish their articles on the World Wide Web, thereby maintaining all the advantages of the law review system—manpower of student editorial staff, educational benefits to students, and brand-name recognition—while at the same time taking

71. Charles W. Bailey, Jr., *What is Open Access?*, in OPEN ACCESS: KEY STRATEGIC, TECHNICAL AND ECONOMIC ASPECTS 13, 15 (Neil Jacobs ed., 2006), available at <http://www.digital-scholarship.com/cwb/WhatIsOA.pdf>; BORGMAN, SCHOLARSHIP IN THE DIGITAL AGE, *supra* note 1, at 100.

72. Bailey, *supra* note 71, at 14.

73. Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship*, 37 N.M. L. REV. 431, 438 (2007).

74. See, e.g., William H. Manz, *Floating ‘Free’ in Cyberspace: Law Reviews in the Internet Era*, 74 ST. JOHN’S L. REV. 1069 (2000); Shawn G. Pearson, Comment, *Hype or Hypertext? A Plan for the Law Review to Move into the Twenty-First Century*, 1997 UTAH L. REV. 765.

75. Pearson, *supra* note 74, at 798.

76. *Id.* at 782.

77. *Id.* at 782–83.

78. Compare, e.g., bepress, About bepress journals, <http://www.bepress.com/journals/about.html> (last visited Nov. 6, 2008) (“All bepress journals are rigorously edited and peer-reviewed by some of the world’s best-known and most widely-published scholars”) with Harvard Law Review, <http://www.harvardlawreview.org/about.shtml> (last visited Nov. 6, 2008) (“The *Harvard Law Review* is a student-run organization whose primary purpose is to publish a journal of legal scholarship. . . . Student editors make all editorial and organizational decisions . . .”).

advantage of the new technology.⁷⁹ Thomas Manz analyzed whether free access on the web would have a significant impact on paying subscribers and concluded that “the average law review would suffer no loss of print subscriptions by posting its articles free on the web.”⁸⁰ Manz pointed out that the main consumers of law reviews—judges, law clerks, large firm attorneys, law professors, and law students—“already ha[d] easy access to law review articles through law libraries, LexisNexis and Westlaw.”⁸¹

¶31 The first call for the legal scholarly community to embrace open access as a principle came from Dan Hunter, who offered a “manifesto in favor of open access to legal scholarship and a polemic against the walled gardens of law reviews.”⁸² After conducting a 2004 survey of law review publication policies, Hunter concluded that “law reviews are a long way behind other disciplines in adopting open access but . . . they are funded in a way that is consistent with open-access approaches.”⁸³ Hunter’s position reflects Kling and McKim’s description of electronic publishing enthusiasts, who believe that it is just “a matter of time” before the other fields catch up to the early adopters. Hunter recognized that changes in current business models will require activism on the part of law school deans and law faculty, but remained frustrated that law reviews have not embraced open-access models.⁸⁴ Hunter’s frustration extended to law review editors, who, as “students who have grown up with the Internet,” should see the benefits provided by open access.⁸⁵ Another source of frustration for Hunter was what he saw as the “unbearable irony” that “the same law reviews that have published seminal legal works on the importance of the public domain and open access to ideas might be the same law reviews that have the most restrictive policies on public access to the works that they publish.”⁸⁶

¶32 In light of Hunter’s advocacy and frustrations, it is instructive to consider the anecdote with which he opens his “manifesto.” Hunter assigned his copyright in another article to the law review who accepted the article for publication, only to have the law review ask the open-access repository where he had posted his draft to remove it.⁸⁷ Why did an open-access advocate like Hunter assign his copyright in his contract? Hunter was angry with himself and candidly explains why he did so knowingly:

Unlike some authors, I knew perfectly well what I was doing when I assigned the copyright. I did not seek to negotiate a lesser transfer of my interests because *I did not want to jeopardize the offer of publication in a top ten law review. As an untenured faculty member, I accepted the risks of this sort of assignment in exchange for publication in a journal that would significantly help my tenure case.* Older and wiser professors, I have subsequently discovered, have numerous means to avoid assigning copyright to law reviews.⁸⁸

79. Pearson, *supra* note 74, at 794–98.

80. Manz, *supra* note 74, at 1072.

81. *Id.* at 1086.

82. Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 612–13 (2005).

83. *Id.* at 613.

84. *Id.* at 637.

85. *Id.*

86. *Id.* at 639–40.

87. *Id.* at 608–09.

88. *Id.* at 609 (emphasis added). Some of these means of retaining copyright include “refus[ing]

If even a passionate open-access advocate like Hunter was unwilling to put open-access idealism ahead of career concerns, why would other, less committed faculty do so?

¶33 Responding to Hunter's impassioned call, legal scholarship circles did start to examine the possibilities of open-access publishing. The American Association of Law Libraries created an "Open Access Task Force," which in 2005 published an article focusing on the issue.⁸⁹ Also in 2005, the Open Access Law Program was created, a joint project of "Creative Commons, a nonprofit organization that provides flexible copyright licenses for authors and artists, and Science Commons," a Creative Commons project designed to promote "sharing of scientific and academic" information.⁹⁰ The projects' leaders were law professors Dan Hunter and Mike Carroll, and resources included the "Open Access Law Journal Principles and an Open Access Law Model Publication Agreement," and the "Open Access Law Author Pledge."⁹¹

¶34 In 2006, the *Lewis & Clark Law Review* published a symposium issue on "Open Access Publishing and the Future of Legal Scholarship."⁹² Many of the participant authors repeated the observation that, economically, law reviews seem to be a perfect fit for open access models.⁹³ Jessica Litman conducted a detailed accounting for constructive first-copy costs of law reviews, concluding that "[t]he legal academy subsidizes the cost of generating and publishing legal scholarship to a degree that makes the expense of printing and mailing law journals insignificant."⁹⁴ Litman argues that the royalties that law reviews receive from LexisNexis, Westlaw, and the Copyright Clearance Center will not be affected by open access, because users still will turn to Westlaw and LexisNexis for the added value they provide through search capabilities.⁹⁵

to sign the contract at all," or changing the wording of the contract at the last minute and not telling the editors about the change. *See id.* at 609–10. Other strategies include negotiating with the law review to change the terms of standard form agreements. *See Levit, supra* note 21, at 979.

89. Paul George & AALL Open Access Task Force, *The Future Gate to Scholarly Legal Information*, AALL SPECTRUM: MEMBERS' BRIEFING, Apr. 2005, at 1.

90. Press Release, Creative Commons & Science Commons, Creative Commons and Science Commons Announce Open Access Law Program (June 6, 2005), <http://creativecommons.org/press-releases/entry/5464>.

91. *Id.* These documents and others are available at the Open Access Law Program web page. Science Commons, Open Access Law Program, <http://sciencecommons.org/projects/publishing/oalaw> (last visited Nov. 6, 2008). As of October 2008, thirty-three U.S. law journals have "either adopted the open access law journal principles or have policies consistent with them." Open Access Commons, Open Access Law: Adopting Journals, <http://sciencecommons.org/projects/publishing/oalaw/oalawjournals> (last visited Nov. 6, 2008).

92. Symposium, *Open Access Publishing and the Future of Legal Scholarship*, 10 LEWIS & CLARK L. REV. 733–924.

93. *See, e.g.*, Dan Hunter, *Open Access to Infinite Content (Or "In Praise of Law Reviews")*, 10 LEWIS & CLARK L. REV. 761, 774–75 (2006); Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 783 (2006).

94. Litman, *supra* note 93, at 789.

95. *Id.* at 786, 792.

Resistance to Change

¶35 If open access is such a good fit for law reviews, why haven't law reviews embraced it? Litman offers an economic explanation—"the absence of any demand-side pressure to explore lower cost alternatives to the traditional subscription model."⁹⁶ The absence of demand-side pressures is exemplified by the fact that law professors have what feels like "open access" to legal scholarship on LexisNexis and Westlaw, because their law schools are paying for it.⁹⁷ Michael Madison asserts that "realistically, law professors know that few people outside of law schools actually read the law reviews" and asks,

What's the difference between the system as we find it—scholarship written by scholars for scholars, and made available for free in online commercial databases that are entirely subsidized by our institutional employers—and the open access system that we hypothesize we're missing? My first cut at the problem suggest that the difference is—nothing.⁹⁸

¶36 James Milles states bluntly that "[t]he open access movement in legal scholarship, at least as exemplified in current law library efforts, is a solution in search of a problem,"⁹⁹ and argues that the real problem, which open access could help to alleviate, is "the soaring costs of nonscholarly, commercially published, practitioner-oriented legal publications."¹⁰⁰

¶37 Therefore, based on the current situation, which includes the low cost of law review subscriptions, the discounted price of Westlaw and LexisNexis to law schools, and law professors' subsidized access to legal scholarship, there is little economic incentive for the current structure to change.

¶38 The academic value system also provides compelling reasons to resist change. Several authors have discussed how concerns regarding promotion and tenure present a barrier to embracing electronic publication forums.¹⁰¹ It can be hard to obtain a clear picture of legal scholarly culture, though, because much of it constitutes "tacit knowledge," unspoken and assumed by members of that culture.¹⁰² This tacit knowledge includes not only research practices, but advice about how to advance one's career within the legal academy.

¶39 While it can be difficult for outsiders to learn about this tacit knowledge, some studies and articles provide glimpses of it. For example, a 2006 study explored "academic value systems associated with scholarly publication and communication" in various disciplines, including law and economics, through interviews with faculty members.¹⁰³ The law professors in the study saw some advantages of the new publishing technologies, such as efficient communication and facilitation of

96. *Id.* at 791.

97. *Id.* See also Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 832 (2006); Manz, *supra* note 74, at 1080.

98. Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access*, 10 LEWIS & CLARK L. REV. 901, 904–05 (2006) (footnote omitted).

99. Milles, *supra* note 13, at 634, ¶ 54.

100. *Id.* at 631, ¶ 37.

101. See, e.g., Bruce, *supra* note 61, at 243; Hunter, *supra* note 82, at 609–10; Pearson, *supra* note 74, at 782–83; Rier, *supra* note 63, at 207.

102. BORGMAN, SCHOLARSHIP IN THE DIGITAL AGE, *supra* note 1, at 165–67.

103. C. JUDSON KING ET AL., SCHOLARLY COMMUNICATION: ACADEMIC VALUES AND SUSTAINABLE MODELS 2 (2006), available at http://cshe.berkeley.edu/publications/docs/scholarlycomm_report.pdf.

professional collaboration, but the perceived disadvantages were linked to concerns about prestige and the professional advancement system.¹⁰⁴ Specifically, new electronic journals were considered to be at a disadvantage, in terms of prestige. As one professor characterized the dilemma: “[T]he problem is, I’m not going to publish with an online journal that nobody reads and nobody’s going to read an online journal that nobody publishes in.”¹⁰⁵ Again, the issue here is not so much the online format as the newness of the purely online journals and the accompanying lack of prestige. The perceived risk of giving away one’s ideas by posting working papers online was somewhat alleviated because of the growing acceptance of citing to online repositories like the Social Science Research Network (SSRN).¹⁰⁶ Strategies for professional advancement included “posting several articles on SSRN for quick dissemination,” while at the same time attempting to place an article in a high-visibility journal.¹⁰⁷ When asked whether new publication methods were a support or hindrance to the advancement process, views were somewhat mixed, but none of the interviewees felt that new publication methods were helpful.¹⁰⁸

¶40 Overall, the King study demonstrates that law professors are wary of electronic publishing due to uncertainty about how tenure and promotion committees would consider articles published in online journals, confirming concerns already noted by other authors. Some of the professors interviewed believed that change needed to come from their institutions, in terms of encouraging new forms of publication, and that tenure and promotion committees needed to place “more emphasis on the quality of the individual work and the quality of a journal’s editors,” rather than the prestige of a particular journal.¹⁰⁹

¶41 Another article that gives a good snapshot of the current academic value system in law is Nancy Levit’s *Scholarship Advice for New Law Professors in the Electronic Age*.¹¹⁰ Apart from providing good general advice about the writing process, Levit focuses on the choices new professors make regarding electronic publishing, commenting that “[p]rofessors just joining the legal academy may feel caught in a time of transition between promotion and tenure rules based on traditional methods of publication and contemporary electronic and interdisciplinary possibilities for publication.”¹¹¹ Levit balances advice about publication in traditional forums (law reviews) with advice for using new electronic forums to obtain feedback on drafts, and counsels professors to get permission from the law review publishing an article to post the article on a faculty web page or the law review’s web site, in addition to an electronic repository.¹¹² Electronic media are highlighted as a tool for strengthening community—Levit suggests that professors use listservs to seek the advice of both faculty mentors and others in the wider scholarly com-

104. *Id.* at 79–80.

105. *Id.* at 80.

106. *Id.* SSRN is discussed in more detail *infra* ¶¶ 56–57.

107. KING ET AL., *supra* note 103, at 81.

108. *Id.* at 82.

109. *Id.* at 83.

110. Levit, *supra* note 21, at 947.

111. *Id.* at 948.

112. *Id.* at 971–73.

munity.¹¹³ Levit's article demonstrates the truth of the "middle ground" view: namely, that technology has changed scholarly legal culture, but the uses of the technology and the forms that have been adopted have been influenced by legal scholarly culture and practices.

Open Access as a Complementary System to Law Reviews

¶42 In yet another demonstration of their resilience and staying power, law reviews are currently alive and well, although they have made some changes in the direction of open access. Not surprisingly, considering prestige concerns and how deeply traditional law reviews are entrenched in legal culture, electronic-only journals have not significantly penetrated the legal market. For example, I looked at ISI Journal Citation Reports for law journals from 2001 to 2007, sorted by impact factor, which is based on citation frequency.¹¹⁴ I chose the top twenty publications by impact factor, selecting those that appeared in the top thirty for at least six out of the seven years.¹¹⁵ Of these twenty law journals, all are traditional law reviews. Eighteen are student-edited law reviews published by law schools; one, *Law & Human Behavior*, is published by a scholarly society (the American Psychology-Law Society), and one, the *Journal of Legal Studies*, is sponsored by the University of Chicago Law School and edited by two law professors there. Of the top 100 by impact factor from 2007, none are electronic-only journals, and the majority are student-edited law reviews published by law schools.¹¹⁶

¶43 The Directory of Open Access Journals (DOAJ) defines open access journals as

[J]ournals that use a funding model that does not charge readers or their institutions for access. From the [Budapest Open Access Initiative] definition of "open access" we take the

113. *Id.* at 982.

114. ISI Journal Citation Reports can be created at <http://admin-apps.isiknowledge.com/JCR/JCR> (last visited Nov. 7, 2008) (subscription required). Specifically, impact factor is the average number of times articles from the journal published in the previous two years have been cited in the year covered by the Journal Citation Report. See ISI, Journal Impact Factor, http://admin.isiknowledge.com/JCR/help/h_impfact.htm (last visited Nov. 7, 2008).

115. The following eighteen law reviews appeared in the top thirty in all seven years: Harvard, Columbia, UCLA, Texas, Yale, University of Pennsylvania, California, Cornell, Stanford, Virginia, Georgetown, Michigan, the *Journal of Legal Studies*, Minnesota, Northwestern, Vanderbilt, New York University, and the University of Chicago. The following two law reviews appeared in the top thirty in six out of the seven years: the *Harvard Environmental Law Review* and *Law & Human Behavior*.

116. Editors at ISI select the journals that are included in a particular subject area using multiple factors, including the journal's basic publishing standards, its editorial content, the international diversity of the authors, and the citation data associated with it. See Thomson Reuters, The Thomson Scientific Journal Selection Process, http://www.thomsonreuters.com/business_units/scientific/free/essays/journalselection (last visited Nov. 7, 2008) (stating that "the basic mission of Thomson Scientific is to provide access to the world's most important and influential journals regardless of the media in which they are published," and noting that the same criteria are used to evaluate electronic journals). Additionally, there must be sufficient data available to calculate the impact factor. Hundreds of electronic-only journals are included in the databases from which the Journal Citation Reports are drawn. See e-mail from Marie McVeigh, Senior Manager JCR and Bibliographic Policy, Thomson Reuters, to author (Nov. 3, 2008) (on file with author). The Journal Citation Reports in the "law" subject category did not include any electronic-only journals.

right of users to “read, download, copy, distribute, print, search, or link to the full texts of these articles” as mandatory for a journal to be included in the directory.¹¹⁷

The DOAJ web site contains 3728 journals, but only sixty-five journals in law.¹¹⁸ Of these sixty-five, only twenty-four are published in the United States, and five of those twenty-four are published by Duke University School of Law, which has made a conscious decision to make all of its journals available online.¹¹⁹ Setting aside the Duke law reviews, four of the remaining nineteen are technology-related.¹²⁰ Of the remaining fifteen journals, all but one (the *New England Law Review*) are specialized law reviews and none is contained in the ISI Journal Citation Reports of the top 100 journals in law by impact factor for 2007.¹²¹ Additionally, these fifteen journals are all relatively new, beginning publication in or after 1995. No other law schools have followed the example of Duke Law School in making all their journals freely available online. It should be noted, though, that DOAJ is a not comprehensive listing, and therefore journals that fit the criteria may not appear simply because they have not requested inclusion or been suggested by others.¹²²

¶44 Berkeley Electronic Press (bepress) publishes nine peer-reviewed, electronic legal journals,¹²³ but none of these are represented in the ISI top 100 journals in law by impact factor for 2007. They would also not fall under DOAJ’s definition of open-access journals, because they charge subscription fees.¹²⁴ However, readers can download full-text versions of all the articles without cost by registering, and bepress allows archiving of pre-prints and post-prints.¹²⁵

117. Directory of Open Access Journals, Frequently Asked Questions, <http://www.doaj.org/doi?func=loadTempl&templ=faq> (last visited Nov. 7, 2008) (footnote omitted) (emphasis omitted).

118. Directory of Open Access Journals, Home, <http://www.doaj.org> (last visited Nov. 7, 2008); Directory of Open Access Journals, Law & Political Science Journals, <http://www.doaj.org/doi?func=subject&cpid=45> (last visited Nov. 7, 2008).

119. See Duke Law Academics, Journals, <http://www.law.duke.edu/scholarship/journals> (last visited Nov. 7, 2008) (“Duke Law is a leader in electronic publishing of legal scholarship and is actively involved in efforts to promote open access to legal information. We continue to make our journals widely accessible electronically and to give authors the ability to disseminate published articles.”).

120. *Michigan Telecommunications & Technology Law Review*, *Northwestern Journal of Technology & Intellectual Property*, *Richmond Journal of Law & Technology*, and *Stanford Technology Law Review*.

121. These journals are: *Asian Pacific Law & Policy Journal*; *Connecticut Public Interest Law Journal*; *Federal Courts Law Review*; *Harvard Human Rights Journal*; *Human Rights & Human Welfare*; *International Journal of Baltic Law*; *International Journal of Not-For-Profit Law*; *Internet Journal of Law, Healthcare & Ethics*; *Journal of Philosophy, Science & Law*; *The Jury Expert*; *New England Law Review*; *Open Forensic Science Journal*; *Rutgers Journal of Law & Religion*; *Unbound: Harvard Journal of the Legal Left*; and *War Crimes, Genocide & Crimes Against Humanity*.

122. See Directory of Open Access Journals, Suggest a New Title, <http://www.doaj.org/doi?func=suggest> (last visited Nov. 7, 2008); see also Directory of Open Access Journals, *supra* note 117..

123. Bepress, Law Journals, <http://www.bepress.com/journals/law.html> (last visited Nov. 7, 2008).

124. *Id.*

125. See The Berkeley Electronic Press, About bepress Journals, <http://www.bepress.com/journals/about.html> (last visited Nov. 7, 2008). See also Sherpa/RoMeo, <http://www.sherpa.ac.uk/romeo.php> (last visited Nov. 7, 2008) (allowing full-text searches of bepress journals as well as those of numerous other publishers).

¶145 Even some law reviews that do not meet the DOAJ criteria for inclusion do post full-text, downloadable versions of articles online, including articles in the current issue. This indicates that those law reviews have concluded that making full-text freely available will not harm their print subscription revenue, or their royalties from LexisNexis, Westlaw, and the Copyright Clearance Center. For example, of the top twenty law journals on ISI Journal Citation reports for the past seven years, fourteen contain links to full-text versions of articles from the current issue on their web site (see figure 1).¹²⁶

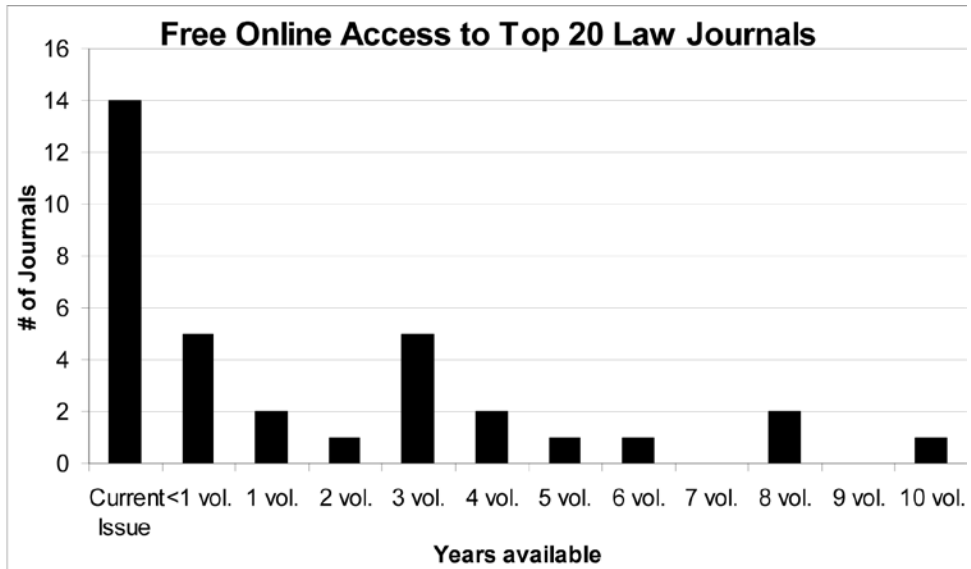


Figure 1. Free Online Access to Top 20 Law Journals

¶146 Fifteen of the top twenty journals post one or more previous volumes online; however, the number of archived volumes varies from journal to journal.¹²⁷ An analysis of the subscription cost of these twenty journals demonstrates that the cost is relatively modest: the average price was \$46.30, and the median price was \$46 (see figure 2).¹²⁸ The most expensive journal was one of the non-student-run jour-

126. I determined whether the current issue was “available” by comparing the most recent issue posted online to the most recent print issue received by our law library. If the online version had not caught up to the print version, I considered it “not available.” This data reflects the situation at the time I made these comparisons (Nov. 4, 2008).

127. Figure 1 is subject to change, as the law reviews make more back issues available in their online archives or remove previously available back issues.

128. I obtained the prices from the law reviews’ web sites, or if not available there, from ULRICH’S PERIODICALS DIRECTORY (2008). In order to make a valid comparison, I used the individual annual subscription price. Most journals provided only one subscription price, but a few had different prices for individuals and institutions. For example, the *Harvard Law Review* costs \$55 for an individual subscription and \$200 for an institutional subscription, with discounted subscriptions for nonprofit institutions (\$95 for initial subscription; \$75 for continued subscription). See *Harvard Law Review, Ordering Information*, <http://www.harvardlawreview.org/order.shtml> (last visited Oct. 8, 2008).

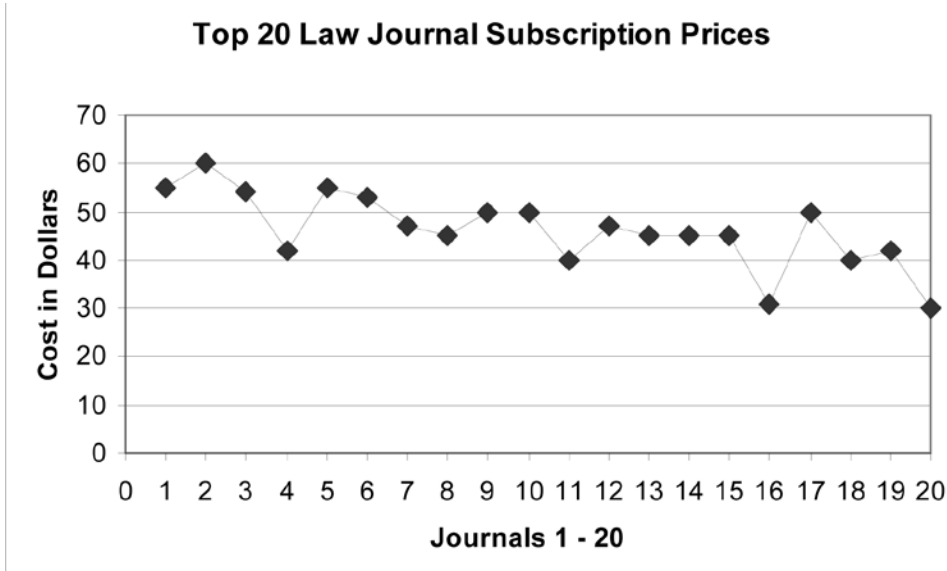


Figure 2. Top 20 Law Journal Subscription Prices

nals: the *Journal of Legal Studies* (\$83). All of the student-run journals range between \$30 and \$60.

¶47 Regarding open access, four of the top twenty have explicitly articulated some kind of open-access policy (See figure 3).¹²⁹ For example, the *Michigan Law Review* has an “Open-Access Policy” on its web site, explaining that “we believe that authors should not be required to give up their intellectual property rights in their work in order to publish in the *Michigan Law Review*.”¹³⁰ Specifically, the *Michigan Law Review* requires a nonexclusive license, and authors may publish under a Creative Commons license if they wish. Additionally, after publication, the *Michigan Law Review* will give the author a PDF of the citable form of the article “with the expectation that this will be posted in an Open Access Repository.”¹³¹ The *Minnesota Law Review* also focuses on authors’ rights to distribute their work, stating that it “offers publication agreements that conform to the Open Access Law Journal Principles” (the same as those mentioned by the *Michigan Law Review*), and posting their “model publication agreement.”¹³² *Law and Human Behavior*, the

129. In constructing figure 3, some of the categories overlapped. However, I began with the distinction between journals that referred permission requests to the Copyright Clearance Center, and those that articulated some kind of open-access policy. There was no overlap between these two groups. I then prioritized the category of journals that gave explicit criteria for classroom use, putting journals here even if they also had some statement about contacting the law review or author (such as the *N.Y.U. Law Review*). I prioritized the “open access” category above “classroom use,” so I placed Minnesota in “open access” even though they also had a “classroom use” policy. The journals in the “contact law review and/or author” category are those that mentioned none of the other three policies.

130. Michigan Law Review, Open-Access Policy, <http://www.michiganlawreview.org/submit/openaccess.htm> (last visited Nov. 7, 2008).

131. *Id.*

132. Minnesota Law Review, Submission Information, <http://local.law.umn.edu/lawreview/submissions.htm> (last visited Nov. 7, 2008).

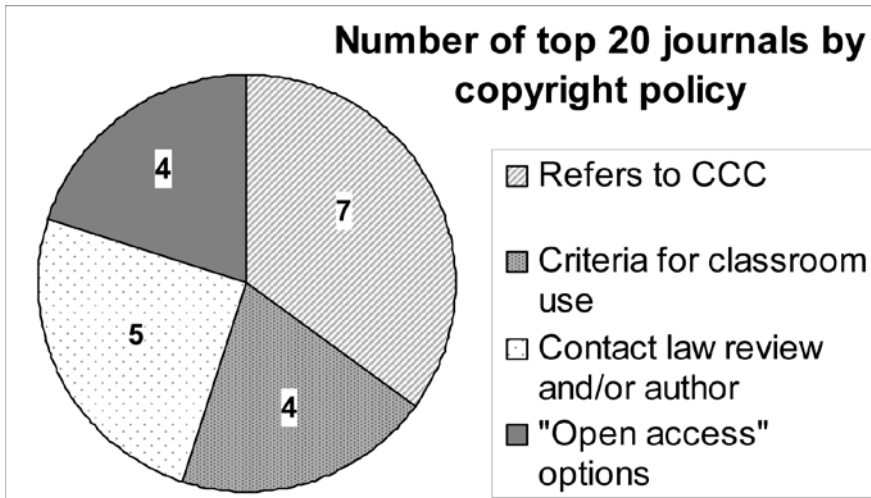


Figure 3. Number of Top 20 Journals by Copyright Policy

official journal of the American Psychology-Law Society, is generally available only to members of the American Psychology-Law Society and to members of institutions that subscribe to article databases that include the journal.¹³³ However, Springer, the commercial publisher, provides an “Open Choice” option, where authors can keep their copyright and have their journal articles made available with full open access in exchange for a \$3000 “article processing charge.”¹³⁴

¶48 Finally, the *Northwestern University Law Review* focuses not only on the “green road” (providing authors with the ability to self-archive their works or to otherwise make the work freely accessible) but also the “gold road” (becoming an open access journal). Specifically, the law review published a statement expressing its “commitment to maintaining broad and costless access to the information we publish.”¹³⁵ It went on to explain that starting with volume 99, issue 4,

all of our content has been, and will continue to be, available as a PDF download through our past issues tab. As a result, anyone will be able to find *Northwestern University Law Review* content using an internet search engine, and download it for free. Furthermore, we will maintain a fully permissive policy regarding authors who wish to post drafts of their forthcoming articles to SSRN, Bepress or other locations on the web.¹³⁶

Northwestern Law Review acknowledged that the “hard part” was the prospect of scanning nearly 100 years of print issues of the *Review*, but that it had a plan to start scanning backwards from the most recent issues.¹³⁷

133. Law and Human Behavior, <http://www.ap-ls.org/publications/behaviorIndex.php> (last visited Nov. 7, 2008) (access limited to members); Springer, Forensic Psychology: Law and Human Behavior, <http://www.springer.com/psychology/law+%26amp;+psychology/journal/10979> (last visited Nov. 7, 2008) (access limited to subscribers).

134. Springer, Manuscript Guidelines for Journal Authors, <http://www.springer.com/authors/journal+authors?SGWID=0-154202-12-417499-0> (last visited Nov. 7, 2008).

135. The *Law Review's* Commitment to Open-Access Publishing, Colloquy, Oct. 23, 2006, http://colloquy.law.northwestern.edu/main/2006/10/the_law_reviews.html.

136. *Id.*

137. *Id.*

¶49 Of the remaining sixteen journals, seven referred all permissions requests to the Copyright Clearance Center, four provided some criteria for classroom use, and five instructed individuals requesting permissions to contact the law review or the author of the article.

¶50 In summary, while traditional law reviews may contain copyright restrictions for future uses, many have become open-access journals in that readers wishing to access their content may freely read and download current issues and a steadily growing archive of past issues.

Parallel Systems: Online “Companions” and Electronic Repositories

¶51 As shown by the above discussion, while traditional law reviews are becoming more freely available online, open-access journals have not replaced the traditional system of law reviews. Instead, the availability of new technology has resulted in the creation of parallel avenues for publication.

¶52 One example of this parallel system is the creation by traditional law reviews of online “companions,” cleverly titled online publications containing shorter articles and responses to articles published in the law review, and freely available on the law review’s web site. These online companions include Yale Law Review’s *Pocket Part*, Harvard Law Review’s *Forum*, Columbia Law Review’s *Sidebar*, Michigan Law Review’s *First Impressions*, Virginia Law Review’s *In Brief*, Texas Law Review’s *See Also*, Northwestern University Law Review’s *Colloquy*, the University of Pennsylvania Law Review’s *PENNumbra*, and Vanderbilt Law Review’s *En Banc*.¹³⁸ These online companions contain embedded hypertext links in the articles, so that readers may seamlessly access cited materials. In many ways, these publications have responded to the frequently repeated criticisms of traditional law reviews. The shorter articles are more timely, accessible, and written in a less formal, op-ed style. Many of the online companions specifically mention the popularity of legal blogs and the desire to increase accessibility and draw in readers outside of academia, such as practicing attorneys, judges, legislators, and members of the public. For example, the *Yale Pocket Part* states that the publication is an effort to combine the strengths of legal blogs with “the traditions of the student-edited law journal,” and seeks to address “concerns of members of the bench and the bar who rarely read law review articles.”¹³⁹ Similarly, Northwestern’s *Colloquy* states that “[i]t features legal commentary written in a form that is a hybrid between a print article and a blog post” and that the shorter essays “straddle the border between the

138. See *Pocket Part*, <http://www.thepocketpart.org> (last visited Nov. 7, 2008); Harvard Law Review *Forum*, About the Forum, <http://www.harvardlawreview.org/forum/aboutforum.shtml> (last visited Nov. 7, 2008); Columbia Law Review *Sidebar*, <http://columbialawreview.org> (last visited Nov. 7, 2008); *First Impressions*, <http://www.michiganlawreview.org/index-fi.htm> (last visited Nov. 7, 2008); *In Brief*, <http://virginialawreview.org/index.php> (last visited Nov. 7, 2008); *See Also*, <http://www.texasrev.com/seealso> (last visited Nov. 7, 2008); Northwestern *Colloquy*, <http://colloquy.law.northwestern.edu> (last visited Nov. 7, 2008); *PENNumbra*, <http://www.pennumbra.com> (last visited Nov. 7, 2008); *En Banc*, <http://law.vanderbilt.edu/publications/vanderbilt-law-review/online-companion/about/index.aspx> (last visited Nov. 7, 2008). Nine of the top twenty law reviews I looked at had an online companion.

139. *Pocket Part*, The Future of Legal Scholarship (Sept. 6, 2006), <http://yalelawjournal.org/editorial/the-future-of-legal-scholarship.html>.

depth and rigor of an article and the speed and brevity of a blog post or an op-ed.”¹⁴⁰ The University of Pennsylvania’s *PENNumbra* has as its tagline “Uniting the Public and the Legal Academy,” and declares that it is “on the frontier of a refreshing medium that is accessible to legal scholars and to the lay public alike, uniting the Internet and the academy at the nexus of two different spheres. . . .”¹⁴¹

¶53 These online companions may fit the “gold road” open-access strategy, but publication in the traditional law reviews is still considered the route to tenure and promotion for legal scholars.

¶54 While the law reviews’ online companions offer one model of a parallel open-access forum, a second and more widespread example is author self-archiving in electronic repositories (the “green road” strategy). These include both institutional repositories and commercial electronic repositories.

¶55 Electronic repositories give authors the opportunity to archive digital “e-prints”—either “preprints” (working papers that haven’t yet been published) or “postprints” (articles already published by a journal).¹⁴² Not surprisingly, due to the prominence and innate conservatism of traditional law reviews, this self-archiving option has been more successful than open access in the field of legal scholarship.¹⁴³ The benefit of archiving in electronic repositories is that it increases the audience for legal scholarship, while not negatively affecting student-edited law reviews subsidized by law schools.¹⁴⁴ “All major institutional repositories are now indexed by Google Scholar,” and if the repository complies with the Open Archives Initiative’s Protocol for Metadata Harvesting (OAI-PMH), users can utilize federated searching across all repositories.¹⁴⁵

¶56 In the field of legal scholarship, the electronic repositories that are dominant are not institutional repositories, whether based on open source or proprietary software, but commercial repositories limited to legal scholarship. The two most popular are the Legal Scholarship Network (LSN),¹⁴⁶ a subdivision of the Social Science Research Network (SSRN), and the Berkeley Electronic Press Legal Repository (bepress).¹⁴⁷ Differences between institutional repositories and commercial repositories are that the commercial repositories “do not support multimedia files . . . and few are registered” with the Registry of Open Access Repositories (ROAR).¹⁴⁸ Carol Parker, in an excellent discussion of institutional repositories, argues that while the repositories hosted by SSRN and bepress do not meet every element of SPARC’s (the Scholarly Publishing and Academic Resource Coalition)

140. Announcing the *Northwestern Colloquy* (Oct. 7, 2006), http://colloquy.law.northwestern.edu/main/2006/10/announcing_the_.html.

141. *PENNumbra*, About *PENNumbra*, <http://www.pennumbra.com/about> (last visited Nov. 7, 2008).

142. Parker, *supra* note 73, at 438.

143. *Id.* at 442.

144. *Id.* at 444–45.

145. *Id.* at 449–50.

146. Social Science Research Network, Legal Scholarship Network, <http://www.ssrn.com/lsn/index.html> (last visited Nov. 7, 2008).

147. bepress Legal Repository, <http://law.bepress.com/repository> (last visited Nov. 7, 2008).

148. Parker, *supra* note 73, at 455.

definition of an institutional repository, because they come very close, they should count as institutional repositories.¹⁴⁹

¶157 SSRN was founded in 1994 by a group of scholars, and its Legal Scholarship Network (LSN) is the largest collection of open-access legal e-prints currently available.¹⁵⁰ SSRN is a closely held, for-profit corporation.¹⁵¹ Authors can upload papers to one of LSN's "subject matter journals" for free, and readers can download those papers for free. Alternatively, an institution can sponsor a "research paper series" on LSN, and readers can download those papers for free as well. SSRN earns its revenue from abstracting journals, site subscription license fees from institutions that pay SSRN to host the Research Paper Series for the institution, "fees received for professional and job announcements, conference fees for SSRN's Conference Management System, and . . . fees shared with SSRN by publishers who distribute their papers through SSRN on a pay per download basis."¹⁵² While SSRN is indexed by Google, as are institutional repositories, "the site is not OAI-PMH compliant and is not registered with ROAR or OpenDOAR."¹⁵³ Many law reviews require that authors remove the final version of a working paper from SSRN when it is published in the print journal,¹⁵⁴ but some law reviews are responding to pressure from authors and allowing authors to post the final version of the article in electronic repositories.¹⁵⁵ As of May 2008, ninety-one U.S. law schools were sponsoring a research paper series on LSN.¹⁵⁶

¶158 The other popular commercial legal repository is part of Berkeley Electronic Press, founded in 1996 by professors who were frustrated with the publication delays and costs related to traditional academic journals.¹⁵⁷ Bepress "is a privately held, for-profit corporation" and publishes "several peer-reviewed online journals"; it is also a software developer and has created applications that manage online journals, institutional repositories, and the previously mentioned application to facilitate online submissions to law journals (ExpressO).¹⁵⁸ The bepress Legal Repository was founded in 2004, and as with SSRN, authors can upload individual papers that users can download for free, or institutions can pay to have a working paper series and users can download those papers free of charge.¹⁵⁹ "The

149. *Id.* at 456.

150. *Id.* at 456–57; SSRN, A Tenth Anniversary Message (Aug. 2007), <http://www.ssrn.com/update/general/mjensen.html>.

151. Parker, *supra* note 73, at 456.

152. SSRN, A Tenth Anniversary Message, *supra* note 150.

153. Parker, *supra* note 73, at 458.

154. George & AALL Open Access Task Force, *supra* note 89, at 2.

155. Hunter, *supra* note 82, at 636–37; Levit, *supra* note 21, at 981.

156. Legal Scholarship Network, Research Paper Series, http://www.ssrn.com/update/lsn/lsn_rps_jrl.html (last visited Nov. 7, 2008).

157. Berkeley Electronic Press, Promote Your Faculty Scholarship, <http://law.bepress.com/repository/faq-institutions.html> (last visited Oct. 8, 2008); see also Paula J. Hane, *bepress.com Introduces Innovative Scholarly Publishing Model*, INFO. TODAY, Mar. 2001, at 1, 56, available at <http://www.infotoday.com/IT/mar01/hane.htm>.

158. Parker, *supra* note 73, at 458–59.

159. *Id.* at 459; Bepress Legal Repository, Promote Your Faculty Scholarship, *supra* note 157; Information for Authors, <http://law.bepress.com/repository/faq-authors.html> (last visited Nov. 7, 2008).

[material] in the bepress Legal Repository is indexed by Google at the full-text level,” and “[a]ll bepress applications are OAI-PMH compliant”¹⁶⁰ As of November 2008, thirty-four U.S. law schools were sponsoring a working paper series in the bepress Legal Repository.¹⁶¹

¶159 Even when law schools have an institutional repository where scholars can archive e-prints, the law school often will pay to have a Law School Research Paper Series on LSN, or a Working Paper Series in the bepress Legal Repository. Some schools even pay SSRN or bepress instead of using an existing repository at their institution.¹⁶²

¶160 The movement for faculty self-archiving of legal scholarship in electronic repositories received a huge boost in May of 2008 when the Harvard Law School faculty voted unanimously to make articles authored by faculty freely available in an online repository.¹⁶³ Harvard is “the first law school to commit to a mandatory open access policy.”¹⁶⁴

Formal vs. Informal Communication in Legal Scholarship

¶161 At first, it may seem that using electronic media to create and disseminate legal scholarship has contributed to the blurring of the line between formal and informal scholarship.¹⁶⁵ For example, it is difficult to categorize LSN, which is both an example of informal scholarly communication through the posting of drafts and pre-prints, and a vehicle for the dissemination of formal scholarship through the posting of post-prints. However, the lines “between formal and informal communication . . . were never distinct.”¹⁶⁶ Christine Borgman’s insights about the shifts caused by electronic dissemination accurately characterize the changes in the field of legal scholarship:

What has changed most since the days of print and post is the balance between public and private communication. Conversations that previously were oral are now conducted by e-mail or online discussion lists, sometimes leaving a public record for a long period of time. Presentations that would have been heard by a few people at a seminar are now widely available online via the posting of slides, speaking notes, and Webcasts. Manuscripts, preprints, technical reports, and other written works that were circulated privately are now posted publicly. Online communication has accelerated the amount of informal communication among scholars and simplified the dissemination of formal products of scholarship.¹⁶⁷

In legal scholarship, the clearest example of the acceleration of the amount of informal communication and a shift in the balance between public and private communication is the development of legal blogs.

160. Parker, *supra* note 73, at 461.

161. Bepress Legal Repository, Browse by Institution, <http://law.bepress.com/repository/institutions.html> (last visited Nov. 10, 2008).

162. Parker, *supra* note 73, at 462–63.

163. Berkman Center for Internet & Society, *Harvard Law Votes Yes on Open Access*, May 7, 2008, <http://cyber.law.harvard.edu/node/4273>; News Release, Harvard Law School, May 7, 2008, http://www.law.harvard.edu/news/2008/05/07_openaccess.php.

164. News Release, Harvard Law School, *supra* note 163.

165. Danner, *supra* note 12, at 350.

166. BORGMAN, SCHOLARSHIP IN THE DIGITAL AGE, *supra* note 1, at 48.

167. *Id.* at 49.

¶62 Networked technologies have enabled the growth of legal weblogs, or blogs, and many law professors have started their own blogs. For example, the Law Professor Blogs Network hosts fifty-six blogs in various subject areas.¹⁶⁸ Many law professors host their own blogs independently; the legal blog Law X.0 lists eighty-six law professor blogs.¹⁶⁹ Blogs enable scholars to circumvent the limitations of the traditional law review format and write shorter, more timely pieces on a variety of legal topics that are widely disseminated on the Internet. The blog posts are written in a more colloquial style and are not as heavily footnoted. Unlike the law review publication process, legal blogs involve the creation of an online community where members provide feedback to the blog authors. Additionally, legal blogs enable coverage of legal topics not as well represented in traditional law reviews.

¶63 Legal blogs have become such a prominent feature of scholarly legal culture that on April 28, 2006, a symposium was held at Harvard Law School, organized by the Berkman Center for Internet and Society, to explore the effect of blogs on legal scholarship.¹⁷⁰ The dissemination of this symposium is an excellent example of the current spectrum of forums for legal scholarship. First, taking advantage of new technology, podcasts of the symposium's proceedings are available at "MediaBerkman," the Berkman Center for Internet & Society Podcast.¹⁷¹ Second, as the open-access repository option, all of the symposium papers and commentaries are hosted at a special page on SSRN.¹⁷² Third, as the traditional law review option, the same papers and commentaries were all published in a symposium issue of the *Washington University Law Review*.¹⁷³

¶64 These symposium papers and comments provide a fascinating "inside view" into current legal scholarly culture, particularly into areas that were previously tacit and unspoken, or perhaps broached in private conversations. They expand, in a public forum, the glimpses provided by the King study of law and economics professors and Nancy Levit's advice to new law professors.¹⁷⁴ As Kate Litvak, the one law professor symposium panelist without a blog, so aptly puts it, a blog can be seen as "a bugged water cooler," a forum for informal communication that in the past would be private, but now, through technology, has become public.¹⁷⁵ A discussion of how legal blogs are transforming legal scholarship initiates debate and discussion about such questions as: What is legal scholarship? How has legal scholarship changed? Are blogs legal scholarship? In the process, the panelists

168. Law Professor Blogs, Welcome, <http://www.lawprofessorblogs.com> (last visited Nov. 10, 2008).

169. Law Professor Blogs, Law X.0, http://3lepiphany.typepad.com/3lepiphany/2006/03/law_professor_b.html (last visited Nov. 10, 2008).

170. Bloggership: How Blogs Are Transforming Legal Scholarship, <http://cyber.law.harvard.edu/node/2457#> (last visited Nov. 10, 2008).

171. Bloggership 2006, MediaBerkman, <http://blogs.law.harvard.edu/mediaberkman/category/events/bloggership-2006> (Apr. 28, 2006).

172. Bloggership: How Blogs Are Transforming Legal Scholarship (Archive), SSRN, <http://www.ssrn.com/link/Bloggership-2006.html>, (last visited Nov. 10, 2008).

173. Symposium, Bloggership: How Blogs Are Transforming Legal Scholarship, 84 WASH. U. L. REV. 1025-1261 (2006).

174. KING ET AL., *supra* note 103; Levit, *supra* note 21.

175. Kate Litvak, *Blog as a Bugged Water Cooler*, 84 WASH. U. L. REV. 1061, 1066 (2006).

brought to the surface many unspoken practices and assumptions about the nature of legal scholarship, career advancement, and the creation of community.

¶65 Overwhelmingly, the law professors who have blogs appreciate the fact that their blogs engage them in an active dialogue with their online reader community, who provide feedback through e-mails and posting of comments.¹⁷⁶ One frequently repeated criticism of current legal scholarship is that it is increasingly abstract and theoretical and no longer relevant to practicing attorneys and judges, but legal blogs enable their authors to re-engage with the wider legal community.¹⁷⁷ For example, as Douglas Berman, author of *Sentencing Law and Policy Blog*,¹⁷⁸ writes: “More than any other form of communication, blogs enable a law professor to reach out and interact as cyberpeers with an extensive and extraordinarily diverse audience.”¹⁷⁹ This audience “includes not only judges, policymakers, and practitioners . . . but also academics from other disciplines, journalists of all stripes, many nonlawyers interested in criminal justice issues, and also—perhaps most valuably—the real people whose lives are most impacted by the policies and doctrines that I discuss.”¹⁸⁰ Not only can blogs reach a wider audience than traditional legal scholarship, they are increasingly being cited in court opinions and law review articles.¹⁸¹

¶66 Blog authors recognize that legal blogs serve a function in the informal scholarly communication process. D. Gordon Smith describes the process of blogging about a particular case, which involved conversations, debates, and analysis with co-bloggers, as “pre-scholarship”¹⁸² and writes that “[t]his sort of exploration is part of the scholarly process, and my blogging about the . . . case feels very much like the work that I do in the preliminary stages of writing a law review article.”¹⁸³

¶67 Another benefit of legal blogs is rapid dissemination: authors can post immediate commentary on current events or recently decided cases that would be

176. Douglas A. Berman, *Scholarship in Action: The Power, Possibilities, and Pitfalls for Law Professor Blogs*, 84 WASH. U. L. REV. 1043, 1049–50 (2006); Paul Butler, *Blogging at Blackprof*, 84 WASH. U. L. REV. 1101, 1102–04 (2006); Paul L. Caron, *Are Scholars Better Bloggers? Bloggership: How Blogs are Transforming Legal Scholarship*, 84 WASH. U. L. REV. 1025, 1026 (2006); Gail Heriot, *Are Modern Bloggers Following in the Footsteps of Publius? (And Other Musings on Blogging by Legal Scholars . . .)*, 84 WASH. U. L. REV. 1113, 1118, 1124 (2006); D. Gordon Smith, *A Case Study in Bloggership*, 84 WASH. U. L. REV. 1135, 1136–39 (2006); Lawrence B. Solum, *Blogging and the Transformation of Legal Scholarship*, 84 WASH. U. L. REV. 1071, 1073–74 (2006); Eugene Volokh, *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*, 84 WASH. U. L. REV. 1089, 1091–92 (2006).

177. Berman, *supra* note 176, at 1047–48; Heriot, *supra* note 176, at 1115–20, 1124.

178. *Sentencing Law & Policy Blog*, <http://sentencing.typepad.com> (last visited Nov. 10, 2008).

179. Berman, *supra* note 176, at 1049.

180. *Id.*

181. *Cases Citing Legal Blogs*, Law X.0, http://3lepiphany.typepad.com/3lepiphany/2006/08/cases_citing_le.html (Aug. 6, 2006); *Law Review Articles Citing Legal Blogs*, Law X.0, http://3lepiphany.typepad.com/3lepiphany/2006/08/law_review_arti.html (Aug. 16, 2006). While these listings have not been updated in more than two years, it can be assumed that more recent cases and law review articles continue to cite to blogs.

182. Smith, *supra* note 176, at 1139 (quoting Professor Amanda Perry).

183. *Id.* at 1138. See also Orin S. Kerr, *Blogs and the Legal Academy*, 84 WASH. U. L. REV. 1127, 1131 (2006) (“[B]log posts are likely to become the first rough draft of scholarship on new legal developments.”).

untimely if the author had to wait for publication of a law review article.¹⁸⁴ Gail Heriot argues that blogs allow modern legal scholars to take on the role of the “public intellectual,” by providing commentary on current legal and policy issues in the tradition of the authors of the *Federalist Papers*.¹⁸⁵

¶68 Not surprisingly, the discussion about blogs and legal scholarship includes concerns about how blogging will be viewed by promotion and tenure committees. Christine Hurt and Tung Yin consider whether blogging is a “risky venture” for untenured law professors.¹⁸⁶ After describing the spectrum of different types of legal blogs and possible pitfalls, Hurt and Yin conclude that the benefits outweigh the risks, writing that “[f]or the majority of pretenured law professors, blogging may be a great way to become a part of the dialogue in a given area. And is that not why we became law professors in the first place?”¹⁸⁷

¶69 Just as specialized law reviews provided a forum for “outsider scholarship,” legal blogs provide an electronic forum for discussions about topics such as critical race theory, affirmative action, feminism, and sexual orientation law.¹⁸⁸ These blogs can provide a virtual community where scholars can connect and express views that are not well represented in mainstream legal publications, in addition to connecting with a wider community of readers. For example, Paul Butler, whose blog is Blackprof,¹⁸⁹ writes that “we at Blackprof have a new way to connect with, teach, and learn from many people who don’t know or care what a law review is. . . . Our blog may not change legal scholarship, but it has helped nine African American legal scholars talk to, and learn from, the communities we serve.”¹⁹⁰ Finally, the popularity of legal blogs can be seen as an indicator of larger changes in legal scholarship. As Lawrence Solum writes, “[t]he importance of blogs, if any, is as the medium (or technology) through which the incentives and institutional forces that are pushing legal scholarship toward the short form, open access, and disintermediation are doing their work. If it had not been blogs, it would have been something else.”¹⁹¹

Conclusion

¶70 A sociotechnical systems view, which considers the complex interactions between technology and disciplinary cultures, is helpful for understanding how electronic publishing technologies have affected the field of legal scholarship. Both during the early days of the Internet, and now in the age of the open-access movement, a sociotechnical systems view explains the resiliency of law reviews, and the

184. Heriot, *supra* note 176, at 1115–16, 1123; Volokh, *supra* note 176, at 1095.

185. Heriot, *supra* note 176, at 1121–23.

186. Christine Hurt & Tung Yin, *Blogging While Untenured and Other Extreme Sports*, 84 WASH. U. L. REV. 1235, 1236 (2006).

187. *Id.* at 1255.

188. See, e.g., Sexual Orientation and the Law, <http://lawprofessors.typepad.com/lgbtlaw> (last visited Nov. 10, 2008); Feminist Law Professors, <http://feministlawprofs.law.sc.edu> (last visited Nov. 10, 2008); Blackprof, <http://www.blackprof.com> (last visited Nov. 10, 2008).

189. Blackprof, *supra* note 188.

190. Butler, *supra* note 176, at 1103–04.

191. Solum, *supra* note 176, at 1086.

reasons why they have not been replaced with open-access journals or become open-access publications themselves. Instead, new technologies have resulted in open access-forums that have created a parallel system to law reviews. These new forums include the law reviews' online "companions," and online repositories such as SSRN's Legal Scholarship Network and bepress's Legal Repository.

¶71 The system of scholarly communication creates a complicated web of interactions connecting a community of scholars. While the early days of the law reviews connected legal scholars to a wider community of practitioners, a shift toward more abstract and theoretical approaches has made law review articles less relevant to practicing attorneys and judges. This shift has correspondingly made legal scholarship a more isolated endeavor. Networked technologies have supplied ways for strengthening community by enhancing informal communication between legal scholars and also between legal scholars, judges and attorneys, and the wider public. The posting of pre-prints on the Legal Scholarship Network enables professors to receive feedback not only from scholars at their institution, but from scholars nationally and internationally. Similarly, legal blogs enable their creators to actively engage with an online community of scholars, practitioners, and interested members of the public. Technology may develop in ways we have not imagined, but a focus on the culture of legal scholarship will enable us to better understand the ways in which it continues to evolve.