School: University of Baltimore.

Transcript: The Fate of Scholarship in American Laws Video.

Panel 4.

Date: 08/13/2016.

Captioner: Carrie.

"This text is being provided in a rough draft format. Communication access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings."

>> This morning and our first panel was highly qualified to do that in an interesting way. And so is our second panel organized by my colleague Garrett Epps. Panel is on the subject of legal scholarship, journalism, and new media. Garrett will introduce all of the panelists. And moderate the panel. So let me turn it over now to Garrett Epps. Garrett?

>> Thanks C.J. Welcome everybody. Thanks for being here. I'm Garrett Epps, Professor of Law here and these days my, my chief indeed sole -- scholarly activity, if that's the correct term for it, is as Supreme Court correspondent for the "Atlantic On-line". So that to some extent is the journalistic perspective. But we've got people doing really interesting stuff here on this panel with law in ways that, you know, would have been really -- 20 years ago, very surprising to people. And now, after the last panel, we are sort of the legacy media panel. But --

[ Laughter ]
And let me introduce our, our speakers and tell you how we're going to proceed. To my far left is Solangel Maldonado, which is the Joseph Lynch professor at Seton Hall University School of Law and this year also scholar and residence at the Center for the Study of Law and Culture at Columbia. Solangel writes extensively and is published in plenty of traditional forums on, on issues of family law. She's the coeditor of a book called "family law in the world community." But for our purposes, of most significant is the fact that she's perma blogger or she's attached to the concurring opinion's blog, which is something that has become really a very important presence in the world of legal scholarship and ongoing debate. And she is going to dialogue about that world in a, in kind of interesting, among other things, an interesting case study with my colleague Jane Murphy to my immediate left who recently published in an on-line symposium solicited by Solangel in concurring opinions and that was your first blog post.

>> Yes.

>> Right? Ever. Jane Murphy is Lawrence Katz professor here at the University of Baltimore. She's been director of clinical education and associate dean. She has recently published a book called "divorced from reality, rethinking family dispute resolution." And indeed is the former chair of the AAALS section on family and juvenile law. And you know, again for our purposes, participated in this symposium and I think we were, we're going to start by having these two talk a little bit about that process.

To my right is Kermit Roosevelt, Professor of Law at the University of
Pennsylvania. He's a specialist in constitutional law and conflict of laws. And has written for a number of the very top law reviews and a couple of important books including one called "the myth of judicial activism, making sense of Supreme Court decisions." I did want to say that -- you know, Supreme Court, if judicial activism is a myth, I feel like the guy who has seen Bigfoot. I'm like -- I've seen him with my own eyes, what are you talking about? But that's not really, that's not the subject of today's panel. We'll get into that later.

For our purposes, Kim, offers a fascinating perspective on yet another medium for scholarship that has traditionally not been considered in the mainstream. But I think it's quite important. That is he has written two quite significant and well-regarded novels about the law, I'm in the shadow of the law "which deals with life in a contemporary law firm. And then most recently" Allegiance."

[Laughter]

A really terrific book which I recommend highly about the Supreme Court and the law in the time of World War II shedding very important insights on two major cases -- Ex Parte Quirin, the German spy case and the, the Japanese internment cases here by (Indiscernible), etc., in ways that I think, conceptually, that ordinary legal scholarship can't do. So for the second half of our time, Kim and I are going to bounce around a little bit about fiction, both in turns of writing and in terms of course we both teach, which is fiction writing for law students to, to what extent that brings value to the table as well.

And then we'll have time for your questions. And just in advance, so
everybody knows we want to make sure that everybody is comfortable during the Q & A and so the video recording will be off during that period. It will just record our -- presentation.

And with those words, we'll go until about 12:10 because we started late. And take it away. I will be time Nazi.

>> Great. Great. Well, thank you, Garrett for inviting us and C.J. for organizing this amazing conference.

So, so what we're going to do, we're going to have a conservation about legal scholarship and its sort of interesting looking that title "journalism and new media" I keep thinking was new media supposed to be us? Expect that now I've just learned that blogging is just so 2005 -- 2006 --

[ Laughter ]

So we're really bringing it back to -- you know, lets, let's go back 10 years.

So you know, the last panel specifically, you know, Dan Pats talked about you know, some of these new forms of sort of legal scholarship. But I want to just specifically, a little bit about blogging because that is what I know. So I have been involving with concurring opinions which is a legal blog founded by Dan Scolof, a privacy scholar at GW. And he basically recruited a number of his friends, because one of the ways, I think that people sort of join blogs is you invite your friends to be perma bloggers, which that means we're just sort of on the staff permanently and they won't let us go, I've tried. And then we'll also invite guest bloggers for one-month stint where people can blog for a month about
basically any topics that they want, but it's all very much related to law. And the ABA journal, which actually ranks legal blogs has put us in the category of legal theory blogs, but -- it's just basically a general blog. Not the year they put us in the category of law professor blog, because they did away with their legal theory sort of category.

So why, why blog? So I find that there's many benefits. One is it's a great way, I think, to sort of test, test an idea. So if you're thinking about, you know, writing a piece and you want to sort of get the sense of what other academics think and also just general public, lay people, then you can, you know, do a short blog, a thousand-word, 1500 words and ask for thoughts. Right? So if you ask people for their feedback, I find that they do respond. If you don't say thoughts or I would love to know what you think, then -- people may read it and not say anything. But I think it's a good way to sort of, you know, test your identities.

It's also, I think, a great way to market an article once you've completed it, you know, by this I mean a traditional law review article or an essay, you've completed the article, it is on SSRN or it has actually been published and now you actually blog about it. If it is something, if it is sort of a big significant piece that you really can't do in one blog post, we have sort of serial posts like -- part one, stay tuned next week for part two and so forth. So that's a way to sort of expose a much broader audience to your work. And in terms of the audience, you know, I write in the family law area, so I expect that most of the people who are reading my work if any r going to be other family law scholars.
So it's that 20 to 30 people, you know, the sort of really -- I think, might be interested in what I'm doing.

But when you're writing, but when you're posting on a blog, you're going to get law professors from other disciplines. So you might, you know, so for example I know nothing about privacy, but because I'm reading these blogs I actually, you know, I read what's going on in the privacy world and I may read about what's going on, you know, I don't know in contracts or follow first amendment issues really closely because my colleagues on concurring opinions are blogging about these issues. But also it's academic from other fields. Law students, so it's actually our students think it is really cool when, you know, that their professors are blogging.

Other times, a blog post is just that. Meaning, it's not an idea for a bigger article and it's not a summary of a another article that has bird been published or completed, but it is just, you just, you're reacting to something and you really don't need, you know, more than a thousand or 1500, 2,000 words to actually get your point across. And it is just something that you feel strongly about. So you just put it out there. So I think it is sort of a great venue for that.

And then, as others in the, in the, in the previous panel mentioned, it's just -- its, it's wonderful to be able to react to something or to basically steak out your, your -- you know, your position early on. So Supreme Court has just released an opinion and you can blog on it, you know, the same day, the very next day. Or have an on-line discussion, I remember a couple of years ago, this was
not for concurring opinions, I forgot for which blog I did this for. But when the Supreme Court decided the union child warfare case adoption of baby girl a couple of years ago, someone, I'm trying to remember who organized this, but got eight or nine family law scholars and we're all very diverse even in our philosophies and she, and it was, we were ready to go the day, you know, the court released the opinion or the next morning to start blogging. It was this conversation, Jim Dwyer was part of it. If any of you family law scholars like, Jim Dwyer and I probably disagree on most thing, but a great discussion, sometimes can get pretty heated. But, but it is a great way to express your ideas.

And then also, citations in law reviews. So I found, Robert Brown at the University of Denver College of Law did an empirical study in 2012 where he looked at how frequently blogs were actually cited in, in law review articles and in cases. Well -- not, most blogs are, are not cited in, in cases, it is just, judge Hamilton told us yesterday, even though we believe that judges do read them, as judge Hamilton mentioned yesterday, but citations in law reviews are actually significant. So as of, in 2000, as of 2012, the Balkan Conspiracy had been cited in over 700 law review articles. And Balkanization, Jack Balkan's blog had been cited in over 400 law review articles and concurring opinions, which ranked I think number four, was cited in about 279 law review articles and -- the casebooks and other types of materials. So it is a way to, you know, sort of get your name out there, become a more -- public scholar.

And the last thing I'll, I'll say, before Jane and I start our conversation,
is that you can also use blogs not only to, to talk about your own ideas and your own scholarship, but to talk about other people's scholarship and so one of the things that I've been doing in concurring opinions the last few year is I'm not, I don't actually blog very much and actually -- to the extent that I have been blogging, I've sort of have been doing it in sort of different -- not necessary concurring opinions, but I bring in guests and I'll, we'll talk about that in a second, but I also organize books symposium. And this has -- somewhat, say, has -- have been maybe -- replacing the traditional book reviews. So for example, you published an academic book or a trade book that's related to law and I will, I've read your book, I think it's wonderful, or maybe I don't think it's so wonderful, but I think it is interesting, so I will work with the author to put together an on-line book symposium. And it is basically six to 10 people who, I think, would, would be great readers and commentators on your book and then you get to respond to that and so it's mechanism for, you know, getting, if you write a book, I think, you're always concerned, at first, how many people are actually reading it? Well, this is a way of getting people to read it and engage with, with your book. And of course, for the commentators, what's in it for you? Well, as we all know, in book reviews you're not just reviewing the work, but you're also getting your own ideas across. And one of, another blog that I'm affiliated with is JOTWLL, "journal of things we love lots." That's the acronym, it is basically just -- it is a forum for contributors, there is over 200 of us, to each, to select articles in whatever field, I, I write in the trust, the estates and
trusts field, I think family law was full so they asked me to do estates and trusts, and I summarize, and I basically select, you know, sort of top articles, articles that I think are really important, and you just write a short, you know, 1500, 2000-word blog post and for, for someone, let's say you're not in the trust and estates area, but you think it might be interesting -- you're not going to invest the time to read a 60-page, 70-page law review article, but you might be willing to read a 2000-word post in that area. So it's a way, I think, for all of us to, you know, keep informed about much broader scholarship. You know, that's not necessarily in our area. So those I think are the advantages of blogging.

>> Good morning. So Garrett asked me to be on the panel to fill the role he called "every prof." You know, the professor who has done traditional scholarship and has not delved too deeply into new media. Hasn't established myself as a media company yet, as Dan Katz described it. So I'm going to spend a couple of minutes introducing myself and taking about my limited experience with new media and then, as Solangel asked her some questions that some of you might have about how to get more involved in new media so we have more nuts and bolts.

So until recently my legal scholarship focused on traditional outlets. Law reviews, book chapters and books. I have always attempted to do the translational research that professor talked about yesterday, translating my law review articles into op-eds and -- you know, radio appearances and popular press outlets, but I didn't explore blogging really, until I wrote the book that Garrett mentioned and both my publisher and I had an interest in trying to expand the readership and
that was one of the ways I might do that.

So I've written since concurring opinions and few other blogs -- a couple of essays for on-line companions to law reviews and, and a bit of what I would call new media.

So Solangel talked about some of the benefits from this kind of writing and I agree with all she said, but I just want to add kind of the flip side, some concerns and surpasses from my very limited experience with this process. So while blogging can be a way of getting something out in less time, you know, getting the frame the ideas very early, it can also be a, a -- surprisingly substantial time commitment. Not so much an issue if you're post tenured, fully promoted, but if you are pretenure, if you're concerned about research stipends it really doesn't count for very much in most law schools.

So a couple of examples of how it can be kind of time-consuming, as Solangel mentioned, she does these book symposia and asked me to participate in one, and Alicia Keys, I mean, Alicia -- was in one of those as well -- and we were asked to be commenters on wiener's book, parents as partners. I thought it would be a great thing to do. And book I was interested in reading. Solangel said it could be as long as or as short as we wanted. Concurring opinions well-regarded blog. No footnotes. No editing. It sounded great. And it was a good experience, but it took a lot of time, at least for me. Now there might be a gender dimension that we will talk about a little bit more. But I started by reading a 500-plus-page book very carefully, which of course took a fair amount of time. And to really
say something significant about the book, I think you had to write 2,000 to 3,000 words and for me to think very carefully about what I said -- not a law review article, but not a causal, quick post.

There's no editing, which can be a plus, certainly, but for those of us who are used to editing, even it is law students, you know, getting the draft vetted and checked and back and forth, its little unnerving to sort of write something and then just post it as we were told to do. So I felt I had to have at least one or two colleagues read it, you know, give me feedback, was it too critical, too informal, too formal -- you know, what's the tone is it factually accurate?

And then one of the other participants in the symposium asked me to do the same thing. So between reading the book, writing the post, getting feedback, giving feedback, it was, it ended up being a much longer process that I -- then I thought it would be. And even though I wasn't looking for a research stipend or promotion or tenure, it was sort of, it feels like there were -- is no real recognition of this work, perhaps other than the feedback you get from it.

One other quick example was a post I did for a university blog called "urban matters" for New York City University. And that seemed very simple. And invitation to do a short piece. No more than a thousand words about my book. You know, highlight the themes of your book. So no need to vet. No need to send it out for commenting. Sent it in, and it went through two levels of editing and I must have written eight drafts on this silly little piece. But that is the case with some blogs. I think -- this particular blog was a new one. They weren't
quite sure how to moderate the submissions, but they -- it was more closely edited pretty much than anything I have ever done.

So concerns about time whether, you know, the benefits -- merit the time. The second concern relates to whether our assumptions about reaching broader audiences are always true. It's really hard to gain that. So the symposium that we did, Alicia participated in, involved eight people submitting comments to the book and then the author responded and there were no comments by anyone else. So I'm wondering is anyone reading this? Is it too dense? Is it better off in a law review? And I think -- Solangel --

>> Jane, you mean there was a place for comments, but no one actually commented?

>> Right. Right.

And, you know, is that how you measure whether it has been read? The number of comments? Is the more the number of subscriber, whether it is shared or reposted. So this may be a good time to start my questions for Solangel.

So if you're convinced after this conference you do want to do more new media, how do you choose among the many blogs, we've talked a little bit about that and how to get the opportunity to do it. So let's start with this question of what are the best blogs? You mentioned the ABA ranking. Is that -- a measure of readership? Is it a measure of the quality of the pieces? The credentials of the blogger? So --

>> So -- so the ABA has been ranking the top 100 out of the 4,000 legal blogs
which they call blogs BLAWGS. And so when they started this ranking in 2006 or 2007, they only had, you know, 3,000, now they have up to 4,000, and they choose the top, you know, 100, but and what's interesting is, you know, blogs can come in and out of the 100. So you know, there's some that have been on like Balkan's Conspiracy has been on, you know, the entire, you know, since its existing. Concurring opinions has made that list, you know, four times. Balkanization has made it most years. But when you look at the criteria for the ABA's ranking, it actually, you know, it, I think it leaves a lot to be desired. The ABA says its list is really a favorites list based on the selections of the ABA journal staff. So it's whoever they, they thought, well, this sounds interesting. And now, until, now, for the last nine years, they also would take nominations from their readers. You know, so you could nominate your favorite blogs. But this year they did away with it. They don't tell you why. We just did away with it. Okay. So this year it's definitely, you know, 2015, it's definitely just a favorites list. Now, they do see, the ABA journal says that a good blog -- a good blogs are those that are regularly updated, contain original content, opinion, and analysis. But you also see that some of the blogs they might choose are just kind of gossipy blogs. So I don't think that's really sort of a great measure. Pollak Karen, a tax prof, he ranks blogs just based on visits. Right? So how many people visit. And you know -- I mean, there's really no. I couldn't tell you what's the best way to sort of Iran -- a blog.

But readership goes up and down and one of the things that, that I've learned
is that obviously blogs are, definitely sort of the old media because concurring opinions on or you know, sort of like the height of concurring opinions we were really sort of one of the hottest blogs our visitors were about 2,000 a day. And I know that the last panel talked about, you know, how many visitors a day. So now we're more, we're hovers about a thousand a day. So I think part of the reason for that, there is just so much more out there. So many other types of media so that the traditional legal blogs just aren't frequented or, aren't visited as often as, as there used to be back in 2007, '8, '9, '10. So --

>> Okay. So -- when I talked to you about the lack of comments you said that's not really the only measure of, of the impact of your post.

>> Right.

So-and-so we know that people, I mean, so we know that people are reading it just because, again, we can track it through visitors. Right? So who's on the website, so that gives us an idea. Also one of the things in my experience is that even if people, I'm one of those offenders, I guess, I would say, I almost never post a comment on the blog itself, but I will e-mail the person. And say, hey, that was a great post. I have this question, I have that question. Now, why would I do that when -- isn't it in my best, in my interest to sort of, you know, increase comments by starting this conversation? Well, I'm not as comfortable posting a comment that I haven't, you know, posing a comment for the world to see that I haven't spent a lot of time thinking about.

And so as Jane pointed out, you know, blogs take a long time. They don't
take anywhere nearly as long as a law review article, but they do take a long time and here I definitely see a gender component and I've spoken to many, I mean, many people, many other women who blog, many men who blog, and I definitely see a difference and actually, I'll read something to you from, that Rosa Brooks wrote a number of years ago, but -- so men, I have spoken to many men, they will just, they will do a blog, not a book review, because the book review you need to actually, read the book, that takes time. But they will just sort of get up, read the newspaper, see something interesting and they will just, you know, crank out a blog in 45 minutes to an hour and they're done. And then just go.

Now, you know, a lot of times they have great things to say, but when I'm reading these posts I often find typos, grammatical errors, things that make me cringe and I just, I'm not comfortable with that. And I found that women tend to be, again, I'm generalizing, but women tend to be less comfortable with that than men. So most of the female bloggers I've spoken to, they do exactly what Jane did. They just, they simply don't spend 45 minutes then post it, but they are -- you know, they're researching everything. Then they're sending it to a colleague for, for editing. Feed pack. And then the back and forth, next thing you know, you have spent two days on a 1500-word, 2000-word post. That's just, that's, it's going to make it very difficult for you to post frequently.

And one of the things that I did last night, is -- I, I went through, you know, concurring opinions, which does have female bloggers sort of as perma bloggers, and also Balkanization has female bloggers, but when I looked that most
recent posts I went all of the way back to February, all men. So how did it be
that you have women on your staff, but the only people who had posted on, on these,
you know, on Balkanization, it is, you know, a popular, many, many posts, you know,
but no women had actually posted anything since February.

And, you know, what's the explanation? Is it the time component? Well, Rosa
Brooks, at Georgetown, Professor Rosa Brooks in 2006, she wrote a post for the
Yale on-line -- Yale pocket part, and she, she said -- quote the on-line world
of legal scholarship may ultimately replicate many of the hierarchical and gender
structures found in the offline world of legal scholarship. Take blogging, for
example, with its 24/7 quality, blogging attracts the obsessive, the energetic,
and the insomniac.

[ Laughter ]

So, so -- and so, and then she goes on to say, there are a handful of prolific
female legal bloggers, but even more than in the pages of law journals, women legal
bloggers are still thin on the ground. And as I said, Robert Brown did an empirical
study of blogs in 2012 and he looked at who was blogging in a six-month period,
he looked at all law professors who were blogging on Leal blogs from January to
June of 2012. And he found there were 299 law professors blogging on Leal blogs.
But only 80 -- ah, I wrote down the number, now I can't find it, but only 84 of
the 299 were women. So 28%.

So Rosa Brooks, she wrote this in 2006 when blogs were, were just -- sort
of hitting the ground, here we are in 2012 and I don't think, and just my research
last night, I don't think that has changed.

>> Yeah. It's interesting because Pew has done a lot of studies on sort of gender differences and social media generally and historically women are more active in social media, but it is Facebook, twitter, other -- not -- not legal blogs.

Is there a race dimension?

>> Yes. Absolutely.

And that, that is something that I guess I had not really thought about before. But when I, I went and looked at a couple of the big blogs, you know, Balkan Conspiracy, and looked at Balkanization, you know, all white. Concurring opinions is a little bit more diverse. In, or I shouldn't say, I mean, definitely no. You know, no African-Americans, concurring opinions is a little bit more diverse, but we as well don't have any African-American bloggers. And there was back in, I guess, 2006, 2007, there was a, a legal blog called "black prof" which I think was phenomenal, it’s no longer in existence, it only last a few years because blogging, it's difficult to maintain. Again, it really, it requires, you know, sort of the 24/7 quality, the ABA tells us you need to update the content repeatedly. You need to get contributors and that is very difficult to do. So many blogs basically just, you know, they're not sustainable for a long period of time. But other than "black prof" that was the only, you know -- blog that I'm aware of that had significant numbers of racial minorities. And then Darin Hutchinson at Florida has a blog called "dissenting opinion" or "dissenting justice." But
that's only one person. So I just looked last night and there hasn't been any content since January. So definitely a race dimension.

>> So it seems like part of the answer to that is to sort of have a critical mass of bloggers if you're going to sustain a blog and as someone who is affiliated with one to invoice a more diverse audience, I want to ask how you choose. You said friends, how you choose your bloggers and how you choose the books. The problem with the symposium I did, it was not my book. How do you choose the book? And what impact does it have for a book, to, for example have a concurring opinion symposium?

>> So I guess let me talk about the, the guests. How do we invite people? Well, I mean, so much, I think, is who's in our social circle, which again reproduces so many of the hierarchies of the legal academy. So who's invited to conferences a lot of the times are the same people, well, who do you know? Maybe, who knows who, the people that I've invited to blog are basically people who I've met at conferences. That's, that's -- you know, that's very common. So there was a workshop, there was -- or -- sometimes it's that I have read, you know, that I've read their work. But again, the likelihood that I will have read, usually I will read their work because I have actually met them or heard them speak at a conference, so then that's how I get to sort of invite the person.

And when I look at other, you know, I've spoken to people on other blogs they are basically inviting, you know, their own social circle. Their friends, which, of course, is, is really problematic.
One of the things that I try to do is, at least, I mean, I find that, that many of these, you know, popular blogs, don't, I mean, none of them focus on, I think, the areas that I'm really interested like family law, trust and estates. So I try to invite guests who are going to, who I know write in areas where I think we're not getting, we're really not getting much exposure. So that's one of the things that I do.

As to the book symposium, how do I choose the book? Again, there's no. We really don't have criteria, except, well, I came across this interesting book or something told me about the book and then I'll do a book symposium, but because timeliness really matters, it means that if a book came out and I'm not aware of it until the book has been out let's say six months than it is too late. So usually it's that the book just came out so Merle's book, Merle is my coauthor or a casebook. So I knew she was working on this book. I was like okay when is your book coming out. You know, the moment that, the publisher can send you a free copy. You get a free copy for participating in the on-line book symposium I'm ready to schedule this. But I think we need to find some mechanism, a more egalitarian mechanism for selecting books. And I think for selecting guests to be, you know, to on these, on these blogs.

In terms of the impact, we don't, we actually don't know. Right? All, I mean, there's no. I don't have any empirical, you know, data on -- what a difference it makes. I know that people -- I mean -- people are reading the books and people are reading the reviews and that actually at conferences I've
had conversations with people about that was a really good symposium, etc. And I know that for me sometimes other people have posted symposium or I've read symposia on other, on other blogs, you know, because it's not just concurring opinions that does this, and it actually may be something I was not planning to read, but now after I read the reviews I want to read this. I just go on Amazon and I order the book. But there's, there's really very little data. The only thing we can sort of track is -- how many people actually visit the site, but that's basically all that we're able to track.

>> Great. Well I think our time is up.

>> Yeah.

>> So I'll turn it over.

>> I think what's interesting a lot of things at the words were interesting. To me, particularly in, in -- combination with the last panel is that we're now talking about a new medium that's mature in a certain sense, that has conventions, that has a word. There are other things bubbling up behind it. The -- to the extent that there's a connection in our segue, it's, it's sort of almost the reverse is that -- Kim is going to talk to you a little bit about very, very old form that is coming, I think, and I hope, into relevance and acceptance in the legal world as -- just the way blogs are, as -- an all, perhaps an alternative or a supplement or even a replacement for -- the -- the traditional law review article. And that, of course, is, is, in this case, is the art of -- pros fiction. And for those of you, I will say, I have not been prompted, that "Allegiance" is on sale outside
in the lobby. And for those of you who have not read it, I think it is a wonderful read, but beyond that, for me, as a constitutional law scholar, it made me encounter certain people who are very important in my world in a new way because the characters in the book include Hugo Black, and Felix Frankfurter and a number of other, very important figures in the shaping of the modern constitutional cannon whom I've read a great deal account. And whom fiction can make you identify with or react to in ways that even the very best nonfiction, necessarily can't. And a fascinating comparison would be to compare "Allegiance" with Noah Feldman's book "Scorpions" with some of the same personalities. So I would like to just throw it to Kim and say, what did you learn, what do people learn from seeing functional accounts of these incredibly important events and these, these people who are so important in our world?

>> Well, thank you, thank you, having me here, Garrett. Thank you all for coming. (Clearing throat). I was guided, I guess by two principles as I was trying to write about these historical figures. The first one was that you cannot liable the dead. So that gave me a sense of freedom to some extent.

[Laughter]

But I also had a sense of responsibility. Because the other thing I was thinking about was (Clearing throat). The relationship and the differences between what you could say maybe are facts and truth and illumination. And what I mean by that, is you could think of a bad biography, a bad nonfiction book that just gives you a bunch of facts about some person and you come away from that
thinking, what was the point? I don't know this person at all? I don't have a sense of what this person was like. Or you could think of a good biography that carefully selects facts and presents them in a way that luminates themes and draws connections between them and has some sort of commentary on it. You come away from that thinking -- I have a real sense of what this person was like and I could imagine what they would do in situations that author didn't describe.

And what goes into that is, I think, not that dissimilar to what goes into the process of writing fiction, because you've got your material handed to you in a certain way, but you're still telling a story based on that material. You're still creating order where there isn't necessarily a natural order that's presented to you and you're deciding what the themes are and what the linkages are between different moments in this person's life and so on. And it's that sort of creative reinterpretation of the facts that I think gives you illumination.

And I also think it is possible to generate illumination through stories that are not based entirely on fact. And I don't mean to say that there's no difference between describing what someone actually did and saying that they did something that they didn't do because for many purposes that's a very crucial difference. And in the book, actually, I tried generally speaking to stay pretty close to the historical record so there are historical people who do and say generally speaking what they in fact did and said, although -- sometimes they didn't say it, they wrote it in their diary and I've turned it into dialogue, but I fell little compunction about doing things like that. I tried not to have historical figures
doing things that they really didn't do. With basically one exception, which is there's a historical figure, Felix Frankfurter who gets involved in my non historically-based more sort of thriller-murder-mystery plot. So to that extent, he does depart from the historical record. But generally what I was trying to do was give you historical facts which I felt had a certain kind of significance to them and illustrated certain themes and were connected in certain ways and present them in an interesting way that people would enjoy reading about and also at the same time use the license and the strength of fiction to tell another story which I've made up, which is more my thriller plot, that illustrates the same themes and gives us a different, and I hope, a deeper understanding of the actual historical material.

So I sort of extreme example of this that I was just thinking about, is the movie "Abraham Lincoln: Vampire Hunter." Which I haven't seen, and I assume very few have seen. But for the purposes of this does cushion, I will assume the title is an accurate reflection of what it is about. So that's telling you a story about Abraham Lincoln that certainly didn't happen. But what it is telling you about, you think maybe it did, well I don't know, I haven't we searched it. But what is it telling you about Abraham Lincoln? It is telling you Abraham Lincoln is a heroic figure who fought evil and a strong and imposing guy. That's true and illuminating in a certain sense. And also maybe tells you something about the word and our history, which is the Civil War was a struggle against the dead hand of the past and an evil system that sustained itself on the lifeblood of other
human beings. And that's also illuminating.

Now, I don't know if "Abraham Lincoln: Vampire Hunter" executes this well, but I could imagine an illuminating story that actually tells us something deep and important about Abraham Lincoln and the Civil War even though it has vampires in it.

So that's what I was trying to do. Though, like I said, I tried to stay much closer to the actual historical record than I believe Abraham Lincoln vampire does, but I was trying to use real historical data and real historical people and a supplemental functional plot line to tell you something about who these people were and the ways that they acted. But also something about broader themes, you know, what the means to be an American. How we as a nation and a people react in times of national insecurity. The kinds of moral conflicts that arise. The kinds of conflicts that can arise between Leal duties and constitutional duties and ethical duties. And -- basically I guess, the fundamental moral question is -- when it is okay to sacrifice some people to save others.

When I was talking about a biographer drawing connections between different episodes in someone's life or bringing out different themes. One of things that I try to do in "Allegiance" and one of the things that the fictional plot line allowed me to do more easily was to sort of rerun that moral dilemma over and over again in different contexts. So over and over again the question comes up -- is it okay to sacrifice this probably innocent person for some other goal? You know, to save other innocent people some other to pursue some other aim? And it has
different answers in different contexts, but I think that looking at it in different contexts some of them fictional, some of them factual, actually gives us a deeper insight into that question and into all of the other themes I was trying to explore.

>> Well, you know, in addition to the historical figures, we have, we have the book as told by a narrator whose first name suggestively enough is "Cash" and she is an aspiring lawyer who has to make a series of decisions in realtime that concern events we look back on, you know, with very much the benefit of, of hindsight. Very much the benefit of realizing that the actions of the U.S. government during the Japanese internment were profoundly flawed, morally bankrupt and so forth. And, and -- Cash is in the middle of the situation. He's an actor, he doesn't have the luxury of, of stepping off the train. What do you think that, that taught you and what maybe teaches the reader about lawyering, which is -- a realtime thing where moral judgments have to be made in imperfect situations.

>> Well -- that's an interesting question. I'm not sure that I was trying to teach something about lawyering so much as that was supposed to be my commentary on the present day. Because one of the main points of this was it was supposed to be a little bit like Arthur Miller and the crucible. You look back to a time where they it was a real witch hunt. And then you think about the present day, and it is not exactly the same thing going on, but a metaphorical witch hunt and maybe it is not justified either. This was supposed to be getting a way of people to think about the reaction of September 11th, basically and national security
policies and enhanced interrogation, and Guantánamo detention and all of that sort of stuff. And part of the point was that was if you, if you have a particular view about what's going on now, you can pick a historical episode that supports that view, which is sort of what I was doing, because here's this national security reaction that turns out to be an unjustified hysterical counterproductive overreaction. So I was trying to suggest that is.

But the other important thing that I learned while writing this was there's a tendency for us to overreact to perceived threats to national security and to regretted it afterwards and say, oh, that was a mistake and then to sort of whitewash and say well no one knew that at the time. Everyone thought this was necessary. You have to remember what it was like back then. We feared another attack. All of these rationales that you hear for -- you know, post 9/11 national security policies. And it’s important to remember that very often, and -- basically all of the historical episodes I've looked at, that's not actually the way it happens. There were lots of people at the time saying this is wrong. This is counterproductive. This is about American, we will all be a shamed with this comes out, we shouldn't be doing this. And you see that in the World War II era and you see it in the post 9/11 era. And I think it’s important to try to give people a picture of, and I guess this is what you're saying, of what it is like as you're going through that because yes. It's hard to make decisions at the time. In fact, you know, my protagonist goes into this with the mindset that changes very much. You know, he goes in very trusting of the government thinking the government
wouldn't do anything wrong, and that changes to some extent. But it's important to see that there are, you know, at the moment voices on both sides and it's possible to reach a fair conclusion if you think about it in a way that's based, you know, not on fear.

>> One of the things that, that I was interested in listening to -- your discussion that I think carries over in speaking for myself as well as a novelist, is the whole question of audience. Right? Your, your over there saying why are there now comments. Right? What does that mean? Am I being read? And of course, that -- problem is -- quite salient for people who write fiction because you're writing for an audience of people who, if you're lucky, buy the book and, or else they're you're family.

[ Laughter ]

And, and then take it home and read it -- you give it a chance and decide if they like it and then perhaps have some reaction and so forth.

How do you deal with the question of feedback and lack of feedback and -- wanting to know how the audience responds? You know, who do you think of as your reader?

>> Well -- I was, I was trying to write this book in part to reach a broader audience than legal scholarship traditional law review legal scholarship did. I have no way of knowing how many people read my law review articles I guess, but I thought that I could reach a different and hopefully, ideally a wider audience. And then, you know, you're right -- novelist go through exactly the same thing.
You wonder why there are so few Amazon reviews. What's going on some for anyone who is interested in this book, if you do buy it and like it, please review it on Amazon. I would appreciate that.

[Laughter]

But actually, I've been struck by how much feedback there is. You know, and, and -- you can compare these to traditional legal scholarship where I count my Westlaw citations, of course, I think everyone does, but also sometimes I look at the people who cite me on Westlaw and tiny, tiny fraction of those are actually engaging with something I've said. Usually I think it is just a research assistant is supposed to find a source that supports some proposition and they say this article does, let's cite it. Whereas I get, you know, a whole bunch of e-mails about this book. And there are the Amazon reviews and there are other reviews, not as many as I would hope, of course, but I do get people writing me e-mails and sometimes we go back and forth and have conservative discussions about it. So -- from that perspective, actually the novel writing is sort of gratifying, because there are people out there who write me and say this is what I got from your book. And sometimes I'm thinking, wow. How did that happen? But sometimes I'm thinking, yes. That's what I was hoping you would get from my book and it is very gratifying.

>> Well, opening up this question a little to the mission as pros, something you and I both do and I have kind of coconspired in over the veers is to take our background writing fiction and bring it into the legal academy. So we -- both
of us just for the audience's knowledge, both teach seminars called "fiction writing for law students" in which we take a class of law students and train them in how to produce a short story. How do, how to, not only, some of the techniques and also some of the heart of the fictional enterprise.

What do you think you've gotten out of that experience and what do you think students get out of it?

>> Well I think I've gotten a greater appreciation of the way in which lawyering and in particular litigation actually is storytelling because I started out teaching this course with a little bit of a sense of embarrassment. And my justification for it was -- well at least they're writing. So -- could I get students to take a -- legal writing seminar with me? Maybe I could. Would it be as much fun for them. Would they be as invested in it. Would I be as invested in it? Probably not. So I was saying, you know, at least they write something every week and they get feedback on it and we discuss it in class and how -- how you could make your sentences more effective.

So at least they're getting writing experience from it. And I think, well, you know that probably helps them as lawyers, especially if you compare it to the step there that I was teaching before which was sort of advanced constitutional theory where maybe that is useful for aspiring law professors, but basically not for anyone else, no matter what you go into in your legal career, advance constitutional theory is not very useful for you, unless that's what you want to pursue as an academic.
But then I realized as I thought the course over and over again, that actually -- what I was teaching them was techniques that I think would be very useful, particularly for litigators but possibly for other lawyers, because really what they would be doing as litigators would be trying to tell a more persuasive story then the other side. So you've got a sea of facts and some of them are not in dispute and some are in dispute. So you got -- you know, in much the same way that a novelist or a historical novelist is present would particular data and then you got to decide how to present those facts. What themes to bring out. What connections to drop you've got to decide how to cast the various characters in this drama. Who's the hero. Who's the villain. What different roles are the characters playing. And you've got to be put it altogether in a story that hangs together and is convincing to the finder of fact so they will say I believe your story and not the other side story.

And learning how to write a good short story, I am sure. Makes them a lot better at that.

>> I'm going to -- chime in on this, too, because I think that some of the things I learned from writing the fiction seminar, you know, are in, in a way, in kind of meta way, they are applicable across this spectrum of, of media -- outlets that we've been talking about. In the presentation on Casetext for example. People not high in the hierarchy can begin contributing. One of the fascinating things to me about the fiction seminar is that it provides an opportunity for people 82 really feel crushed and, and, and sort of put at not
by the law school system with all of this -- you know, hierarchy, with, the very, very strongly gendered nature as we all know, and people who come in feeling and receiving this message from law school that who they were when they entered is really irrelevant to the enterprise. Right? That they are -- they are in a sense less than they were on the first day of law school. One of the things my students have to do is draw on, you know, their life experience and bring it to bear in fiction. And, and you have people who have -- who have -- had a really -- very hard time in law school. Can who have just -- experiencing the enterprise it is just something they are slogging through, who can show that they are really good at something different from what they get tested on in most classes.

And, and there is, you know, a gender and ethnic and racial component to all of this. People are able to write about topics sort at one removed that, that they don't get to bring up in a sort of straightforward way. You know, professor you were talking about Roe Vs. Wade, here's my thoughts. If you had any of that?

>> Yeah. I have. And I guess I hadn't quite thought about it that way before. I mean, I thought about it in the sense that there are students who are sort of alienated by the formal listing legal thinking that's being pushed on them. You know, they're being told, they're being asked what's the holding, what is the dictum, what is the fourth element in this five-factor test and they find that alienating. I think it is good for them to -- be able to see, you know law is about more than that. Law is about stories, law is about drama. Law is about people. But also what I was just thinking as you were talking about the kinds
of stories that I get, I think, do really reflect what you were saying. Because I get you know, basically four or five different types of stories predominate. I get sort of the lives of young associates, which are the people who are relatively happy with law school. And then I get paranormal romance, which is the people that sort of just want to be doing something else. And then I also get a lot of family dramas and I get a lot of ethnic fiction where people are drawing on particular racial or ethnic experiences. And I do think that's a way for them to try to assert things that are important to them that law school is telling them are not important. You know, they're particular family history. Their experiences as members of a particular racial or ethnic group.

And yeah. I think it's good that they get a chance to express that and have it validated by the school.

>> Which is coming to my mind as we talk, that we need a new medium to publish these and solicit these fictions from law students and young lawyers.

My consumption of this course arose out of a couple of experiences I had. And the first one was that a relatively low Ed in my life, I received randomly a flyer in my faculty mailbox that said some to Cape Cod and learn to write your legal thriller. And I thought, this is a sign. Right?

[ Laughter ]

So I did. And I went to this event that was -- sponsored by a commercial CLE company and featured, brilliant faculty member, your friend, the mystery author, Lisa Scott Leaney, and there were probably 200 lawyers present at this
event at a nice Cape Cod resort trudging around with some of the absolute saddest novel synopsis I ever read. It was painful.

And I thought, you know, like any writer's gathers, 90% of these people will never publish, but why should they have to pay the thousands extra to do it. Why don't we just fleece them in law school and they get that experience as part of, you know, their tuition payment. So that idea kind of -- percolated and then it also occurred and we were talking about this last night -- some of us at the hotel, that for various reasons my -- law schools, American constitutional society chapter was putting on a mock filibuster so everybody would see what a filibuster was like. This is at a time when Democrats were for the filibuster. And Oceana was at war with East Asia. So they asked me if I would take a half hour shift and I said okay. And then I thought what am I going to do. And I ended up almost sort of randomly picking a really wonderful book off of my shelf called "The Queen of Sheba" a retelling by a 19th century Syrian French author of the story of the Queen of Sheba from her point of view, in which Solomon is kind of a klutz and doesn't know what he is doing, she is the cool person. There is this line in it -- that -- I just one of the most beautiful lines I think in all of pros that I ever read, I have trouble getting through it -- in which -- the 18-year-old Sheba asked her attendant lady, the wise old lady, what is this love that they speak of. She said, oh, blossom of flowers is truly, love moves the words, for the words are love. And whether the pipes of love play, the dead themselves lift up their hands to dance. So I read this, because I'm just filling time. It could have
been anything. As I left, a student, a female student whom I know by sight only said thank you so much. I said what are you thanking me for, that doesn't happen. I'm a lawyer professor, no one thanks, me. She said I don't hear the words lovely and mystery and poetry and magic in this building ever. So the two things kind of came together. It is like shame on us. Shame on all of us. Right? Because -- the things that are done in fiction are very important to being a lawyer. As you say, the ability to tell a story. The ability to empathize and the ability to move people and understand people different from you. Right a very important and I hope to some extent that's, certainly I think that's what happens in" Allegiance "is that you are invited in to make your own decision about someone who is operating with imperfect knowledge. We all know the right answer to the Japanese internment now. We didn't know it then. Right? For sure. We know how the story ends. And I think that is really important for lawyers to understand and I think it is a medium that really should be embraced more fully. I'd like to see more law schools doing -- this kind of course that we do. But I'm also kind of struck by bringing it together. Again this problem of the audience. Right? Is who, who are they writing for some it students are worried who they are writing for. Can I reveal myself, is it safe? On the other hand, they really desperately want to bring parts of themselves in. And then you have the anxiety of anybody reading. I think they're, you know, blogs like concurring opinions also represent the impulse of people like ourselves who work in this field to want to do something other than the 60 -- 10,000, 20000-word article, because we have
things to say about a lot of different things, right? So the question is how do you find an audience for all of this stuff? What is it that we really have to say? I was listening back and forth, I remembered a quote from Henry James and I think maybe we'll -- go to questions after this because I'm going to exercise moderator's prerogative, but in both of these areas, you know, the anxiety about who's reading and does it have an effect -- is in a question we can't answer. No medium is going to answer that for us. And the question from James, which I really love is he says" we work in the dark, we do what we can, we give what we have, our doubt is our passion, and our passion is our task, the rest is the madness of art." So on that note, let's get a conversation going. That would be fun.>> Let me remind the tech, if we can shut of the recorder now. Okay. Good. [ Event concluded ]

"This text is being provided in a rough draft format. Communication access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings."