

The Citation of Blogs in Judicial Opinions

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I. INTRODUCTION

A blog is a Web site where one or more authors publish written commentary. The commentaries are published in reverse chronological order. Blog authors are typically called bloggers, and the commentaries they publish are called blog posts. According to BlogPulse, a Web site that tracks blogs, there are currently over 150,000,000 blogs on the Internet.¹ A blawg is a blog about law. There are approximately 2800

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1. BLOGPULSE, <http://www.blogpulse.com/> (last visited Nov. 2, 2010).

blawgs in existence today.² It is estimated that over 235 blawgs are written by law professors and at least eight are written by judges.³

Blogs are used by lawyers, scholars, and others who want to have an impact in judicial decision making. Blogs have been heralded as a replacement for law review case commentary, as a vast amicus brief, and have even been compared with the *Federalist Papers*.⁴ Traditionally, scholars who wanted to have an impact on issues coming before the courts would try to anticipate what types of issues courts might face in future cases, spend one year or more writing and publishing an article addressing these issues, and finally hope that it would be read by a judge. The painstakingly slow law review publication process, when compared with blogs, “feel[s] as ancient as telegrams, but slower.”⁵ Prominent blogger Eugene Volokh imagined how blog posts might be a more effective way to reach judges in his article *Scholarship, Blogging, and Tradeoffs: On Discovering, Disseminating, and Doing*.⁶ Volokh explained that law clerks read blogs and if they happen to read a post about an issue facing the court, they might pass it along to a judge.⁷

The Supreme Court case of *Kennedy v. Louisiana* is perhaps the most well-known example of a blog post that has influenced a judicial opinion.⁸ In *Kennedy*, the Court held that it was unconstitutional to impose the death penalty for the crime of child rape.⁹ The majority and dissenting opinions erroneously declared that there was no federal law permitting the imposition of the death penalty for child rape.¹⁰ A few

2. The Web site Blawg.com tracks blogs about law and arranges them into a subject hierarchy. As of November 2, 2010, Blawg.com was tracking 2793 blawgs. BLAWG, <http://www.blawg.com/> (last visited Nov. 2, 2010).

3. Brian A. Craddock, *2009: A Blawg Odyssey: Exploring How the Legal Community Is Using Blogs and How Blogs Are Changing the Legal Community*, 60 MERCER L. REV. 1353, 1355 (2009).

4. Orin Kerr, *Will Blogs Kill the Law Review Case Comment?*, VOLOKH CONSPIRACY (Feb. 21, 2005, 12:11 PM), <http://volokh.com/posts/1109009511.shtml>; Howard Bashman, *Viewing Law Blogs as a Vast Amicus Brief*, 4 No. 9 INTERNET L. & STRATEGY 1 (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 (2006).

5. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8. For more on the declining influence of law reviews, see Bernard Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615 (1996); Gerald F. Uelman, *The Wit, Wisdom, and Worthlessness of Law Reviews*, CAL. LAW. (June 2010), <http://www.callawyer.com/story.cfm?eid=909875&evid=1>.

6. Eugene Volokh, *Scholarship, Blogging and Tradeoffs: On Discovering, Disseminating and Doing*, 84 WASH. U. L. REV. 1089, 1095-96 (2006).

7. *Id.*

8. 128 S. Ct. 2641 (2008).

9. *Id.* at 2678.

10. *Id.* at 2652, 2666-71.

days after the opinion was released, Dwight Sullivan, a lawyer specializing in military justice, pointed out on his blog that in 2006, Congress revised the Uniform Code of Military Justice to include death as a punishment for the rape of a child.¹¹ The blog post was read by another military justice lawyer who mentioned it to his wife, the preeminent Supreme Court journalist, Linda Greenhouse.¹² Greenhouse broke the story on the front page of the *New York Times*.¹³ Louisiana petitioned the Court for rehearing. The Court accepted briefs on the issue and ultimately modified its opinion acknowledging the omission of the 2006 law, but refused to change its initial decision in the case.¹⁴ This example, although a bit embarrassing for the Supreme Court and the lawyers involved in the case, illustrates the potential that blogs have to impact real cases.

Two previous surveys have counted the number of times specific blogs were cited in judicial opinions.¹⁵ No study has closely examined the citation of blogs in judicial opinions to discover why or how courts are citing blogs. This Article explains the results of my exhaustive research into the citation of blogs in judicial opinions. I began my research by exploring in further detail the blog citations in the forty cases identified in the two previous surveys.¹⁶ I updated the previous surveys by searching for cases citing blogs after the two surveys were released.¹⁷ In Westlaw, I searched the database ALLCASES for the terms “blog” or “blawg” or “blogger” or “typepad.”¹⁸ I ran an identical search in the LexisNexis database, Federal & State Cases Combined. The LexisNexis and Westlaw results were compared to ensure that the results were

11. Dwight Sullivan, *The Supremes Dis the Military Justice System*, CAAFLOG (June 28, 2008, 6:25 PM), <http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html>.

12. Rachel C. Lee, Note, Ex Parte *Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535, 1538 (2009). Lee’s Note provides a detailed account of the influence of Sullivan’s blog post on the *Kennedy v. Louisiana* case.

13. Linda Greenhouse, *In Court Ruling on Executions, A Factual Flaw*, N.Y. TIMES, July 2, 2008, at A1.

14. Lee, *supra* note 12, at 1539.

15. Ian Best, *Cases Citing Blogs—Updated List*, LAW X.0, http://3lepiphany.typepad.com/3l_epiphany/2006/08/cases_citing_le.html (last visited Nov. 10, 2010); Dave Hoffman, *Court Citation of Blogs: Updated 2007 Study*, CONCURRING OPINIONS (July 26, 2007, 6:52 PM), http://www.concurringopinions.com/archives/2007/07/court_citation.html.

16. Best, *supra* note 15; Hoffman, *supra* note 15.

17. The date limiter da(aft 07/26/2007) was used to find cases published after the two previous surveys.

18. In some instances courts would cite to the URL of a blog without actually referring to it as a blog or blawg. To improve the chances of locating these blogs the terms “blogger” and “typepad” were included. “Blogger” and “typepad” are the two most popular blogging platforms. Both terms appear in the URL of blogs hosted on either platform.

comprehensive. These searches returned a total of 287 opinions.¹⁹ I read through these opinions and identified specific opinions citing blogs as secondary authority to support the court's reasoning or analysis, opinions that cited blogs for factual information, or opinions that cited blogs as the source of documents. Forty-five out of the 287 opinions fell into one of these three categories. I did not closely examine the 242 opinions that did not fall into one of these three categories. These 242 opinions typically cited blogs in dicta or to define a nonessential term.

Part II of this Article discusses the citation of blogs for their discussion of substantive legal issues. The unique status enjoyed by several boutique blogs is examined and the value of blogs as interactive sources is explained. Part III discusses the citation of blogs for factual information and the impact of these citations on the law of evidence, ethics of the judiciary, the constitutional and procedural rights of litigants, and the judicial role in the common law adversarial system. Finally, Part IV explores the methods used by courts to cite blogs, recently released blog citation rules, and solutions for preserving blog content.

Figure 1
Blogs Cited in Judicial Opinions, 2004-2009²⁰

| Blog Name | Number of Opinions Citing to Support Reasoning or Analysis | Number of Opinions Citing for Factual Information | Number of Opinions Citing as a Source for Documents | Total Number of Opinions Citing Blog |
|--|--|---|---|--------------------------------------|
| Sentencing Law & Policy | 21 | 3 | 9 | 33 |
| Professorbainbridge.com | 3 | | | 3 |
| Wall Street Journal Law Blog | | 3 | | 3 |
| Ohio State Journal of Criminal Law Amici: Views from the Field | | | 2 | 2 |

19. Total number of cases retrieved, using the methodology described herein to search for cases from July 26, 2007 to October 8, 2009.

20. A total of 287 opinions were located in LexisNexis and Westlaw that contained some form of citation to a blog. The eighty-five opinions represented in this chart are opinions that cited blogs to support judicial reasoning or analysis, for factual information, or as a source for documents. Forty of these opinions were listed in the two previous surveys. Best, *supra* note 15; Hoffman, *supra* note 15. Forty-five of these opinions were discovered using the LexisNexis and Westlaw searches described above. The remaining 242 opinions were discovered in the LexisNexis and Westlaw searches; they cited blogs for dicta or to define a nonessential term.

| Blog Name | Number of Opinions Citing to Support Reasoning or Analysis | Number of Opinions Citing for Factual Information | Number of Opinions Citing as a Source for Documents | Total Number of Opinions Citing Blog |
|--|--|---|---|--------------------------------------|
| How Appealing | 2 | | | 2 |
| New York Times Blog | | 2 | | 2 |
| Crime and Federalism | 2 | | | 2 |
| The Volokh Conspiracy | 2 | | | 2 |
| Ideoblog | 2 | | | 2 |
| Federal Defenders.org | | | 2 | 2 |
| American Thinker Blog | 1 | | | 1 |
| Huffington Post | 1 | | | 1 |
| Class Action Defense Blog | 1 | | | 1 |
| Becker-Posner Blog | 1 | | | 1 |
| CNN 360 Blog | | 1 | | 1 |
| Air Leaf Victims Blog | | 1 | | 1 |
| Wall Street Journal Bankruptcy Blog | | 1 | | 1 |
| Politics and Government Blog of the New York Times | | 1 | | 1 |
| Weather Blog (Philadelphia Daily News) | | 1 | | 1 |
| El Paso Blog | | 1 | | 1 |
| Google Public Policy Blog | | 1 | | 1 |
| Citizens United | | 1 | | 1 |
| ABC 7 News Blog | | 1 | | 1 |
| Watchdog Blog | | 1 | | 1 |
| Chronicle of Higher Education News Blog | | 1 | | 1 |
| New York Times Dealbook Blog | | 1 | | 1 |
| De Novo | 1 | | | 1 |
| Legal Theory Blog | 1 | | | 1 |
| Patently-O | 1 | | | 1 |
| The UCL Practitioner | 1 | | | 1 |
| Prawfs Blog | 1 | | | 1 |
| Eric Chiappinelli's Blog | 1 | | | 1 |
| Sexoffenderresearch.com | | | 1 | 1 |
| ImmigrationProfBlog | | 1 | | 1 |
| Creditslips.org | 1 | | | 1 |
| WGN Weather Center Blog | | 1 | | 1 |

| Blog Name | Number of Opinions Citing to Support Reasoning or Analysis | Number of Opinions Citing for Factual Information | Number of Opinions Citing as a Source for Documents | Total Number of Opinions Citing Blog |
|-----------------------------|--|---|---|--------------------------------------|
| Goldman's Observations Blog | 1 | | | 1 |
| Clinicalcorrelations.org | | 1 | | 1 |
| Chicago Sun Times Blog | | 1 | | 1 |
| NPR Blog "Marketplace" | 1 | | | 1 |
| Comair Pilots Blog | | 1 | | 1 |
| Lawrence Journal World Blog | | 1 | | 1 |
| Total | 45 | 26 | 14 | 85 |

II. BLOGS AS SECONDARY SOURCES USED TO SUPPORT JUDICIAL REASONING OR ANALYSIS

A. *The Most Frequently Cited Blogs*

As Figure 1 demonstrates, the majority of judicial opinions examined in this study cite blog posts as secondary sources to support judicial reasoning or analysis. The blog that is cited most frequently to support judicial reasoning or analysis is Professor Douglas Berman's Sentencing Law & Policy blog.²¹ A total of thirty-three judicial opinions have cited Professor Berman's blog since 2004.²² Sentencing Law & Policy holds the distinction of being the first and, as of the date this Article went to press, the only blog cited in an opinion of the Supreme Court of the United States.²³ As one of Berman's fellow blogger's put it, Sentencing Law & Policy is "in a class of its own."²⁴

Sentencing Law & Policy has several distinguishing characteristics that explain why it is cited more frequently than any other blog in judicial opinions. The blog's author is perhaps the leading authority on federal sentencing law. Professor Berman is the author of a casebook on federal sentencing law, has served as an editor for the *Federal Sentencing*

21. See Douglas A. Berman, SENT'G L. & POL'Y, http://sentencing.typepad.com/sentencing_law_and_policy/ (last visited Nov. 2, 2010).

22. See Best, *supra* note 15 (documenting nineteen cases citing Sentencing Law & Policy through August 6, 2006); Hoffman, *supra* note 15 (noting seven additional citations to Sentencing Law & Policy from August 2006 through July 2007). Six additional cases cited (Sentencing Law and Policy) from July 2007 to October 2009.

23. See *United States v. Booker*, 543 U.S. 220, 278 n.4 (2005) (Stevens, J., dissenting).

24. A. Michael Froomkin, *The Plural of Anecdote Is "Blog,"* 84 WASH. U. L. REV. 1149, 1154 (2006).

Reporter for over a decade, has written numerous law review articles on the subject, and has been called to testify before Congress on the subject.²⁵

The profile of Sentencing Law & Policy has undoubtedly increased because of Berman's blogging about two monumental sentencing law cases over the past few years. On June 24, 2004, the United States Supreme Court decided *Blakely v. Washington*.²⁶ The case invalidated the State of Washington's sentencing guidelines under the Sixth Amendment to the United States Constitution.²⁷ The case had an immediate impact on federal cases working their way through the system as district and circuit courts around the country reached different conclusions about *Blakely's* impact on the federal sentencing guidelines.²⁸ Less than one year later, the Supreme Court decided in *United States v. Booker* that the federal sentencing guidelines were no longer mandatory.²⁹

In the wake of *Blakely* there was a void of information about how the case impacted the federal sentencing regime. Berman noted on Sentencing Law & Policy: "It's now a full week since *Blakely* came down, and we've not heard a single official word from the U.S. Sentencing Commission or the U.S. Department of Justice. . . . I really do not think silence is the right choice."³⁰ Eventually the United States Sentencing Commission released a Report to clarify the impact of *Blakely* and *Booker* on federal sentencing law.³¹ But in the weeks and months following *Blakely*, Berman's Sentencing Law & Policy became an extremely important and frequently consulted source for courts as they struggled to make sense of the radically changed sentencing landscape.

Berman was very nimble in the days following the *Blakely* decision. He would frequently post multiple reports in a single day chronicling the impact of *Blakely* in courts around the country. He alerted his readers to the first district court opinion to declare the sentencing guidelines

25. Douglas A. Berman's Curriculum Vitae, OHIO ST. U. MORITZ C. L., http://moritzlaw.osu.edu/faculty/cv/berman_douglas.pdf (last visited Nov. 2, 2010).

26. 542 U.S. 296 (2004).

27. *Id.* at 313-14.

28. See U.S. SENT'G COMM'N, *Final Report on the Impact of United States v. Booker on Federal Sentencing* at iv (Mar. 2006), http://www.ussc.gov/booker_report/Booker_Report.pdf.

29. *Id.*

30. Douglas A. Berman, *Other Institutions, Rulings and Remedies*, SENT'G L. & POL'Y (July 1, 2004, 03:31 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/other_instituti.html.

31. Douglas A. Berman, *The USSC Booker Report Is Back (with Corrections)*, SENT'G L. & POL'Y (Mar. 20, 2006, 05:47 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2006/03/the_ussc_booker.html.

unconstitutional in the aftermath of *Blakely* and other significant judicial opinions.³² He brought items to the attention of his readers that would not have otherwise been easily discovered. For example, he posted on his blog the transcript of a sentencing by a Federal district judge in Maine discussing the implications of *Blakely*.³³ His reporting “from the trenches” brought his readers stories of how judges were reacting to *Blakely*, including accounts of important rulings made from the bench.³⁴ He provided access to a Department of Justice memo regarding sentencing in the wake of *Blakely* by posting the memo to his blog.³⁵ The memo stated it was “attorney work product which should not be distributed outside DOJ” but Berman posted it regardless, calling on his loyal readers to represent him if he was sued for the post.³⁶

Berman’s agile blogging on Sentencing Law & Policy in the days following the *Blakely* opinion made him an invaluable source to courts around the country. In the six months following *Blakely*, Berman’s blog was cited in five cases for his analysis and discussion of the case.³⁷ For example, the United States Court of Appeals for the Second Circuit cited Berman in *United States v. Penaranda*, decided on July 12, 2004, less than one month after the Supreme Court handed down the *Blakely* opinion.³⁸ The court noted that it had no guidance on how to apply the guidelines immediately after *Blakely* was decided.³⁹ It cited a handful of published opinions applying the guidelines in the wake of *Blakely* and also relied on Douglas Berman’s reporting of the “[m]any techniques

32. Douglas A. Berman, *Judge Cassell Declares USSG Unconstitutional*, SENT’G L. & POL’Y (June 30, 2004, 08:09 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/06/judge_cassell_d.html; Douglas A. Berman, *New York Rulings of Great Interest*, SENT’G L. & POL’Y (July 2, 2004, 11:00 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/edny_ruling_of_.html.

33. Douglas A. Berman, *Watching the Blakely Cataclysm/Disaster/Havoc*, SENT’G L. & POL’Y (June 30, 2004, 03:47 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/06/watching_the_bl.html.

34. Douglas A. Berman, *New Variations in Blakely Coping*, SENT’G L. & POL’Y (July 3, 2004, 07:09 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/new_variations_.html; Douglas A. Berman, *Down Goes FSG, Down Goes FSG. . . .*, SENT’G L. & POL’Y (July 7, 2004, 05:42 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/down_goes_fsg_d.html.

35. See Douglas A. Berman, *More DOJ Analysis and Strategizing*, SENT’G L. & POL’Y (July 8, 2004, 07:42 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2004/07/more_doj_analys.html.

36. *Id.*

37. See *United States v. Penaranda*, 375 F.3d 238, 246 n.9 (2d Cir. 2004); *United States v. Ameline*, 376 F.3d 967, 986 n.4 (9th Cir. 2004); *United States v. Levy*, 391 F.3d 1327, 1341 (11th Cir. 2004); *United States v. Croxford*, 324 F. Supp. 2d 1255, 1261 n.33 (D. Utah 2004); *United States v. Johnson*, 333 F. Supp. 2d 573, 576 n.6 (D.W. Va. 2004).

38. 375 F.3d 238 (2d Cir. 2004).

39. *Id.* at 246.

currently being implemented by district judges in the aftermath of *Blakely*.⁴⁰

Another example of the significance that courts attached to Sentencing Law & Policy shortly after the *Blakely* opinion is found in *United States v. Ameline*.⁴¹ The *Ameline* case was decided less than one month after *Blakely* was handed down. In *Ameline*, the government argued that the court was barred from reviewing the constitutionality of the defendant's sentence.⁴² The court rejected this argument, relying primarily on several cases and the "flood of post-*Blakely* scholarship [that] supports this conclusion."⁴³ As examples of this scholarship, the court cited two articles discussing the impact of *Blakely* on the argument made by the government.⁴⁴ The court indicated that both articles were available at Sentencing Law & Policy.⁴⁵

Similarly, in *United States v. Johnson*, decided less than two months after *Blakely*, the court cited Sentencing Law & Policy to help make sense of the divergent ways that appellate courts were applying *Blakely*.⁴⁶ The defendant in *Johnson* argued that the enhancement of his sentence was prohibited by *Blakely*.⁴⁷ The court rejected this argument and sentenced the defendant within the United States Federal Sentencing Guidelines range.⁴⁸ In support of its holding, the court cited the United States Court of Appeals for the Fourth Circuit case of *United States v. Hammoud*, which held that *Blakely* did not invalidate the guidelines.⁴⁹ The court conceded that its approach may someday be rejected by the Supreme Court, but cited to Sentencing Law & Policy for Professor Berman's discussion of how *Blakely* is being applied by appellate courts:

The Second Circuit has decided to continue to apply pre-*Blakely* sentencing law while awaiting a decision on *Blakely* questions certified to the Supreme Court. See Doug Berman, *www.sentencing.typepad.com*, post for Thursday, August 12, 2004 (discussing *United States v. Mincey*, where the Second Circuit decided that the district court did not err in applying the Guidelines, but withheld the mandate pending a Supreme Court decision). This suggests that the Second Circuit finds *Blakely*

40. *Id.* at 246 n.9.

41. 376 F.3d at 978 (9th Cir. 2004).

42. *Id.* at 977.

43. *Id.* at 978 n.13.

44. *Id.*

45. *Id.*

46. 333 F. Supp. 2d at 573, 576 n.6 (S.D.W. Va. 2004).

47. *Id.* at 574.

48. *Id.*

49. 378 F.3d 426 (4th Cir. 2004).

inapplicable to the Guidelines, but the court provides no reasoning on the issue.⁵⁰

The commentary and analysis that Berman posted on Sentencing Law & Policy in the wake of *Booker* was also very influential to judges. Sentencing Law & Policy was cited in six cases in the six months following the Supreme Court's opinion in *Booker*.⁵¹ *United States v. Wilson* was decided on January 13, 2005, just one day after the Supreme Court decided *Booker*.⁵² In *Wilson*, the court considered not applying the guidelines at all because of how *Booker* affected the "parsimony provision" of the Sentencing Reform Act.⁵³ The parsimony provision provides that "the court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of punishment] set forth' in the Sentencing Reform Act."⁵⁴ The court in *Wilson* attempted to apply *Booker* one day after it was decided. It did not have the luxury of consulting a law review article or treatise on how the parsimony provision might be affected by *Booker*. The court, however, was able to cite Professor Berman's post "The Power of Parsimony (and Justice Breyer's Notable Omission)" which appeared on Sentencing Law & Policy within hours after *Booker* was decided.⁵⁵ The post contemplated how *Booker* might impact the parsimony provision of the Sentencing Reform Act.⁵⁶

Courts also turn to Sentencing Law & Policy for broad analysis after the dust has settled. Berman is widely respected by judges. One judge called him "a leading academic chronicler of sentencing decisions."⁵⁷ Judges view Sentencing Law & Policy as an authoritative source on the sentencing guidelines. One judge described it as "an excellent and provocative forum widely consulted for current and trenchant analysis of sentencing issues."⁵⁸ In *United States v. Kandirakis*,

50. *Johnson*, 333 F. Supp. 2d at 576 n.6.

51. *United States v. Cage*, 451 F.3d 585, 595 n.5 (10th Cir. 2006); *United States v. Rodriguez*, 406 F.3d 1261, 1284 (11th Cir. 2005); *United States v. Bailey*, 369 F. Supp. 2d 1090, 1092 n.4 (D. Neb. 2005); *United States v. Phelps*, 366 F. Supp. 2d 580, 584 n.2 (D. Tenn. 2005); *United States v. Wilson*, 355 F. Supp. 2d 1269, 1286 n.106 (D. Utah 2005); *United States v. Wilson*, 350 F. Supp. 2d 910, 922 n.63 (D. Utah 2005).

52. *Wilson*, 350 F. Supp. 2d 910.

53. *Id.* at 922.

54. *Id.* (citing 18 U.S.C. § 3553(a)).

55. Douglas A. Berman, *The Power of Parsimony (and Justice Breyer's Notable Omission)*, SENT'G L. & POL'Y (Jan. 12, 2005, 08:54 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2005/01/the_power_of_pa.html.

56. *Id.*

57. *Cage*, 451 F.3d at 595 n.5.

58. *United States v. Valencia-Aguirre*, 409 F. Supp. 2d 1358, 1379 n.17 (M.D. Fla. 2006).

a case decided over a year and a half after *Booker*, the court relied on Berman's judgment to support sentencing the defendant to a term proscribed by the federal sentencing guidelines.⁵⁹ The court noted:

[A]s of July 31, 2006, the Sentencing Law & Policy Blog kept by Professor Douglas A. Berman of The Ohio State University Moritz College of Law (<http://www.sentencing.typepad.com>), and which reports in near-realtime on *Booker* and other sentencing issues, had noted only a single case in which a within-Guidelines sentence was reversed as unreasonable.⁶⁰

Another example of the authoritativeness of Sentencing Law & Policy is found in *Smylie v. State*.⁶¹ There the defendant was sentenced by the trial court to a term that exceeded Indiana's sentencing guidelines.⁶² The sentencing took place while *Blakely* was still pending and had not yet been decided by the Supreme Court. The defendant challenged the constitutionality of his sentence on appeal citing both *Blakely* and *Booker* as grounds for modification of his sentence.⁶³ The Indiana Supreme Court remanded the defendant's above-guideline sentence for review.⁶⁴ In its opinion, the court rejected the State's argument that the defendant should be barred from appellate review because he did not make a *Blakely* objection at the time of trial.⁶⁵ The court concluded that a liberal approach to preserving a *Blakely* issue for appeal is appropriate, given the radical way that *Blakely* "reshaped our understanding of a critical element of criminal procedure."⁶⁶ The court cited Sentencing Law & Policy in support of the sentence:

We also note that *Blakely* has created such controversy that the so-called owner of the "*Blakely* Blog," Professor Douglas A. Berman, of Moritz College of Law at The Ohio State University, has stopped tracking state cases related to *Blakely* because of the overwhelming number and diversity of the holdings. Douglas A. Berman, *In re State Blakely Interpretations*, (Dec. 9, 2004) at <http://sentencing.typepad.com>. That so many states are wrestling with the meaning of *Blakely* is further evidence of its unpredictability and a further indication that reasonable lawyers would not have known of the outcome.⁶⁷

59. 441 F. Supp. 2d 282 (D. Mass. 2006).

60. *Id.* at 298 n.36.

61. 823 N.E.2d 679, 687 n.12 (Ind. 2005), *superseded by statute*, IND. CODE ANN. §§ 35-50-2-3 to -7 (West 2005), *as recognized in* Anglemyer v. State, 868 N.E.2d 482 (Ind. 2007).

62. *Id.* at 682.

63. *Id.* at 681.

64. *Id.* at 687.

65. *Id.* at 690.

66. *Id.* at 687.

67. *Id.*

This type of rapid-fire reporting, commentary, and analysis would not have been possible without the advent of the blog format. The Sentencing Law & Policy blog allowed Berman to bypass the painfully slow law review publication process and instead communicate to his readers several times a day. His important insights were cited to support the reasoning and analysis underlying several judicial decisions.

Sentencing Law & Policy is not the only blog that courts cite to support their legal reasoning and analysis. Several other boutique blogs are cited frequently in judicial opinions to support the court's reasoning and analysis. Steven M. Bainbridge is a professor of law at the University of California Los Angeles who specializes in securities and corporate law.⁶⁸ His blog postings at ProfessorBainbridge.com have been discussed in several opinions. His posts are cited at length by courts to support the conclusion that a claim of fiduciary duty did not exist, when discussing the fiduciary duties owed by corporate directors, and for his discussion of insider trading and securities law.⁶⁹ How Appealing, a well-known blog by Pennsylvania appellate lawyer Howard J. Bashman, has been cited in a dissenting opinion from the Ninth Circuit critiquing the majority's reliance on social justice and in another opinion as support for the court's holding.⁷⁰ Crime and Federalism, an anonymous blog by "a Pepperdine law grad and scholar of the law of Section 1983" was cited by a court as authority critiquing important case law and for the blog's discussion of the United States Court of Appeals for the Eleventh Circuit case law to support the referral of a case to a magistrate.⁷¹

B. Blogs as Authorities

The question looming behind this exploration of the citation of blogs to support judicial reasoning and analysis is whether blogs are becoming authoritative sources of information. The examples cited above demonstrate that courts are relying on the discussion of substantive legal issues found on certain blogs to support judicial reasoning and

68. See *Stephen Bainbridge Biography*, UCLA L. FAC., <http://www.law.ucla.edu/home/index.asp?page=409> (last visited Nov. 2, 2010).

69. See *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168 (Del. Ch. 2006); *Desimone v. Barrows*, 924 A.2d 908, 932 (Del. Ch. 2007); *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 593 n.77 (Del. Ch. 2007).

70. Howard Bashman, *HOW APPEALING*, <http://howappealing.law.com/> (last visited Nov. 2, 2010); *Kennedy v. Lockyer*, 379 F.3d 1041, 1065, 1065 n.7 (9th Cir. 2004); *Diamonds.net v. IDEX Online*, 254 F.R.D. 475, 477 n.2 (S.D.N.Y. 2008).

71. *About Me, CRIME & FEDERALISM*, <http://federalism.typepad.com/about.html> (last visited Nov. 2, 2010); *Priester v. Rich*, 457 F. Supp. 2d 1369, 1375 n.4, 2006 U.S. Dist. LEXIS 36831, at *11 n.4 (D. Ga. 2006); *Boxer X v. Harris*, No. 603CV147, 2007 U.S. Dist. LEXIS 45149, at *5 n.3 (S.D. Ga. June 4, 2007).

analysis. In the days and weeks following *Blakely* and *Booker*, courts turned to Sentencing Law & Policy when making important decisions. Sentencing Law & Policy was cited as the only source in support of specific aspects of judicial rulings. The blog effectively became an “authority.”

Berman’s motive may not have been to become an authority in the traditional sense of the word. In an article titled *Scholarship in Action: The Power, Possibilities, and Pitfalls of Law Professor Blogs*, Berman does not specifically mention influencing judges as a motivation for his blog posts.⁷² Instead, he views his blogging as an “activity that enables [him] to engage simultaneously in the troika of scholarship, teaching, and service.”⁷³ A SCOTUSblog contributor points out that many bloggers “have not the slightest interest in legitimacy”⁷⁴ and would prefer “to be unfettered by convention, unrestrained by civility, uninhabited by standards, and unconfined by ethics or law.”⁷⁵ Others may blog with the specific intention of influencing the outcome of judicial proceedings.

The increasing citation of Sentencing Law & Policy and other blogs by courts is an example of what Frederick Schauer described as the “informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted.”⁷⁶ The motivations of bloggers whose posts are cited in judicial opinions are largely irrelevant. The citation of blogs for their discussion of substantive legal issues chronicled above is evidence that blogs have already become or are quickly becoming traditional sources of authority.

One court has already expressed the view that blogs are like any other secondary authority. In *In re GMC*, the court explained its citation to Professor Steven Lubben’s blog, Credit Slips:

Blogs are a fairly recent phenomenon in the law, providing a useful forum for interchanges of ideas. While comments in blogs lack the editing and peer review characteristics of law journals, and probably should be considered judiciously, they may nevertheless be quite useful, especially as food for thought, and may be regarded as simply another kind of secondary authority, whose value simply turns on the rigor of the analysis in the underlying ideas they express.⁷⁷

72. Douglas A. Berman, *Scholarship in Action: The Power, Possibilities and Pitfalls of Law Professor Blogs*, 84 WASH. U. L. REV. 1043 (2006).

73. *Id.* at 1051.

74. Lyle Denniston, *Legal Blogs: The Search for Legitimacy*, 11 NEXUS 17, 17 (2006).

75. *Id.*

76. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1956-57 (2008).

77. 407 B.R. 463, 502 n.96 (Bankr. S.D.N.Y. 2009).

Blogs mesh well with the traditional view of authority in law: content independence. Under this view, the “force of an authoritative directive comes not from its content, but from its source.”⁷⁸ Further, “[w]hat matters is not what the reason says but where it comes from.”⁷⁹ A lower court judge follows the decision of a higher court because of its source and not because of the reasons given by the higher court.

Under the content-independent view of authority, blogs are authoritative not because of what they say but because of the identity of their author. The identity of a blog’s author is typically disclosed on the home page of the blog, and many blogs include biographical details about their authors. As Figure 1 demonstrates, blogs written by well-known legal scholars or practitioners are cited with more frequency than other blogs.

The ability to know the identity of a blog author is an important distinguishing characteristic between blogs and other Internet sources such as Wikipedia. Wikipedia is an online encyclopedia that is created through the collaboration of multiple contributors. Authors of Wikipedia content “can contribute anonymously, under a pseudonym, or with their real identity, if they choose.”⁸⁰ Wikipedia has a decidedly antielitist bent, but Wikipedia’s cofounder, Larry Sanger, regrets not instituting a policy of respect and deference to experts.⁸¹ In contrast, most blog authors clearly identify themselves.⁸² Many of the blogs cited in judicial opinions are written by leading experts in their respective fields of law.

The fact that most blog authors are known will contribute to blogs becoming accepted authorities under the content-independent view of authority. In contrast, “Wikipedia will never be viewed as high quality authority under the traditional content-independent view of authority that is prevalent in legal reasoning.”⁸³ Comparing the results of this study with my previous study on the citation of Wikipedia confirms this prediction.⁸⁴ Blogs are cited nearly twice as often as Wikipedia to support judicial reasoning and analysis. My previous study revealed that Wikipedia was cited in 407 judicial opinions, but it was only used to

78. Schauer, *supra* note 76, at 1935.

79. *Id.* at 1936.

80. *About*, WIKIPEDIA, <http://en.wikipedia.org/w/index.php?title=Wikipedia:About&oldid=375751131> (last visited Nov. 2, 2010).

81. Larry Sanger, *Why Wikipedia Must Jettison Its Anti-Elitism*, KURO5HIN (Dec. 31, 2004, 12:42 AM), <http://www.kuro5hin.org/story/2004/12/30/142458/25>.

82. However, blogs can still be used to deceive. See discussion *infra* Part III.D for a discussion of flogging, astroturfing, and opportunistic editing.

83. Lee F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 YALE J. L. & TECH. 1, 35 (2009).

84. *See id.*

support judicial reasoning or analysis in twenty-eight cases.⁸⁵ The results of this study show that blogs were cited in 287 cases, but were used in forty-five cases to support judicial reasoning or analysis.

Debating whether blogs are becoming or have already become authorities is an exercise in futility. Law students, law professors, lawyers, and others will continue to blog. Judges and their clerks will continue to read and be influenced by blog posts, and blogs will be cited in judicial opinions. As the next section explains, the interactive nature of blogs makes them attractive sources for courts to cite in certain situations.

C. *The Value of Blogs as Interactive Sources*

Blogs are designed to encourage the interactive exchange of ideas. Most blogs allow readers to post comments. Some blogs require readers to register before posting comments, while others allow comments to be posted anonymously. The substantive discussion on some blogs is, to a large extent, driven by the comments posted by readers and the replies posted by the blogger. Professor Robert Berring has compared blogs to Parisian salons.⁸⁶ Viewed in this context, blogs are different from any other source traditionally cited in judicial opinions.

The interactive nature of blogs makes them attractive sources to cite when courts are faced with certain types of questions. Blogs could be useful in cases where courts are asked to determine public perception. In cases where trademark infringement or trademark dilution are alleged, public perception is a principle issue that must be established to prevail with either claim.⁸⁷ In *University of Kansas v. Sinks*, the plaintiff brought trademark infringement and dilution claims against the defendant, a sportswear manufacturer.⁸⁸ The court denied the defendant's request for a judgment as a matter of law that no actual trademark dilution had occurred.⁸⁹ In support of its conclusion, the court cited oral testimony, the jury's verdict, and "evidence in the form of web blog entries in the

85. *Id.*

86. Robert C. Berring Jr., Keynote Address at Georgetown University College of Law Symposium: The Future of Today's Legal Scholarship (Aug. 25, 2009), <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=872>).

87. See Alan S. Cooper, *Litigating Trademark, Domain Name, and Unfair Competition Cases: Using and Excluding Surveys, Survey Experts, and Other Experts*, SJ055 ALI-ABA 59 (2004). This concept was further discussed in the context of Wikipedia in Peoples, *supra* note 83, at 21.

88. 644 F. Supp. 2d 1287 (D. Kan. 2008).

89. *Id.* at 1298.

Lawrence Journal World that show that certain people in the Lawrence community believed the T-shirts to be offensive.”⁹⁰

The *Sinks* decision demonstrates that blogs can be used to establish public perception in the context of trademark dilution. In a case decided just three days after *Sinks*, however, another court rejected an attempt to use a blog posting as evidence of trademark confusion. In *Blue Bell Creameries v. Denali Co.*, the defendant sought an injunction to stop the plaintiff from using the name of a particular flavor of ice cream that was similar to the name of a trademarked flavor produced by the defendant.⁹¹ The defendant offered Internet blog entries as proof of actual trademark confusion. The court rejected this evidence on the grounds that:

[T]he blog entries lack sufficient indicia of reliability. Nothing is known about the persons who made the entries, about whether they are related in any way to either party or whether they are describing true events and impressions. Moreover, the authors’ meaning and the import of the blog entries are far from clear.⁹²

It is possible to reconcile the seemingly conflicting approaches taken by the courts in *Sinks* and *Blue Bell*. In *Sinks*, blog evidence was offered in addition to other evidence and the jury found that actual confusion existed regarding the trademark.⁹³ In *Blue Bell*, however, blog evidence was the only evidence offered.⁹⁴ The *Blue Bell* court included a footnote to its discussion on the use of blog evidence that left open the possibility of using blogs in future cases: “This should not be construed as a ruling by the Court that entries on Internet blogs could not, on a different record, be reliable and admissible.”⁹⁵

A blog has been cited to construe the meaning of a particular word in a statute. In the case of *In re GMC*, the court cited Professor Stephen Lubben’s blog Credit Slips to define the meaning of the term “interest” in the context of a particular section of the bankruptcy code.⁹⁶ When defining statutory language or a term of art, courts should stick with blog postings by well-known legal experts and should not rely on blogs by nonexperts or anonymous comments submitted to blogs.

The interactive nature of blogs makes them potentially attractive sources to use in interpreting insurance contracts. Determining the

90. *Id.* at 1294.

91. J-08-0981, 2008 WL 2965655, at *1 (S.D. Tex. July 31, 2008). *Sinks* was decided on July 28, 2008. *Blue Bell* was decided on July 31, 2008.

92. *Id.* at *5.

93. *Sinks*, 644 F. Supp. 2d at 1305.

94. *Blue Bell*, 2008 WL 2965655, at *5.

95. *Id.* *5 n.4.

96. 407 B.R. 463, 502 (Bankr. S.D.N.Y. 2009).

common usage or ordinary and plain meaning of contract terms is a method of interpretation that “has long been recognized, and has been applied in the context of various types of insurance.”⁹⁷ Blog postings about the meaning of particular contract terms and any comments left by blog readers in reaction to postings can be useful in this context. To this extent, Wikipedia has been used by courts to define the terms “recreational vehicle” and “car accident.”⁹⁸ To date, no court has cited a blog entry or comment to determine the common usage of a term in an insurance contract.

One court has expressly cited comments posted to a blog. In *United States v. Perez* the court, when discussing recent sentencing guidelines opinions by the Supreme Court, cited comments posted by “Bob Batey” to Sentencing Law & Policy.⁹⁹ Neither the court nor Douglas Berman, author of the Sentencing Law & Policy blog, explained who Bob Batey was or whether he was knowledgeable about federal sentencing law.¹⁰⁰ Some quick research revealed that Bob Batey is a Professor of Law at Stetson University College of Law, whose scholarship and teaching focus on criminal law and sentencing.¹⁰¹

In this instance, the court’s citation to comments posted to a blog by someone other than the blog author seems harmless. But courts should be cautious in citing to or relying on comments posted to a blog. Blogs that allow anonymous readers to post comments are obviously open to manipulation. Blogs that require users to register before posting comments do not guarantee the identity of the individuals who register with the blog. Some blogs have fallen prey to “comment spam,” described in a recent *ABA Journal* article as “unrelated gibberish” in blog comments that link to another Web site in an effort to increase advertising revenue.¹⁰²

97. 2 COUCH ON INSURANCE § 22:38 (2009). This concept was discussed in the context of Wikipedia in Peoples, *supra* note 83, at 32.

98. *Ferguson v. Stonebridge Life Ins. Co.*, 271488, 2007 WL 286793, at *3 (Mich. App. Feb. 1, 2007); *Laasmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment*, No. 06-cv-00013-MSK-MJW, 2007 WL 1613255, at *4 (D. Colo. June 1, 2007).

99. No. 4:05CR3010, 2008 WL 2309497 (D. Neb. June 4, 2008) (citing posting of Bob Batey, *Seeking Any and All Reports from USSC Conference to Sentencing Law and Policy*, SENT’G L. & POL’Y (May 25, 2008, 08:14 AM), http://sentencing.typepad.com/sentencing-law_and_policy/2008/05/seeking-any-and.html#comments).

100. *See id.*

101. *Robert Batey Faculty Biography Page*, STETSON L., <http://www.law.stetson.edu/tmpl/faculty/memberProfile.aspx?id=1244> (last visited Nov. 2, 2010).

102. Rachel M. Zahorsky, *Search and Deceive*, ABA J. 32 (Feb. 1, 2010), available at http://www.abajournal.com/magazine/article/search_and_deceive/.

The use of a law professor's blog comment to support judicial reasoning must be distinguished from attempts to use blog comments as evidence. In the case of *In re Air Crash at Lexington, Kentucky*, the plaintiffs attempted to introduce comments posted to a blog into evidence.¹⁰³ The court ruled that the blog comments were hearsay and were inadmissible.¹⁰⁴ This case is clearly distinguishable from the *Perez* case where blog comments were not offered into evidence but merely used by the court as support for judicial reasoning.¹⁰⁵

Judges have interacted with blogs in a variety of ways. Some judges have replied directly to bloggers in judicial opinions. In a blog post, Douglas Berman was critical of United States District Court Judge Kopf's brushing aside of a particular statutory mandate in a sentencing case.¹⁰⁶ Judge Kopf directly replied to Berman's critique in an opinion released less than one month after the blog post. In *United States v. Bailey*, Judge Kopf explained that *Booker* "caused one bright professor to become 'puzzled' since, so he suggests, I apparently ignore a part of the statute that Congress wrote and I am otherwise big on listening to Congress."¹⁰⁷ Kopf's reply continues "The answer to the professor's (mock?) perplexity, is that, using my *Booker* discretion, I would read the 'parsimony' provision with the Guidelines heavily in mind."¹⁰⁸

Other judges interact with blogs by posting comments directly to the blog. In *Patton v. Astrue*, the plaintiff attempted to demonstrate the bias of an administrative law judge based on comments the judge posted to a blog.¹⁰⁹ The plaintiff cited comments that the judge had posted to a National Public Radio blog about incidents of "deception and falsification" that the judge sees in social security disability cases.¹¹⁰ The plaintiff did not succeed in her attempt to demonstrate judicial bias in this specific case.¹¹¹ The blog comments she cited were posted several years after the judge in question decided her specific case. But *Patton* should put judges on notice that anything they say in the blogosphere can potentially be used against them.

103. No. 5:07-CV-320, 2009 WL 1883996, at *6 (E.D. Ky. June 30, 2009).

104. *Id.*

105. *See Perez*, 2008 WL 2309497.

106. Douglas A. Berman, *A Punchy, Though Puzzling, Perspective on Parsimony*, SENT'G L. & POL'Y (Apr. 19, 2005, 04:07 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2005/04/a_punchy_though.html.

107. 369 F. Supp. 2d 1090, 1092 n.4 (D. Neb. 2005).

108. *Id.*

109. No. 08-205J, 2009 WL 2876715, at *4 (W.D. Pa. Sept. 8, 2009).

110. *Id.*

111. *Id.*

III. THE CITATION OF BLOGS FOR FACTUAL INFORMATION

The previous two surveys on the citation of blogs in judicial opinions only focused on the citation of legal blogs for their commentary or analysis and for documents posted to the blogs.¹¹² The surveys did not examine the citation of blogs for factual information.¹¹³ In my research I discovered that since July of 2007, twenty-six judicial opinions have cited blogs for factual information. This practice raises a number of important legal and ethical questions that have not yet been answered.¹¹⁴

A. *Taking Judicial Notice of Blog Content*

Blogs have been cited in several judicial opinions for adjudicative facts. Adjudicative facts are “the historical acts that create the controversy . . . who did what, when, where, how and why.”¹¹⁵ When a court declares the existence of an adjudicative fact without requiring proof of that fact, the court is, in essence, taking judicial notice, even though the court might not expressly use the term “judicial notice.” Federal Rule of Evidence 201 expressly applies to “judicial notice of adjudicative facts.”¹¹⁶ Courts should not ignore the requirements of Rule 201 when declaring the existence of an adjudicative fact.¹¹⁷

Rule 201 allows a court to take judicial notice of a fact “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”¹¹⁸ Judicial notice “means a court’s on the record declaration of the existence of a fact normally decided by the trier of fact, without requiring proof of that fact.”¹¹⁹ When a court takes judicial notice, the jury is instructed to “accept as conclusive any fact judicially noticed.”¹²⁰

Coincidentally, both cases where courts cite a blog post for an adjudicative fact involve the weather. In *Gurley v. Sheahan*, the plaintiff

112. See Best, *supra* note 15; Hoffman, *supra* note 15.

113. See Best, *supra* note 15; Hoffman, *supra* note 15.

114. These questions were explored in the context of Wikipedia in Peoples, *supra* note 83. Some of the wording of this section and sources cited were adapted from that article.

115. 21B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5103.3 (2d ed. 1990).

116. FED. R. EVID. 201(b).

117. This concept was discussed in the context of Wikipedia in Peoples, *supra* note 83, at 17-19.

118. FED. R. EVID. 201(b).

119. WRIGHT & MILLER, *supra* note 115, § 5103.

120. FED. R. EVID. 201(g).

alleged violations of his civil rights during his incarceration in the Cook County Jail.¹²¹ Specifically, the plaintiff claimed that his unit was very cold and he became ill as a result.¹²² The court refuted this allegation by pointing out that the plaintiff was incarcerated during the summer.¹²³ It then cited to the WGN Weather Center Blog for the statement, “2005 was an especially hot summer.”¹²⁴

The other case where a blog was cited for an adjudicative fact is *United States v. Burk*.¹²⁵ In *Burk*, the defendant cited a weather blog to prove that it was overcast and rainy at the time an officer looked through the tinted windows of his vehicle and saw packets of heroin.¹²⁶ The defendant’s argument followed that because it was overcast and the windows were tinted, the officer could not have seen the heroin packets and therefore did not have probable cause to arrest the defendant or search his vehicle.¹²⁷

In both cases, the courts relied on blog postings to establish adjudicative facts. When a court accepts an adjudicative fact at face value, the Sixth and Seventh Amendment jury trial rights are implicated. Accordingly, adjudicative facts must be subjected to the requirements of FRE 201.¹²⁸ Before information obtained from blogs is incorporated into the court’s opinion, the information should be evaluated to determine if it meets the requirements of FRE 201. Specifically, the court should verify that the information was “not subject to reasonable dispute” and “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.”¹²⁹

Courts have not yet taken judicial notice of blog content. FRE 201 sets a high standard for judicial notice. It is conceivable that factual blog content could meet the FRE 201 standard of not being subject to reasonable dispute if the blog content is known within the court’s jurisdiction or is capable of determination by resort to unquestionably accurate sources. For example, if factual information is only available from a blog and the blog is authored by an accurate source, the information will meet the FRE 201 standard. Courts are generally

121. No. 06C3454, 2009 WL 2178685 (N.D. Ill. July 21, 2009).

122. *Id.* at *2.

123. *Id.* at *2 n.4.

124. *Id.*

125. 2009 WL 89681, at *3 (E.D. Pa. 2009).

126. *Id.* at *6.

127. *Id.* at *4.

128. WRIGHT & MILLER, *supra* note 115, § 5104.

129. FED. R. EVID. 201(b). This argument was also made in the context of Wikipedia in Peoples, *supra* note 83, at 12-19.

advised to avoid taking judicial notice of blog content, however. Blogs are poor candidates for judicial notice because of their rapidly changing content and the difficulty of verifying the true identity of the blog's author or the authors of comments posted to blogs. When taking judicial notice of factual information, courts should select a traditional print source that meets the stringent requirements of FRE 201 instead of a blog. In the related context of Wikipedia, most courts have prudently declined to take judicial notice of Wikipedia content.¹³⁰

B. Judicial Ethics and Blog Research

The citation of blogs in judicial opinions raises a number of ethical concerns. At the outset it is important to make a distinction between the use of blogs for legal versus factual research. Judges are free to conduct legal research related to pending cases.¹³¹ This study and the previous two studies reveal that the majority of judicial opinions cite blogs for their discussion of the law.¹³² A judge reading a blog post about a legal issue authored by a prominent academic is no different than a judge reading a legal treatise or law review article by the same author. In some situations a blog post by a prominent legal scholar has the potential to be a *better* source for a judge to consult than a legal treatise or law review article by the same author. Blogs give legal experts the ability to immediately disseminate their ideas and analysis in a way that traditional print sources cannot. Recall Douglas Berman's use of his blog to quickly comment on how federal sentencing law changed in the wake of important case law. In contrast, it takes months or years for the ideas distilled into a law review article or legal treatise to make it through the editing and publication process. The immediacy of blogs gives them a distinct advantage over traditional print sources for their ability to quickly disseminate information.

Judges who want to obtain the advice of a disinterested legal expert about a case pending before them are required to give the parties notice and an opportunity to respond under *Model Code of Judicial Conduct* Rule 2.9 (A)(2).¹³³ What happens if a judge stumbles upon a blog post

130. See *Steele v. McMahon*, No. CIVS-05-1874DADP, 2007 WL 2758026, at *8 (E.D. Cal. Sept. 21, 2007) (refusing to take judicial notice of the Wikipedia entry "In the Shadows of the War on Terror"). *But see* *Helen of Troy, L.P. v. Zotos Corp.*, 235 F.R.D. 634, 639 (W.D. Tex. 2006) (taking judicial notice of the Wikipedia entry on Urea. The entry was later changed and currently does not support the proposition of which the court took judicial notice); see Peoples, *supra* note 83, at 12-19, for a thorough explanation.

131. *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

132. See Best, *supra* note 15; Hoffman, *supra* note 15.

133. See MODEL CODE OF JUDICIAL CONDUCT, R. 2.9(a)(2) (2007).

specifically addressing a case before the court? What if the blog post is an obvious attempt to influence the outcome of the case? Are judges ethically permitted to read or cite to the blog post? Howard Bashman, a prominent legal blogger, argues that judges should consider such posts as long as they are publically available, the author was not connected to the case, and no steps were taken to draw the court's attention to the post.¹³⁴ Bashman views the Internet as a "vast amicus brief" and argues that blog posts by experts can help judges learn about the nuances of a particular area of law and "issue the best possible rulings."¹³⁵

Courts have already followed Bashman's advice and cited blogs that specifically addressed pending cases. In *Carrington v. United States*, the dissenting judge cited Douglas Berman's post on Sentencing Law & Policy, which discussed specific aspects of the *Carrington* case.¹³⁶ Because judges do not cite every source they consult, it is likely that blog posts specifically addressing pending cases have been influential in other cases.¹³⁷ An obvious example is the Supreme Court case of *Kennedy v. Louisiana*, discussed in the Introduction, where a blogger recognized a mistake in the Court's legal analysis and the Court subsequently modified its opinion and acknowledged the mistake.¹³⁸

How should courts handle blog posts about the legal aspects of pending cases written by the parties to the case, their lawyers, or amici? One author provides several examples of lawyers and amici blogging about pending cases in the recent Note, Ex Parte *Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*.¹³⁹ The author chronicles the practice of attorneys with cases before the Supreme Court blogging about their cases after oral argument and shortly before cases are decided in conference.¹⁴⁰ This "shadow briefing" has "the power to potentially reach the Justices with one more presentation of the best arguments for a side—particularly a version crafted after the insight that oral argument offers into the Justices' concerns."¹⁴¹ She concludes that it would be a violation of the *Model Code of Judicial Conduct's* prohibition against ex parte communication for a judge to read a blog post by a lawyer or amici

134. Bashman, *supra* note 4, at 1.

135. *Id.*

136. 503 F.3d 888, 902 (9th Cir. 2007).

137. See Anthony Niblett, *Do Judges Cherry Pick Precedents To Justify Extra-Legal Decisions? A Statistical Examination*, SOC. SCI. RES. NETWORK (Feb. 1, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434451.

138. 128 S. Ct. 2641 (2008).

139. Lee, *supra* note 12.

140. *Id.* at 1544.

141. *Id.* at 1546.

discussing a pending case.¹⁴² She proposes several options to regulate ex parte blogging by the Supreme Court bar.¹⁴³

A number of legal and ethical issues arise when blog posts are cited for factual information. Twenty-six out of the eighty-five opinions examined in this study cited blogs for factual information. It is often difficult to determine if the court discovered a blog post sua sponte and through ex parte research or if one of the parties brought the blog to the court's attention. In rare cases, the court admits to conducting sua sponte and ex parte factual research. For example, in *United States v. Khan*, "the court visited the Internet and ran a 'Google' search for Defendant's name. Over two thousand 'hits' came up, not all of which, of course, were related to the Defendant. Nonetheless, many were related to him—there were blogs about this. . . ."¹⁴⁴

In most cases, judges do not mention if they discovered a blog through their own research or if a party to the case brought the blog to their attention. In *Gurley v. Sheahan*, discussed above, the court cited a weather blog in its opinion to refute the plaintiff's claim that his jail cell was cold.¹⁴⁵ It appears likely in this case that the court discovered the blog through its own sua sponte ex parte research. Neither party cited this blog in written pleadings filed with the court.

Judges who conduct their own research into the facts of a case without giving the parties notice or an opportunity to be heard are in danger of violating the parties' due process rights, the law of evidence, the rules of judicial ethics, and the traditions of the American legal system.¹⁴⁶ Ex parte and sua sponte judicial research violates the due process rights of the parties unless they receive notice and an opportunity to respond.¹⁴⁷ Information that judges discover while researching the facts of a case may violate the judicial notice and hearsay provisions of the evidence code.¹⁴⁸ The ABA *Model Code of Judicial Conduct* Rule 2.9 was recently amended to make it clear that "A judge shall not investigate facts in a matter independently, and shall consider only the evidence

142. *Id.* at 1557.

143. *Id.* at 1569.

144. 538 F. Supp. 2d 929, 934 (E.D.N.Y. 2007).

145. No. 06C3454, 2009 WL 2178685, at *2 n.4 (N.D. Ill. July 21, 2009).

146. This Part is adapted from the discussion of this phenomenon in the context of Wikipedia in Peoples, *supra* note 83, at 19-21.

147. Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 193 (2008); see also Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417 (2002).

148. See FED. R. EVID. 201.

presented and any facts that may properly be judicially noticed.”¹⁴⁹ A comment added to the rule explicitly provides, “The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.”¹⁵⁰

In addition to violating these legal and ethical rules, *ex parte sua* sponte judicial research is simply un-American. “Under our adversary system, the trial judge cannot behave like a French magistrate and embark on a personal factfinding expedition, however deficient the efforts of counsel may appear.”¹⁵¹ Judges should not search blogs for information about the facts of cases before them unless the parties are given notice and an opportunity to comment on any information the judge discovers.

C. *Blogs and Expert Witnesses*

It may be permissible for judges to conduct independent factual research on blogs within the framework of expert witness testimony. Under Federal Rule of Evidence 702, expert testimony must be the “product of reliable principles and methods.”¹⁵² The *Daubert* decision requires “expert opinions based on unreliable scientific methodology” be excluded from evidence.¹⁵³ *Daubert* “tasked federal judges as all-important gatekeepers who are obligated to ensure that only ‘good’ science reaches the jury.”¹⁵⁴ In performing the gatekeeping task, judges have some latitude to conduct independent factual research for the purpose of assessing the qualifications of an expert witness or the substance of expert testimony.¹⁵⁵

No court has expressly rejected or accepted expert testimony where an expert relied on information obtained from a blog. In the case of *In re FEMA Trailer Formaldehyde Products Liability Litigation*, plaintiffs objected to an expert’s conclusion based on a blog post sponsored by the Formaldehyde Council.¹⁵⁶ The court allowed the expert to testify but did not specifically address the expert’s reliance on the blog in its ruling.¹⁵⁷

149. MODEL CODE OF JUDICIAL CONDUCT R. 2.9 (2007).

150. *Id.*

151. WRIGHT & MILLER, *supra* note 115, § 5102.1.

152. FED. R. EVID. 702.

153. R. Jason Richards, *Courting Wikipedia*, 44 TRIAL 62 (2008) (discussing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

154. Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1265 (2007).

155. *Id.*

156. MDL No. 07-1873, 2009 WL 2900030, at *1 (E.D. La. Sept. 3, 2009).

157. *Id.*

Surprisingly, only one judicial opinion has discussed the use of a blog to evaluate the substance of expert testimony and the expert's qualifications. In *United States v. Grober*, Professor Berman testified as an expert witness for the defense.¹⁵⁸ The court noted in its opinion that Berman “has published an increasingly influential article written by a federal public defender, Troy Stabenow, on his sentencing blog.”¹⁵⁹ The opinion recounts that Berman testified under direct and cross examination about the Stabenow article and was able to “support Stabenow’s contributions and research.”¹⁶⁰

In the future, blog posts and comments will likely play a prominent role in assisting judges in performing their gatekeeping function under *Daubert*.¹⁶¹ Judges and parties have traditionally examined the prior work of expert witnesses in assessing their qualifications and the substance of their testimony. Typically this prior work is in the form of previous testimony, journal articles, professional presentations, and other publications. In assessing the qualifications and substance of expert testimony, judges should explore blog posts and comments by expert witnesses testifying in cases before them. In the related context of Wikipedia, courts have both accepted and rejected expert testimony based on information from Wikipedia.¹⁶²

D. Blogs and Motions for Summary Judgment

Another area to watch is the use of blogs in the context of motions for summary judgment. Courts have not yet endorsed or rejected blogs as a source of information to demonstrate the presence or absence of the existence of a material fact in the context of a motion for summary judgment. Summary judgment is a procedural tool used to obtain relief on all or part of a claim when there is “no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”¹⁶³ Any material that would be admissible at trial may be considered in deciding a motion for summary judgment.¹⁶⁴

Courts should be cautious when presented with a blog posting or comment that purports to demonstrate the presence or absence of the

158. 595 F. Supp. 2d 382, 389-99 (D.N.J. 2008).

159. *Id.* at 391.

160. *Id.*

161. *See generally* *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 573 (1983).

162. *Alfa Corp. v. OAO Alfa Bank*, 475 F. Supp. 2d 357 (S.D.N.Y. 2007); *Campbell v. Sec’y of Health & Human Servs.*, 69 Fed. Cl. 775, 781 (2006) (rejecting expert testimony based on information from Wikipedia).

163. FED. R. CIV. P. 56(c)(2).

164. *Id.*

existence of a material fact in the context of a motion for summary judgment. Blogs can be used to deceive. Flogging, fake blogging designed to generate interest or support for a product, and astroturfing, fake consumer or grassroots blogs that are in fact funded by corporations, are just two varieties of deceptive blogs.¹⁶⁵ One infamous example is provided in *F.T.C. v. Whole Foods Market, Inc.*, where the court mentions Whole Foods CEO John Mackey's "pseudonymous blog postings in which Mr. Mackey touted Whole Foods and denigrated other supermarkets as unable to compete."¹⁶⁶

Anyone can start a blog about anything. Many blogs allow anonymous users to post comments. These features make blogs susceptible to a phenomenon known as "opportunistic editing."¹⁶⁷ Consider this example of opportunistic editing in the context of Wikipedia:

[I]f Wikipedia were regarded as an authoritative source, an unscrupulous lawyer (or client) could edit the Web site entry to frame the facts in a light favorable to the client's cause. Likewise, an opposing lawyer critical of the Wikipedia reference could edit the entry, reframing the facts and creating the appearance that the first lawyer was misrepresenting or falsifying the source's content.¹⁶⁸

A party can very easily publish a new blog or leave comments on an existing blog that are designed to show the presence or absence of a genuine issue of material fact. Lawyers who knowingly cite a blog entry that has been opportunistically edited would clearly be in violation of Model Rule of Professional Conduct 3.3 and perhaps other state or federal laws.¹⁶⁹ In the future, courts would be well advised to avoid ruling on an issue of material fact based solely on a blog posting or blog comment. In a related context, courts have rejected attempts to demonstrate issues of material fact based solely on Wikipedia entries.¹⁷⁰

The legal and ethical issues surrounding the use of blogs in judicial opinions will likely be resolved as courts cite them with increasing frequency. Two issues that have tremendous importance but have largely

165. Justin Brookman, *Ethical and Legal Pitfalls of Social Networking and Blogging*, 929 PLI/Pat 537, 541-44 (2008).

166. 548 F.3d 1028, 1032-33 (D.C. Cir. 2008).

167. Noam Cohen, *Courts Turn to Wikipedia, But Selectively*, N.Y. TIMES, Jan. 29, 2007, at C3.

168. Richards, *supra* note 153, at 63.

169. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2010) prohibits lawyers from knowingly making false statements of fact or law to a tribunal and from offering evidence that is known to be false.

170. See *Jones v. Blige*, No. 04-60184, 2006 WL 1329247 (E.D. Mich. May 16, 2006), and the discussion of related cases in Peoples, *supra* note 83, at 26-27.

been ignored are the interrelated questions of how blogs should be cited and preserved. Blog citation and preservation will have a long-term impact on the certainty and stability of law.

IV. THE CITATION AND PRESERVATION OF BLOGS

A. *Blog Citation*

Citations are tools used by judges, lawyers, and academics to communicate the authority they are relying on.¹⁷¹ In a previous article I compared citations to “bread crumb trails” allowing future readers “to retrace the logical steps of an argument.”¹⁷² “Accurate and complete citations are essential for unpacking legal arguments, advocating for their expansion or contraction in future cases, and for developing the law.”¹⁷³ When blogs are cited to support judicial reasoning or analysis they become important sources for future researchers. If future researchers cannot locate a blog used to support judicial reasoning or analysis, it will be difficult to determine how that aspect of the opinion should be applied, expanded, or contracted in the future. If a blog is cited to support judicial reasoning or analysis and that blog cannot be located in the future, will the opinion that cited it lose its authoritativeness? Will the law become less stable as a result? Will disappearing sources lead to a “degradation in the reliability and respectability of the Common Law” and imperil “continued harmonization in the law”?¹⁷⁴

The citation methods currently in use were designed for traditional print sources. These methods work very well for accurately communicating to readers exactly which print source a lawyer or judge is relying on. As lawyers and judges begin to cite Web sites, blogs, Twitter postings, and Wikipedia entries, it becomes painfully obvious that traditional citation methods are not easily adapted to electronic sources.

Blogs can be particularly difficult sources to cite. One of the key advantages of blogs is that they can be updated very quickly and contain the most accurate and up-to-date information. This constant state of change is a double-edged sword when determining the best way to cite a blog.

The recently released nineteenth edition of *The Bluebook* contains a substantially revised rule on citing Internet sources. According to the

171. This introduction to the use of citations in American common law was adapted from Peoples, *supra* note 83, at 36.

172. *Id.*

173. *Id.*

174. Michael Whiteman, *The Death of Twentieth-Century Authority*, SOC. SCI. RES. NETWORK (Jan. 21, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540164, at 32.

introductory paragraph of rule 18.2.2, “Internet citation should include information designed to facilitate the clearest path of access to the cited reference.”¹⁷⁵ The rule, as applied to blogs, is a vast improvement over the rule found in the eighteenth edition of *The Bluebook*. The nineteenth edition includes eleven examples of how blogs should be cited while the eighteenth edition provided only two examples.¹⁷⁶

The rule, 18.2.2: Direct Citations to Internet Sources, is broken down into subcategories dealing specifically with author, title, date and time, URL, and archival source.¹⁷⁷ The rule requires that author information be included when available.¹⁷⁸ When citing postings or comments the username of the poster should be included.¹⁷⁹ The following specific example is provided of how to cite comments to a blog: “Martinned, Comment to *More on Section 7 of the Torture Convention*, THE VOLOKH CONSPIRACY (Jan. 29, 2009, 11:02 AM), <http://www.volokh.com/posts/1233241458.shtml>.”¹⁸⁰ This is an improvement over the eighteenth edition, which only required authors’ names to be included when multiple posters posted to a blog and did not specifically address how to cite comments left on a blog.¹⁸¹ This rule is needed as judges have already begun citing comments left on blogs in their opinions.¹⁸²

The rule requires the title of a post or comment to be included with the generic title of the blog.¹⁸³ The following example is provided: “David Waldman, *This Week in Congress*, DAILY KOS (Jan. 19, 2009, 6:30:04 AM), <http://www.dailykos.com/storyonly/2009/1/18/235223/489/683/685802>.”¹⁸⁴ This is an improvement over the rule found in the eighteenth edition, which only required the generic title of the blog when citing a

175. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18.2.2, at 166 (COLUM. L. REV. ASS’N ET AL. EDs., 19th ed. 2010) [hereinafter THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 19th ed.].

176. *Id.*; THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18.2.4, at 158 (Colum. L. Rev. Ass’n et al. eds., 18th ed. 2005) [hereinafter THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 18th ed.].

177. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 19th ed., *supra* note 175, R. 18.2.2, at 166.

178. *Id.*

179. *Id.*

180. *Id.* R. 18.2.2(a), at 167.

181. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 18th ed., *supra* note 176, R. 18.2.4, at 158.

182. United States v. Perez, No. 4:05CR3010, 2008 WL 2309497, at *1 n.1 (D. Neb. June 4, 2008).

183. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 19th ed., *supra* note 175, R. 18.2.2, at 167.

184. *Id.* R. 18.2.2(b), at 167.

blog post or comment.¹⁸⁵ The generic title (Daily Kos in the example above) can be useful for locating the blog or reading current posts, but is useless in locating specific older posts cited by the court. The best approach, and the approach taken by the nineteenth edition, is to require the generic blog title *and* the specific title of the cited post.¹⁸⁶ Interestingly, most courts were ignoring the eighteenth edition's rule and were including the specific title of a post, not just the generic title of the blog. Forty-three out of the eighty-five opinions examined in this study cite to a blog post by including the specific title of the post. Ironically, by ignoring the eighteenth edition's rule and citing a blog post by its specific title, courts increased the chances that future researchers will accurately be able to locate the cited post.

The rule also requires that a date and timestamp be provided. In an example readers are cautioned:

Blogs and other dynamic sites that are updated frequently should include a timestamp whenever possible. Especially when the citation is for a comment to a posting or is otherwise easily identifiable by the time of its posting, the timestamp listed on the subheading should be included with the date: Donn Zaretsky, *Ruling Is a Setback for Sports Artist*, ART L. BLOG (Aug. 26, 2009, 10:51 AM), <http://theartlawblog.blogspot.com>.¹⁸⁷

The date and time of the post were also required under the old rule found in the eighteenth edition.¹⁸⁸ Unfortunately, most courts ignore this rule. Only two out of the eighty-five opinions examined in this study follow the rule and provide the date and timestamp when citing blog posts.¹⁸⁹

A URL that “points readers directly to the source cited rather than to an intervening page of links” is required.¹⁹⁰ This is an improvement from the eighteenth edition which only required a generic URL to the blog in general and not to the specific post cited.¹⁹¹ A generic URL takes researchers to the blog as it exists today. Blogs display their most recent

185. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 18th ed., *supra* note 176, R:18.2.4 at 158.

186. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 19th ed., *supra* note 175, R.18.2.2(b), at 167.

187. *Id.* R. 18.2.2(c), at 168.

188. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 18th ed., *supra* note 176, R. 18.2.4, at 158.

189. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 477 n.77 (Tex. 2009); *In re Gen. Motors Corp.*, 407 B.R. 463, 502 (Bankr. S.D.N.Y. 2009).

190. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 19th ed., *supra* note 175, R. 18.2.2(d), at 168.

191. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 18th ed., *supra* note 176, R. 18.2.4, at 158.

content first. Researchers attempting to access a specific blog post cited in a judicial opinion do not want to see the blog as it exists today. They want to see the specific post cited in the opinion. The most efficient way to give researchers access to the specific post cited in an opinion is to provide them with a direct link URL.

Interestingly, the majority of judicial opinions citing blogs did not follow the eighteenth edition's rule requiring blogs to be cited by generic URL. Sixty-three of the opinions included a direct link to the blog post cited. Including a direct link to a blog post gives readers a better chance of accurately viewing the posts cited in judicial opinions. *The Bluebook* editors were wise to adopt this updated rule for the nineteenth edition.

The rule could be improved, however, by requiring permalink URLs to be included when blogs are cited. A permalink URL "is a URL that points to a specific blog or forum entry after it has passed from the front page to the archives. Because a permalink remains unchanged indefinitely, it is less susceptible to link rot."¹⁹² Most blogs provide a permalink URL directly below the text of each post. This URL can easily be copied and pasted into a citation.

The introductory paragraph accompanying the rule proclaims that "all efforts should be made to cite the most stable electronic location available."¹⁹³ This is accomplished in the final portion of Rule 18.2.2, which deals with archival copies.¹⁹⁴ This provision was added to the Rule with the release of the nineteenth edition. The rule encourages "printing or downloading copies of Internet sources" and requires an "explanatory parenthetical" when past versions of an Internet page are cited.¹⁹⁵ The following example is included: "Tom Goldstein, *Somewhat Significant Settlement*, SCOTUSBLOG (Feb. 7, 2005, 8:54 PM), <http://web.archive.org/web/20050208081922/www.scotusblog.com/movabletype> (accessed by searching for SCOTUSblog in the Internet Archive index)."¹⁹⁶

192. *Permalink*, WIKIPEDIA, <http://en.wikipedia.org/w/index.php?title=Permalink&oldid=320562121> (last visited Aug. 3, 2010). The name "permalink" should not be confused with a link to a blog post that has been permanently archived. Permalink URLs could easily be rendered useless if the entire blog is deleted. See *infra* Part IV.C-D.

193. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, 19th ed., *supra* note 175, R. 18.2.2, at 166.

194. *Id.* R.18.2.2(h), at 169.

195. *Id.*

196. *Id.* It is ironic that SCOTUSblog was selected for this archival example given the comments of the blog's founder that he was "pathologically clueless about preservation." *The Future of Today's Legal Scholarship, Tom Goldstein Discusses Blogs and Reliability*, GEORGETOWN L. (July 25, 2009), <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=872> [hereinafter *The Future of Today's Legal Scholarship*].

The nineteenth edition's rule on archival copies is a step in the right direction. The alarmingly high rate at which blog posts and entire blogs disappear, as discussed *infra* Part IV.C, illustrates the need to preserve archival copies. The basic guidance provided by the rule is appropriate for the general legal community. The judiciary, however, should take more care to ensure that blogs cited in their opinions will be preserved. The recently proposed Federal Judicial Conference *Guidelines on Citing To, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions* adopts a more stringent approach to the preservation of blogs and other Internet sources cited in judicial opinions.¹⁹⁷ The *Guidelines* are discussed in more detail *infra* Part IV.E.

B. Problems Caused by Westlaw and LexisNexis

In LexisNexis or Westlaw, researchers who attempt to pull up a blog post cited by a court are likely to encounter difficulties. These problems are beyond the control of the judge writing the opinion and unfortunately cannot be fixed by simply including a direct link or permalink in the opinion. When LexisNexis and Westlaw load judicial opinions into their databases, URLs in the text of the opinions are not always copied exactly as they appear in the print reporter. Additional spaces are frequently inserted into the URL, making it difficult and sometimes impossible to locate the source cited.

LexisNexis inserts working hyperlinks into their opinions while Westlaw simply includes the text of the link. The links in opinions appearing on LexisNexis worked with much greater frequency than the URLs in opinions appearing on Westlaw. Nevertheless, the links in opinions on LexisNexis did not always function properly. Links in twenty-seven out of the eighty-five cases on LexisNexis did not work properly.

In *Booker*, Justice Breyer cited a Memorandum posted on the Sentencing Law & Policy blog, which discussed the implications of the *Blakely* case.¹⁹⁸ In the print version of the opinion found in the *Supreme Court Reporter*, the URL appears as http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf.¹⁹⁹ When this URL is typed into a Web browser, the document cited in the opinion

197. Memorandum from the Judicial Conference of the United States, Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions (May 23, 2009) [hereinafter Guidelines], available at <http://www.inbar.org/LinkClick.aspx?fileticket=hptDW9DIhFY%3D&tabid=356>.

198. United States v. Booker, 543 U.S. 220, 278 (2005).

199. *Id.* at 278 n.4.

comes up. The URL that appears in the opinion on Westlaw is http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf. Note the additional space after “/” and before “sentencing.” Researchers who cut and paste the URL from Westlaw into an Internet browser will see the message “Address Not Found.” The URL appears in LexisNexis as http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf. Note the additional space between “doj_” and “memo.” Researchers who click the link in the opinion on LexisNexis will see the message “Cannot Complete Request.”

Researchers who are Internet savvy may notice that additional spaces have been added to URLs appearing in LexisNexis and in Westlaw. Many of the URLs become functional once the extra spaces are removed. Another technique used by savvy researchers to find a blog post is to search through the blog’s archive. Many blogs archive their posts and provide a link to the archives on the main page of the blog. To be successful with this method, it is essential to have the name of the blog and the title of the specific post. It also helps to have the date and timestamp of the post. For example, in *Trenwick America Litigation Trust v. Ernst & Young*, the court cited Professor Stephen M. Bainbridge’s blog for his discussion of the fiduciary duties owed by corporate directors to insolvent corporations.²⁰⁰ The citation includes the specific title of the post, and the month, date, and year of the post.²⁰¹ The URL provided in the opinion on LexisNexis and Westlaw does not work. However, if the researcher goes to ProfessorBainbridge.com, clicks on archives, and follows the link to July 2006, the post can be viewed in its entirety.

C. *Blog Posts that Move, Change, or Disappear*

Blogs that have “moved” are another potential pitfall for researchers. In *Suboh v. Borgioli*, the court cited an entry on the popular legal blog The Volokh Conspiracy.²⁰² The direct link to the post brings up a “Page Not Found” message. It is not immediately obvious to the researcher, but the page is not available because the location of The Volokh Conspiracy has changed since the court’s opinion was published.

200. 906 A.2d 168 (Del. Ch. 2006).

201. *Id.*

202. 298 F. Supp. 2d 192, 194 (D. Mass. 2004) (citing SEO TUTORIAL, http://volokh.blogspot.com/2003_04_13_volokh_archive.html%20#2001549%2016, available at http://volokh.com/~volokhc/2003_04_13_volokh_archive.html#200161560).

It is possible to locate the blog post by going to the blog's current location and searching the archives.

All researchers are not created equal. Some do not understand how URLs function. Many may see the error messages described above and simply give up. Others do not know that many blogs provide a link to archived posts that can be searched or browsed chronologically. If courts want to provide future researchers with access to materials cited in their opinions, they must include complete and accurate citations to the sources cited.

Unfortunately, complete and accurate citations do not guarantee that a resource cited in an opinion will be available to researchers in the future. A carefully constructed citation can easily be rendered useless if a blog post changes or disappears after the court cites it. Blogs are ephemeral sources that change all the time. A recent study on blog preservation found that ninety six percent of blog posts are changed after they are initially posted.²⁰³ The study revealed that forty eight percent of bloggers have deleted posts because they no longer held an opinion expressed in the post, and twenty three percent have intentionally deleted an entire blog.²⁰⁴ Bloggers attitudes were mixed on the subject of blog preservation. While seventy one percent of bloggers surveyed believed their blog should be archived, only twenty-four percent admitted archiving their blog on a regular basis.

Blogs are excellent sources to consult for current information. Because blog posts are written on the fly, they do not always contain the most accurate information. As the study above demonstrated, almost all bloggers update their blog posts after they are initially posted.²⁰⁵ Bloggers update posts to fix spelling and grammatical mistakes, rephrase content, update links, and correct erroneous information.²⁰⁶ There is no standard method for signaling to blog readers that a post has been updated. Some bloggers will include a note alerting readers that a post has been updated. Others will keep the original post intact but will strikethrough language they wish to remove. Many bloggers update posts and remove the

203. Carolyn Hank, *BLOGGER PERCEPTIONS ON DIGITAL PRESERVATION*, <http://persistent.blog.wordpress.com> (last visited Nov. 3, 2010). The best citation system for electronic sources is useless if the electronic source is not accessible. See Barger, *supra* note 147; Mary Rumsey, *Runaway Train: Problems of Permanence, Accessibility, and Stability in the Use of Web Sources in Law Review Citations*, 94 *LAW LIBR. J.* 27, 30 (2002) (discussing links in judicial opinions and law review articles that cease to function).

204. Hank, *supra* note 203.

205. *Id.*

206. *Id.*

original language at will without any indication that the post has been updated.

The blogs cited in judicial opinions provide examples of the varying methods used by bloggers when updating blog posts. Douglas Berman's blog is cited frequently by courts because his posts are often updated. When updating a post Berman typically keeps the existing text in place and adds new text at the bottom of a post after the word "update" which is bolded and underlined. Sentencing Law & Policy was cited in *United States v. Penaranda* for Berman's reporting on the techniques used by district judges in the aftermath of *Blakely*.²⁰⁷ Many of the blog posts cited in *Penaranda* were updated with notes appearing at the end of the post preceded by the signal: "UPDATE."²⁰⁸

Other bloggers favor the strikethrough method of indicating updates. For example, in *Desimone v. Barrows*, the court cited ProfessorBainbridge.com when discussing the duties of corporate directors.²⁰⁹ Bainbridge edited the post cited by the court, after it was initially published, to indicate that a judicial decision he was discussing had been published.²¹⁰ Bainbridge uses a strikethrough to make the change obvious: "In ~~an as-yet-unpublished opinion in~~ *Ryan v Gifford*."²¹¹

When bloggers update blog posts they typically do not change the date and timestamp of the post. Because blog posts appear in reverse chronological order, updating the date and timestamp of the blog would change the order in which posts appear. This is significant because *The Bluebook* rule on citing blog posts requires posts to be cited according to the date and timestamp on the blog. If courts cite blog posts according to the date and timestamp, and the blog is later updated but the date and timestamp is not changed, there could be confusion about what language the court was referring to in the blog post.

D. Blog Preservation

Consider the following scenario: A court cites a blog post discussion of a substantive legal issue to support its reasoning on that issue. The court does not cite any other authority in support of its reasoning. Several weeks after the court's opinion is published, the

207. 375 F.3d 238, 247 n.9 (2d Cir. 2004).

208. See Berman, *supra* note 34.

209. 924 A.2d 908, 932 n.82 (Del. Ch. 2007).

210. Stephen M. Bainbridge, *Ryan v. Gifford: Chandler Tackles Stock Options*, PROFESSORBAINBRIDGE.COM (Feb. 27, 2007, 07:27 PM), <http://www.professorbainbridge.com/professorbainbridgecom/2007/02/ryan-v-gifford-chandler-tackles-stock-options.html>.

211. *Id.*

blogger changes her mind on the issue and edits the blog post cited in the opinion. The issue for which the blog was cited may not have been significant at the time the opinion was published, but imagine several years pass and the issue becomes significant. Researchers, lawyers, and judges begin to examine the court's opinion for guidance on the issue. They pull up the blog post cited in the opinion and are puzzled to find that the post no longer includes the information originally attributed to the blog. Or imagine that instead of the post being updated after the opinion is published, the blog post or the entire blog has been deleted. What will researchers do when trying to follow the logical steps of the court's argument? When a blog post has changed significantly after being cited or disappears entirely, researchers are likely to lose confidence in the court's opinion.

Little attention has been paid to preserving blog posts in order to prevent this scenario from playing out. Neither of the previous studies considered the preservation question. In the summer of 2009, a symposium titled *The Future of Today's Legal Scholarship* was held at Georgetown Law Center to "determine how to prioritize, collect, archive, preserve, and ensure reliable long-term access to" law related blogs.²¹² There, researcher Carolyn Hank discussed the results of her survey of bloggers' attitudes toward preservation. While seventy-one percent of bloggers surveyed believed their blog should be archived, only twenty four percent admitted to doing so regularly. These findings are borne out by the comments of Tom Goldstein, founder of the well-known and highly regarded SCOTUSblog. Goldstein remarked that he and other bloggers are not motivated to create a permanent and accurate archive.²¹³ Goldstein explained that the practice of displaying the most recent content at the top of a blog denigrates older posts and that most blog posts lose their value about a week after they are published.²¹⁴ He admitted to caring about the accuracy of what appears on his blog, but was "clueless" about preserving it.²¹⁵

Many blogs provide access to older posts via an "archive" link on the blogs main page. All but seven out of the eighty-five blogs cited in judicial opinions examined in this study provide access to older posts via an archive link. Calling these links to older posts "an archive" is misleading, however, as there is no guarantee of permanent preservation.

212. *Future of Today's Legal Scholarship Symposium*, GEORGETOWN L. LIBR. (July 25, 2009), <http://www.ll.georgetown.edu/ftls/>.

213. *The Future of Today's Legal Scholarship*, *supra* note 196.

214. *Id.*

215. *Id.*

If the blog is deleted, access to the older posts will vanish along with the blog.

There are currently two efforts underway to preserve blog content. The Internet Archive's Wayback Machine is a massive archive of Web pages reaching back to 1996.²¹⁶ Every two months it "harvests" about 150 billion Web pages. Users type in a URL and if the Web site is archived, they will see links to versions of the page at different points in time. The Internet Archive downloads and stores content directly to its own servers. This way, if a Web site or blog disappears, older versions of it may still be accessible in the Internet Archive.

Most of the blog posts cited in judicial opinions examined in this study are accessible in the Internet Archive. Twenty-eight of the specific blog posts cited in judicial opinions examined in this study were archived by the Internet Archive. Four blogs cited in judicial opinions were archived, but the archive did not reach back far enough in time to capture the specific post cited in the opinion. Six of the blogs cited in judicial opinions examined in this study were not archived by the Internet Archive.

In 2007, the Library of Congress launched the Law Library Legal Blawgs Web Archive.²¹⁷ The goal is to capture and preserve a variety of law blogs, also known as blawgs. Blawgs were selected for the archive based on specific criteria, including the authoritativeness of the blawg and the number of nominations it received.²¹⁸ The archive began in 2007 by capturing ninety blawgs and added thirty-eight more in 2008. The archive uses the Internet Archive's application for capturing blawgs. Blawg content is captured several times throughout the year and is stored on Library of Congress servers. The archive has its own Web site that allows users to search blawg content or to browse for a specific blawg by title or subject.²¹⁹ An individual page for each archived blawg allows users to view the blawg on the specific dates it was captured by the archive.

The Library of Congress archive is a relatively new project and only focuses on a limited number of blawgs. It is not surprising that only one

216. INTERNET ARCHIVE WAYBACK MACHINE, <http://www.archive.org/web/web.php> (last visited Nov. 3, 2010).

217. *Law Library Legal Blawgs Archive*, LIB. CONG., <http://lcweb2.loc.gov/diglib/lcwa/html/lawlb/lawlb-overview.html> (last visited Nov. 3, 2010).

218. *The Future of Today's Legal Scholarship, Donna Scheeder Discusses Blog Preservation*, GEORGETOWN L. (July 25, 2009), <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=872>).

219. *Legal Blawgs by Subject*, LIB. CONG., <http://www.loc.gov/law/find/web-archive/legal-blawgs.php> (last visited Nov. 3, 2010).

blog post cited in a judicial opinion examined in this study was captured in the Library of Congress archive.²²⁰ The archive had captured six blogs cited in judicial opinions but did not reach back far enough in time to capture the specific blog post cited in the opinions. As the archive continues to include more blawgs it is likely that it will contain more blawgs cited in judicial opinions in the future.

The way courts cite blogs makes it difficult to locate the specific post cited in the opinion using either the Internet Archive or the Library of Congress's archive. Both archives display a list of specific dates of when a blog was archived. Users searching for a specific blog post must know the day, month, and year of the blog post they are searching for in order to access it. Unfortunately, twenty-eight out of the eighty-five opinions examined in this study do not include the specific date of the blog post in their citation. Without the specific date of the post, researchers are left guessing as to the specific post cited by the court. Additionally, if there were several posts on the specific day, month, and year, it becomes essential to know the time of the specific post in question. As described above, the date and timestamp of the specific blog post cited is provided in only two out of the eighty-five opinions examined in this study.²²¹ The lack of a date and timestamp makes it difficult to locate a specific blog post using the Internet Archive or Library of Congress's archive.

Concerns over blog preservation are partially ameliorated when courts include direct quotations from blogs in their opinions. The blog language becomes part of the opinion and is essentially preserved for all time. Twenty-five out of the eighty-five opinions examined in this study included language from a blog post in their opinion.²²² This can be extremely helpful to future researchers attempting to reconstruct the logical steps of the court's argument. But a complete and accurate citation to the blog is still essential for researchers who wish to examine the quotation from the blog post in context. Blog posts can easily be misconstrued unless they can be viewed along with surrounding posts, updates or corrections posted by the author, or comments left by readers.

220. See *Talbott v. Hustwit*, 78 Cal. Rptr. 3d 703, 707 n.2 (Cal. Ct. App. 2008).

221. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433,477 n.77 (Tex. 2009); *In re Gen. Motors Corp.*, 407 B.R. 463, 502 (Bankr. S.D.N.Y. 2009).

222. See *Boxer X*, No. 06-318-DRH, 2007 U.S. Dist. LEXIS 45, at *5 n.3 (Jan. 3, 2007) (providing an example of an opinion that includes language from a blog post).

E. Judicial Conference Guidelines

The way courts cite blog posts and the way blogs are archived leaves much to be desired. As discussed, blogs cited in judicial opinions today may not be accessible in the future. The Judicial Conference of the United States recently took a bold step to improve the citation and preservation of Internet resources in judicial opinions. Recognizing that Internet sources were being cited with “increasing frequency” in judicial opinions and that Internet sources often disappear, the Judicial Conference released *Guidelines on Citing to, Capturing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions* (*Guidelines*) in May, 2009.²²³

The *Guidelines* acknowledge, “where the cited material cannot be found in an authoritative print resource,” it may be necessary to cite an electronic source.²²⁴ The *Guidelines* include examples of how to evaluate sources for accuracy, scope of coverage, objectivity, timeliness, authority, and verifiability.²²⁵ The *Guidelines* advise judges to follow *Bluebook* Rule 18.2 and other applicable rules of citation when citing Internet resources.²²⁶

Interestingly, the *Guidelines* direct judges to carefully reproduce and confirm any URLs that they include in their opinions.²²⁷ The *Guidelines* suggest “cutting and pasting the citations from a browser’s address window” to help ensure accuracy.²²⁸ As this study demonstrates, cutting and pasting URLs directly from LexisNexis or Westlaw is likely to result in a broken URL because of the extra spaces that LexisNexis and Westlaw erroneously insert into URLs appearing in their databases.

The *Guidelines* direct judges to consider capturing cited Internet resources when citing a resource that is “fundamental to the reasoning of the opinion and refers to a legal authority or precedent that cannot be obtained in any other format.”²²⁹ If there is reason to expect that the resource may “be removed from the website or altered,” judges are urged

223. *Guidelines*, *supra* note 197.

224. *Id.* at 1.

225. *Id.* at 1-2.

226. *Id.* at 2.

227. *Id.*

228. *Id.*

229. *Id.* In a small number of opinions examined in this study, courts indicated that they had kept a copy of the cited blog post in their files. See *United States v. Penaranda*, 375 F.3d 238, 247 (2d Cir. 2004). Since 2003, the United States Supreme Court has maintained a hard copy of all Internet sources cited in its opinions in the Clerk of Court’s case file. William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323, 334 (2006).

to capture it.²³⁰ The *Guidelines* provide that it may not be necessary to capture sources cited only for background or illustration.²³¹

If a judge decides to capture a resource, the *Guidelines* instruct the judge to capture it “as closely as possible to the time it is viewed by the chambers, to ensure that the exact version of the Internet resource that was relied upon by the judge will be preserved.”²³² The *Guidelines* include instructions on how to capture a resource as a PDF document and to insert a watermark indicating the date it was viewed by the court.²³³ The federal court’s CM/ECF system is to be used to preserve the captured materials along with the opinions citing them.²³⁴

The *Guidelines* have the potential to improve the ability of future researchers to accurately locate blog posts cited in judicial opinions. The *Guidelines* as they are currently written, however, leave too much discretion to individual judges. In deciding whether to capture a resource, judges are directed to consider if they have reason to believe the resource will be removed or altered.²³⁵ As the Carolyn Hank study discussed above demonstrates, ninety-six percent of blog posts are changed after they are initially posted and twenty three percent of blogs are intentionally deleted.²³⁶ A blog post may seem permanent, but it can quickly disappear on the whim of its author.

In describing how to capture blog posts, the *Guidelines* could be more specific. By default, most blogs do not display comments posted to the blog unless the reader clicks on the “comments” button. Specific instructions could be added to the *Guidelines* detailing how to display the comments to a blog post so they will be preserved when the post is captured.

The *Guidelines* are not mandatory. Courts are asked to consider them in developing local policies and were asked to report back on their progress. Court Administration Policy Staff in the Administrative Office of the U.S. Courts report that comments were received and the policy may be tweaked based on those comments.²³⁷ Uniformity is certainly desirable in how courts cite blogs and preserve them. If individual federal circuits ignore the *Guidelines*, blog posts cited in opinions from

230. *Guidelines*, *supra* note 197, at 3.

231. *Id.*

232. *Id.*

233. *Id.* at 5.

234. *Id.* at 3.

235. *Id.*

236. Hank, *supra* note 203.

237. Telephone Interview with Jane MacCracken, Pol’y Staff Member, Admin. Off. U.S. Cts. (June 10, 2010).

those circuits may become unavailable and, as a result, instability and uncertainty may creep into the case law of those circuits. A uniform approach to the citation and preservation of blog posts would avoid varying standards between the circuits.²³⁸ Unfortunately, according to Court Administration Policy Staff, the *Guidelines* will not become a mandatory court rule and courts will retain discretion in citing and preserving internet resources.²³⁹

The *Guidelines* were promulgated by the Judicial Conference and only apply to federal courts. Fifteen out of the eighty-five opinions citing blogs in this study were from state courts. The National Center for State Courts or another group should monitor the implementation of the *Guidelines* at the federal level and develop similar guidelines for state courts.

V. CONCLUSION

Blogs are valuable sources that should not be ignored by the judiciary. The blog format provides a venue for legal scholars to rapidly disseminate their insights and analysis on cutting edge issues. The use of Douglas Berman's Sentencing Law & Policy Blog in judicial opinions is an example of the highest and best use of a blog by the judiciary. Berman's insights on the *Blakely* and *Booker* decisions were valuable to judges as they confronted the fundamental changes that those decisions made to the federal sentencing regime. Other legal academics and expert practitioners will soon join Berman's ranks as more of them embrace blogging as a way to quickly communicate their ideas. The interactive nature of blogs makes them particularly well suited to assist the judiciary in specific cases involving the interpretation of insurance contracts and in determining public perception in trademark cases. Several courts have already used blogs for these purposes.

Blogs will play a greater role in legal scholarship in the near future. The law review format as the primary means of scholarly communication in law has come under attack in recent years. Bernard Hibbitts predicted the demise of law reviews in a 1996 article titled *Last Rights?*

238. The varying approaches to publication, citation, and the precedential value of unpublished opinions after the enactment of Federal Rule of Appellate Procedure 32.1 is a perfect example of the consequences of taking divergent approaches to an issue like this. See Lee F. Peoples, *Controlling the Common Law: A Comparative Analysis of No-Citation Rules and Publication Practices in England and the United States*, 17 IND. INT'L & COMP. L. REV. 307, 342-43 (2007); see also David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, SOC. SCI. RES. NETWORK, (Aug. 5, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444649.

239. MacCracken Telephone Interview, *supra* note 237.

Reassessing the Law Review in the Age of Cyberspace.²⁴⁰ Although Hibbitts' prediction has not fully come to pass, critiques of the law review form continue.²⁴¹ Law reviews are routinely criticized for their slow publication process, lengthy articles with dense footnotes, and lack of peer review.²⁴² The blog format provides the perfect antidote to the criticisms of the traditional law review. Blog posts work best in the short form using hypertext links instead of footnotes. Blogs can be published instantly, bypassing the lengthy delays of many print law reviews. The comments feature of a blog invites critiques from others, and if these critiques come from other legal academics or expert practitioners, they can function as a form of peer review.

A significant hurdle impeding the use of blogs for scholarly communication in law is the unanswered question of whether blogging counts for promotion and tenure. Although no definitive conclusion has been reached on this issue, it has been discussed in law review articles and at recent conferences.²⁴³ In reality, blogs are not likely to ever replace the law review format in full, but they have an important role to play as supplements to the traditional law review article.

The citation of blogs for factual information in judicial opinions raises concerns involving the judicial role in the common law system, judicial ethics, the law of evidence, and litigants' constitutional and procedural rights. Judges should not conduct independent factual research on blogs, should avoid taking judicial notice of blog entries, and should not decide a motion for summary judgment based on a blog entry.

The constantly changing nature of blogs makes them challenging sources to cite and preserve. The rules on citing blogs in the recently released nineteenth edition of *The Bluebook* are a vast improvement over the rules found in previous editions. The recently updated rules require citations to blogs to include the author of the post, title of the post, title of the blog, date and timestamp, and a URL that links directly to the post cited.

240. Hibbitts, *supra* note 5, at 615.

241. See Kerr, *supra* note 4; Liptak & Uelmen, *supra* note 5.

242. Kerr, *supra* note 4. Criticisms of the law review process have not fallen on completely deaf ears. Several law reviews have embraced the short form and are now publishing short articles of a few thousand words or less in an electronic-only format. Examples include the YALE L.J. ONLINE, <http://www.yalelawjournal.org/> (last visited Aug. 12, 2010), and See Also, TEX. L. REV., <http://www.texaslrev.com/seealso> (last visited Nov. 12, 2010).

243. Ellen S. Podgor, *Blogs and the Promotion and Tenure Letter*, 84 WASH. U. L. REV. 1109 (2006); Robert C. Berring, *Scholarly Gatekeepers and Electronic Information: Brave New World?*, AALS Comm. on Libr. & Tech. Program, 2008 AALS Ann. Meeting (on file with author).

Blog posts cited in judicial opinions must be preserved. Many blog posts change or are deleted after they are initially posted. If a blog post is cited for something significant in a judicial opinion and subsequently changes or disappears, future researchers may be unable to understand or apply that portion of the opinion. The Judicial Conference *Guidelines* wisely direct judges to capture and preserve internet sources if they have reason to believe that the source may be removed or altered. The *Guidelines* combined with the recently revised *Bluebook* rules are an improvement over past practices. The ultimate responsibility for correctly citing and preserving blog posts that appear in judicial opinions rests with lawyers and judges.