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A (Mostly) Legislative History of the Defend Trade Secrets Act of 2016*

John Cannan**

This narrative of the passage of the Defend Trade Secrets Act of 2016 analyzes the law’s legislative history as its various bills moved through Congress. Unlike most traditional legislative histories, it was prepared not after the Act passed, but contemporaneously during its passage. The goal of this analysis is to suggest how law librarians can use legislative history preparation as part of a broader mission to demonstrate their value and expand their services to their communities.

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Introduction

¶1 “Politics,” claimed Otto von Bismarck, “is the art of the possible.”¹ A corollary could be that in politics, uniform (or near-uniform) consensus makes anything possible. The swift passage of the Defend Trade Secrets Act of 2016 (DTSA) proves this statement.² Introduced in the Senate on July 29, 2015, it was passed less than a year later—clearing the Senate on April 4, 2016 and the House on April 27, 2016—and was signed into law shortly thereafter, on May 11, 2016, by then President Barack Obama.³ This was brisk progress for such significant legislation in a

* © John Cannan, 2017.

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1. YALE BOOK OF QUOTATIONS 86 (Fred R. Shapiro ed., 2006) (remark by Otto von Bismarck to Meyer von Waldeck).

2. S. 1890, 114th Cong. (2016) (enacted).

3. See *Actions Overview S.1890—114th Congress (2015–2016)*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1890/actions?q=%7B%22search%22%3A%5B%22s.+1890%22%5D%7D&r=1>.

Congress by all accounts plagued by partisan gridlock.⁴ Also notable was the lack of procedural sleight of hand used to pass it. The bill was conducted through both chambers in “regular order,” the traditional legislative procedure that most Americans know through the *Schoolhouse Rock* cartoon, “I’m Just a Bill.”⁵ Despite such speedy passage, the bill accreted a significant, if mercifully brief, legislative history of bills, reports, hearings, and floor debate that help explain and interpret its provisions.

¶2 This article narrates the DTSA’s passage and lists the legislative history source materials available, including when they came into existence and what changes they made or explained. More importantly, this narrative sheds light on which resources are the most valuable as well as on the multiple means Congress used to express its intent. It is a “mostly” legislative history because it was written *as* the legislation moved through Congress. This contemporary viewpoint provides context that might not be available or readily apparent to researchers who construct histories *after* legislation is passed. The overall goal is to show how law librarians can offer the compilation of contemporary legislative histories as a predictive service that meets patrons’ needs before patrons recognize such needs themselves.

The Trade Secret Problem

¶3 The primary goal of the DTSA is to protect trade secrets through the “redress” to federal courts as enjoyed by the other areas of intellectual property—copyright, patent, and trademark.⁶ The legislation defines trade secrets as

under U.S. law, consist[ing] of three parts: (1) information that is non-public; (2) the reasonable measures taken to protect that information; and (3) the fact that the information derives independent economic value from not being publicly known. This confidential business information can be protected for an unlimited time, unlike patents, and requires no formal registration process. But unlike patents, once this information is disclosed it instantly loses its value and the property right itself ceases to exist.⁷

Trade secrets are virtually any information that gives companies a creative competitive edge, from innovative designs and formulas to data like customer lists.⁸ Trade secrets have always been valuable elements of corporate IP catalogs (for example, the Coca-Cola formula or Kentucky Fried Chicken’s “secret sauce”). This remains true today, perhaps even more so.⁹

¶4 While theft of trade secrets was nothing new, two reports, published contemporaneously with the first trade secret legislation in 2013 and referenced by legislators in hearings and bill reports, documented that its scope and impact were reaching unprecedented levels. One, issued in 2013 by the Commission on the Theft of American Intellectual Property—“an independent and bipartisan initiative of leading

4. Philip Bump, *Farewell to the Most Polarized Congress in More than 100 Years!*, WASH. POST: THE FIX (Dec. 21, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/21/farewell-to-the-most-polarized-congress-in-over-100-years/> [<https://perma.cc/V2NW-UUWS>].

5. *Schoolhouse Rock!: I’m Just a Bill* (ABC television broadcast Feb. 5, 1977), <http://abc.go.com/shows/schoolhouse-rock/episode-guide/season-01/24-im-just-a-bill>.

6. H.R. REP. NO. 114-529, at 2 (2016).

7. *Id.*

8. *Id.*

9. *Id.*

Americans from the private sector, public service in national security and foreign affairs, academe, and politics”—claimed the impact of intellectual property theft, including stolen trade secrets, could be measured in the loss of hundreds of billions of dollars and potentially affected millions of U.S. jobs.¹⁰ A year later, the Center for Responsible Enterprise and Trade (CREATe.org) and PricewaterhouseCoopers LLP estimated the loss for U.S. companies due to trade secret theft was hundreds of millions of dollars, or between one and three percent of the national GDP.¹¹ Public officials issued dire warnings of the problem's scope as well. Among them, then U.S. Attorney General Eric Holder said in 2013, “There are only two categories of companies affected by trade-secret theft: those that know they’ve been compromised and those that don’t know yet.”¹² The culprits behind this massive theft were overseas actors, some working in collusion with foreign governments—China being the primary suspect.¹³

¶5 One of the remedies commentators suggested to combat the problem of trade secret theft was legislation. Traditionally, trade secrets were protected under state law.¹⁴ Instrumental in this protection are the civil remedies drafted into the Uniform Trade Secrets Act (UTSA).¹⁵ The UTSA has since been adopted by forty-eight states, the District of Columbia, and the Virgin Islands. But in the environment of digitization and intense worldwide competition, it was perhaps inevitable that the federal government would increasingly become involved in trade secret protection. With the Economic Espionage Act of 1996 (EEA), Congress criminalized trade secret theft and empowered the attorney general to bring criminal and civil actions against infringers.¹⁶ By the time the trade theft issue exploded decades later, a broad business consensus had emerged that the protections of state law and federal enforcement were not sufficient.¹⁷

¶6 One remedy adopted by the *IP Commission Report* and embraced by those within and outside Congress was to amend federal law to create a federal civil cause of action for trade secret theft. According to proponents of this view, doing so would create an efficient means of prosecuting trade secret protection. Given that trade secret theft could, and often did, occur across state and national borders, federal civil court actions would give trade secret owners a more efficient means to serve and prosecute those they saw as infringers, proceeding through the federal court process instead of those of multiple states.¹⁸

10. THE IP COMMISSION REPORT: THE REPORT OF THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY 11–12 (May 2013), http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf [<https://perma.cc/3JGM-HUR5>] [hereinafter THE IP COMMISSION REPORT].

11. CREATe.ORG AND PwC, ECONOMIC IMPACT OF TRADE SECRET THEFT 3 (Feb. 2014).

12. S. REP. NO. 114-220, at 2 (2016).

13. THE IP COMMISSION REPORT, *supra* note 10, at 3.

14. Shubha Ghosh, *Open Borders, Intellectual Property & Federal Criminal Trade Secret Law*, 9 J. MARSHALL REV. INTELL. PROP. L. 24, 57 (2009).

15. UNIF. TRADE SECRETS ACT §§ 1–12, 14 U.L.A. 529–659 (2005).

16. 18 U.S.C. §§ 1831–1839 (2012); Ghosh, *supra* note 14, at 58.

17. *Protecting Trade Secrets: The Impact of Trade Secret Theft on American Competitiveness and Potential Solutions to Remedy This Harm: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2015) (statement of Sen. Hatch) [hereinafter *Protecting Trade Secrets*], <https://www.judiciary.senate.gov/meetings/protecting-trade-secrets-the-impact-of-trade-secret-theft-on-american-competitiveness-and-potential-solutions-to-remedy-this-harm>. As of the writing of this article, the Senate Committee on the Judiciary had still not published a hearing transcript.

18. *Id.* at 5 (statement of Thomas R. Beall, Vice President & Chief Intellectual Property Counsel, Corning Inc.) [hereinafter Beall Statement].

¶7 The national approach to a problem so often described as international, on its face may seem puzzling. Testimony by members of Congress and those in industry admitted that the focus of the ultimate legislation was not on traditional industrial espionage or cyberespionage committed by international actors, but on “rogue employees.”¹⁹ For example, a representative of the pharmaceutical company Eli Lilly discussed a typical scenario that federal civil trade secret legislation would be meant to remedy:

We often run into situations where we find that an ex-employee has left and is going to work for a competitor, and we find out something such that once they turn in their Lilly-issued computer, there has been a download of a number of documents which contain highly confidential Lilly trade secrets. These occurrences almost always happen on a late Friday afternoon, and, therefore, the best part, I believe, about the ex parte seizure aspect of the bill that is currently pending is the fact that we could go to Federal court and in one action kick out an ounce of prevention rather than worrying about a pound of cure a week or two later, when we can get the Indiana State courts involved or the New Jersey State courts involved or perhaps both the Indiana and New Jersey State courts involved, leading to a whole lot more expense if we have to go through State court, a whole lot more risk because we may not be able to isolate and seize the stolen materials as quickly; and, therefore, a Federal cause of action where we can go to a single court and institute the power of the Federal court system to seize stolen materials would be extraordinarily helpful in those situations.²⁰

The foreign impact of the bills was documented by its supporters to be more indirect. They argued that such legislation would set a “gold standard” of trade secret protection, which could then be injected into trade agreements or used to convince other nations to create and adhere to similar protections.²¹

Passage of the DTSA

¶8 The genesis of the DTSA took place over the two Congresses that preceded its passage. Leading the effort were Delaware Senator Christopher Coons and Utah Senator Orrin Hatch. In the 112th Congress, Coons and others introduced the Protecting American Trade Secrets and Innovation Act of 2012, with Wisconsin Senator Herb Kohl giving an introductory statement on the bill.²² The bill was referred to the Senate Judiciary Committee, where it died.

¶9 Two years later, in the 113th Congress, Senators Coons and Hatch introduced the Defend Trade Secrets Act of 2014.²³ The bill was referred to the Senate Judiciary Committee, which held a hearing on trade secret issues at which this bill was referenced.²⁴ Ultimately, it met the same fate as its predecessor.

¶10 As often happens today in the U.S. Congress, a parallel effort for trade secret legislation was underway in the 113th Congress’s House. First, the House

19. *Id.*

20. *Economic Espionage and Trade Secret Theft: Are Our Laws Adequate for Today’s Threats? Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 113th Cong. 20 (2014) (statement of Douglas K. Norman, Eli Lilly & Co.) [hereinafter *Economic Espionage and Trade Secret Theft*].

21. *Id.* at 15.

22. S. 3389, 112th Cong. (2012); 162 CONG. REC. S5086 (July 17, 2012).

23. S. 2267, 113th Cong. (2014).

24. *Economic Espionage and Trade Secret Theft*, *supra* note 20.

Subcommittee on Courts, Intellectual Property, and the Internet of the Committee on the Judiciary held a hearing on trade secret issues on June 24, 2014.²⁵ A month later, Representative George Holding and others introduced the Trade Secrets Protection Act.²⁶ The bill was reported out of committee late in the 113th Congress, with a published report,²⁷ but no floor action was taken. Despite this House bill's demise, it was resurrected as the foundation and framework on which the DTSA was based, as will be shown below.

¶11 Successful passage of a trade secrets bill was finally achieved with the DTSA, or S. 1890, in the 114th Congress. After its introduction on July 29, 2015, the bill was referred to the Senate Judiciary Committee, which held a hearing on the legislation in December, amended the legislation, and reported it out of the Senate Judiciary Committee, with a published report.²⁸ After receiving supportive floor statements from Senators Coons, Hatch, and Amy Klobuchar from Minnesota, it passed unanimously, 87–0, on April 4, 2016, was engrossed, and was then referred to the House.²⁹

¶12 The House version of the DTSA was introduced on the same day as S. 1890 and contained the same text as the Senate bill.³⁰ This bill was referred to the House Judiciary Committee, where it was sidelined as the Senate's DTSA advanced. The committee reported the Senate bill to the House floor, without any amendments but with a report, the text of which was mostly reconstituted and repeated from that of the Senate Judiciary Committee.³¹ The bill was advanced to the floor, with supportive statements by Representatives Bob Goodlatte, John Conyers, and others, and passed the House on April 27, 2016, by 412–2.³² It is tempting, given the lack of House input, to view the DTSA as primarily a Senate initiative. However, again, as will be shown, the basis of much of the DTSA had been drafted in the House's Trade Secrets Protection Act of the previous Congress.

¶13 As legislation goes, the DTSA is eminently manageable. Its substantive provisions involve two key components—the federal civil cause of action for trade secret misappropriation and an ex parte seizure procedure. The first remained relatively consistent throughout the legislation's incarnations over various Congresses. The second was modified over time. To fully understand these provisions, as introduced and finally passed, they must be viewed as the confluence of three other pieces of legislation. Again, the law itself amends and expands the EEA. Its civil cause of action provisions were drawn nearly verbatim from the UTSA. Finally, its civil seizure provisions were cribbed from those found in federal trademark law. The law, at its core components, was dictated by legislative efforts that came before

25. *Trade Secrets: Promoting and Protecting American Innovation, Competitiveness and Market Access in Foreign Markets: Hearing Before the Subcomm. on Courts, Intellectual Property & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Promoting and Protecting American Innovation*].

26. H.R. 5233, 113th Cong. (2014).

27. H.R. REP. NO. 113-657 (2014).

28. S. 1890, 114th Cong. (2014) (as introduced); *Protecting Trade Secrets*, *supra* note 17; S. REP. NO. 114-220 (2016).

29. 162 CONG. REC. S1626–31 (Apr. 4, 2016).

30. H.R. 3326, 114th Cong. (2015).

31. H.R. REP. NO. 114-529, at 13 (2016). Because of the close similarity of the reports, they will be referred to in the plural, and citations will be given to the source of quotations in both documents.

32. 162 CONG. REC. H2028–34, H2046–47 (Apr. 27, 2016).

it. The wholesale copying that was performed may have been intended for the law's future interpretation—where statutes are similar or near similar, the one can be used as a guide for the other.³³

¶14 The DTSA is, and is best understood as, an amendment to the EEA. The EEA emerged in the wave of IP protection legislation that was drafted in the late 1990s. According to a former congressional staff member who testified at the House trade secret hearing in 2014, Congress had originally considered adding a private right of action to the bill that matured into the EEA. Apparently, legislators did not want to include a civil matter in a criminal law bill, and the idea arrived too late to receive full consideration. Drafters thought such a provision might be included in a later bill by a later Congress, but legislators missed that goal as they became preoccupied with the Digital Millennium Copyright Act and then patent reform.³⁴

¶15 Another major source document for the DTSA is the uniform trade secret law—the UTSA. The UTSA was passed in 1979, after ten years of labor, and over the next several decades it was embraced by the majority of states, though with variations in implementation and interpretation. The DTSA draws from sections 2–5 of the UTSA, which itself is only twelve sections long. As will be shown below, the DTSA cannot be fully understood without reference to both the UTSA and the EEA.

The New Definitions to the EEA

¶16 One of the EEA's key links with the DTSA is the former's existing definitions, which the latter adopts, amends, and adds to. The original list of the EEA's definitions was not particularly long; it included descriptions of the terms “foreign instrumentality,” “foreign agent,” “trade secret,” and “owner.”³⁵ The DTSA did not add many definitions to this list—including only the terms “misappropriation,” “improper means,” and a reference to the “Trademark Act of 1946”—but its additions did not lack for significance.³⁶

¶17 EEA provisions not changed were the definitions of “owner,” “foreign instrumentality,” and “foreign agent.” Of these, the most important is the definition of trade secret owner: “(4) the term ‘owner,’ with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed.”³⁷ The EEA's definitions of “foreign agent” and “foreign instrumentality” are not particularly relevant to this discussion, despite the early emphasis on espionage by foreign actors and countries.³⁸

33. *United States v. McCorkle*, 143 F. Supp. 2d 1311, 1320 n.1 (M.D. Fla. 2001); 2B SUTHERLAND STATUTORY CONSTRUCTION § 52:1 (7th ed. 2012).

34. *Promoting and Protecting American Innovation*, *supra* note 25, at 8, 59–60 (statement of Richard A. Hertling, Protect Trade Secrets Coal.). Hertling was a former congressional staff member in various capacities, including with the House Committee on the Judiciary. *Id.* at 6.

35. 18 U.S.C. § 1839 (2012).

36. Pub. L. No. 114-153, 130 Stat. 376, 380–81 (2016).

37. 18 U.S.C. § 1839(4).

38. *Id.* § 1839(3)–(4).

¶18 The DTSA amended the EEA's description of what constitutes a trade secret, which originally read:

(3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.³⁹

The drafters of the EEA stated that this definition was "largely" based on that of the UTSA, though, unlike DTSA's drafters, they deviated from uniform law's text style.⁴⁰ Apparently, the use of the word "public" at the end of the original definition created some confusion with the courts and raised the possibility that there was a "potentially meaningful" distinction between "trade secret" definition in the federal law and the UTSA.⁴¹

¶19 The DTSA's drafters sought to remedy this problem. The Senate Judiciary Committee struck the word "public" in S. 1890 and added the phrase: "another person who can obtain economic value from the disclosure or use of information," which came from the UTSA's definition.⁴² The Senate and House reports note that the intent behind this change was to "bring the Federal definition of a trade secret in conformity with the UTSA's definition." In making this change, the committees were clear that the definition of the EEA, as amended, was to be the same as that of the UTSA: "While other minor differences between the UTSA and Federal definition of a trade secret remain, the Committee does not intend for the definition of a trade secret to be meaningfully different from the scope of that definition as understood by courts in States that have adopted the UTSA."⁴³

¶20 The most significant new DTSA definitions included were "misappropriation" and "improper means."⁴⁴ The misappropriation definition was drawn from the UTSA, though with some stylistic changes made during the legislative process. By "intentionally" drawing the text directly from the UTSA, the committees that worked on the DTSA were clear that the goal of the new legislation was "not

39. *Id.* §§ 1839(3).

40. H.R. REP. NO. 104-788, at 12 (1996).

41. The committee reports note two cases dealing with this issue: *United States v. Lange*, 312 F.3d 263, 266 (7th Cir. 2002); and *United States v. Hsu*, 155 F.3d 189, 201 (3d Cir. 1998).

42. S. 1890, 114th Cong., sec. 2(b)(3), 18 U.S.C. § 1839(3)(B) (2016) (as reported from S. Comm. on the Judiciary and enrolled). Citing to bills in a legislative history narrative can be a challenge where, as was the case in the trade secret protection legislation discussed here, bills are divided by section numbers, which can also include numbers for the U.S. Code section to be amended. To clarify which section numbers are being referred to, the author has adopted Bluebook Rule 12.4(d), which designates bill sections with the abbreviation for section or "sec." and amendments to the U.S. Code with the section symbol or "§".

43. S. REP. NO. 114-220, at 10 (2016); H.R. REP. NO. 114-529, at 14 (2016).

44. Defend Trade Secrets Act, sec. 2(b)(3), 18 U.S.C. § 1839(5) & (6), 130 Stat. 380-81.

intended to alter the balance of current trade secret law or alter specific court decisions.”⁴⁵ The DTSA’s drafters also followed the text of the UTSA’s definition of “improper means,” with, however, the specific exclusion of “reverse engineering” and “independent derivation” to clarify that neither activity would “constitute improper means.”⁴⁶

¶21 The important relation between the definition provisions of the EEA and the DTSA, and even the UTSA, raises an interesting example of how legislative histories close in topical relation but distant in temporal proximity become inter-related. Just as the UTSA spawned definitions in the EEA that affected what was implemented in the DTSA, a researcher may have to investigate past laws which become incorporated with contemporaneous statutes.

The DTSA’s Civil Remedies for Trade Secret Misappropriation

¶22 The declaration of the DTSA’s civil remedy is comprised of two components—the activity redressable by private parties and the necessary jurisdictional requirement to get such actions into federal court. In both cases, the DTSA’s language differs markedly from its previous incarnations in prior Congresses.

¶23 The prior Senate versions of the DTSA in the 112th and 113th Congresses sought to include the EEA’s expansive descriptions of industrial espionage and theft of trade secrets as causes of action, along with a more general misappropriation of trade secrets.⁴⁷ The drafters in the House took a different approach, making misappropriation of an owner’s trade secret solely actionable.⁴⁸ Ultimately, the DTSA included the House language.⁴⁹

¶24 The DTSA also deviated from the jurisdictional requirements of one of its prior versions. S. 3389, from the 112th Congress, required that actionable theft of a trade secret be “related to or included in a product that is produced for or placed in interstate or foreign commerce.”⁵⁰ S. 2267 and H.R. 5233, from the 113th Congress, adopted language from the EEA’s 18 U.S.C. § 1832(a), extending protection to trade secrets “related to a product or service used in, or intended for use in, interstate and foreign commerce.”⁵¹ And this was used in S. 1890.⁵² The reason for the switch was that, in 2012, the Second Circuit had held that section 1832(a)’s original language of the EEA, which, again, was the same as S. 3389, should be construed narrowly, allowing a former Goldman Sachs employee to avoid criminal sanctions for theft of the source code to the company’s proprietary high-frequency

45. S. REP. NO. 114-220, at 10; H.R. REP. NO. 114-529, at 14.

46. S. REP. NO. 114-220, at 10; H.R. REP. NO. 114-529, at 14.

47. S. 3389, 112th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(1) (2012); S. 2267, 113th Cong., sec. 2(a) § 1836(a)(1) (2014).

48. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836 (b)(1) (2014) (as introduced and reported from H. Comm. on the Judiciary).

49. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(1) (2016) (as introduced).

50. S. 3389, 112th Cong., sec. 2(a), 18 U.S.C. § 1836 (a)(1)(B) (2012).

51. S. 2267, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(1)(B) (2014); H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(1) (as reported from H. Comm. on the Judiciary); H.R. REP. NO. 113-657, at 10 (2014).

52. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(1) (2015) (as introduced and enrolled).

trading system.⁵³ In response, Congress passed the Theft of Trade Secrets Clarification Act of 2012, which replaced the phrase “included in a product that is produced for or placed in” with “a product or service used in or intended for use in” to negate the Second Circuit’s ruling.⁵⁴

¶25 The civil remedies provisions of S. 3389 from the 112th Congress; S. 2297, H.R. 5233, and H.R. 3326 from the 113th Congress; and S. 1890 and H.R. 3326 from the 114th Congress consistently adopted the intent if not the style of the UTSA. S. 3389 and S. 2297 adopted similar injunctive relief provisions to the UTSA’s section 2, allowing courts to grant injunctions to prevent actual or threatened trade secret misappropriation; affirmative action, where appropriate, if necessary to protect the trade secret; and, in exceptional circumstances, where an injunction would be inequitable, a reasonable royalty for the time period in which a use could have been prohibited.⁵⁵ S. 1890 included similar provisions “drawn directly” from UTSA’s section 2,⁵⁶ but with one addition. Some senators had voiced concern that the bill might overrule state laws protecting worker mobility.⁵⁷ An employee protection measure had been adopted to restrict injunctive relief from preventing employees from accepting offers of employment.⁵⁸ Employee mobility remained a concern, and this change was built on in the Senate Judiciary Committee. The version of S. 1890 reported from that committee now required that any conditions that were imposed on taking new employment had to be related to trade secret misappropriation and not mere personal knowledge.⁵⁹ Further, such relief could not conflict with state laws against restraints on the lawful practice of a profession, trade, or business, though, as will be seen, the bill did not limit such additional equitable remedies at the state level.⁶⁰

¶26 The awards provision of the various DTSA’s consistently tracked the UTSA’s section 3, including damages for actual losses and unjust enrichment or, in lieu of damages, a reasonable royalty.⁶¹ Of these, both the Senate and House committee reports discouraged the use of the royalty remedy, preferring others that would “first, halt misappropriator’s use and dissemination of the misappropriated trade secret, and, second, make available appropriate damages.”⁶² The committees also noted that state courts viewed the royalty provision as a measure of last resort.⁶³

53. The court found that the original section 1832(a) did not apply because the trading system was not specifically produced for or placed in commerce. *United States v. Aleynikov*, 676 F.3d 71, 79–80 (2d Cir. 2012).

54. Pub. L. No. 112-236, 126 Stat. 1627 (2012); 158 CONG. REC. S6978 (Nov. 27, 2012). It may well be that the EEA’s deviation from the UTSA’s text, which resulted in *Aleynikov*, may have convinced the DTSA’s drafters to directly copy the uniform law’s text whenever possible.

55. S. 3389, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(4)(2012); S. 2267, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(3) (2014); Neither piece of legislation employed the UTSA’s definition of section 2. UNIF. TRADE SECRETS ACT § 2, 14 U.L.A. 619 (2005).

56. S. REP. NO. 114-220, at 8 (2016).

57. Of these, only Senator Dianne Feinstein was specifically named as voicing such a concern. *Id.*

58. S. 1890, 114th Cong., sec. 2(a), § 1836(b)(3)(a) (2015) (as introduced).

59. *Id.* § 1836(b)(3)(A)(i)(I) (as reported from S. Comm. on the Judiciary and enrolled).

60. *Id.* § 1836(b)(3)(A)(i)(II).

61. *Id.* § 1836(b)(3)(B)(i) & (ii). Both the Senate and House reports state that this language was “drawn directly” from the UTSA’s section 3. S. REP. NO. 114-220, at 9 (2016); H.R. REP. NO. 114-529, at 13 (2016).

62. S. REP. NO. 114-220, at 9; H.R. REP. NO. 114-529, at 12.

63. S. REP. NO. 114-220, at 9 n.17; H.R. REP. NO. 114-529, at 13 n.13.

Like the UTSA, the federal bills also included exemplary damages for willful and malicious misappropriation, though the amount changed in each Congress. For S. 3389, from the 112th Congress, it was equal to that for actual losses and unjust enrichment; for S. 2297 and H.R. 5233, both from the 113th Congress, and S. 1890, from the 114th Congress, as introduced, it was three times the amount.⁶⁴ S. 1890 was amended in the Senate Judiciary Committee to two times the amount, which is consistent with the UTSA.⁶⁵

¶27 Each legislative effort tracked the UTSA's provision of a prevailing party's attorneys' fees fairly closely and consistently, allowing such remedies where claims of appropriation and motions to terminate were made in bad faith and where a trade secret was willfully and maliciously misappropriated.⁶⁶ The Senate Judiciary Committee alleviated evidentiary burdens for parties charging claims of misappropriation were made in bad faith, including language that such accusations could be proven by circumstantial evidence.⁶⁷

¶28 The statute of limitations to bring a claim under the DTSA's bills veered between three and five years over its various versions. S. 3389 originally took the shorter toll.⁶⁸ S. 2297, H.R. 5233, and S. 1890, as introduced, took the longer one.⁶⁹ The version of S. 1890 reported from the Senate Judiciary Committee reduced the limit to three years, making it identical with that of the UTSA.⁷⁰

The DTSA's Ex Parte Seizure

¶29 While the civil action provisions were fairly consistent throughout the legislation's genesis over several Congresses, this was not the case with the ex parte seizure provision, which was changed in style and substance with each introduced

64. S. 3389, 112th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(4)(C) (2012); S. 2267, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(3)(C) (2014); H.R. 5233, sec. 2(a), 18 U.S.C. § 1836(b)(3)(C) (2014) (as reported by H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(3)(C) (2016) (as introduced). The House and Senate reports for S. 1890 state that this provision is "very similar" to the UTSA's section 3(b). S. REP. NO. 114-220, at 9; H.R. REP. NO. 114-529, at 13.

65. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(3)(C) (2016) (as reported from S. Comm. on the Judiciary and enrolled). The House and Senate reports for S. 1890 state that this provision is "very similar" to the UTSA's section 3(b). S. REP. NO. 114-220, at 9; H.R. REP. NO. 114-529, at 13.

66. S. 3389, 113th Cong., sec. 2(a), § 1836(a)(4)(D); S. 2267, 113th Cong., sec. 2(a), § 1836(a)(3)(D) (2014); H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(3)(D) (2014). S. 1890, 114th Cong., sec. 2, § 2(b)(3)(D) (as introduced). The Senate and House reports for S. 1890 state that this provision is "modeled" on the UTSA's section 4. S. REP. NO. 114-220, at 9; H.R. REP. NO. 114-529, at 13.

67. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(3)(D) (2015) (as reported from S. Comm. on the Judiciary and enrolled). Regrettably, the legislative history does not appear to contain any reasoning for this change. Professor Sharon Sandeen raised the possibility that the DTSA could be used to harass smaller businesses months before the Senate Judiciary Committee met. *Protecting Trade Secrets*, *supra* note 17, at 4–5 (statement of Sharon K. Sandeen). The provision could have been added to address that concern.

68. S. 3389, 112th Cong., sec. 2(a), 18 U.S.C. § 1836(c) (2012).

69. S. 2297, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(c) (2014); H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(d) (2014) (as reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(d) (2015) (as introduced).

70. S. 1890, 114th Cong., sec. 2(a), § 1836(d) (as reported from S. Comm. on the Judiciary and enrolled); S. REP. NO. 114-220, at 9–10 (2016), H.R. REP. NO. 114-529, at 13 (2016). Both reports note that states have adopted different limitations periods.

bill. This provision has been described as an “Anton Piller” order, a form of prejudgment discovery enabling one party to have the property of another seized for a future action.⁷¹ In the case of trade secrets, the supporters of the trade secret provision argued such a measure was made necessary by the technological ease with which information could be copied and transported across state lines and national boundaries.⁷²

¶30 The original Senate incarnation of the trade secret ex parte seizure procedure of S. 3389, from the 112th Congress, was comparatively brief compared to its future versions. It required a complaint describing the “reasonable measures” taken to protect a trade secret and a sworn representation that the dispute involved a need for nationwide service of process or misappropriation of a trade secret to another country. A court, finding clear and convincing evidence that an order was necessary to prevent irreparable harm, could issue an order for the “seizure of any property (including computers) used or intended to be used, in any manner or part, to commit or facilitate the commission of the violation alleged in the civil action” and “the preservation of evidence in the civil action.”⁷³ The court could have the property retained for seventy-two hours, a time period that could be extended only after the affected party had received notice and a chance to be heard. The court could require the party requesting the order (hereinafter, the applicant) to pay for any copies of the seized property and return seized property after the running of the retention time period and any extensions.⁷⁴ Aggrieved parties subject to the seizure could bring a civil action against the applicant for “damages for lost profits, cost of materials, and loss of good will”; punitive damages if the action was brought in bad faith; and reasonable attorneys’ fees if the court found extenuating circumstances.⁷⁵

¶31 The 113th Congress’s S. 2267 filled out the Senate’s planned ex parte seizure procedure. This bill required an applicant to submit an affidavit or a verified complaint to the court.⁷⁶ In response, the court could issue appropriate orders to preserve evidence, including making copies of storage media containing the misappropriated trade secret.⁷⁷ The bill adopted the requirements of trademark’s Lanham Act, requiring that any reference to counterfeit marks be read instead to say “misappropriation of a trade secret.”⁷⁸ This essentially made an application require a showing that:

- any other relief but ex parte would be insufficient,
- the applicant had not publicized the seizure,
- the applicant would likely succeed in showing the misappropriation of a trade secret,
- immediate and irreparable harm would result if the seizure was not made,

71. *Protecting Trade Secrets*, *supra* note 17 (a concept originating from the United Kingdom, it has been called a legal nuclear weapon); Kern Alexander, *The Mareva Injunction and Anton Piller Order: The Nuclear Weapons of English Commercial Litigation*, 11 FLA. J. INT’L L. 487, 488 (1997).

72. *Protecting Trade Secrets*, *supra* note 17, at 4–5 (statement of Karen Cochran, Chief Intellectual Property Counsel, E.I. DuPont de Nemours & Co.).

73. S. 3389, 112th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(3) (2012).

74. *Id.*

75. *Id.*

76. S. 2267, 113th Cong., sec. 2(a), 18 U.S.C. § 1836 (a)(2)(B) (2014).

77. *Id.*

78. *Id.*

- the matter to be seized was at the location identified in the application,
- the applicant would suffer more harm than the seizure would cause if granted, and
- the person or persons against whom the order was being made would move or destroy evidence if given notice.⁷⁹

If the court found the applicant would suffer irreparable injury, it could issue appropriate orders to mitigate such harm, requiring the preservation of evidence—even the copying of an “electronic storage medium” that contained trade secret information—and injunctions authorized under the bill’s civil remedies provision, e.g. injunctions to prevent actual and threatened trade secret misappropriation.⁸⁰ The bill limited orders by requiring that they not allow seizure of property incidental to the misappropriation and that they be crafted, “to the extent possible, . . . not [to] interrupt normal and legitimate business operations unrelated to the trade secret.”⁸¹ A notable omission from the bill was the deletion of the “clear and convincing standard of its predecessor.”⁸²

¶32 But it was in the House, also during the 113th Congress, that the *ex parte* seizure option was fully fleshed out in H.R. 5233, with more limitations than had existed in the Senate legislation in that and prior Congresses.⁸³ The shift from replicating trademark’s *ex parte* seizure to crafting a modified one, on the record anyway, appears to have resulted from testimony by David M. Simon, Senior Vice President for Intellectual Property at Salesforce.com Inc., before the Subcommittee on Courts, Intellectual Property, and the Internet of the House Judiciary Committee. Simon warned that basing the trade secret *ex parte* seizure procedure on one for physical goods, such as with trademark and copyright, was risky. He noted that trade secrets were often in intangible form and commingled with the unrelated information of others, on the computer networks and drives of data hosting services. He claimed that seizing such storage mediums, and holding them for days, would deprive a large number of innocent parties of their own information, destabilizing their businesses. Moreover, he warned that technical knowhow was required on the part of officials undertaking such seizures. Another witness, Thaddeus Burns, Senior Counsel for Intellectual Property and Trade at General Electric, testified on behalf of the Intellectual Property Ownership Association (IPO). Burns was apparently involved in the “discussions” on the legislation and was receptive to Simon’s concerns:

[Mr. BURNS] I think when we started having this discussion, all of us were thinking with a Lanham Act headset on, and we know the Lanham Act is really aimed at essentially seizing goods, so you are trying to find the infringing embodiment of a Lacoste shirt, right?

Mr. NADLER. A what?

Mr. BURNS. This is a—a Lacoste shirt, you know, this is a very different environment that we are in. What we are really—our objectives here are really about preserving evidence so that you can have a proceeding on the merits that looks at all the facts and also to prevent

79. *Id.*; J. Joseph Bainton, *Reflections on the Trademark Counterfeiting Act of 1984: Score a Few for the Good Guys*, 82 TRADEMARK REP. 1, 32 (1992).

80. S. 2267, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(a)(2)(A)(ii)(II) (2014).

81. *Id.*

82. *Id.*

83. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii) (2014) (as introduced).

further leakage beyond what has already taken place, whether it is in a digital environment or a physical environment. So I fully agree with you, if there is going to be a seizure provision, it needs to be a very narrowly tailored one, something of last resort that is aimed at that bad faith individual who is about to get on a plane, fly to another country with a PIN drive full of confidential data.⁸⁴

House drafters got the message as well. When trade secret legislation was introduced a month after the hearing; it contained the tailored Lanham Act seizure provisions.⁸⁵

¶33 Under H.R. 5233, an ex parte applicant, through an affidavit or a verified complaint, could obtain the seizure of property necessary “to prevent the propagation or dissemination” of misappropriated trade secrets.⁸⁶ The requirements for the order were that it must “clearly appear” from “specific facts” that certain requirements were met.⁸⁷ These requirements were mostly from trademark’s Lanham Act, but with the provisions now specifically written into the bill instead of being incorporated by reference.⁸⁸ The applicant had to show that a traditional order would be inadequate because the party against whom the order would be issued (hereinafter, the defendant) would not comply with traditional injunctive relief.⁸⁹ The applicant also had to show that immediate and irreparable injury would occur without the seizure.⁹⁰ Harm to the applicant had to outweigh that endured by the defendant and substantially outweigh that endured by any third parties harmed by the seizure.⁹¹ They also had to show that the applicant was “likely to succeed” in showing that a trade secret was involved and that the party subject to the order had misappropriated it and was in possession of it.⁹² The application had to describe the matter to be seized with “reasonable particularity” and identify the location of such matter “to the extent reasonable under the circumstances.”⁹³ It also had to appear that the

84. *Promoting and Protecting American Innovation*, *supra* note 25, at 56 (statement of Thaddeus Burns, General Electric).

85. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii) (2014) (as introduced); H.R. REP. No. 113-657, at 10–11 (2014).

86. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(i) (2014) (as introduced).

87. *Id.* § 1836(b)(2)(A)(ii).

88. *Protecting Trade Secrets*, *supra* note 17 (statement of Sen. Hatch). As will be shown, the language of the ex parte procedure mirrors specific provisions of the Lanham Act, even though neither the Senate nor the House noted such similarities, as they did with the sections influenced by the UTSA, in their reports of the legislation.

89. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(I) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(I) (as introduced and enrolled). This section is similar to, though with more specificity than, 15 U.S.C. § 1116(d)(4)(B)(i) (2012).

90. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(II) (2014) (as introduced and reported from H. Comm. on the Judiciary). This section is the same as 15 U.S.C. § 1116(d)(4)(B)(iv).

91. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(III) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(III) (2015) (as introduced and enrolled). This section is mostly the same as 15 U.S.C. § 1116(d)(4)(B)(vi), except that it lacks the provision regarding the balance of interests against third parties.

92. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(IV) (2014) (as introduced). This appears to be derived from 15 U.S.C. § 1116(d)(4)(B)(iii).

93. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(V) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(V) (2015) (as introduced); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(VI) (2015) (as enrolled). This appears to be derived from 15 U.S.C. § 1116(d)(4)(B)(V) (2012).

defendant, or those acting with the defendant, would destroy, conceal, or make “such matter” inaccessible to the court.⁹⁴ Finally, the applicant could not have already publicized the seizure.⁹⁵

¶34 Perhaps the most significant deviation from trademark law’s seizure provision was the possession requirement. The House Judiciary Committee report’s analysis of that particular section strongly suggests that representatives heeded Simon’s warnings:

The requirement in subclause (IV) protects third-parties from seizure. For instance, the operator of a server on which another party has stored a misappropriated trade secret, or online an intermediary such as an Internet service provider, would not be subject to seizure because that party did not misappropriate the trade secret. The court may decide to issue an injunction preventing disclosure of the trade secret, but not a seizure order under this provision.⁹⁶

Attention to that concern remained a factor in the development of legislation in the subsequent Congress.⁹⁷

¶35 H.R. 5233 also included much greater detail on the elements the order was to contain. Close similarities also existed with the Lanham Act. Courts were to set forth their findings of fact and conclusions of law.⁹⁸ They had to direct the seizure’s conduct in a manner that would minimize the interruption of third party business operations and, where possible, the legitimate business operations of the party subject to the order that were unrelated to the trade secret.⁹⁹ Courts also had to draft an order for protecting against disclosure of the seized property with restrictions on the applicant’s access to it, even during the seizure; a prohibition on the making of copies of it; and prevention of undue damage until the defendant had an opportunity to be heard.¹⁰⁰ Courts were to hold a seizure hearing at “the earliest possible” time and no later than seven days after issuance of the order. This was unless the defendant or others harmed by the order consented to another date, though they could not move to dissolve or modify the order until giving notice to

94. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(VI) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(VI) (as introduced); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(VII) (2015) (as enrolled). This section is the same as 15 U.S.C. § 1116(d)(4)(B)(vii).

95. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(VII) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(VII) (as introduced); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(VIII) (2015) (as enrolled). This section is the same as 15 U.S.C. § 1116(d)(4)(B)(ii).

96. H.R. REP. No. 113-657, at 11 (2014). This language was also used in the Senate and House reports for S. 1890.

97. *Protecting Trade Secrets*, *supra* note 17 (statement of Sen. Leahy).

98. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(i) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(i) (2015) (as introduced and enrolled). This section is the same as 15 U.S.C. § 1116(d)(5)(A) (2012).

99. H.R. 5233, 113th Cong., sec. 2(a) § 1836(b)(2)(B)(ii) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(ii) (2014) (as introduced). There does not appear to be a similar provision in the Lanham Act.

100. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(iii) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(iii) (2015) (as introduced). This section has some similarity to 15 U.S.C. § 1116(d)(9).

the applicant.¹⁰¹ Any access to the seized property had to be consistent with the provisions governing its custodianship by the court.¹⁰² The applicant was required to provide adequate security for damages that might result from wrongful or “excessive” seizure.¹⁰³ Courts were to take measures to restrict any publicity arising from the order.¹⁰⁴ Service of the order was to be made by federal, state, or local law enforcement officers, who would then execute service.¹⁰⁵ Courts were required to secure seized material from “physical and electronic access” during the seizure and while in the court’s custody.¹⁰⁶

¶36 Those who endured damage due to “wrongful or excessive seizure” had recourse to a cause of action against the applicant—the same relief as provided under trademark’s Lanham Act § 34(d)(11) or 15 U.S.C. § 1116(d)(11). The aforementioned security posted with the court would not limit recovery of third parties for damages.¹⁰⁷

¶37 H.R. 5233 as reported from the House Judiciary Committee had few but significant modifications. Foremost amongst these was alteration of the requirement describing against whom the order could be brought, changing the text from a person who “misappropriated the trade secret” to “misappropriated the trade secret by improper means, or conspired to use improper means to misappropriate the trade secret.”¹⁰⁸ This provision includes a curious redundancy since the act defined misappropriation as the acquisition of a trade secret through improper means. The House Judiciary Committee report for the legislation states that this was to prevent *ex parte* seizure from being used against a party that knew it had acquired a misappropriated trade secret, but did not use or conspire to use

101. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(iv) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(iv) (2015) (as introduced); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(v) (2015) (as enrolled). This section has some similarity to 15 U.S.C. § 1116(d)(10) (2012).

102. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(D) (2014) (as introduced and re-reported from H. Comm. on the Judiciary). There does not appear to be a similar provision in the Lanham Act.

103. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(v) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(v) (2015) (as introduced); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(vi) (2015) (as enrolled). This section is similar to 15 U.S.C. § 1116(d)(4)(A) (2012). A notable difference is that the inclusion of “excessive” in H.R. 5233 and its progeny.

104. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(C) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(C) (2015) (as introduced and enrolled). This section is similar to 15 U.S.C. § 1116(d)(6).

105. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(E) (2014) (as introduced and re-reported from H. Comm. on the Judiciary); S. 1890, 114th Cong. sec. 2(a), 18 U.S.C. § 1836(b)(2)(E) (2015) (as introduced). This section has similarities to 15 U.S.C. § 1116(d)(9) (2012).

106. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(D) (2014) (as introduced and re-reported from H. Comm. on the Judiciary). There does not appear to be a similar provision in the Lanham Act.

107. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(F) (2014) (as introduced and reported from H. Comm. on the Judiciary); S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(G) (2015) (as introduced).

108. H.R. 5233, 113th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(IV) (2014) (as reported from H. Comm. on the Judiciary). The DTSA, introduced in the 114th Congress, included this language but with new subdivisions. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(ii)(IV) (2015) (as introduced).

“improper means” to obtain it.¹⁰⁹ The clause did allow for seizure where a party was an accomplice to the theft.¹¹⁰

¶38 When Congress returned to trade secret legislation the following year, both the House and Senate built on H.R. 5233, with some changes. Both S. 1890 and H.R. 3326 spelled the seizure hearing out in greater detail. At the hearing, the applicant had the burden of proof to show that the order’s findings of facts and conclusions of law were still in effect; otherwise the order would be dissolved or modified.¹¹¹ The defendant or anyone harmed by an order was empowered to move to dissolve or modify the order at any time after giving notice to the applicant.¹¹² The court could make such orders modifying the rules of discovery to prevent frustration of the purposes of the hearing.¹¹³ Parties could move, at any time, and even *ex parte*, to encrypt material stored in an electronic storage medium that had been or would be seized.¹¹⁴

¶39 Apparently, Simon’s earlier caution about courts grappling with the technical issues of seizing information contained in electronic storage devices was still a concern. The new bills had a provision that material in an “electronic storage medium” was prohibited from being connected to an “electronic network” or the Internet without both parties’ consent. This custody was to remain in effect until the seizure hearing.¹¹⁵

¶40 The seizure provisions went through significant changes, as well as stylistic ones, in the Senate Judiciary Committee. These were the final alterations to the legislation: none were made on the Senate floor, in the House Judiciary Committee, or on the House floor. First, phrasing was included that this *ex parte* relief could be granted only in “extraordinary circumstances.”¹¹⁶ This was in keeping with statements made at a hearing in which senators and witnesses affirmed that this remedy was limited and controlled and available only as a last resort.¹¹⁷ Reference was also made in the Senate and House reports on the legislation, documenting the rare instances in which such a procedure should be used:

For example, this authority is not available if an injunction under existing rules of civil procedure would be sufficient. The *ex parte* seizure provision is expected to be used in instances in which a defendant is seeking to flee the country or planning to disclose the trade secret to a third party immediately or is otherwise not amenable to the enforcement of the court’s orders.¹¹⁸

109. H.R. REP. NO. 113-657, at 11 (2014). This explanation was also printed in the Senate and House reports for S. 1890. S. REP. NO. 114-220, at 6–7 (2016), H.R. REP. NO. 114-529, at 10–11 (2016).

110. *Id.*

111. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(F)(ii) (2015) (as introduced and enrolled). The Lanham Act seizure provision has the same standard of proof. 15 U.S.C. § 1116(d)(10)(A) (2012).

112. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(F)(iii) (2015) (as introduced and enrolled). There does not appear to be a similar provision in the Lanham Act.

113. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(F)(iv) (2015) (as introduced and enrolled). This section is mostly similar to 15 U.S.C. § 1116(10)(B).

114. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(H) (2015) (as introduced and enrolled). There does not appear to be a similar provision in the Lanham Act.

115. S. 1890, 114th Cong. sec. 2(a), 18 U.S.C. § 1836(b)(2)(D) (2015) (as introduced). Aside from the first sentence, this section is different from 15 U.S.C. § 1116(d)(7)

116. S. 1890, 114th Cong., sec. 2(a), 18 U.S.C. § 1836(b)(2)(A)(i) (2015) (as reported from S. Comm. on the Judiciary).

117. S. REP. NO. 114-220, at 3 (2016); Beall Statement, *supra* note 18, at 5.

118. S. REP. NO. 114-220, at 9; H.R. REP. NO. 114-529, at 9–10 (2016).

¶41 In the provision requiring the narrowest seizure possible, the phrase requiring that legitimate business operations of the defendant “that are unrelated to the trade secret that allegedly has been misappropriated” was deleted.¹¹⁹ Access to seized material in court custody, by either the applicant or defendant, was now prohibited instead of restricted, until parties had an opportunity to be heard in court.¹²⁰ In fashioning their seizure orders, court had to provide guidance to law enforcement authorities, delineating their authority, including the hours that a seizure could be executed and whether force could be used to access locked areas.¹²¹

¶42 Seizures were now to be conducted specifically by federal law enforcement officers, though state and local officers could participate in such actions.¹²² In addition, law enforcement could request assistance from technical experts, unaffiliated with the applicant and bound by a nondisclosure agreement, if the court found such participation would aid “efficient execution” and “minimize the burden of seizure.”¹²³ Applicants and their agents were to be specifically excluded from such raids.¹²⁴ The custody provisions now included empowerment to courts to appoint special masters, bound by nondisclosure agreements, who were charged with locating and isolating misappropriated trade secret information and facilitating unrelated property and data to those from whom it had been seized.¹²⁵

Civil Cause of Action Rule of Construction

¶43 A “rule of construction” statement attached to the section containing the civil cause of action remained the same throughout the DTSA’s predecessors and its form throughout passage: “Nothing in the amendments made by this section shall be construed to modify the rule of construction under section 1838 of title 18, United States Code, or to preempt any other provision of law.”¹²⁶ The section it refers to is the construction with other laws provision of the EEA, which states that the EEA does not preempt or displace civil remedies of federal and state laws.¹²⁷ According to the Senate and House reports, the result of this rule is that “State trade secret laws are not preempted or affected by this Act.” Nor did it affect “otherwise lawful disclosures” under the Freedom of Information Act.¹²⁸

Additional DTSA Amendments to the EEA

¶44 Besides its most salient provisions, the DTSA version that emerged from the Senate Judiciary Committee had other changes. It now had modifications for

119. S. 1890, 114th Cong. sec. 2(a), 18 U.S.C. § 1836(b)(2)(B)(ii) (2015) (as reported from S. Comm. on the Judiciary).

120. *Id.* § 1836(b)(2)(B)(iii)(I).

121. *Id.* § 1836(b)(2)(B)(iv).

122. *Id.* § 1836(b)(2)(E).

123. *Id.*

124. *Id.*

125. *Id.* § 1836(b)(2)(D)(iv).

126. S. 1890, 114th Cong., sec. 2(d), 18 U.S.C. § 1836(f) (2015) (as reported from S. Comm. on the Judiciary and enrolled).

127. 18 U.S.C. § 1838 (2012).

128. S. REP. NO. 114-220, at 10 (2016); H.R. REP. NO. 114-529, at 14 (2016).

the criminal provisions of the EEA, changing the computation that could be levied for criminal violations from \$5 million to the greater of \$5 million or “three times the value of the stolen trade secret” to an “organization,” including “expenses for research and design and other costs that the organization has thereby avoided.”¹²⁹ The term “organization” is derived from the EEA. While not specifically defined in the law, the intent behind its use appears to distinguish corporate or group entities from individuals and natural persons.¹³⁰

¶45 The bill also included a new subsection that forbade courts from directing an owner from disclosing material claimed to be a trade secret unless the owner was allowed to file a sealed submission describing the owner’s interest in the material and its interest in keeping it confidential.¹³¹ This subsection to the prosecutors or the court did not waive trade secret protection without consent of the owner. According to the committees, part of the rationale behind this language was to deny trade secret disclosure to defendants because “the actual secrecy of information that is the object of the conspiracy is not relevant to the prosecution of a conspiracy charge.”¹³² Finally, language was added to make economic espionage and theft of trade secrets “predicate offenses” under the Racketeer Influenced and Corrupt Organizations Act (RICO).¹³³

¶46 One provision that affected both the criminal-focused EEA and the civil provisions of the DTSA was the exemption for disclosures of trade secrets in certain legal proceedings. Individuals making confidential trade secret disclosures to report a violation or suspected violation of laws, to federal, state, and local law enforcement officials and attorneys, were immunized from liability.¹³⁴ Disclosures in a case’s pleadings were also immunized so long as these were made under seal.¹³⁵ Individuals who filed a lawsuit against an employer who had retaliated for such disclosures could disclose the trade secret to an attorney as long as documents containing it were filed under seal and did not disclose the secret save in order to comply with a court order.¹³⁶ Notice of this immunity was required to be provided to employees, either in employment contracts governing trade secrets or by referencing another policy document.¹³⁷ Employers failing to do so could not receive the act’s exemplary damages or attorneys’ fees against employees who did receive such notice. Under the definition of this section, employees included contractors and consultants.¹³⁸ The committees were emphatic that this immunity did not extend to other illegal acts: “The Committee stresses that this provision immunizes the act of disclosure in the limited circumstances set forth in the provision itself; it

129. S. 1890, 114th Cong., sec. 3(a)(1), 18 U.S.C. § 1832(b) (2015) (as reported from S. Comm. on the Judiciary and enrolled).

130. See 18 U.S.C. §§ 1837(1) & 1839(1) (2012); H.R. REP. NO. 104-788, at 3, 4, 12, 13 (2014).

131. S. 1890, 114th Cong., sec. 3(a)(2), 18 U.S.C. § 1835(b) (2015) (as reported from S. Comm. on the Judiciary).

132. S. REP. NO. 114-220, at 13; H.R. REP. NO. 114-529, at 15.

133. S. 1890, 114th Cong., sec. 3(b), 18 U.S.C. § 1961(1) (2016) (as reported from S. Comm. on the Judiciary).

134. S. 1890, 114th Cong., sec. 7(a)(1), 18 U.S.C. § 1833(a)(2) & (b)(1)(A) (2015) (as reported from S. Comm. on the Judiciary and enrolled).

135. *Id.* §§ 1833(a)(2) & (b)(1)(B).

136. *Id.* § 1833(b)(2).

137. *Id.* § 1833(b)(3).

138. *Id.*

does not immunizes [sic] acts that are otherwise prohibited by law, such as the unlawful access of material by unauthorized means.”¹³⁹

Additional Provisions

¶47 The act, from the reported version of H.R. 5233 to S. 1890, also provided for the other branches of government to produce information related to trade secret theft and protection. The attorney general, in consultation with the IP enforcement coordinator, the director of the U.S. Patent and Trademark Office, and “heads of other appropriate agencies,” was to produce a biennial report on international trade secret theft.¹⁴⁰ The Federal Judicial Center was charged with producing best practices for the seizure, storage, and security of information as required by the new law.¹⁴¹

¶48 The drafters of S. 1890 also included a “sense of Congress” statement with the bill. Sense statements, unlike purpose statements, are not imperative or enforceable. They express Congress’s “desire” as to how a law should be interpreted.¹⁴² S. 1890 also included other provisions not included in the prior bills. It included a statement that the law was “not to be construed as a law pertaining to intellectual property for purposes of any other Act of Congress”—that is, copyright, patent and trademark law.¹⁴³ Finally, the new legislation made minor alterations to the style of the code, for example, renaming section 1836 of title 18 “Civil Proceedings.”¹⁴⁴

A New Use for Legislative History

¶49 This is, no doubt, an inopportune moment to declare that writing a legislative history narrative of the DTSA is *not* the primary purpose of this article. The lead goal is to suggest a new way to use legislative history. Although the process of documenting a law’s passage differs little from Elizabeth Finley’s description in 1946,¹⁴⁵ the ease with which we collect, organize, and disseminate this information has changed significantly.¹⁴⁶ At the same time, law librarians have come to face an

139. *Id.* § 1833(b)(5); S. REP. NO. 114-220, at 13 (2016); H.R. REP. NO. 114-529, at 16 (2016).

140. S. 1890, 114th Cong., sec. 4 (2015) (as reported from S. Comm. on the Judiciary). As of the writing of this article, this report had not yet been produced.

141. S. 1890, 114th Cong., sec. 6 (2015) (as reported from S. Comm. on the Judiciary). The Federal Judiciary posted its first set of best practices on June 28, 2017. TIMOTHY LAU, TRADE SECRET SEIZURE BEST PRACTICES UNDER THE DEFEND TRADE SECRETS ACT OF 2016 (2017), https://www.fjc.gov/sites/default/files/2017/DTSA_Best_Practices_FJC_June_2017.pdf [<https://perma.cc/C65S-3KHM>].

142. S. 1890, 114th Cong., sec. 5 (2015) (as reported from S. Comm. on the Judiciary); LARRY M. EIG, CONG. RES. SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 34 (2011).

143. S. 1890, 114th Cong., sec. 2(g) (2015) (as reported from S. Comm. on the Judiciary and enrolled). See, e.g., *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 (11th Cir. 2006) (reviewing the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 230(b), which had a similar statement: “Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.”). The *Almeida* court noted that the CDA’s statement did not “immunize” parties from trademark claims. *Id.*

144. S. 1890, 114th Cong., sec. 2(d) (2015) (as reported from S. Comm. on the Judiciary).

145. Elizabeth Finley, *Legislative Histories*, 39 LAW LIBR. J. 161, 161 (1946).

146. Finley describes what must have been the arduous task of building files of paper legislative history materials. *Id.* at 162–63. At the time, legislative history had enjoyed such innovations

urgent need to prove their own utility amid shrinking budgets and improved technology. They must show that they are “thought leaders in legal information,” in part by demonstrating to the “legal community” that they are the “recognized experts” in that field.¹⁴⁷ The “new use” of legislative history proposed combines this long-standing law librarian skill and the digital availability of legislative information to combat the profession’s current existential threat—suggesting that law librarians actively leverage and market their knowledge and abilities in legislative history by making and publicizing legislative histories contemporaneously with a bill’s passage into law.

¶50 Of course, law librarians have plentiful and varied tools in their skill sets, but significant factors advance legislative history as a leading candidate for promotion. Legislative history retains significant importance to the study and practice of law. Obviously, legislative history’s role in statutory interpretation remains controversial and has its detractors, but its use is widespread in the courts, academe, and practice.¹⁴⁸ More important, just as in Finley’s day, few if any inhabitants of the legal field wish to perform legislative history research. Lawyers are often daunted by the prospect of compiling a legislative history, and usually they forward the work to associates or interns who, if they are smart, ask for help from a law librarian.¹⁴⁹ Academics routinely thank law librarians in their articles’ footnotes for performing legislative history research, suggesting they are not too keen on performing the practice either.¹⁵⁰ Rare are law students who are excited to do legislative histories, and those who are will likely be applying to library school to become law librarians themselves.¹⁵¹ Legislative history is the domain of the law librarian almost by default.

¶51 Nor are digital nor online tools likely to change this state of affairs, at least not any time soon. The information age has made many formerly laborious research tasks much easier, but legislative history research steadfastly defies such

as West’s *U.S. Code Congressional & Administrative News* and CCH’s *Congressional Index*. Robert K. Emerson & Frank L. Fuller, III, *How to Find and Use Federal Legislative Materials*, 51 W. VA. L.Q. 169, 174 (1948). But these pale in comparison to the direct access and variety of access points to legislative history materials law librarians enjoy now.

147. *Strategic Directions: 2016–2019*, AM. ASS’N OF LAW LIBRARIES (approved July 2016), <http://www.aallnet.org/mm/Leadership-Governance/strategic> [https://perma.cc/AV6T-ZYM5].

148. To investigate this claim, I ran a Lexis Advance search of federal court cases since January 1, 2017, that included the phrase: “**legislative history**” and retrieved almost 1000 hits. I ran the same search in law reviews and retrieved more than 1100 hits. When I ran this search in Legal News, I retrieved nearly 2500 hits. Even discounting roughly two-thirds of those as being related to tax issues, it is conceivable the remainder have significant potential coverage of legislative history. These searches are no replacement for a scientific study, of course, but they do show a significant and widespread interest in, if not practice of, legislative history in the legal field today.

149. W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 408 (1992). The root causes of this aversion are still best described by Judge Richard Posner, who wrote more than thirty years ago,

Almost three years of reading briefs in cases involving statutory interpretation have convinced me that many lawyers do not research legislative history as carefully as they research case law. It may be that they do not know how. It is more difficult to research legislative history than case law, yet instruction in the former is at most law schools rudimentary.

RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 339 (1985).

150. See, e.g., Daniel M. Simon, *Cell Phone Ringtones: A Case Study Exemplifying the Complexities of the § 115 Mechanical License of the Copyright Act of 1976*, 57 DUKE L.J. 1865, 1865 n.† (2008).

151. This is a personal observation based on anecdotal evidence.

simplification. A legislative history is not something easily Googled. A Google search can yield a legislative history if one exists and is available online. Google itself cannot do the job of tying together all the legislative documents that may exist if one is not available. Of course, there are databases, like *ProQuest Congressional* and *Congress.gov*, that do make legislative history research easier, but even these are not without their issues. A comprehensive resource, like *ProQuest Congressional*, may be overloaded with historical information, compelling researchers to conjecture which of many sources are relevant to their needs and which are not.¹⁵² Conversely, more limited sources, like *Congress.gov*, report information from only the Congresses that passed a particular bill into law, leaving out information earlier Congresses may have generated in prior attempts to pass a similar bill.¹⁵³ While the legal profession as a whole frets over the possibility of automated lawyering, the inability of digital tools to fully capture legislative history shows we're still far, far away from automated legislative history research, if that is even possible.¹⁵⁴

¶52 Because legislative history retains its importance, few other legal professionals can or will “do” it, and it cannot be “Googled” on any database, such research still falls to law librarians, as does teaching the basics of how to perform it. This state of affairs renders legislative history as a platform through which law librarians can “assert their value in a meaningful way.”¹⁵⁵ The operative word in that phrase is “assert.” It is not enough that law librarians know legislative history; they must be *known* to know legislative history.¹⁵⁶ A simple means of achieving this goal is to generate and make available legislative histories, with narratives explaining them, *when bills pass* rather than passively awaiting a patron request to do so. If someone, somewhere, is going to need a legislative history of a law at some point, why not anticipate that need and meet it instantaneously when it appears?¹⁵⁷ Why not make that legislative history available through a journal such as this one, a law library webpage, or other similar venues for research? Doing so would advertise the utility of law librarians in documenting and generating this important information. This use of legislative histories help could usher in a new law library mission for the digital age—a “broader conception of community service,” which public libraries have embraced already and was recently called for in the pages of this journal.¹⁵⁸

152. A bill with a modest legislative record, like the DTSA, may not present much of a challenge to researchers. A more complex bill—for example, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), with multiple hearings, nearly a dozen reports, and scores of hearings and procedural twists and turns—will have its own special obstacles.

153. For example, *Congress.gov*'s legislative history for the DTSA will return only information associated with S. 1890 from the 114th Congress. The only link to related legislation is to the companion House bill for that Congress, H.R. 3326.

154. Steve Lohr, A.I. *Is Doing Legal Work. But It Won't Replace Lawyers, Yet*, N.Y. TIMES (Mar. 19, 2017), <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html>.

155. Laura J. Ax-Fultz, *Igniting the Conversation: Embracing Legal Literacy as the Heart of the Profession*, 107 LAW LIB. J. 421, 422, 2015 LAW LIB. J. 20, ¶ 2.

156. A point perhaps best described by novelist Henry Fielding: “It is not enough that your designs, nay, that your actions, are intrinsically good; you must take care they shall appear so.” HENRY FIELDING, *THE HISTORY OF TOM JONES: A FOUNDLING* 97 (Illustrated Mod. Libr. 1943) (1749).

157. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 907 (2013).

158. Ursula Gorham & Paul T. Jaeger, *The Law School Library or the Library at the Law School? How Lessons from Other Types of Libraries Can Inform the Evolution of the Academic Law Library in the Digital Age*, 109 LAW LIB. J. 51, 66, 2017 LAW LIB. J. 2, ¶ 44.

¶53 These are not mere academic observations. This legislative history of the DTSA was compiled during the law's passage to test whether the contemporaneous legislative history approach would actually yield the benefits described above. The history was then made available through a research guide containing the law's legislative history resources and a draft paper on its legislative path that was posted on SSRN shortly after the law was passed in April 2016.¹⁵⁹ Two leading IP blogs and one practitioner were then alerted to the existence of this information.¹⁶⁰ To date, the research guide has received almost 1000 hits.¹⁶¹ The SSRN narrative, as of this writing, had more than 200 downloads and for two weeks in May 2016 was in the top ten SSRN articles downloaded in the "Private Law—Intellectual Property" category.¹⁶² Finally, one of the IP blogs, contacted about the DTSA legislative history, invited the author to write a blog post on the topic.¹⁶³ If these results could be achieved with such limited promotion, certainly far greater success could be obtained through more diligent and aggressive publicity.

¶54 How does one compile a contemporaneous legislative history? The process is not much different than that for a traditional legislative history. The most significant challenge is in choosing which bills to follow. Thousands of bills are introduced in each Congress, and only a fraction of these ever become law. How is a law librarian to know which ones will mature into legislation? Do law librarians need to rigorously monitor Congress or have some seer-like ability to make a contemporaneous legislative history? Gut instinct and mild current awareness will give an answer where math, and even analytics, cannot—or, at least, cannot yet. Some bills can be described as "most likely to pass," if not "must pass." A prime example is the revision of copyright law now underway. Most commentators, experts, and ordinary people acknowledge that the current law, passed in 1976, is woefully inadequate to the digital age. Congress has already begun work on a new law, and one will probably pass, conceivably within this or the next decade.¹⁶⁴ Then there are bills that are merely likely to pass, bills that enjoy bipartisan support (yes, that still does happen on occasion) and move through Congress with sufficient speed to reach a final vote before the end of a session. For example, the 114th Congress passed the 21st Century Cures Act, potentially far-reaching legislation dealing with pharmaceutical drugs, medical devices, mental health, and diseases.¹⁶⁵ Other candidates for contemporaneous legislative history will not be known until the session progresses and legislative priorities of the House and Senate, as well as the potential of getting presidential

159. John Cannan, A (Mostly) Legislative History of the Defend Trade Secrets Act of 2016 (May 4, 2016), <https://ssrn.com/abstract=2775390> or <http://dx.doi.org/10.2139/ssrn.2775390>.

160. The blogs were PATENTLY-O, <https://patentlyo.com/>, and IP WATCHDOG, <http://www.ipwatchdog.com/>.

161. Statistics on file with the author.

162. Cannan, *supra* note 159; e-mail from management@ssrn.com to author (May 14, 2016, 06:50 EST) (on file with author).

163. John Cannan, *A Legislative History of the Defend Trade Secrets Act of 2016*, IP WATCHDOG (May 20, 2016), <http://www.ipwatchdog.com/2016/05/20/a-legislative-history-of-the-defend-trade-secrets-act-of-2016/id=69082/>.

164. The 1976 law took roughly twenty years to draft and pass, and one can hope that its replacement will not take *that* long.

165. Pub. L. No. 114-255, 130 Stat. 1033 (2016); Jennifer Steinhauer & Robert Pear, *Sweeping Health Measure, Backed by Obama, Passes Senate*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/us/politics/21st-century-cures-act-senate.html>.

approval, are made known or political exigencies demand. For example, both parties agree that a reform of the tax code is desirable, though, at the writing of this article, significant inter- and intraparty differences remain in both chambers.¹⁶⁶ Even if a bill being researched fails to become law, as most bills do, the record of a contemporaneous history will prove helpful to future researchers in law, history, and political science as an illustrative lesson of how the legislative process does, and does not, work. At the time of writing this article, the GOP-controlled Senate of the 115th Congress was enduring multiple obstacles in its attempt to “repeal and replace” the Patient Protection and Affordable Care Act.¹⁶⁷ Should the effort collapse, the significance of this failure will certainly have some bearing on any future healthcare bills.

¶55 The researcher’s temporal relationship to traditional and contemporaneous legislative history presents another distinction between the two forms. With a traditional legislative history, the researcher traces the legislative process backward through time to acquire a record of sources. A contemporaneous legislative history follows the process as it moves forward, requiring the researcher to monitor the creation of sources and to incorporate them into a history after they are made available. Key to a contemporaneous legislative history, and absent from a traditional one, is the researcher’s need to monitor congressional activity, which can operate at a glacial pace at one moment, and frenetically at another. A variety of online services, many of them free, now exist to alert researchers to bills as they are introduced and keep them apprised as the legislation moves through the legislative process—for example, *GovTrack.us*, the Sunlight Foundation’s Scout, and *Congress.gov*. Lexis Advance and Westlaw have bill tracking features as well. However, the contemporaneous legislative history researcher cannot rely exclusively on such services, as a bill’s path toward passage is often not a single or a linear path, and sometimes is even a shell game. Often, a legislative initiative is not the product of a single bill. Numerous bills can be introduced to deal with a certain subject. Of these, the House and Senate may choose to work on their own versions so that two separate bills are proceeding through consideration at the same time. The chambers might advance the work of one or swap the work that emerged from the other chamber with its own. Add to this tendency the possibility that separate bills may deal with a fractional element of a topic and then be rolled into larger legislation, even an omnibus bill that deals with many matters. Researchers can track all these legislative pieces by monitoring traditional news media or, better still, subscribing to news alerts (from Bloomberg BNA, for example).

¶56 Contemporaneous legislative history may not be for every law librarian or every law library. However, this practice does illustrate the tactics that both will need to demonstrate their continued importance—the leveraging of their formidable legal information skills and resources, the anticipation of future patron needs,

166. Andrew Taylor, *Conservative: GOP Stuck on Budget, Threat to Tax Overhaul*, AP NEWS (June 9, 2017), <https://www.apnews.com/bdc343b00a8d4d11b7053fd6d2af336a> [<https://perma.cc/3C3V-JF9A>]; David Morgan, *Senate Tax Chief Says Scope for Tax Cuts Still Unclear*, REUTERS (June 7, 2017), <http://www.reuters.com/article/us-usa-congress-tax-idUSKBN18Y2CH> [<https://perma.cc/M9G9-AKDY>].

167. Robert Pear, Thomas Kaplan & Maggie Haberman, *In Major Defeat for Trump, Push to Repeal Health Law Fails*, N.Y. TIMES (Mar. 24, 2017), <https://www.nytimes.com/2017/03/24/us/politics/health-care-affordable-care-act.html>.

and the development of innovative services. Contemporaneous legislative history itself will predict the tasks that law librarians need to achieve to secure the future of their profession.

Conclusion

¶57 What is clear from the DTSA's legislative history source documents is the direction Congress intended to go—a uniform civil cause of action for trade secrets misappropriation. Congress provided a guide as to the goals the DTSA was intended to achieve. And it did so with a remarkable degree of unanimity for a body that is not currently known for being able to achieve consensus. This broad agreement is evidenced not only in the actual votes to pass it but in the marked similarity between the bills and committee reports, in both chambers. In few pieces of legislation has Congress spoken so clearly and unitedly. Beyond its purpose, the DTSA is a direct counter to the idea that legislative history cannot express the will of a chamber or a Congress.¹⁶⁸

¶58 What is not clear is how the desired uniformity will be achieved. The UTSA itself has been implemented differently by different state legislatures and interpreted differently by different state courts. Federal district and appellate courts will draw on that diversity as they grapple with the new federal law. It is conceivable that the legislative histories of the UTSA and state implementations of it could merge, creating diverse research trails to follow while untangling issues raised by the DTSA's interpretation. Congress may have set the objective, but the federal courts will have to figure out how to get there.

¶59 What is certain is that shifting congressional trends and uncertain legislative outcomes create opportunities for law librarians to proclaim their definite value: by using legislative histories to report on how Congress conducts its business and to organize and deliver information to assist legal practitioners and academics to interpret its laws. In this way, law librarians prove their knowledge in a specific and important aspect of legal information—just one “niche,” as former Law Librarian of Congress David Mao described, that expresses how law librarians bring value to their institutions, the legal community, and the civil society at large.¹⁶⁹

168. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 29–37 (1997).

169. Gorham & Jaeger, *supra* note 158, at 66, ¶ 42.

The Algorithm as a Human Artifact: Implications for Legal [Re]Search*

Susan Nevelow Mart**

The results of using the search algorithms in Westlaw, Lexis Advance, Fastcase, Google Scholar, Ravel, and Casetext are compared. Six groups of humans created six different algorithms, and the results are a testament to the variability of human problem solving. That variability has implications both for researching and teaching research.

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An algorithm must be seen to be believed.¹

Research . . . is not a method, it is not an object, it is a behavior. . . . Research is the systematic indulgence of one's curiosity.²

"Legal research" is not merely a search for information; it is primarily a struggle for understanding.³

Introduction

¶1 In the twenty-first-century world of legal resources, finding the right information and turning that information into knowledge that can be used to solve a legal problem or advise a client requires confronting technology as a partner in the research enterprise. Having a relationship with a partner always requires an investment of time and energy, and partnering with technology is no different. Researchers need to acquire some expertise about the technology at the meta-level. If you are searching online, as all legal researchers do, you need to remember that an algorithm is being used to return your results, and that, as a Westlaw engineer once wrote to me, "all of our algorithms are created by humans."⁴ Those human creators made choices about how the algorithm would work that have implications for the search results returned to the researcher.

¶2 Those choices become the biases⁵ and assumptions that are built into systems. If the search entered into a legal database has five terms,⁶ and only four terms appear, how will the algorithm treat the search? If the algorithm is strict, it will return only results with exactly those five terms. But the algorithm can be adjusted so that results with four of the terms will appear in the results set. The algorithm is set to determine how close those words have to be to each other to be returned in the top results. The programming team decides which of the search terms entered are automatically stemmed⁷ and which are not. Only the team knows which legal phrases are recognized by the algorithm without quotation marks around the phrase and how many preexisting legal phrases are added to the search without

1. 1 DONALD E. KNUTH, *THE ART OF COMPUTER PROGRAMMING* 4 (3d ed. 1997).

2. Felix Frankfurter, Karl N. Llewellyn & Edson R. Sunderland, *The Conditions for and the Aims and Methods of Legal Research*, 6 AM. L. SCH. REV. 663, 664 (1930).

3. Michael J. Lynch, *An Impossible Task but Everybody Has to Do It—Teaching Legal Research in Law Schools*, 89 LAW LIBR. J. 415, 415 (1997).

4. E-mail from Mike Dahn, Senior Vice-President Prod. Dev., Thomson Reuters, Legal, to author (Oct. 1, 2012, 18:17 MST) (on file with author). The advent of coding algorithms is not an impossibility, and some sort of oversight beyond "algorithmic accountability" may be necessary. See, e.g., Anupam Datta, Shayak Sen & Yair Zick, *Algorithmic Transparency via Quantitative Input Influence: Theory and Experiments with Learning Systems*, 2016 IEEE SYMP. SECURITY & PRIVACY 598.

5. "Bias" is not used in this article in the usual pejorative sense. It is used to indicate a preference in a computer system. For a detailed analysis of bias in computer systems, see Batya Friedman & Helen Nissenbaum, *Bias in Computer Systems*, 14 ACM TRANSACTIONS ON INFO. SYS. 330 (1996), discussed *infra* ¶ 12.

6. "Term" is used throughout this article in its function in the research process, as a word used to query a database or search engine to retrieve relevant information. See JOAN M. REITZ, *DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE* 641, 712 (2004).

7. To "stem" is to take the root of a word. *Id.* at 683. In information retrieval, there are many methods of using algorithms to stem words in an index and then look for the variants. See Anjali Ganesh Jivani, *A Comparative Study of Stemming Algorithms*, 2 INT'L J. COMPUTER TECH. & APPLICATIONS 1930 (2011).

user input. The researcher does not have access to the list of synonyms that are (or are not) added automatically to the search. The scope of any machine learning is not known to the researcher. Once these decisions have been made, searches are automatically executed; any bias is encoded into the system.⁸ For an example of how coding choices affect results, the effect when a technician working for Amazon changed the value of the metatag “adult” from “false” to “true” is illustrative;⁹ the change to “true” excluded 57,000 books with tags for “gay,” “lesbian,” “health,” “mind,” “body,” “sexual medicine,” and “reproductive” from appearing in the results.¹⁰ In the Amazon example, users, particularly authors, noticed. Legal researchers are not likely to be able to tell how the encoded biases and assumptions are affecting search results. Legal database providers have viewed their algorithms as trade secrets and so have been reluctant to discuss the algorithms.¹¹

¶3 This article argues that legal database providers can be much more transparent about the biases in their algorithms without compromising trade secrets. The article is, in part, a call for more algorithmic accountability. Algorithmic accountability in legal databases will help assure researchers of the reliability of their search results and will allow researchers greater flexibility in mining the rich information in legal databases. If researchers know generally what a search algorithm is privileging in its results, they will be better researchers. Law librarians will be better teachers of the kind of analysis researchers need to search in any new database. And in the likely event that researchers do not have access to all of the different databases studied in this article, knowledge about the variability of each database might mean that researchers will work search term and resource variability into their search strategies. More information about databases may also affect collection development decisions.

¶4 In the absence of transparency from the database providers themselves, there may still be things that can be learned about system biases. This article sets out the results of a study designed to reveal how hidden biases and assumptions affect the results provided by some of the major legal database providers.¹² While it is usually

8. Lisa Shay et al., *Do Robots Dream of Electric Laws? An Experiment in the Law as Algorithm 7* (2013), http://www.rumint.org/gregconti/publications/201303_AlgoLaw.pdf [<https://perma.cc/WMG8-QBYZ>]. Bias is used here in the usual sense; the coders for this project were creating algorithms that determined traffic violations for specific sets of circumstances.

9. Andrea James, *AmazonFail: An Inside Look at What Happened*, SEATTLE POST-INTELLIGENCER: AMAZON & ONLINE RETAIL BLOG (Apr. 13, 2009, 6:32 PM), <http://blog.seattlepi.com/amazon/2009/04/13/amazonfail-an-inside-look-at-what-happened/> [<https://perma.cc/M9R2-8JW9>].

10. Andrea James, *Amazon Calls Mistake “Embarrassing and Ham-fisted,”* SEATTLE POST-INTELLIGENCER: AMAZON & ONLINE RETAIL BLOG (Apr. 13, 2009, 2:43 PM), <http://blog.seattlepi.com/amazon/2009/04/13/amazon-calls-mistake-embarrassing-and-ham-fisted/> [<https://perma.cc/EDQ3-KX2M>]. The error in the system—changing the code—affected not only the sales rank of some books, which pushed them to the bottom of the list where they were unlikely to be found, and also had “the effect of removing the books from Amazon’s main product search.” *Id.*

11. The algorithms used by LexisNexis and Westlaw are trade secrets. See, e.g., JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE* 209 (2012) (“Efforts to gain access to information about the algorithms that determine the order of online search results typically have been stymied by assertions of trade secrecy . . .”). The exact operation of a relevancy-ranked natural language algorithm is proprietary and usually not disclosed. See also Danny C.C. Poo & Christopher S.G. Khoo, *Online Catalog Subject Searching*, in 3 *ENCYCLOPEDIA OF LIBRARY AND INFORMATION SCIENCE* 2218, 2224 (Miriam Drake ed., 2d ed. 2003).

12. This article makes the following assumptions about the six database providers studied: they have access to and publish a similar corpus of published federal cases, and they are trying to accomplish a similar task: to return cases relevant to the researcher’s query with the algorithms they create.

difficult to know what documents are being searched in very large databases, using jurisdictional limits creates a unique opportunity to compare how different algorithms process the same search in the same set of documents. This study used Casetext, Fastcase, Google Scholar, Lexis Advance, Ravel, and Westlaw to look at the differences in results when six different sets of engineers set out to solve the same problem.

¶5 The results are a remarkable testament to the variability of human problem solving. There is hardly any overlap in the cases that appear in the top ten results returned by each database.¹³ An average of forty percent of the cases were unique to one database, and only about seven percent of the cases were returned in search results in all six databases. It is fair to say that each different set of engineers brought very different biases and assumptions to the creation of each search algorithm. The uniqueness of results may show something about the worldview of each database that suggests that searching in multiple databases may be the twenty-first-century version of making sure that multiple authorial viewpoints are highlighted in a library collection's holdings. One of the most surprising results was the clustering among the databases in terms of relevant results. The oldest database providers, Westlaw and LexisNexis, were at the top in terms of relevance, with sixty-seven percent and fifty-seven percent relevant results, respectively. The newer legal database providers, Fastcase, Google Scholar, Casetext, and Ravel, were clustered together at a lower relevance rate, each returning about forty percent relevant results.

¶6 Legal research has always required redundancy in searching; one resource does not usually provide a full answer, just as one search does not provide every necessary result. This study clearly demonstrates that this need for redundancy has not faded with the rise of the algorithm. From the law professor seeking to set up a corpus of cases to study, to the trial lawyer seeking that one elusive case, to the legal research professor showing students the limitations of algorithms, researchers who want full results need to mine multiple resources with multiple searches. An exemplar legal research problem illustrating what the human construction of algorithms means for the uniqueness and relevance of results in any given database is provided. Once researchers have determined on their own that every algorithm has a unique voice, they truly understand the need for and the usefulness of redundancy in searching.

¶7 Paragraphs 8–15 of this article discuss algorithms in the context of legal research and set the stage for today's research environment. Paragraphs 16–29 describe in general terms the types of search algorithms employed by legal database providers and discuss what each provider has revealed about its algorithms in promotional material. Paragraphs 30–56 discuss the empirical study, its protocols, the results of the empirical study, and some conclusions that can be drawn. Paragraphs 57–58 conclude by returning to the question of algorithmic accountability and the cognitive impact of algorithms on legal research strategies.

13. The full results and analysis discussed in this paragraph are presented *infra* ¶¶ 45–56.

A Brief Discussion of Algorithms and Classification

¶8 At the simplest level, an algorithm is “a set of step by step instructions, to be carried out quite mechanically, so as to achieve some desired result.”¹⁴ The Pythagorean theorem is an algorithm, and so is the set of instructions that Netflix uses to recommend movies. Although algorithms have always had a role in modern life,¹⁵ it is the role that algorithms play in selecting what legal information we see that is critical for legal researchers.¹⁶ As we increasingly rely on algorithms for the assessment of information, algorithms dominate in mediating our information environment.¹⁷ If researchers are not aware that the information they seek may be missing from a database, or that the results that might be helpful may not be privileged in the result set, or that the list of documents suggested may have been generated by a legal worldview that opposes the path the researcher is trying to forge, a research session may terminate with no helpful results when helpful results actually exist.¹⁸ So we have to have sets of questions like these to ask each algorithm: How is information included or excluded from a system? How does the resource use predictive algorithms to anticipate use? How is relevance evaluated? Does the “black box”¹⁹ of the algorithm’s work lend a seeming objectivity to the results? How does use of the system change result patterns?²⁰ For attorneys, learning to navigate black boxes is part of the ethical duty to do competent research: knowing something about why you received the results that you did is a critical skill. For legal research professors, teaching this skill may involve passing on some understanding of how the systems we use today evolved.

¶9 Online legal information systems did not arise as completely new structures. The initial transition to any new technology is frequently fairly literal. Think of the “horseless” carriage or the first bicycles. The first legal information that made the

14. Jean-Luc Chabert, *Introduction*, in *A HISTORY OF ALGORITHMS: FROM THE PEBBLE TO THE MICROCHIP* 1, 1 (Jean-Luc Chabert ed., 1999).

15. As just one example from industry, Gantt charts were simple instructions for scheduling that have been in use since the mid-1890s. Starting in 1958, those instructions were computerized with algorithmic instructions, using the Naval Ordnance Research Calculator, the most powerful computer in existence at the time. Jeffrey W. Herrmann, *A History of Production Scheduling*, in *HANDBOOK OF PRODUCTION SCHEDULING* 1, 11–12 (Jeffrey W. Herrmann ed., 2006).

16. See, e.g., Tarleton Gillespie, *The Relevance of Algorithms*, in *MEDIA TECHNOLOGIES: ESSAYS ON COMMUNICATION, MATERIALITY, AND SOCIETY* 167 (Tarleton Gillespie et al. eds., 2014) [hereinafter *MEDIA TECHNOLOGIES*].

17. *Id.* at 167–68. The study of algorithms as mediators of all public information is a rich field on its own, but one that is beyond the scope of this article, which will limit its focus to algorithms that mediate legal information systems.

18. See Gregory J. Downey, *Making Media Work: Time, Space, Identity, and Labor in the Analysis of Information and Communication Infrastructures*, in *MEDIA TECHNOLOGIES*, *supra* note 16, at 141; see also Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 *AM. U. J. GENDER SOC. POL’Y & L.* 573, 639 (2015) (stating that for the law review articles promoted to the researcher as “Context & Analysis,” the researcher has no way of knowing the criteria used by the publisher in picking those articles, and the work that went into making those decisions has a definite influence on the course of the research).

19. On one level, a black box is any “technical object that operates as it should. When this occurs, the complex sociotechnical relationships that constitute it are rendered invisible, or black-boxed.” Darryl Cressman, *A Brief Overview of Actor-Network Theory: Punctualization, Heterogeneous Engineering & Translation* 1, 6 (Ctr. for Policy Research on Sci. & Tech. No. 09-01, 2009), <http://summit.sfu.ca/item/13593>.

20. Gillespie, *supra* note 16, at 168.

transition online was the full text of cases, made searchable with Boolean logic.²¹ Headnotes, case summaries, statutes, news, business information, and finally law reviews were subsequently added to the systems.²² The freedom to search full text without the constraints of classification systems was supposed to unmoor the law from its structure.²³ But it turns out that trying to make sense of information without underlying ontologies or classification systems can impede automation practices.²⁴ Legal database providers may even make the human additives to their search explicit. LexisNexis boasts of the human indexing in Shepard's citations;²⁵ Westlaw is proud of its human-generated Key Numbers;²⁶ and Bloomberg BNA advertises that the human indexing in its BNA treatises significantly boosts search results.²⁷

¶10 The complexity of the source material may require classification to aid relevant search results. Even the current "Google-like" legal databases provide extensive prefiltering, postfiltering, and word wheel²⁸ options for granular classification by source, authority, jurisdiction, and content type, and by value-added indexing by humans.²⁹ Some of the changes in the levels of prefiltering and word wheel options have been in response to user demand; lawyers seem to need clas-

21. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CALIF. L. REV. 1673, 1696 (2000) ("LEXIS and WESTLAW built on the old foundations. They loaded the text of cases online, each word of each case . . . WESTLAW and LEXIS were brave pioneers, but one cannot build new information systems out of thin air. Both followed a predictable course. Like the first iteration of many systems, WESTLAW and LEXIS tried to use new technology to accomplish the old tasks. Since everyone was deeply immersed in the existing system, they aped the functions of the old system.").

22. Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 657–58 (1996) (noting that this transition took until 1982).

23. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 26–27 (1987) ("There is no underlying rational structure to the law other than what the positivists give it. Allowing people to go online in free text liberates them from any requirement to fit their thoughts into a pre-existing structure. Individual researchers are able to order legal doctrine as it suits their needs . . .").

24. Francisco Iacobelli et al., *Information Finding with Robust Entity Detection: The Case of an Online News Reader*, in HUMAN-COMPUTER INTERACTION: THE AGENCY PERSPECTIVE 375–87 (Marielba Zacarias & JoséValente de Oliveira eds., 2012). To create an automated news reader that worked to find sources for news reporting, among other inputs, the authors "manually built a higher-level classification system on top of Wikipedia's categories." *Id.* at 381. Netflix boasts that its "secret sauce" is human indexing. Netflix's chief content officer added that in its 70/30 mix of data and judgment, "the thirty needs to be on top." Tim Wu, *Netflix's Secret Special Algorithm Is a Human*, NEW YORKER (Jan. 27, 2015), <http://www.newyorker.com/business/currency/hollywoods-big-data-big-deal> [<https://perma.cc/A8CY-LH46>].

25. *Shepard's Citations Service*, LEXISNEXIS, <http://www.lexisnexis.com/Shepards> [<https://perma.cc/4TDA-FR85>] ("Experienced *Shepard's* attorney-editors read cases around the clock and make assessments according to strict standards and guidelines. They recognize implications, case subtleties and nuances that algorithms simply can't.").

26. Westlaw is proud of its human-generated Key Numbers. *Topic and Key Number Overview*, WESTLAW, <https://lawschool.westlaw.com/marketing/display/RE/24> [<https://perma.cc/QFK8-HZ3L>].

27. *BNA's Law School Professional Information Center: Using Online Indexes*, BLOOMBERG BNA, <http://subscription.bna.com/pic2/lsl.nsf/id/DTRS-5L3RPC?OpenDocument> [<https://perma.cc/NH3H-7N5V>].

28. A word wheel describes the autocomplete list of choices generated by a legal database provider when the researcher starts typing in the search box. For example, a researcher typing in "American law" may get a list asking: "Looking for this? American Law Reports Digest; American Law Reports; American Law of Product Liability." Clicking on one of these options will take the researcher directly to the legal resource listed.

29. See the discussion of the value-added interfaces for six legal databases *infra* ¶¶ 20–28.

sification in the law.³⁰ Lawyers, after all, are human, and we are all hardwired to impose structure on the world.³¹

¶11 The transition to online searching has increased the complexity of the search task; as more information becomes available, more research is required.³² As is frequently the case, automation has made a task more complex for the humans involved.³³ In exchange for instant access, the user has to master increasingly complex tasks to recover information effectively. The human reasoning, classification schemes, design decisions, and other work that went into the creation of the systems the researcher is using are mostly hidden.³⁴ Going beneath the surface of research systems, even in the predigital search environment, has never been the norm.³⁵ There is a long history in legal research of researching with only a surface understanding of the underlying structure. Speaking of lawyers at the time of transition to online searching, Bob Berring has noted that most were unaware of the details of the classification systems imposed by the Key Number system,³⁶ and in the early days of online searching, most users were unaware of the structure underlying the system.³⁷ This is almost certainly still true. But that is not to say that some basic understanding of the forces at work would not be helpful to researchers in the

30. MAGGIE NELSON, *THE ARGONAUTS* 53 (2015) (positing an “Aristotelian, perhaps evolutionary need to put everything into categories”). Recent studies on the human mind illustrate the deep-seated desire to classify and categorize, and, in response, lawyers push online systems to recreate the systems and categories. DANIEL J. LEVITIN, *THE ORGANIZED MIND: THINKING STRAIGHT IN THE AGE OF INFORMATION OVERLOAD* 25 (2014) (“The formation of categories in humans is guided by a cognitive principle of wanting to encode as much information as possible with the least possible effort. Categorization systems optimize the ease of conception and the importance of being able to communicate about those systems.”). Even in the evolution of online databases, where the first databases were just the stripped-out text of cases, the momentum has always been toward more structure and classification in the online systems. F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 *LAW LIBR. J.* 563, 569–72, 2002 *LAW LIBR. J.* 36, ¶¶ 19–25; see also William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 *LAW LIBR. J.* 543 (1984–1985).

31. LEVITIN, *supra* note 30, at 32. Lawyers may be singular in their need for control and order. See, e.g., Margaret Hagan, *Do Lawyers Want Bad Visual Design?*, OPEN LAW LAB (June 28, 2016), <http://www.openlawlab.com/2016/06/28/do-lawyers-want-bad-visual-design/> [<https://perma.cc/7FWQ-AFQ5>] (“Lawyers want maximum overload of information in response to queries they do; They want it listed out in detail, with lots of information packed onto the page; They don’t want white space, they want text covering as much of the screen as can fit. They want lots and lots of controls, all kinds of filters and sorting mechanisms.”).

32. Berring, *supra* note 21, at 1683–90 (tracing the differences between the forms and content of an 1891 Supreme Court case and a 1996 Supreme Court case).

33. ENGINEERING PSYCHOLOGY AND COGNITIVE ERGONOMICS: UNDERSTANDING HUMAN COGNITION 206–07 (Dan Harris ed., 2013).

34. See GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* 33 (1999).

35. Berring, *supra* note 21, at 1694.

36. See *id.*; Robert Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 *BERKELEY TECH. L.J.* 189, 210–11 (1997). In the pre-online research world, many lawyers were aware that the West classification system missed a lot. See Daniel P. Dabney, *The Curse of Thamus: An Analysis of Full-Text Legal Document Retrieval*, 78 *LAW LIBR. J.* 5, 14 (1986) (“This short review of ideas in indexing shows that the indexing process is prone to many sorts of errors and uncertainties. Manual indexing is only as good as the ability of the indexer to anticipate questions to which the indexed document might be found relevant. It is limited by the quality of its thesaurus. It is necessarily precoordinated and is thus also limited in its depth. Finally, like any human enterprise, it is not always done as well as it might be.”).

37. Berring, *supra* note 21, at 1697.

brave new world of information overload and satisficing³⁸ that we now live in. And that is what we need to teach legal researchers.

¶12 Lawyers are not alone, of course. Most people do not think about the underlying structures of the technologies they use.³⁹ But some inquiry into the forces at work in the legal research environment, at this moment when so much of the work is truly invisible, is certainly called for.⁴⁰ It is time to examine technical bias in legal computer systems.⁴¹ Technical bias is built into systems. We just don't see it because the systems we use are black boxes.⁴² The following attributes contribute to the biases that programmers embed in the black box:

- prioritization (“emphasiz[ing] . . . certain things at the expense of others,” like relevance ranking);
- classification (putting an “entity [in a] constituent . . . class.” Data training may import human biases);

38. Satisficing is a time-honored information-seeking activity; it means to settle for what is “most readily available with little or no regard for costs and benefits,” when you want quick answers and may not have time to optimize the search. BRIAN C. O’CONNOR ET AL., HUNTING AND GATHERING ON THE INFORMATION SAVANNA: CONVERSATIONS ON MODELING HUMAN SEARCH ABILITIES 131 (2003).

39. The classifications, design decisions, and choices made every day by information scientists in our technological environment frequently embody “moral and aesthetic choices” that impact our own decisions and thoughts. BOWKER & STAR, *supra* note 34, at 3–4. These hidden choices can have very deep effects, as the recent “great recession” has shown. The great recession was in part a failure of algorithmic oversight. See MORTON GLANTZ & ROBERT KISSELL, MULTI-ASSET RISK MODELING: TECHNIQUES FOR A GLOBAL ECONOMY IN AN ELECTRONIC AND ALGORITHMIC TRADING ERA 437–39 (2014).

40. There is a large literature on bias in databases. See, e.g., HUMAN VALUES AND THE DESIGN OF COMPUTER TECHNOLOGY (Batya Friedman ed., 1997); Tarleton Gillespie & Nick Seaver, *Critical Algorithm Studies: A Reading List*, SOC. MEDIA COLLECTIVE RES. BLOG (July 20, 2016), <https://socialmediacollective.org/reading-lists/critical-algorithm-studies/#4.3> [<https://perma.cc/4UQY-76C7>]. For a discussion of how algorithms may unintentionally encode bias on the basis of protected classes (ethnicity, gender, race, religion), see Michael Feldman et al., *Certifying and Removing Disparate Impact*, in PROCEEDINGS OF THE 21ST ACM SIGKDD INTERNATIONAL CONFERENCE ON KNOWLEDGE DISCOVERY AND DATA MINING 259 (2015), <http://dl.acm.org/citation.cfm?doi=2783258.2783311>. For the effect computational “nonreading” of texts—the pattern recognition that is the language of machine learning—may have on legal interpretation, see Mireille Hildebrandt, *The Meaning and the Mining of Legal Texts*, in UNDERSTANDING DIGITAL HUMANITIES 145, 148–49 (David M. Berry ed., 2012). There has been a broad discussion of bias in applications on the web. See, e.g., Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16 INFO. SOC’Y 169 (2000).

41. Friedman & Nissenbaum, *supra* note 5, at 330. Technical bias is one of the three biases that computer systems can display; the other two are emergent and preexisting. Emergent biases are those that arise in the actual use of the database; these biases can relate to new societal knowledge, differing expertise, differing values, or a mismatch between the user and the system design. *Id.* at 335. The preexisting bias in legal databases is, at a minimum, the structure of the law itself, and the content and classification systems that have been imposed on the law by legal vendors. *Id.* at 333; see also Hanson, *supra* note 30, at 569–72, ¶¶ 19–25. This was a gradual change, as the first computer retrieval systems included only the simple text of cases, with no structure or classification; the evolution to structure and classification was gradual. Harrington, *supra* note 30, at 543; see also Berring, *supra* note 21, at 1693, 1696. For an excellent history of the evolution of ideas about the effect of classification schemes on legal thinking, see Richard A. Danner, *Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law*, 99 LAW LIBR. J. 193, 2007 LAW LIBR. J. 13. The classification systems may also hide assumptions about the nature of the law that mask paths to justice. See Stump, *supra* note 18, at 573; see also Hildebrandt, *supra* note 40, at 148–49 (discussing the effect computational “nonreading” of texts—the pattern recognition that is the language of machine learning—may have on legal interpretation).

42. Cressman, *supra* note 19, at 6.

- association (“marks relationships between entities”); and
- filtering, which “includes or excludes information according to various rules or criteria.”⁴³

¶13 An interesting example of how assumptions or biases inform results is from a study on coding algorithms to enforce that exemplary seemingly simple rule of law, the speed limit.⁴⁴ What seems a relatively straightforward problem becomes dense with assumptions when one thinks about how to implement the law: do you enforce the letter of the law or the intent of the law; is every second you exceed the speed limit a separate violation; do weather or road conditions matter; how often should a driver be given a ticket; does context matter?⁴⁵ There were three groups of coders using actual driving data taken from a vehicle’s computer: the first group was asked to implement the letter of the law; the second group was asked to implement the intent of the law; the third group was asked to follow a detailed written specification.⁴⁶ The differences in the results of each coding scheme are stark: the number of tickets issued by the algorithms varied from zero to 661, for the same driving pattern.⁴⁷ All of the groups made assumptions independent of their instructions; for example, there were significant differences in how the first two groups coded tolerances for exceeding the speed limit, and all of the groups assumed, without instruction, perfect driving conditions.⁴⁸ As the authors of the study note, transparency about coding assumptions may be the only solution to success in implementing automated legal compliance or enforcement in a fair and open manner.⁴⁹

¶14 “Algorithmic accountability” is the term for disclosing prioritization, classification, association, and filtering.⁵⁰ What we need is a frank discussion with database providers about what it means to search in their databases. Trade secrets should not prevent algorithmic accountability. Some database providers do provide search tips that can help their users understand what happens between input and output;⁵¹ legal database providers also publish basic search information for their

43. Nicholas Diakopoulos, *Algorithmic Accountability: Journalistic Investigation of Computational Power Structures*, 3 DIG. JOURNALISM 398, 399 (2015). Black boxes result in technological opacity.

44. Shay et al., *supra* note 8, at 1.

45. See *id.* at 20 for a chart summarizing the differences in results for three groups of coders who were given three different assignments for coding violations.

46. *Id.* at 4–5.

47. *Id.* at 20.

48. *Id.* at 7–8, 14–15. The variations and subtle assumptions are quite varied, and the Shay article discusses only a few.

49. *Id.* at 30–31.

50. Diakopoulos, *supra* note 43, at 402.

51. For example, this information is from a help protocol from Summon, a discovery-layer search product, transmitted in an e-mail to the author because the information is behind the password-protected administrative module. E-mail from Joan Policastri, Collection Servs. & Research Librarian, Univ. of Colo. Law Sch., to author (Jan. 8, 2016, 12:05 PM MST) (on file with author). It would be more helpful if the information were readily available to users:

Boolean search and Summon relevancy algorithm: Boolean queries get processed by the same relevancy algorithm as any other query. This means relevancy enhancements that come from the application of stemming, character normalization, etcetera will apply in Boolean queries as well.

Applying the relevancy algorithm to Boolean queries is particularly helpful in Boolean searches using multiple search terms. For example: **paint drying time (glass OR wood)**.

users.⁵² The more we understand about the input into the black box, even without knowing the code for the algorithm, the more we can see how the system operates in practice. At the moment, we can really only see the output of the systems, and that is what this study investigates.

¶15 The need to know about the input, the paths that mark the way to the results, only increases as the amount of work being done by the algorithms increases. A case in point is the use of IBM's artificial intelligence program, Watson, by the medical community.⁵³ Watson is IBM's supercomputer, which uses artificial intelligence and machine learning to leverage large amounts of data.⁵⁴ Watson is better than humans at reading through documents and is starting to be used as a "quick-witted digital assistant" in oncology clinics, but with a caveat: doctors use it in conjunction with Watson Paths, a visual tool that allows a doctor to see the underlying evidence and inference paths Watson took in making a recommendation. "It's not sufficient to give a black-box answer," said Eric Brown, IBM's director of Watson technologies.⁵⁵ As decision makers, doctors want knowledge, not technological determinism.⁵⁶ Legal researchers need to demand the same kind of transparency.

What Legal Database Providers Say About the Search Experience

¶16 Some information on the search experience is available on each legal database. In terms of the basic types of search, researchers tend to refer to Boolean searching—meaning that the researcher uses terms and connectors, such as "and", "or", and "not",⁵⁷ to construct a search—and natural language searching—meaning

This Boolean query will provide a small relevancy boost for documents containing the words *paint*, *drying*, and *time* in close proximity to each other, which is a relevancy enhancement that previously did not apply to Boolean queries.

Id. Legal professionals who were expert searchers had compiled their own special tips and tricks for getting the best results, but those tips and tricks were for pre-2010 Boolean searching. New tips and tricks are necessary for keyword searching in the current set of search algorithms, but for the most part, these tips and tricks have not been revealed.

52. See *infra* ¶ 16.

53. Steve Lohr, *If Algorithms Know All, How Much Should Humans Help?*, N.Y. TIMES (Apr. 6, 2015), <http://www.nytimes.com/2015/04/07/upshot/if-algorithms-know-all-how-much-should-humans-help.html> [<https://perma.cc/48HA-N92U>].

54. Lauren F. Friedman, *IBM's Watson Supercomputer May Soon Be the Best Doctor in the World*, BUS. INSIDER (Apr. 22, 2014), <http://www.businessinsider.com/ibms-watson-may-soon-be-the-best-doctor-in-the-world-2014-4> [<https://perma.cc/UTD8-KQNR>].

55. *Id.*; see also *IBM Research: WatsonPaths*, IBM, <http://www.research.ibm.com/cognitive-computing/watson/watsonpaths.shtml> [<https://perma.cc/7FZZ-78JR>] (highlighting the visual image of the decision paths Watson shares with doctors to aid transparency and help doctors authenticate the value of the decision). IBM recently released Ross, the legal version of Watson, but nothing has been released about similar transparency in decision paths on the legal side. See *Watson Takes the Stand*, ATLANTIC, <http://www.theatlantic.com/sponsored/ibm-transformation-of-business/watson-takes-the-stand/283/> [<https://perma.cc/PQ5U-U4SQ>].

56. See Julie E. Cohen, *Network Stories*, LAW & CONTEMP. PROBS., Spring 2007, at 91, 92, ("What makes the network good can only be defined by generating richly detailed ethnographies of the experiences the network enables and the activities it supports, and articulating a normative theory to explain what is good, and worth preserving, about those experiences and activities.")

57. George Boole was a nineteenth-century mathematician, and his work on the analogies between algebraic symbols and symbols that represent logical forms and syllogisms resulted in the application of what is known as Boolean logic to searching. *George Boole*, BRITANNICA.COM, <http://>

that the researcher uses keywords without connectors.⁵⁸ However, the reference to natural language searching is frequently a misuse of a technical term that refers to a complex attempt to pattern-match speech or text “through references to a database with the aid of grammatical structures models”;⁵⁹ it does not technically refer to keyword searching where the terms entered into a text box are then ranked by algorithms for relevance, word count, citation count, or other nongrammatical structures.⁶⁰ This article will refer to searches entered into a legal database’s search box without terms and connectors as keyword searches, although efforts will be made to determine and then note whether there is natural language grammatical parsing utilized for a specific legal database. Even though this study focuses on one possible first step in the research process, where the researcher formulates a query, puts keywords in the search box, and looks at the first few results, the full research process is a more iterative, intuitive, and complex process⁶¹ that involves multiple

www.britannica.com/biography/George-Boole [<https://perma.cc/K6WK-9WQG>]; Gerard Salton et al., *Extended Boolean Information Retrieval*, 26 COMM. ACM 1022 (1983), <http://dl.acm.org/citation.cfm?id=358466>. This kind of searching is now more commonly referred to as “terms and connectors” searching. See, e.g., *Search Terms and Connectors*, UNIV. OF OXFORD, <https://www3.law.ox.ac.uk/lrsp/e/searchterms.php> [<https://perma.cc/8TBA-KRMN>].

58. *Searching Bloomberg Law, Lexis Advance and Westlaw: Natural Language v. Terms & Connectors Searching*, WASH U LAW, <http://libguides.law.wustl.edu/LRMSearchingIntro/SearchTypes> (“Natural Language Searching refers to the type of search you would do in Google: enter a few relevant terms in any order. The online service’s search algorithm takes control and delivers results it determines to be most relevant. Sometimes called Descriptive Term Searching, although technically Natural Language Searching is a different process. Terms & Connectors Searching refers to a targeted search strategy that instructs the computer to look for specific terms, often in a specific order and/or a specific proximity to one another. Also called Boolean Searching.”).

59. Takeshi Matsumoto et al., *Application of Search Algorithms to Natural Language Processing*, 1 PROC. AUSTRALASIAN LANGUAGE TECH. WORKSHOP U03-1003 (2003), <http://aclweb.org/anthology/U/U03/U03-1003.pdf>.

60. Natural language searching may include “vector space models, Bayesian inference net models, and language models.” Jack G. Conrad & Qiang Lu, *Next Generation Legal Search—It’s Already Here*, LEGAL INFO. INST.: VOXPOPULI (Mar. 28, 2013, 9:13 AM), <https://blog.law.cornell.edu/voxpath/2013/03/28/next-generation-legal-search-its-already-here/> [<https://perma.cc/4YPV-G8KM>]. Tamsin Maxwell, speaking of free text searching decontextualizing information, commented: “One thing to notice about current methods in open domain IR, including vector space models, probabilistic models and language models, is that the only context they are taking into account is proximate terms (phrases). At heart, they treat all terms as independent.” K. Tamsin Maxwell, *Pushing the Envelope: Innovation in Legal Search*, LEGAL INFO. INST.: VOXPOPULI (Sept. 17, 2009, 1:56 PM), <https://blog.law.cornell.edu/voxpath/2009/09/17/pushing-the-envelope-innovation-in-legal-search/> [<https://perma.cc/L8NQ-TR4G>]. But, Maxwell continues, “inference networks used in commercial legal [information retrieval] are not applied in the open domain,” and they can incorporate “index numbers, terms, phrases, citations, topics, and any other desired information” in a “directed acyclic graph (the network),” which can “then be used to estimate the probability of a user’s information need being met” by a specific document. *Id.* See also Staffan Malmgren, *Towards a Theory of Jurisprudential Relevance Ranking: Using Link Analysis on EU Case Law* (Sept. 4, 2011) (unpublished Master of Laws thesis, Stockholm University), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.397.3802&rep=rep1&type=pdf> (discussing the hidden complication of natural language indexing of documents in databases: attempts to augment the authentic text of legal sources with semantic metadata introduce an interpretation of the legal sources, which get hidden in the system unbeknownst to the user, even if users’ interpretations may differ from the system’s).

61. Boulder Statement on Legal Research Education (June 2009), https://lawlibrary.colorado.edu/sites/default/files/images/docs/2009_boulder_statement_on_legal_research_education.pdf [https://web.archive.org/web/20150922115957/http://lawlibrary.colorado.edu/sites/default/files/images/docs/2009_boulder_statement_on_legal_research_education.pdf]; Marcia J. Bates, *The Design of Browsing and Berrypicking Techniques for the Online Search Interface*, 13 ONLINE REV. 407, 408 (1989) (“Each

methods of starting and continuing a search.⁶² What the study in this article illustrates is that, since every algorithm and database interface is a completely human construct,⁶³ and every search is a completely human construct, the researcher must view the search process as a human interaction, moderated by technology, and not as a technological interaction.

¶17 Keyword searching is just one of many modes of searching.⁶⁴ Each database provider seeks to provide access to some of these other modes of searching and to enhance the search options with different tools that are presented to the researcher on the results screen.⁶⁵ This article is not investigating these secondary prompts. It is investigating one possible first step in the research process and comparing the results, to see how database algorithms differ. No researcher should stop their inquiry after just looking at the top ten results from one keyword search.

¶18 Algorithms in legal databases process search terms, assess the information in their databases, and then represent a set of the “best results.”⁶⁶ Even so simple-seeming a task as assembling the information to be searched has important implications for understanding the context of the information we see as a result of a

new piece of information they encounter gives them new ideas and directions to follow and, consequently, a new conception of the query. At each stage they are not just modifying the search terms used in order to get a better match for a single query. Rather the query itself (as well as the search terms used) is continually shifting in part or in whole.”) See also Aaron Kirschenfeld, *Everything Is Editorial: Why Algorithms Are Hand-Made, Human, and Not Just for Search Anymore*, LEGAL INFO. INST.: VOXPOPULI (Nov. 20, 2013, 9:56 AM), <https://blog.law.cornell.edu/voxpath/2013/11/20/everything-is-editorial-why-algorithms-are-hand-made-human-and-not-just-for-search-anymore/> [<https://perma.cc/26VD-9X5Y>] (“Computer assisted legal research cannot be about merely returning ranked lists of relevant results, even as today’s algorithms get better and better at producing those lists. Search must be only one component of a holistic research experience in which the searcher consults many tools which, used together, are greater than the sum of their parts.”).

62. O’CONNOR ET AL., *supra* note 38, at 127. The techniques most utilized by the novice researcher would seem to be grazing and satisficing. Grazing is “foraging in a space where evaluation and supply are not issues,” and satisficing is a form of settling for “what is most readily available with little or no regard for costs and benefits.” *Id.* at 129, 131.

63. *Id.* at 106; Kirschenfeld, *supra* note 61 (discussing the “artisanal” quality of algorithms, as something “massaged and kneaded by caring craftsmen”).

64. Bates, *supra* note 61, at 408.

65. See *infra* ¶¶ 20–28 (discussing the information a searcher might find to enhance the search process in each of the six legal databases in this study).

66. Gillespie, *supra* note 16, at 167–68 (speaking generally of algorithms in search); see also Conrad & Lu, *supra* note 60 (discussing the actual separation of retrieval from ranking in Westlaw). The difficulty of getting from the input—the processing of search terms—to the output—documents that satisfy the researcher’s information need—is the age-old problem of information retrieval. Bates, *supra* note 61, at 407–08. This is the same philosophical problem the structuralists are dealing with. Even enhanced with machine learning and natural language processing, the match in the middle is difficult to achieve because of the “value” between the signifier and the signified articulated by the structuralists. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 626–42 (2004). In a structuralist model of search, the document (or text) would be represented in the search process (by the algorithm creators) as a signifier. The researcher with the information need creates a query that is intended to retrieve information matching the mental idea or the signified. But there is always a problem in understanding caused by the context-specificity of words, or their “value”; for structuralists, words only have meaning in relation to “that which exists outside” them, such as synonyms or context. *Id.* at 641–42. The structuralists have identified a problem that exists in all human communication; our own “natural language processing” when communicating with each other is not fool-proof. When communicating with a computer, the problem is certainly no easier.

search.⁶⁷ Tarleton Gillespie calls this dimension “patterns of inclusion.”⁶⁸ Before an algorithm is deployed, the dataset of information to search must be assembled; this involves choices as to what is collected, how it is readied for the algorithm, and what is excluded or demoted.⁶⁹ Legal databases use similar primary law, but how it is readied for the algorithm differs: by the elements of metadata, relational, or object-oriented database architecture, for example, or the categories of classification that are chosen. Historical notes can be included or excluded. For all secondary sources, the effect of inclusion and exclusion in a database has an obvious effect on search results. Exclusion may be based on copyright, licensing, or editorial concerns.

¶19 The following section is a brief review of the published information about each database provider’s search algorithm and the various mechanisms used to enhance the search experience beyond the return of “relevant” cases. Just as no good legal researcher stops with reviewing the results of just one search string in a case law database, so no legal database provider stops with returning cases as a dead end to research. Indeed, each provider adds enhancements to the search results page to facilitate connections, in ways that may encourage those serendipitous connections that expert researchers prize and that some expert researchers worry the online interface will prevent.⁷⁰

Westlaw

¶20 Westlaw describes its search functionality as a combination of methodologies, and the promotional material does not clarify whether the methodologies include true natural language searching.⁷¹ The Westlaw interface lists its search as a “plain language” search,⁷² while early WestlawNext promotional material calls it

67. Gillespie, *supra* note 16, at 167–68.

68. *Id.*; see also Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions: The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307, 317–19, 2007 LAW LIBR. J. 18, ¶¶ 27–28 (finding the freedom from categories imposed by legal publishers in the online search environment somewhat illusory).

69. Gillespie, *supra* note 16, at 170–72; Jeffery Alan Johnson, *Representing “Inforgs” in Data-Driven Decisions*, in DIGITAL SOCIOLOGIES 163, 163–64 (Jessie Daniels et al. eds., 2017) (“Creating data requires some process that narrows the many possible representations of a given state of the world to a single data state. This process is carried out within translation regimes: systems of technical rules and social practices that establish a one-to-one correspondence between a given state of the world and a data state.”).

70. O’CONNOR ET AL., *supra* note 38, at 10–11. One dominant metaphor for searching has been the classic Aristotelian nature of access systems—which fails to address the whole of human engagement. The authors suggest the use of a bricoleur model. *Id.* Bricoleur is being used here in the Levi-Straussian sense of thinking and doing with the materials at hand. *Id.* For a full list of the kinds of search behavior that researchers engage in, many of which are not fully integrated into an online environment, see *id.* at 127–34. It is not really clear whether serendipity plays the same role in online searching as it does in print research or browsing the stacks; print resources have generally been felt to provide the most opportunities for analogic surprise. See, e.g., Robert J. Sheran & Douglas K. Amdahl, *Minnesota Judicial System: Twenty-Five Years of Radical Change*, 26 HAMLINE L. REV. 219, 365 (2003); Ryan Metheny, *Re-Searching: While Search Engines Have Made It Easy to Find Facts, Legal Research Still Benefits from a Methodological Approach*, L.A. LAW, Dec. 2014, at 27.

71. Thomson Reuters, *WestSearch: The World’s Most Advanced Legal Search Engine*, http://info.legalsolutions.thomsonreuters.com/pdf/wln2/l-355700_v2.pdf [<https://perma.cc/U8BP-NT37>].

72. Thomson Reuters, *Tips and Tricks to Get You Started on Westlaw*, http://static.legalsolutions.thomsonreuters.com/product_files/westlaw/wlawdoc/wlres/wln_tips_tricks_ug.pdf [<https://perma.cc/3FEQ-LGDV>].

“natural language” searching.⁷³ The search algorithm removes stop words; generates variations of words; identifies legal phrases, citations, topics, and key numbers; and then uses knowledge-based engineering, machine-learning techniques, and statistical classification to improve results.⁷⁴ What is clear from the promotional material is that Westlaw’s algorithm uses value-added content such as the human-generated Key Number System, notes of decisions and headnotes, and KeyCite’s citation networks, as well as commercial user document interaction history to return relevance-ranked results beyond the exact search terms entered.⁷⁵ Qiang Lu and Jack Conrad reveal that WestlawNext separates the function of document retrieval from document ranking, so that retrieval results in high recall (retrieving the highest possible number of relevant results of all the relevant results in the database), and then results are ranked, which “allows potentially dozens of weighted features to be taken into account and tracked as part of the optimal ranking process.”⁷⁶ This theoretically means that searching a small group of pre-selected documents, which used to be the preferred way to produce fewer results with higher recall, may not necessarily produce the same benefits in Westlaw anymore.⁷⁷

¶21 Once those results are returned,⁷⁸ Westlaw offers many options to enhance the search experience. The researcher can filter results by jurisdiction, topic,

73. Thomson Reuters, *WestSearch: WestlawNext Search Technology*, <https://docmh.com/embed/wlnsearch> [<https://perma.cc/S8GV-R5SL>] (“The WestSearch federated search employs natural language processing to retrieve relevant documents . . . [and] builds on the Westlaw Natural Language search method.”).

74. *Id.*; JIN ZHANG, VISUALIZATION FOR INFORMATION RETRIEVAL 25 (2008) (stop words are words that are not important within full text (e.g., “a,” “the,” and “and”); most search engines list such words).

75. Thomson Reuters, *supra* note 73 (“WestSearch combines sophisticated information retrieval, natural language processing, and machine learning to take maximum advantage of the editorial enhancements West editors have added to legal documents since 1876. . .”).

76. Conrad & Lu, *supra* note 60. Until recently, it has been an inviolable law of search that as recall goes up, precision goes down. Paul D. Callister, *Working the Problem*, 91 ILL. B.J. 43, 44 (2003). As far back as 1994, Westlaw’s own study of the relationship between precision and recall in the Federal Supplement database showed that as precision went up, recall went down at almost the identical rate. *Id.*

77. Research assistants were given sample instructions on limiting their search to a specific case database for each of the six databases in the study; in the example used below, the reverse was true for Westlaw; prefiltering produced *more* results. Here were the instructions:

- On the Start page, click on Cases.
- Click on Federal District Court Cases under “Federal Cases by court.”
- Click on the state where your district court is located (e.g., Michigan).
- Run your search (e.g., agency follows clear congressional intent).
- On the left, click open the District Court box and select your actual district (e.g., E.D. Mich.) ALSO use the filters on the left to limit your searches to reported cases and click APPLY FILTERS.

Note that in Westlaw, the results are different if you follow this path (2920 cases) than if you enter the search in the main search box first and then use the filters (clicking on cases/jurisdiction /reported) to limit the jurisdiction (4 cases).

78. For purposes of the discussion about the enhancements each database provider offers, I am using this query from Appendix B, available online at <http://scholar.law.colorado.edu/research-data/5/>. The search is: **criminal sentence enhancement findings by jury required**; entered as key words; the jurisdiction is the Sixth Circuit). The legal framework for evaluating results is: You are looking for cases discussing the constitutionality of increasing the penalty for a crime when the jury did not make a factual determination about facts that enhanced the penalty. The enhancements are what show up on the screen after limiting the jurisdiction and entering Query 1. For a full discussion of the search protocols, see *infra* ¶¶ 30–44.

reported status, judge, attorney, law firm, key number, party, and docket number. In addition, Westlaw's results page recommends secondary sources on the right, as "Related Documents." These documents may or may not be relevant to the information need of the researcher, depending on the level of the search's success in retrieving relevant results.⁷⁹

Lexis Advance

¶22 Lexis Advance's stated worldview is that its search results should be as inclusive as possible but the same whether jurisdictional filtering is performed before or after entering the search terms.⁸⁰ Lexis Advance engineers produced a video on the search algorithm, and they state that their customized search algorithm uses automatic phrase recognition, case name recognition, proximity search between terms, and activity score boosting in the ranking algorithm.⁸¹ The video calls search without connectors "natural language" searching.⁸² Relevance ranking purportedly gives priority to legal phrases and moves documents up based on concentration of terms (how close the terms are to each other), coverage of terms (whether all the terms appear in the document), prominence of the opinion, and how recent the opinion

79. The relevance of the secondary sources recommended is related to the relevance of the results generated by the search. See *infra* ¶ 54. In this *one* instance, the secondary sources were not helpful.

80. LexisNexis, *Differences That Deliver: The Power of Lexis Advance Search*, http://www.lexisnexis.com/documents/pdf/20160803090042_large.pdf [https://web.archive.org/save/_embed/http://www.lexisnexis.com/documents/pdf/20160803090042_large.pdf]. This information was provided by LexisNexis after the author discussed the concept of algorithmic accountability with a Lexis representative, so asking for help is a useful thing to do. Interview with David Dilenschneider, Senior Dir. of Client Relations for LexisNexis (Mar. 4, 2015) (notes on file with author). In Dilenschneider's view, this is what differentiates Lexis Advance from Westlaw. As part of this philosophy, the algorithms have been adjusted so that the search returns the same number of results whether the researcher pre-filters the search results by limiting the search to a particular jurisdiction, or performs it post-search.

Here were the search instructions for limiting a search to a specific court database in Lexis Advance:

- Enter your search (e.g., agency follows clear congressional intent).
- Click the filters arrow next to the search box.
- The top limiter is jurisdiction. Check federal district courts.
- Run the search (e.g., agency follows clear congressional intent).
- Scroll down on the left to Jurisdiction and click on your circuit. Note that you have to know which circuit you are in (e.g., the Sixth).
- Now you can see, under Court, the Eastern District Michigan. Click on that.
- ALSO use the filters on the left to limit your searches to reported cases.

Note that in Lexis Advance, prefiltering and postfiltering should give you the same number of cases (e.g., 338 cases). I have not figured out another way to limit the search to a specific district court.

81. LexisNexisLawSchools, *Understanding the Technology and Search Algorithm Behind Lexis Advance*, YouTube (Oct. 8, 2013), <https://www.youtube.com/watch?v=bxJzfYLwXYQ&feature=youtu.be> (discussed at 13:06 and following).

82. *Id.*

is.⁸³ Lexis Advance also states that changing word order or stop words will generally not alter the search results.⁸⁴

¶23 When searching in a case database, Lexis Advance offers further filtering by court, date, publication status, practice area, attorney, law firm, most cited, keyword, and judge. Lexis does not offer any secondary sources when searching in a case database until the researcher clicks on a case; then the researcher can view a “Legal Issue Trail” that highlights important passages of the case being viewed, or the researcher can Shepardize the case and view secondary sources.⁸⁵

Fastcase

¶24 Fastcase supports using a natural language algorithm.⁸⁶ According to Fastcase’s promotional materials, “natural language searches are much less precise” than Boolean searches, “but they are a good place to start if you are new to legal research, or if you are delving into a new area of the law.”⁸⁷ Ed Walters, CEO of Fastcase, says that natural language is good if you are totally at sea, but only then.⁸⁸ The natural language algorithm returns cases with “the highest relevance scores based on [the researcher’s] overall mix of search terms.” The results may include cases that do not have all of the search terms.⁸⁹ In Fastcase, the researcher chooses to use natural language searching, and the same number of results are returned whether he or she filters before or after the search.⁹⁰

83. See LexisNexis, *Lexis Advance Faculty FAQs*, http://www.lexisnexis.com/documents/pdf/20111216091630_large.pdf [https://web.archive.org/web/20160620151641/http://www.lexisnexis.com/documents/pdf/20111216091630_large.pdf]:

Lexis Advance uses a variety of proprietary methods in producing relevant results for our users; “relevance” as we have defined it means that the document a user would expect to find in their results appears as one of the first five documents in a user’s results set. To ensure this result, Lexis Advance includes, but does not limit, the following:

- a. Automatic phrase recognition
- b. Case name recognition . . .
- c. Proximity search between the terms
- d. Activity score boosting in the ranking algorithm (i.e. “landmarkness” of the case).

84. LexisNexis, *supra* note 80.

85. For this *one* instance, there were no relevant further materials to be found either following the relevant Legal Research Trail or reviewing secondary sources in the *Shepard’s* report.

86. *Frequently Asked Questions: What Are Boolean Searches, Natural Language Searches and Citation Searches?*, FASTCASE, <http://www.fastcase.com/faq/> [<https://perma.cc/K77N-HB9W>]; E-mail from Ed Walters, Chief Exec. Officer, Fastcase, to author (May 4, 2015, 15:01 MST) (on file with author).

87. *Documentation and Resources*, FASTCASE, <https://www.fastcase.com/support/> [<https://perma.cc/KQ5X-UEZR>].

88. E-mail from Ed Walters, *supra* note 86.

89. Fastcase finds that “[l]awyers, law professors, and law students will always get better results searching with Keyword (aka Boolean) searches.” *Id.*

90. Here are the instructions given to research assistants to limit results to a specific jurisdiction:

- On the Start page, click Advanced Case Law search on the left, or the link at the top of the page.
- Enter your search (e.g., agency follows clear congressional intent).
- Leave the Keyword Search button on.
- Click on the Individual Jurisdictions radio button on the left, under Select Jurisdictions select US District Courts, and click on your specific court (e.g., Michigan Eastern District). Make sure that the start date (under Search Options) is January and Before 1925.
- Make sure the results are sorted by relevance.

¶25 Once case search results appear, Fastcase supplements the results with Forecite, an algorithm that suggests relevant cases that do not include the words in the researcher's search, and results from HeinOnline's law reviews and journals database. Again, the relevance of the law review articles is related to the relevance of the search results.⁹¹ Fastcase recently released "Customize Relevance Algorithm," which allows the researcher to see which factors Fastcase is using in its ranking algorithm and allows researchers to adjust the weights to suit particular research strategies, which, of course, may change with the context of the problem being solved.⁹²

Ravel

¶26 Ravel Law's Quick Start Guide describes how its search algorithm works when key words are entered:

Ravel finds all cases that contain those keywords and then ranks them based on a combination of how those keywords appear in the case, and how important that case is more broadly. Ravel ranks the importance of each case by looking at the citation network—assessing how many and which other cases cite to a given case.⁹³

Ravel therefore appears to be using term inclusion, term proximity, term frequency, and citation analysis to determine results, and then, on the main results page, providing a unique visualization tool to help lawyers find more relevant cases. Ravel's visualization shows the top seventy-five results based on the keywords entered.⁹⁴ The visualization map shows circles for cases; the larger the circle, the more important the case is in terms of the number of times it has been cited.⁹⁵ Of course, the relevance of the cases shown in the visualization is related to the relevance of the cases returned in the results set as a whole.⁹⁶ Once a researcher clicks on a case in the list to read, "case analytics" on the left direct the researcher to information

-
- Run the search.
 - Filter out unpublished cases.

Note that following this path leads to an exact number of results (e.g., 68 results); and filtering to the specific court after the search is done yields the same results (e.g., 68 cases) versus filtering to the specific court after the search is done (e.g., 927,000+ cases).

91. In this *one* instance, the secondary sources were helpful.

92. This is available on Fastcase 7, once a researcher clicks on "Advanced Search."

93. RAVEL, RAVEL LAW QUICK START GUIDE 16, https://d2xkqp20fm9wy8.cloudfront.net/downloads/Ravel_QuickStart_Guide.pdf [https://web.archive.org/save/_embed/https://d2xkqp20fm9wy8.cloudfront.net/downloads/Ravel_QuickStart_Guide.pdf].

94. *Id.* at 5. Ravel returns a list of cases on the right, ranked by relevance, and a visual map of the seventy-five most relevant cases shows on the left, which can be filtered by court and relevance.

95. *Id.*; see also Ravel Law, *Overview of Ravel's Data Visualization*, VIMEO (May 11, 2015), <https://vimeo.com/127559698> [<https://perma.cc/GK5M-NXAH>].

96. Daniel Lewis, the CEO of Ravel, explains, "What we try to communicate about visualization is that it's tailored to the way that *lawyers* do research, which is about fitting together 20–30+ cases, which is a very different kind of research than doing a Google search." E-mail from Daniel Lewis, Chief Exec. Officer, Ravel Law, to author (Mar. 31, 2016, 15:18 MST) (on file with author). For this *one* query, the visualization map was not that helpful without further refinement.

about how each page has been cited.⁹⁷ (Note: In June 2017, LexisNexis announced that it had acquired Ravel Law.⁹⁸)

Casetext

¶27 Casetext's relevance algorithm is a function of key word frequency, citation count, date, and jurisdiction.⁹⁹ The user interface lists the results by relevance, although the researcher can re-sort by date or citation count. There are tabs that lead the researcher to other texts, regardless of jurisdiction, and to organizations, communities, and posts.¹⁰⁰ Once the researcher opens a relevant case, Casetext provides "Summaries from Subsequent Cases" and "Key Passages from this Case." The summaries are parentheticals, showing how the case has been paraphrased by later judicial opinions. Key passages are extracted important language from the case, together with the number of times the extract has been cited by later courts.¹⁰¹ Casetext does not provide a filter for jurisdiction.¹⁰²

97. RAVEL, *supra* note 93, at 7. Ravel Law Case analytics show how pages within a case have been cited: the left column within a case shows how each page in an opinion has been cited by later cases, and the citations are grouped when they discuss a similar principle of law. The more citations a page has, the more stars appear next to the page number. Ravel results are the same whether you filter before or after running the search. Here are the instructions given to research assistants to limit results:

- At the home page, enter your search (e.g., agency follows clear congressional intent).
- In Jurisdictions, start typing your court (e.g., Eastern District of Michigan).
- Do not collect unreported cases or Supreme Court cases.

Note that the results are the same whether you prefilter or postfilter. If you limit jurisdiction first, you get 216 cases. If you search before filtering, the search returns 26,483 cases, but after postfiltering for jurisdiction, the results are the same: 216 cases.

98. News Release, LexisNexis Announces Acquisition of Ravel Law (June 8, 2017), <https://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1496247082681222> [<https://perma.cc/8PND-N2VK>].

99. E-mail from Pablo Arredondo, Vice President, Legal Research, Casetext, to author (June 12, 2016, 17:33 MST) (on file with author).

100. In this *one* query, the top post results were not relevant. The posts are crowd-sourced by lawyers, students, and librarians, and as such, are a form of heteromation, where the labor of a group is free and is used to enhance an automated experience. See Hamid Ekbia & Bonnie Nardi, *Heteromation and Its (Dis)contents: The Invisible Division of Labor Between Humans and Machines*, FIRST MONDAY, June 2, 2014, <http://firstmonday.org/ojs/index.php/fm/article/view/5331> [<https://perma.cc/DT45-GLS6>] (discussing an experiment using a free online community to solve folded protein puzzles, called FoldIt).

101. Hannah Doherty, *Master Case Law in Just 5 Steps with Casetext Pro*, CASETEXT (Mar. 23, 2016), <https://casetext.com/orgs/casetext/posts/mastering-case-law-in-just-5-steps> [<https://perma.cc/Q6KY-VLLW>]. Step 1 is understanding the law, which is supported by the summaries; step 2 is finding the important key passages, which is supported by the passages and a heatmap that shows how frequently other court opinions and articles cite to each case in the opinion. For a detailed discussion of the utility of parentheticals to understand the evolution of a case over time, see Pablo D. Arredondo, *Harvesting and Utilizing Explanatory Parentheticals*, 1 LEGAL INFO. REV. 31 (2015–2016).

102. Here are the search instructions given to research assistants to limit results by jurisdiction in Casetext:

- At the home page, enter your search (e.g., agency follows clear congressional intent).
- Under Jurisdictional Filters, open the plus sign, select US District Courts, and then select your court (e.g., Eastern District of Michigan).
- There is only postfiltering in Casetext. Filter out unreported cases.
- Filter out any Supreme Court cases.

Google Scholar

¶28 Google Scholar's case law database is meant to provide the general public with access to the law.¹⁰³ According to its "About" page, "Google Scholar aims to rank documents the way researchers do, weighing the full text of each document, where it was published, who it was written by, as well as how often and how recently it has been cited in other scholarly literature."¹⁰⁴ A study was done of Google Scholar's ranking algorithm, and the authors believe that Google Scholar gives the most weight to citation counts.¹⁰⁵ The occurrence of a search term in the title is also important, but search term frequency in the full text does not seem to impact the ranking.¹⁰⁶ Google Scholar does not search for synonyms.¹⁰⁷ When limiting a search by jurisdiction, the results are the same whether filtering before or after searching.¹⁰⁸ When entering a query into the search box for Google Scholar, the page with the results of the search is just a list of cases. A researcher has to look at an individual case to get any links to other resources, such as the "how cited" function, which will take the researcher to other cases and related documents.¹⁰⁹

Cost

¶29 The cost of these six databases varies widely. Without discussing actual cost, it is safe to say Westlaw and Lexis Advance are the most expensive options; Fastcase is a low-priced option; the cost of Ravel's¹¹⁰ publicly accessible resources is currently unknown; Casetext¹¹¹ is free, although new additions to the database, like CARA, require payment; and Google Scholar is free.

103. Dr. Anurag Acharya, Distinguished Engineer, Google, Presentation at AALL Annual Meeting & Conference: Searching Legal Opinions: The Google Scholar Approach (July 22, 2012) (session recording on file with author).

104. *About Google Scholar*, GOOGLE SCHOLAR, <https://scholar.google.com/intl/en/scholar/about.html> [<https://perma.cc/UN94-R8TP>].

105. Joeran Beel & Bela Gipp, *Google Scholar's Ranking Algorithm: An Introductory Overview*, in 1 PROCEEDINGS OF THE 12TH INTERNATIONAL CONFERENCE ON SCIENTOMETRICS AND INFORMETRICS (ISSI'09) 230, 230–32, 241 (Birger Larsen & Jacqueline Leta eds., 2009), <http://docear.org/papers/Google%20Scholar's%20Ranking%20Algorithm%20--%20An%20Introductory%20Overview%20--%20preprint.pdf>.

106. *Id.*

107. *Id.*

108. Here were the search instructions given to the research assistants to limit results to a specific jurisdiction:

- On the home page, enter your search (e.g. agency follows clear congressional intent).
- Click on the case law radio button and then click on the "Select courts" link.
- Under the Sixth Circuit, click the ED Michigan box and then scroll up or down and click the DONE button (652 results).

The number of results is the same if you limit by court first, click DONE, and then go back and enter your search terms. Note that Google Scholar does not include unreported cases.

109. For the results of the *one* query, there were no secondary sources in the first few pages of results that listed in "related documents."

110. Lexis acquired Ravel on June 8, 2017. Robert Ambrogi, *Harvard's Statement On Ravel Law's Acquisition by LexisNexis Confirms Continued Public Access to Cases*, LAW SITES (June 9, 2017), <https://www.lawsitesblog.com/2017/06/harvards-statement-ravel-laws-acquisition-lexisnexis-confirms-continued-public-access-cases.html> [<https://perma.cc/W86U-ZD8V>]. Ravel and Harvard state that they are committed to keeping the case law free. *Id.* It is no longer clear whether free access will include visualizations and annotations, as was the case before acquisition.

111. Casetext's case search and annotations are free, and some other enhancements are currently free. CARA, Casetext's brief analyzer, is a subscription product. *CARA Research Suite*, CASE-TEXT, <http://casetext.com/pricing> [<https://perma.cc/6DXM-U3KL>].

The Empirical Study

Methodology

¶30 One of the unique things about legal databases is that you can set up a sandbox of nearly identical sets of information. By limiting searches to the subset of reported cases within a specific jurisdiction and using the same search terms in each database, it is possible to compare search results in a nearly identical group of documents.¹¹² If, for example, a search is executed in a database of all reported cases from the Northern District of California, there should be, in theory, an identical set of documents regardless of which legal database is searched. In actuality, a very small margin of potential difference occurs because each database may have a slightly different start date for coverage.¹¹³

¶31 The current study arose out of a single search prepared for a presentation on algorithms in 2013.¹¹⁴ The same search entered into different databases produced starkly varied results. For the presentation, the author looked at a single keyword search—the right to receive information¹¹⁵—across four databases. The results are shown in table 1.

¶32 Cases marked in light grey are unique and relevant,¹¹⁶ while cases that are not colored are unique and not relevant. Of the forty cases shown, seventy percent

112. The coverage in each of the databases studied is as follows:

- Casetext has published federal circuit and district court cases from 1925 to present. *Search Queries*, CASETEXT, <https://casetext.com/search-queries> [<https://perma.cc/KD8T-96SQ>].
- Ravel has published circuit court cases from 1925 and published district court cases from 1933. *What Does Ravel's Case Coverage Include?*, RAVELAW, <https://ravellaw.zendesk.com/hc/en-us/articles/212634578-What-does-Ravel-s-case-coverage-include-> [<https://perma.cc/JPG8-BRQS>].
- Fastcase has published circuit court cases from 1924 and published district court cases from 1932. *Scope of Coverage*, FASTCASE, <http://www.fastcase.com/coverage/> [<https://perma.cc/RP4Q-WSXU>].
- Google Scholar has published circuit and district court opinions from 1923 to current. *Google Scholar Search Tips*, GOOGLE SCHOLAR, <https://scholar.google.com/intl/en/scholar/help.html#coverage> [<https://perma.cc/G8CF-39WG>].
- Lexis Advance has published circuit and district court cases from 1791 forward, as jurisdictions are added. *LEXISNEXIS, LEXIS ADVANCE CONTENT LISTING 3–5* <https://web.lexis.com/help/research/ContentListing.pdf> [<https://web.archive.org/save/embed/https://web.lexis.com/help/research/ContentListing.pdf>].
- Westlaw has published circuit courts cases from 1891 to current. *U.S. Courts of Appeals Cases*, WESTLAW, <https://1.next.westlaw.com/Browse/Home/Cases/USCourtsOfAppealsCases> (click on “i” button) (last visited July 4, 2017). Westlaw’s coverage for district court cases is 1779 to current, as jurisdictions have been added. *Federal District Court Cases*, WESTLAW, <https://1.next.westlaw.com/Browse/Home/Cases/FederalDistrictCourtCases> (click on “i” button) (last visited July 4, 2017).

113. *Id.* All database providers have coverage for all federal cases since 1933; since only two cases in the three thousand cases reviewed in the project were earlier than 1933, minor differences in the earliest years of coverage may be deemed a matter of little importance.

114. Susan Nevelow Mart et al., Panel discussion at the Association of American Law Schools 2013 Annual Meeting: Understanding Search Engine Algorithms: Can We Effectively Teach Legal Research Without Them? (Jan. 6, 2013) (session notes on file with author).

115. The right to receive information is a small but well-defined concept in constitutional law. See Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 2003 LAW LIBR. J. 11.

116. “Relevance” is a highly disputed term. Relevant for the purpose of the searches discussed in this article means that, measured against a statement of relevance given for each search, the

Table 12013 Comparison *right to receive information*

Lexis Advance	Fastcase	WestlawNext	Google Scholar
Celotex v. Catrett	Alderson v. US	Bd. of Educ. v. Pico	Virginia State Bd. of Pharmacy
Anderson v. Liberty Lobby	Fuller v. Dep't of Navy	Virginia St. Pharm. Bd. v. Virginia Consumers	Stanley v. Georgia
Branzburg v. Comm'r	Aitken v. Comm'r	Stanley v. Georgia	Martin v. Struthers
Houchins v. KQED	Gal-Or v. US	Martin v. EPA	Griswold v. Connecticut
US v. Polizzi	Warren Browne v. IRS	Neinast v. Bd. of Trustees	Kleindienst v. Mandel
Kreimer v. Bd. of Police	US v. Whitnery	Kreimer v. Bd. of Police	Red Lion v. FCC
Virginia St. Pharm. Bd. v. Virginia Consumers	Doe v. City of Albuquerque	Doe v. City of Albuquerque	Bd. of Educ. v. Pico
Santa Monica Pictures v. Comm'r	Texas Medical Providers v. Lakey	Sund v. City of Wichita Falls	Procurier v. Martinez
San Antonio Sch. v. Rodriquez	US v. Morriss	Cline v. Fox	Lamont v. Postmaster Gen.
Columbia Broadcasting System	US v. Holmes	Kleindienst v. Mandel	Pell v. Procurier

(twenty-eight cases) are unique, while forty-two percent are both relevant and unique. Cases colored dark grey appear in more than one database; seven of the cases are in two results sets. One case is in three databases. No case is in all four databases.¹¹⁷ Three takeaways result from this effort:

1. All four databases included irrelevant results in the top ten results.
2. Seventy percent (28 of 40) of the cases were unique to one database.
3. Of those unique cases, slightly more than half (16 of 28) were both relevant and unique.

¶33 At least for one search, every algorithm was offering unique and relevant cases not returned in the top ten results by the other databases. So every algorithm had something interesting to add to the legal construct created by the searches being entered into the database. Knowing that algorithms do not remain the same and that later-decided cases will be added to the database, the identical search was run in the same four databases in 2016. The results are shown in table 2.

case would or most likely would be put in a review pile for more detailed examination; that is, the case has the potential to be helpful to a research project on this legal subject. The statement of relevance for this search was “You are looking for cases that discuss factual situations involving the right to receive information as a listener or recipient of information.” For a more detailed discussion of relevance, see *infra* ¶¶ 47–48.

117. In 2013, eighty percent of the LexisNexis results were relevant by my standards. But only ten percent of the Fastcase results were relevant. The natural language search information in Fastcase says if you type in words, “You will get cases that best match the words and phrases in the query,” but many of the cases in the results did not have the phrase “right to receive information.” The algorithm was not privileging proximity in a way that would return cases first that had those four words right next to each other.

Table 2*2016 Comparison right to receive information*

Lexis Advance	Fastcase	WestlawNext	Google Scholar
Illinois v. Gates	Morris v. Equifax	Stanley v. Georgia	Stanley v. Georgia
Branzburg v. Hayes	Wis. Rt. to Life v. Barland	Bd. of Educ. v. Pico	Virginia St. Pharm Bd. v. Virginia Consumers
Virginia St. Pharm. Bd. v. Virginia Consumers	Hull v. IRS	Virginia St. Pharm. Bd. v. Virginia Consumers	Martin v. Struthers
Kreimer v. Bd. of Police	Sorrell v. IMS Health, Inc.	Doe v. Governor of N.J.	Griswold v. Connecticut
Bd. of Educ. v. Pico	Wood v. Ryan	Martin v. EPA	Kleindienst v. Mandel
Gregg v. Barrett	Essential Info. v. USIA	Doe v. City of Albuquerque	Bd. of Educ. v. Pico
Family Trust v. Wolnitzek	Info. Resources v. US	Neinast v. Bd. of Trustees	Red Lion v. FCC
Stanley v. Georgia	McKesson v. Bridge Med.	N.Y. Times v. Sullivan	Procunier v. Martinez
Paris Adult Theater v. Slaton	Sense v. Shinseki	Kreimer v. Bd. of Police	Pell v. Procunier
Kleindienst v. Mandel	Weaver v. USIA	Near v. Minnesota	Lamont v. Postmaster Gen.

¶34 LexisNexis now has just one irrelevant result, but only three of the cases from 2013 show up here. Seven cases are new, even though all of the new cases existed in the database when the first search was performed.¹¹⁸ Fastcase now has two relevant results, but all ten results are new, and only two of those new results were not available in the database when the first search was done.¹¹⁹ Westlaw now has two irrelevant cases, and three cases are new.¹²⁰ All of Google Scholar's cases are the same, but the order in which they were returned changed. The Google Scholar algorithm seems to have been worked on the least. This chart illustrates very clearly that search results change over time by more than the mere addition of new cases to the database. The percentages of unique cases—sixty-seven percent (27 of 40)—remained about the same over time, while the percentage of cases that were both relevant and unique went up slightly—sixty-six percent (18 of 27). But the results from just one search, while provocative, are not statistically significant.

¶35 The study was expanded to fifty different searches. Many of the searches were taken from the author's previous study of digests and citators,¹²¹ and new searches were generated by the author's random reviews of current law review articles for legal concepts that might make a good search. Each search had to turn up at least ten

118. None of the new cases are more recent than 2013, when the first search was performed.

119. Of those ten new results, two are dated 2014, after the first search was performed.

120. One of the three new cases was decided in 2015, after the first search was performed.

121. Susan Nevelow Mart, *The Case for Curation: The Relevance of Digest and Citator Results in Westlaw and Lexis*, 32 LEGAL REFERENCE SERVS. Q. 13 (2013).

results in each of the six legal databases, so that the research assistants could compare the top ten results from each database. Not every search worked in every database, and not every jurisdiction returned sufficient results in some of the databases.¹²² It is possible that focusing on cases with a robust search history, as was done for this study, introduces some bias of its own, but this was unavoidable.¹²³

¶36 The searches were all simple keyword searches, and each was crafted to include multiple words and at least one legal phrase or legal concept and to work in each legal database.¹²⁴ Because not all databases seem to recognize legal phrases with the same consistency, this may have introduced some bias in favor of algorithms that recognize more legal phrases without quotes. But researchers intuitively expect that cases that have the words next to each other will, because of proximity, be returned in the top results. Algorithms that do not privilege proximity to the extent that a case with the four words from the search right next to each other are returned before results with those same four words scattered through the text are not meeting researchers' expectations.¹²⁵ The searches were designed to be medium-good¹²⁶ starting searches. For an actual research problem, of course, if the results from the first search were disappointing, the researcher would refine the search, adding or changing words and word order, or trying different resources. One hopes no researcher would stop with one search or one resource.

¶37 Here are three of the searches used in the study:

- special relationship constitutional duty protect public from crime (N.D. Cal.)
- job performance racial classification constitutional (D.D.C.)
- administrative search 4th amendment warrant requirement (S.D.N.Y.)¹²⁷

122. Research assistants were asked to run the searches and find the number of results in each database prior to entering any data into the spreadsheet or reading cases to determine relevancy. To make the comparison of results consistent, each search had to return at least ten results in the chosen jurisdiction. If the original query did not return at least ten results in each of the six legal databases, first the search was tried in other, larger jurisdictions. If that did not work, a new variation of the query was crafted. If the query did not work in any jurisdiction, the query was discarded and a new query crafted. Of the fifty queries originally created, the jurisdictional case database was changed fifteen times, three search queries were revised, and two queries were discarded.

123. The statistical analysis performed on the fifty queries in six different legal databases for the top ten queries (3000 cases) is descriptive statistics. See *Analysis: Descriptive Statistics*, RES. METHODS KNOWLEDGE BASE, <http://www.socialresearchmethods.net/kb/statdesc.php> [<https://perma.cc/WJ7B-6U22>]. Regarding the selection of cases, see also Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 105 (2008) ("The goal in selecting cases is not a perfect match between sample frame and research conclusions, but only a reasonable connection between the two. Inevitable imperfections in case selection methods often will not seriously threaten the entire validity of the study's findings. It usually suffices to acknowledge limitations fairly briefly."). The data sets for this study are available at <http://scholar.law.colorado.edu/research-data/6/> (data files).

124. For example, just adding quotes around a legal phrase will improve most searches. However, at the time the study was designed, one could not add quotes in Westlaw without adding **adv.**, and that changes the search to a Boolean search. Since the searches had to be identical in each database, a search without quotation marks worked in all databases.

125. This expectation is based on years of discussions the author has had with legal research students about searching. This expectation may not be correct, but then researchers need to know that. This is another instance where algorithmic accountability would be useful. It is also possible that databases that return cases where the words are scattered are not using citation analysis as one of their forms of relevancy ranking.

126. Medium-good means a little thought has gone into creating a search, but not a lot.

127. See Appendix B, *supra* note 78, for the text of all fifty searches.

Where the search was “special relationship constitutional duty protect public from crime,” the student coder was told: You are looking for cases where, despite the fact that state officials normally have no constitutional duty to protect the public at large from crime, the duty is (or is not) imposed by virtue of a special relationship between state officials and a particular member of the public (you are looking for the factual contours of a special relationship).

¶38 For the search “job performance racial classification constitutional,” the research assistant was told: You are looking for cases that discuss situations where job performance is or is not related to race (parameters of acceptable racial classifications for work). And for the search “administrative search 4th amendment warrant requirement,” the coder was told: You are looking for cases about administrative searches and whether or not the search requires a 4th amendment warrant.

¶39 These instructions set the stage for relevance determinations. If a case could be helpful to the legal construct in the statement of relevance in any way, it would be coded as very likely or likely relevant enough to go into the pile for later, more thorough review. Cases that seemed not to be relevant were either very likely or likely to go into the discard files; these were the cases that would not need later review. This expansive view of relevance was meant to ensure that cases that might work by analogy would be included as relevant. While this is certainly a subjective view of relevance, it is the way lawyers actually do a quick review of cases, mentally sorting results into helpful or not helpful to the legal problem. Stuart Sutton sees this as the creation of mental models of an area of law and as a basic determination lawyers make; in his view, “[a] relevant case is one that plays some cognitive role in the structuring of a legal argument.”¹²⁸ Even though the study has tried to define relevance in the most expansive way, human coding of relevance has its own biases. Additionally, percentage of relevant documents may not be the best measure of relevance. For example, if the top ten results from one database have only two relevant cases, but those two are the most relevant in that area of the law, that might be a better result for the research than a search that returns eight relevant documents but misses those top two most relevant cases. To determine relevance at that level of granularity requires subject expertise in each specific legal domain related to each search, which was not possible for this study.

¶40 The decision to limit the review to the top ten results was based on several factors. One factor was the sheer amount of time it takes to review cases. Fifty queries in six legal databases and ten results per database is three thousand cases to review. The ten-result limit also fits in with actual user studies of the primacy of the top ten results in searchers’ behavior: the default page view on Google, for example, is ten results, and studies have found that researchers who are used to online searching will usually stop reading after the top ten results¹²⁹ and try

128. Stuart A. Sutton, *The Role of Attorney Mental Models of Law in Case Relevance Determinations: An Exploratory Analysis*, 45 J. AM. SOC’Y INFO. SCI. 186, 187 (1994).

129. Jessica Lee, *No. 1 Position in Google Gets 33% of Search Traffic [Study]*, SEARCH ENGINE WATCH (June 20, 2013), <https://searchenginewatch.com/sew/study/2276184/no-1-position-in-google-gets-33-of-search-traffic-study> [<https://perma.cc/A6TC-L7SF>] (showing that page 1 results (top ten) received ninety-two percent of all traffic); Daniel E. Rose & Danny Levinson, *Understanding User Goals in Web Search*, in PROCEEDINGS OF THE 13TH INTERNATIONAL CONFERENCE ON WORLD WIDE WEB 13 (2004), <http://dl.acm.org/citation.cfm?id=988675> (documenting a decrease in willingness to look at more than one page of search results). In academic research, researchers are noticing

another search¹³⁰ or another legal resource.¹³¹ One would expect in any event that the goal for each legal database provider would be to present the most potentially relevant results in the top ten, and Lexis Advance explicitly defines “relevance” as a “document a user would expect to find in their results appears as one of the first five documents in a user’s results set.”¹³²

Hypotheses

¶41 There were three hypotheses for the study. The study was framed in the usual way, by stating a null hypothesis and then testing to see whether it was proved or disproved.¹³³ One null hypothesis was that, because the search algorithm for each legal database was trying to achieve the same result in the same pool of information by finding relevant cases, each algorithm would find the same cases. Another null hypothesis was that, because the algorithms all rank relevance, and the goal is to return relevant cases, the top ten cases would all be relevant. The last null hypothesis was that the research assistants coding the results for the statistical study would not agree on relevance. To test the last hypothesis first, in addition to the ten queries each research assistant reviewed across all six legal databases, each of the five research assistants reviewed five of the same queries, chosen with a random number generator. Using standard tests, the research assistants had moderate concordance.¹³⁴ More than moderate concordance can probably not be expected of legal reviewers, as ranking relevance is a highly subjective task even when constrained by the parameters set out for the research assistants in this study.¹³⁵

“horizontal information . . . skimming . . . where people view just one or two pages from an academic site and then ‘bounce’ out.” Ian Rowlands et al., *The Google Generation: The Information Behaviour of the Researcher of the Future*, 60 ASLIB PROC. 290, 294 (2008), <http://www.emeraldinsight.com/doi/pdfplus/10.1108/00012530810887953>. But see Gerard de Melo & Katja Hose, *Searching the Web of Data*, in PROCEEDINGS OF THE 35TH EUROPEAN CONFERENCE ON ADVANCES IN INFORMATION RETRIEVAL 869, 869 (Pavel Serdyukov et al. eds., 2013), <http://dl.acm.org/citation.cfm?id=2458300> (positing that searchers don’t want “10 blue links,” they want “actionable information”).

130. In fact, a recent study showed that researchers using online databases to solve an ill-structured legal research problem used multiple searches; one researcher entered ten search strings in seven minutes in an attempt to get to a case on a legal principal she thought of. Stefan H. Krieger & Katrina Fischer Kuh, *Accessing Law: An Empirical Study Exploring the Influence of Legal Research Medium*, 16 VAND. J. ENT. & TECH. L. 757, 775, 778 (2014).

131. On the principle of least effort in information theory, see Marcia J. Bates, *An Introduction to Metatheories, Theories, and Models*, in THEORIES OF INFORMATION BEHAVIOR 1, 4 (Karen E. Fisher et al. eds., 2005). For an example of the principle of least effort at work, see Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59 (2013).

132. LexisNexis, *supra* note 83.

133. Regarding the null hypothesis, see CHARLES WHEELAN, *NAKED STATISTICS: STRIPPING THE DREAD FROM THE DATA* 148–50 (2013). To put the issue of null hypotheses in a simple legal context, in a criminal trial, the null hypothesis is that the defendant is presumed innocent; to reject the null hypothesis, the jury must find that the defendant is guilty “beyond a reasonable doubt.”

134. The tests used were Krippendorff’s alpha and an intraclass correlation. There was moderate concordance for all five raters based on Krippendorff’s alpha (.50) and an intraclass correlation of .55.

135. See also Jeffrey T. Luftig, *Statistical Analysis of the Data, Susan Nevelow Mart Study of Search Functions in Lexis and Westlaw*, <https://dspace.library.colostate.edu/handle/10974/12902?show=full> [https://web.archive.org/save/_embed/https://dspace.library.colostate.edu/bitstream/handle/10974/12902/StatisticalAnalysisDataUploadVersion.pdf?sequence=6&isAllowed=y], for a positive concordance finding for the research assistants making legal document relevance determinations, where the concordance results were similar to the findings in this study.

¶42 The importance and immutability of the relevance rankings in this study must not be overstated. The relevance determinations were subjective, were constrained by the state of each algorithm at the exact time the research was performed, and were further limited by the precise legal problem posed by the statement of relevance for each query. Different researchers, using the same search terms, could be trying to solve a slightly different legal problem and could reach much different determinations of relevance. What can be concluded from the data the study used is that at the time the queries were run, with the human, algorithmic, and legal constraints that then existed, the relevance rankings of the raters give an accurate although subjective snapshot of relevance for the six databases.

¶43 In addition to a relevance ranking for each case, the research assistants also noted the name of the cases returned, the jurisdiction that was being searched, the date of the case, the number of results returned by the search for each database, and the number of databases that case citation was found in (ranging from unique and only in one database to found in all six databases). The determinations that were made from this raw data are discussed in the next section.

¶44 While each search within a jurisdiction had to return at least ten results to qualify for the study, the range of cases returned by query in each of the databases was large. As an example, the range of the number of cases returned in the results for Query 1, using the same search terms in the same jurisdictional case database, was 123, 909, 1730, 1197, 677, and 25.¹³⁶

Results

Uniqueness of Cases

¶45 In the study of one query, when the search was performed, there was very little overlap¹³⁷ in cases in the results for the four databases tested.¹³⁸ The first null hypothesis was that when there was a large number of searches, that result would not hold true. Because the search algorithm for each legal database was trying to achieve the same result in the same pool of information by finding relevant cases, the algorithms would find the same cases. As chart 1 illustrates, the null hypothesis was disproved by the study, and each algorithm returns an average of forty percent unique cases in its search results.

¶46 The percentage of cases in each category is very consistent across all of the searches. An average of 25 percent of the cases are in only two databases. An average of 15 percent of the cases appeared in three databases, while an average of 9.5 percent of the cases appeared in four databases. Slightly less than 7 percent of the cases appear in five databases and in six databases. So each group of human engineers is solving the search problem in very different ways and illustrating that each algorithm has something interesting to say about what a searcher is looking for, but not the same interesting things. A fair percentage of cases from each database provider will give a researcher a unique set of cases to look at.

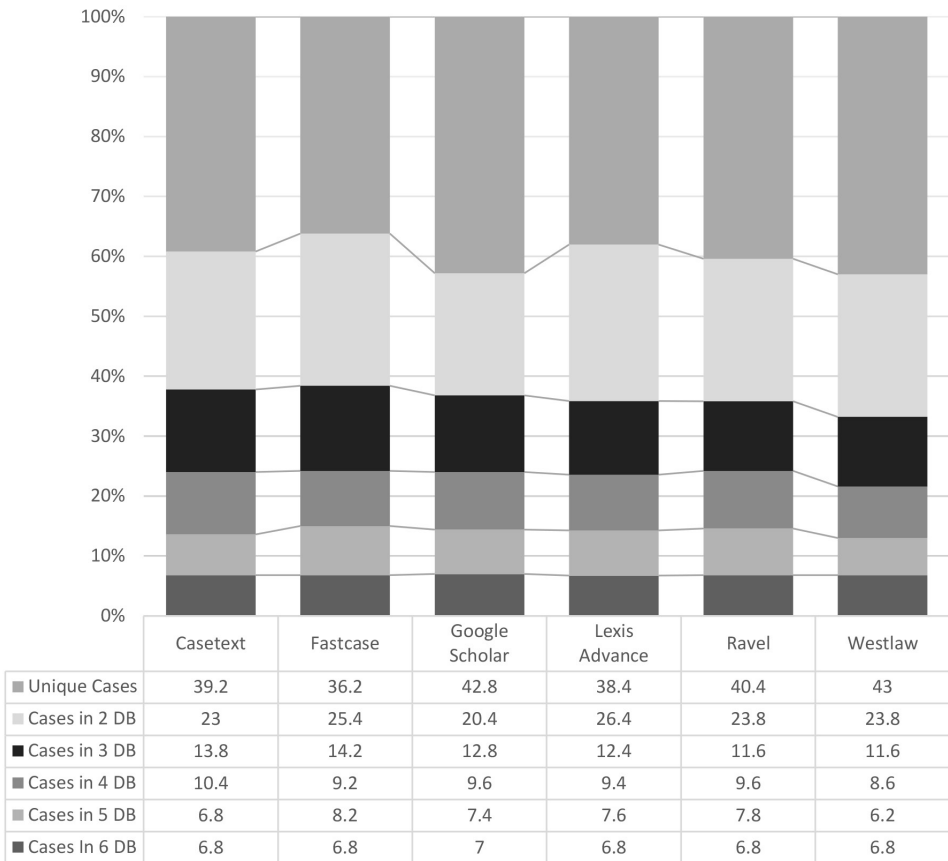
136. See chart 1 for a full representation of the data on the number of cases returned. Query 1 can be found in Appendix B, *supra* note 78.

137. Overlap in this comparison is the occurrence of a specific case in two or more databases.

138. See *supra* ¶ 33.

Chart 1

The Uniqueness of Cases in Each Database



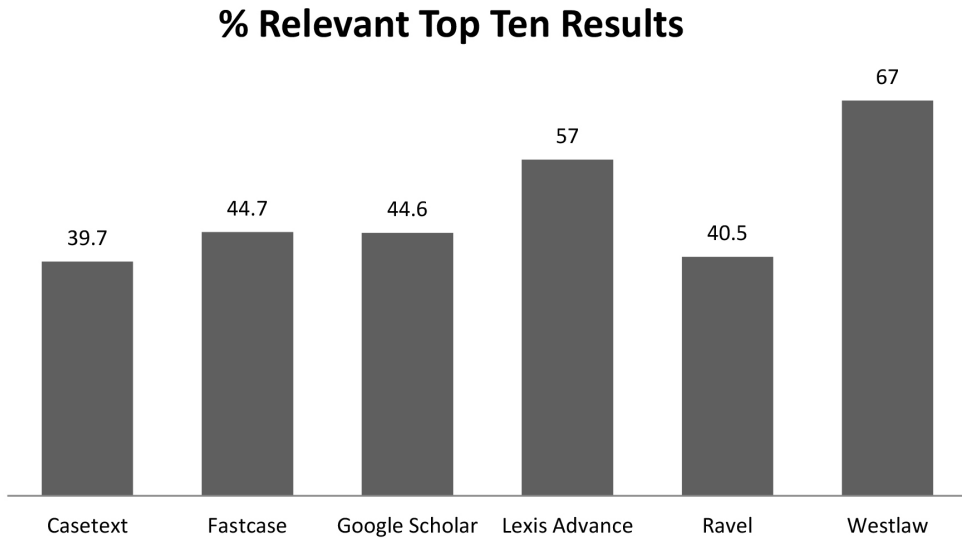
Relevance

¶47 The next null hypothesis was that because the algorithms all rank relevance, and the goal of each algorithm is to return relevant cases, the top ten cases would all be relevant. That hypothesis was disproved. Chart 2 illustrates how many of the results found in the top ten results for each database were relevant by the standards set out in my hypotheses.¹³⁹ Recall that the standard for relevance was subjective but expansive. There were more relevant results for the venerable legal database providers LexisNexis and Westlaw, at fifty-seven percent relevance for Lexis Advance and sixty-seven percent for Westlaw; the newcomers Casetext, Fastcase, Google Scholar, and Ravel were clustered together near forty percent relevance.

139. See *supra* ¶¶ 41–44.

Chart 2

The “Relevance” of the Top Ten Cases in Each Database

**Table 3**

The “Relevance” of the Top Ten and Top Five Cases Compared

Database	Top Ten	Top Five
Casetext	39.7	45.0
Fastcase	44.7	49.2
Google Scholar	44.6	46.0
Lexis Advance	57.0	64.4
Ravel	40.5	43.8
Westlaw	67.0	77.6

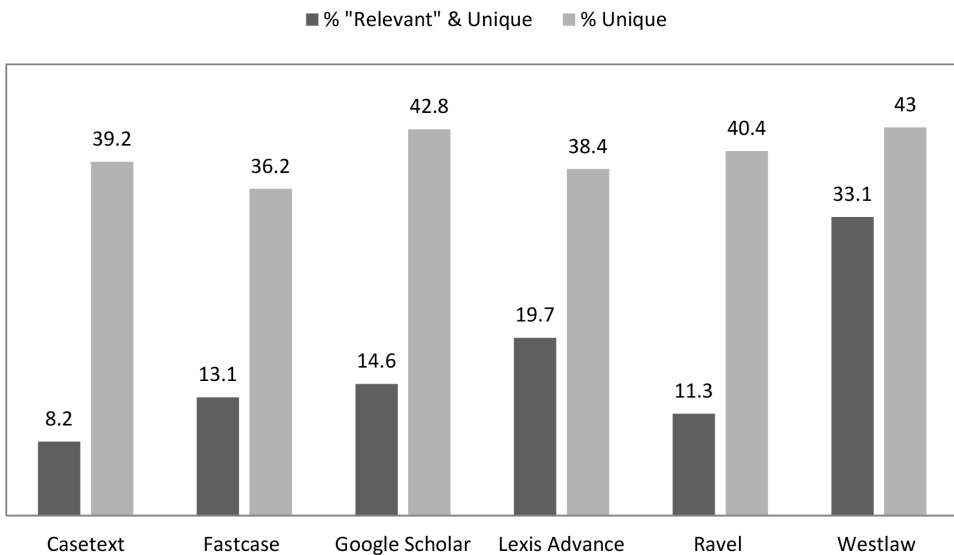
¶48 If you take a look at only the top five results, the number of cases Lexis Advance posits should all be relevant,¹⁴⁰ the percentages of cases that are relevant increased slightly for every database, but no one achieved one hundred percent relevance for those cases (see table 3).

140. LexisNexis, *supra* note 83.

Chart 3

The “Relevance” of the Top Ten Cases in Each Database

Percentage Relevant and Unique

*Relevant and Unique*

¶49 As chart 2 illustrates, each database has an average of forty percent unique cases in the top ten results, and the remaining cases have little overlap. That means that each database is providing a significant number of unique results. One question a researcher might want to know is, of those unique results that each database is providing, how many are relevant?

¶50 Chart 3 shows that Westlaw returns the most relevant results in the unique category. Although there is a diminishing payoff for the remainder of the databases, each unique relevant case is one more opportunity to find a “relevant case . . . that plays some cognitive role in the structuring of a legal argument.”¹⁴¹ The idea that every database has an individual worldview of cases, classification systems, and commentary that it mines for relevant cases, and that therefore each database’s algorithms return unique, relevant cases that may contribute to solving a legal problem that is not fully resolved by searching in only one database, is not an easy concept to communicate to novice researchers. The best way for researchers to internalize the concepts is to figure it out on their own, and Appendix A provides a sample problem for students to illustrate the work of algorithms in legal databases. Since practicing lawyers do not have access to all resources, knowing how to design multiple strategies and searches in the resources one has access to is also a lesson novices need to learn, but it is a lesson legal research professors are used to imparting.

141. Sutton, *supra* note 128, at 187.

Number of Results Returned by a Query

¶51 The study also looked for any statistical correlation between the number of results returned and relevance. For each query in a specific database, the number of results is the same, but since the relevance rank given to each of the top ten cases may not be the same, an average of the relevance rankings across the top ten results was used to see whether relevance changed as the number of results changed. The number of cases returned by each database is reported in chart 4 at the 25th, 50th, and 75th percentiles.

¶52 Lexis Advance returns the highest number of cases, which is interesting when compared to the average relevance rating across most databases. In table 4, you can see that the average relevance of the top ten results stays fairly constant even when the number of results increases. For Lexis Advance, average relevance actually increases as the number of results increases.

Age of Cases

¶53 For the age of cases returned in each database, the following results show that Google Scholar returns the highest percentage of older cases, while Westlaw, Fastcase, and Casetext return the highest number of newer results. (See chart 5.) Age of cases did not correlate in any statistically significant way with relevance.

Discussion

¶54 There is no way to account for the higher percentages for Lexis and Westlaw and the clustering effect for the newer database providers, beyond speculation. It may be that the much greater investment in classification (as in key numbers and concomitant legal phrase recognition), mining of secondary sources, and leveraging machine learning from user search history gives Westlaw the greatest edge, as its largely human-generated classification system is the oldest.¹⁴² In an earlier comparison of the classification systems in Westlaw and LexisNexis, the human-curated system in Westlaw had an advantage over LexisNexis's largely algorithmically generated classification system that despite changes in each company's algorithms and interfaces still seems to make a difference.¹⁴³ LexisNexis's results are the second most relevant, and this may be because LexisNexis's algorithms utilize a topical classification system that it has been refining with machine learning since 1999,¹⁴⁴ a large collection of secondary sources, and, as the first online legal database, the longest repository of user history.¹⁴⁵ As Frank Pasquale has noted, having a large user base that contributes to the search algorithm with every search means that the "incum-

142. The West Key Number System began in the 1890s. Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its Promotions*, 6 CHARLESTON L. REV. 231, 234–35 (2012).

143. Mart, *supra* note 121, at 13, 16, 25–29, 59. In the study, comparing the results of Key Number searches (key numbers are largely human-generated) with Lexis Topics searches (topics are largely computer-generated), Westlaw's results were 61.7% relevant, while the Lexis Topic results were 36.7% relevant. *Id.* at 37.

144. *Id.* at 16.

145. LexisNexis became publicly available in 1973. For an interesting history of online access to legal opinions, see Gary D. Spivey, *Remembering James M. Flavin: The Origins (and Unintended Consequences) of Online Legal Research*, N.Y. ST. B. ASS'N J., Feb. 2008, at 11, 18.

Chart 4

Number of Results Returned by Each Search, by Percentile

25th, 50th, and 75th Percentile for Number of Results Returned

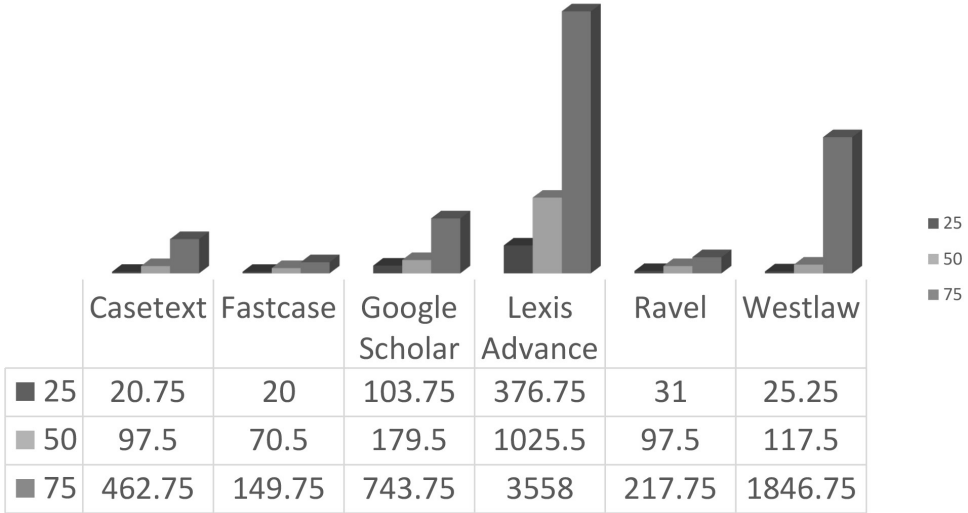


Table 4

Average Relevance Rating Within Number of Results Returned

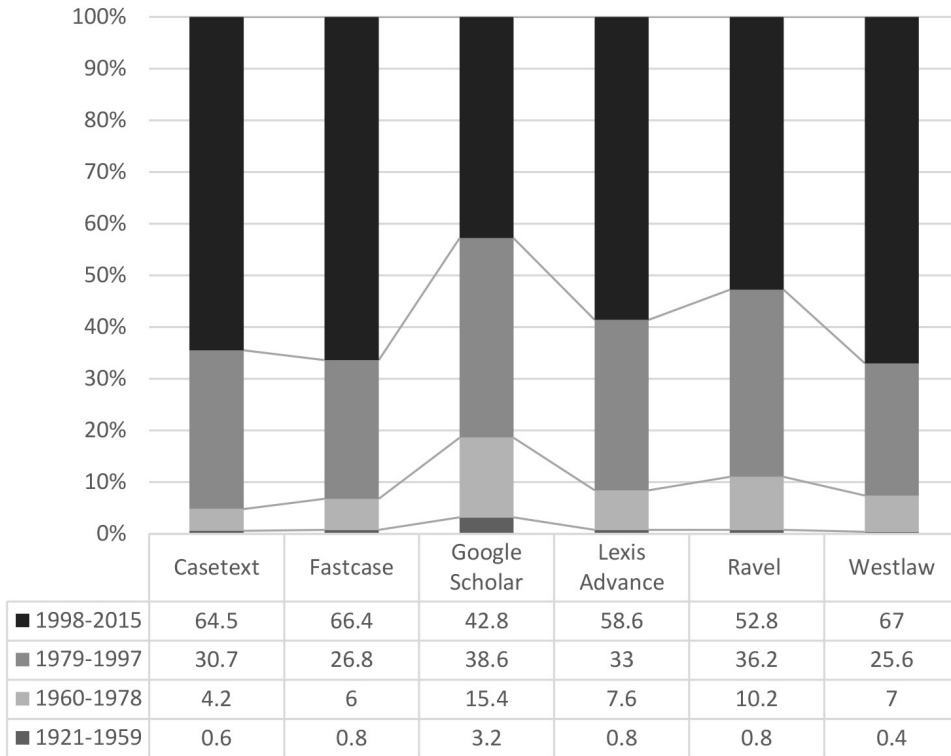
# Cases	Casetext	Fastcase	Google Scholar	Lexis Advance	Ravel	Westlaw
<100	2.2316	2.3896	2.3091	2.6	2.4692	3.1455
100-499	2.4	2.4583	2.45	2.55	2.1289	2.8857
500-999	1.95	1.9967	2.6429	2.4	1.72	3.2
1000-1999	2.04		1.86	2.8727	2.1	3.0167
>2000	1.425	2.05	2.16	2.96	1.3500	2.65

bents with large numbers of users enjoy substantial advantages over smaller entrants.¹⁴⁶ It is therefore not that surprising that the legal database providers with the largest user base and the longest search history to mine exhibit one kind of advantage over the newcomers. In terms of the general relevance of top ten results, there is an advantage to using the older providers’ algorithms.

146. Frank Pasquale, *Dominant Search Engines: An Essential Cultural & Political Facility*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 401, 411-12 (Berin Szoka & Adam Marcus eds., 2010).

Chart 5

Age of Cases in Each Database



¶55 In addition, the West classification system and the LexisNexis classification system reflect a nineteenth-century worldview.¹⁴⁷ The classification systems are not identical,¹⁴⁸ of course, and Westlaw and LexisNexis each has a unique set of sec-

147. The asserted hegemony of the West worldview is thoroughly discussed in Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305 (2000). But see Joseph A. Custer, *The Universe of Thinkable Thoughts Versus the Facts of Empirical Research*, 102 LAW LIBR. J. 251, 2010 LAW LIBR. J. 14. Of course many lawyers did not use legal publications that incorporated the West classification system. But to the extent that the Langdellian method of teaching law recreates a similar classification decade after decade, generations of law students have parsed out the levels of classification in, for example, the formation of a contract, in ways very similar to the West system. Compare CLAUDE D. ROHWER & ANTHONY M. SKROCKI, *CONTRACTS IN A NUTSHELL*, at ix–xxvii (7th ed. 2010), with WEST’S *ANALYSIS OF AMERICAN LAW: GUIDE TO THE AMERICAN DIGEST SYSTEM* 370–82 (2015). Although the exact outlines differ, the subject matter is broken down into similar patterns of essentials for formation, interpretation, performance, and defenses or breach. So is the Topic outline for contracts in LexisNexis, where Topics to look at include formation, condition, performance, interpretation, breach, and defenses. Whether the worldview is based on the West classification system itself or the Langdellian worldview that older classification systems reflect, newer legal research databases may be freer of whatever limitations that worldview imposes.

148. Mart, *supra* note 121, at 18–21.

ondary sources for its algorithms to mine. The classification differences and the differing set of secondary sources voices that contribute to search results lead to two possible kinds of viewpoint discrimination. The first is one law librarians have long dealt with in acquiring treatises and secondary sources for law library collections. Budgets allowing, librarians want more than one authorial viewpoint in their collections because a treatise is only *one* author's view of the law; it is not the law. Since the different authorial viewpoints provided by the very different list of secondary sources in Westlaw and Lexis Advance are baked into their respective search results, it is not surprising that the results from Lexis Advance and Westlaw are different. Every database has about forty percent relevant cases. Of those, Westlaw has thirty-three percent relevant and unique cases in the search results while Lexis Advance has twenty percent.¹⁴⁹ It is possible that those different relevant results reflect the different classification systems and secondary sources. So long as researchers have to deal with databases that import viewpoints into their algorithms, it seems to be a positive that each offers results based on differing classification and authorial viewpoints.

¶56 The second kind of viewpoint discrimination is one we don't think about that much, and that is the nineteenth-century worldview of the legal system explicitly embedded in Westlaw's Key Numbers and in Lexis Advance's Topics. These classification systems, while not identical, follow a pattern that is familiar to anyone who has taken contracts in law school. It is firmly based in the Langdellian view of the world, where the subject matter is broken down into similar patterns of essentials for formation, interpretation, performance, defenses, and breach.¹⁵⁰ This view is a form of filtering, for better or worse, and the newer legal research databases may be freer of whatever limitations that worldview imposes. Over the years, legal researchers have complained that these older classification systems break down as new legal concepts emerge, and may actually impede research.¹⁵¹ The newer entrants into the legal markets may be offering, in their forty percent of cases that are unique, something outside the range of that old worldview, and with the value-added results that users see on the results page,¹⁵² they may be offering new forms of serendipity in search. Researchers looking for an alternative may gravitate toward database providers that offer search results from different worldviews of the legal universe.

149. See chart 3 *supra*.

150. See discussion ¶ 54 *supra*.

151. Hanson, *supra* note 30, at 569, ¶ 16 (noting that researchers in "developing areas of law such as civil rights sometimes have found the West digest system and other traditional research techniques to be more a hindrance than a help").

152. See *supra* ¶¶ 20–28 for a discussion of the value-added features each database provider presents to the researcher once a search has been executed.

Conclusion

¶57 This study produced several specific findings about the six legal databases studied. For results that return the largest number of more recent cases, researchers should turn to Casetext, Fastcase, and Westlaw. The highest percentages of relevant cases, as defined in this study, are found in Lexis Advance and Westlaw. Google Scholar has the most older cases in its results. And Lexis Advance returns searches with the most results. More generally, the study shows that every algorithm starts with a different set of biases and assumptions. Even for returning results from searches in a specific case database, every algorithm draws on a different set of sources and processes, whether those sources and processes are classification systems, secondary sources, citation networks, internal case analyses, mined user search history, or machine learning deployed in the unique environment each legal database provider offers. These algorithmic variations in worldview lead to substantial variations in the unique and relevant results each database provides. The knowledge of this variability expands the opportunities for researchers to find relevant cases that can play “some cognitive role in the structuring of a legal argument.”¹⁵³

¶58 Legal information literacy requires lawyers to be “self-reliant in their investigations” of the law.¹⁵⁴ Legal research professors hope to teach their students to achieve the metacognitive skills required to be self-reliant. Black-boxing the research process is not helping educators or students achieve this goal. Algorithmic accountability will help researchers understand the best way to manipulate the input into the black box and be more certain of the strengths and weaknesses of the output. Asking for that kind of accountability can be successful. It was successful for doctors using Watson in oncology departments,¹⁵⁵ and, in response to requests, some of the database providers have made some of their assumptions much clearer.¹⁵⁶ This article is, in part, a call for each of us to request more accountability from database providers and for database providers to proactively think of algorithmic accountability as a way to improve research results for their users. It is as true now as it was in 1963, when Reed Lawler wrote *What Computers Can Do*: “If you ask the wrong question, you will get the wrong answer.”¹⁵⁷ We need more detailed information to ask the right questions. The answers will allow legal researchers to be the engaged humans they need to be when working with computer algorithms.

153. Sutton, *supra* note 128, at 187.

154. Dennis Kim-Prieto, *The Road Not Yet Taken: How Law Student Information Literacy Standards Address Identified Issues in Legal Research Education and Training*, 103 LAW LIBR. J. 605, 606, 2011 LAW LIBR. J. 37, ¶ 1.

155. See Friedman, *supra* note 54.

156. LexisNexisLawSchools, *supra* note 81.

157. Reed C. Lawler, *What Computers Can Do: Analysis and Prediction of Judicial Decisions*, 49 A.B.A. J. 337, 338 (1963). Lawler was a “pioneer investigator in the application of computer technology and modern logic to the law.” *Id.* at 337. He believed that only those “trained in the law have the skill for asking good legal questions. The computer scientist’s job is to translate the question into machine language.” *Id.* at 338. The human/machine teamwork Lawler foresaw continues to evolve.

- A. Are the cases that you found in Google Scholar relevant to your legal issue? Are they about your motion, your area of law, and your defense? If they are relevant, highlight them.
- B. Are the cases that you found in Lexis Advance relevant to your legal issue? Are they about your motion, your area of law, and your defense? If they are relevant, highlight them.
- C. Are the cases that you found in Westlaw relevant to your legal issue? Are they about your motion, your area of law, and your defense? If they are relevant, highlight them.
- D. How many of the cases are in only one database? ___ In two? ___ In all three? ___

To Leave or Not to Leave—Law Libraries and the FDLP: A Decade Later, Is That Still the Question?*

Lauren Michelle Collins**

Law libraries have long been accepted as integral to the FDLP mission of free access to government information. Though the FDLP model lags behind the times and conditions force many to consider withdrawal, coming change in the FDLP's structure should encourage law librarians to maintain membership and embrace future roles.

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Introduction

¶1 In the summer of 2016, at the Cleveland-Marshall College of Law Library, we were forced to choose between two job positions—one that, among other duties, included the coordination of our participation in the Federal Depository Library Program (the FDLP or the Program), and one that would manage our growing institutional repository. We chose the latter, leaving the question of who would manage our participation in the FDLP uncertain. Just weeks before, the main campus library lost its documents coordinator to retirement and was not permitted to fill the position. At the same time, management at both libraries was considering limiting the hours we were open to the general public due to recent petty thefts and at least one uninvited overnight guest. Though these issues had been quickly resolved, we theorized that these crimes of opportunity could be minimized in the evenings when staffing was light by closing to the general public at 8 P.M. Since building access is an important consideration under FDLP guidelines, this raised a second potential challenge to our FDLP membership. The question of withdrawal was raised more than once as we determined how we would handle these changes. These circumstances are probably familiar to many other law librarians.

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¶2 Most of the librarians involved in the process of determining how our documents are managed had no strong feelings for or against remaining in the FDLP since many of the library's government information patrons were directed to free online government resources available from the Government Publishing Office (GPO),¹ independent of FDLP membership, or purchased from commercial vendors. Only our cataloger was adamantly against withdrawing. From her perspective, the time that staff would need to dedicate to withdrawal would be much more demanding in the short term than the time commitment (just a few hours per month) required to manage the limited print documents we still received through the FDLP and infrequent program reviews. Accounts of the nightmare of withdrawal—including listing each item for other libraries to claim, removing records from the catalog (almost 33,000 for us, including 14,000 items that would have to be recalled from off-site storage), and the potential loss of historical items to regional depositories—are a part of librarianship lore and literature that she did not wish to experience firsthand. Instead of chancing a difficult withdrawal, she argued that the library should remain in the Program by relying primarily on electronic government information, perhaps even decreasing selections below the already low 2.48% currently collected, and committing to her department's continued management of the few items still received in print. For her, leaving the FDLP was not a viable solution for our library. In different circumstances, others have come to the opposite conclusion, but not without much consideration of the role law libraries have played in the FDLP goal of an informed public.

¶3 The question of whether to stay in the FDLP is neither new nor unique. Just this year, the GPO published a report on libraries leaving the FDLP between 2007 and 2015.² Though focused on public libraries, the report shows that a total of 112 libraries left the FDLP during this period.³ Though overwhelmingly general academic and public libraries, five were law libraries.⁴ With the backdrop of the challenges being faced in legal education within this time period, it is surprising that law libraries made up such a small percentage of the members leaving the FDLP. Though the status of law libraries in the Program has been examined before, considering these new challenges, the availability of government information independent of FDLP status, and the data showing other libraries leaving the Program, a reexamination of law library participation in the FDLP seems due.

¶4 This article will recount the literature of the late 1990s and early 2000s, when some librarians, considering the changing form of government information, questioned whether the FDLP would survive in its existing form and recommended

1. Since 2014, under the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. No. 113-235, § 1301, 128 Stat. 2130, 2537–39 (2014), the former Government Printing Office has been redesignated the Government Publishing Office. Both names are used in this article, depending on the time of the reference.

2. U.S. GOV'T PRINTING OFFICE, TO BETTER SERVE AND SUPPORT PUBLIC LIBRARIES: GPO'S ANALYSIS AND FINDINGS ON PUBLIC LIBRARIES LEAVING THE FEDERAL DEPOSITORY LIBRARY PROGRAM BETWEEN 2007–2015 (2017), <https://www.fdpl.gov/file-repository/about-the-fdpl/special-reports-from-gpo/2836-to-better-serve-and-support-public-libraries-gpo-s-analysis-and-findings-on-public-libraries-leaving-the-federal-depository-library-program-between-2007-2015-final-report/file> [<https://perma.cc/D77H-5AKK>].

3. *Id.* at 14.

4. *Id.* at 24.

FDLP changes that would keep depository libraries engaged as the means of accessing digital government information evolved. In the later 2000s, articles and reports included comprehensive suggestions to the GPO, by and on behalf of library associations, of ways to make depository libraries stronger partners in the FDLP. Possibly in response to these calls for reform, the GPO polled depository libraries in its 2012 *FDLP Forecast Survey* to gauge interest and commitment to new and evolving roles for depository libraries responsive to the digital environment in which we now find most government information. This article will summarize the results of that survey. The article will then present the results of an independent survey of academic law libraries conducted by the author to find out whether law library leaders are considering withdrawal from the FDLP or still find FDLP partnership an essential component of access to government information through their libraries. Finally, the article will briefly outline GPO plans for the FDLP released in 2016. Ultimately, the article concludes that whether to withdraw from the FDLP may no longer be a timely question for most law libraries as the GPO works on plans to forge a more modern relationship with libraries, one that better aligns with contemporary law library missions, capabilities, and priorities.

Early Examinations of the Question of Withdrawal

¶5 Whether there is a continued need for law library membership in the FDLP is a question that has been raised several times over the last decade. In one 2007 article, the author posited that “academic law librarians play an essential role in promoting democracy through participation in the Federal Depository Library Program.”⁵ This continued a long tradition of scholarship examining the questions of how and whether academic libraries should continue to participate in the FDLP. Almost a decade before, Laura Orr-Waters had outlined the benefits of FDLP membership, as well as arguments against continued participation.⁶ In the years between the publication of these articles, more libraries withdrew from the FDLP than had in the then-recent past; “between August 1998 and August 2001, the number of libraries leaving the Federal Depository Library Program (FDLP) increased by more than a third over the previous three years.”⁷ At least one academic law library withdrew from the FDLP during this period.⁸ The FDLP had been “originally based on a geographic model of information access,”⁹ the goal of which was to “ensure no matter how far a citizen lived from the seat of power, he or she could gain knowledge of the inner workings of the government through the wide dispersal of the information it produced.”¹⁰ However, the means of delivering government information was changing, and this was

5. Tammy R. Pettinato, *Legal Information, the Informed Citizen, and the FDLP: The Role of Academic Law Librarians in Promoting Democracy*, 99 *LAW LIBR. J.* 695, 695, 2007 *LAW LIBR. J.* 44 ¶ 1.

6. Laura Orr-Waters, *Love It or Leave It: Government Depositories in Law Libraries*, 15 *LEGAL REFERENCE SERVS. Q.*, nos. 3/4, 1996, at 133.

7. Yvonne T. Lev et al., *Making the Decision to Relinquish U.S. Document Depository Status*, 2 *PORTAL: LIBR. & ACAD.* 413, 413 (2002).

8. Elizabeth M. McKenzie et al., *Leaving Paradise: Dropping Out of the Federal Depository Library Program*, 92 *LAW LIBR. J.* 305, 305, 2000 *LAW LIBR. J.* 27, ¶ 2.

9. Pettinato, *supra* note 5, at 695, ¶ 2.

10. *Id.*

beginning to impact the perception of the effectiveness of the FDLP based on geographic access.

¶6 As early as the late 1990s, the geographic model was first questioned by academics who asked whether the movement of government documents to electronic formats, and the promise of even greater migration, potentially brought the citizenry to the seat of power virtually, no matter their home locations. This direct connection between the citizen and government information led many to question the continuing role of libraries in attaining the ultimate goal of supporting an informed citizenry.¹¹ When increased accessibility of government information in electronic formats and the decline of the academic library budget collided, library directors began to wonder whether the resources directed to supporting FDLP membership should be shifted to meet other institutional priorities.¹² These questions were soon echoed in the context of law libraries.¹³ Considering the current downturn in overall law school attendance¹⁴ and its impact on law school finance,¹⁵ and the resulting reconsideration of some library services, particularly to secondary patrons, it is likely that changes in institutional priorities are currently on the table for many law libraries.

¶7 Law school libraries were afforded FDLP status as early as 1929, when Louisiana State University Law Library became a depository library,¹⁶ and libraries associated with accredited law schools have been afforded favor for FDLP status since 1978, by their ability to apply without support from a federal legislator in the state in which they sit.¹⁷ This is significant to the end goal of an informed citizenry. Government document collections in law libraries have an exponential impact on citizen access to justice since our staffs “provide service not only to the public directly, but through attorneys, judges, legal scholars, legislators, and other [g]overnment officials as well.”¹⁸ Even for law libraries where such support remains central to the mission, the impact of declining enrollment that most law schools have experienced since the recession of 2008, and resulting decreases to library staffing levels, raise the question of whether we can continue to bear the costs of the FDLP. With close to ninety percent of FDLP documents reported to be directly

11. See *id.* at 696, ¶ 2.

12. David C.R. Heisser, *Federal Depository Program at the Crossroads: The Library Administrator's Perspective*, 16 GOV'T INFO. Q. 241, 242 (1999); see also David Durant, *The Federal Depository Library Program: Anachronism or Necessity?*, 62 N.C. LIBR. 30, 37–38 (2004); James A. Jacobs et al., *Government Information in the Digital Age: The Once and Future Depository Library Program*, 31 J. ACAD. LIBR. 198, 199–201 (2005).

13. See Pettinato, *supra* note 5, at 696, ¶ 3.

14. See, e.g., Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177 (2012); Deborah M. Hussey Freeland, *The Demand for Legal Education: The Long View*, 65 J. LEGAL EDUC. 164 (2015).

15. Ashby Jones & Jennifer Smith, *Amid Falling Enrollment, Law Schools Are Cutting Faculty*, WALL ST. J. (July 15, 2013, 4:39 PM), <http://www.wsj.com/articles/SB10001424127887323664204578607810292433272>.

16. Paul A. Willis & Richard G. Hutchins, *Law Libraries and the Depository Program*, 65 LAW LIBR. J. 190, 193 (1972).

17. See Act of Apr. 17, 1978, Pub. L. No. 95-261, 92 Stat.199 (codified as amended at 44 U.S.C. § 1916 (2012)); U.S. GOV'T PRINTING OFFICE, DESIGNATION HANDBOOK FOR FEDERAL DEPOSITORY LIBRARIES 7 (2008), http://www.lib.noaa.gov/collections/gov/FDLP_Designation-handbook.pdf [<https://perma.cc/47JN-WLVK>].

18. Willis & Hutchins, *supra* note 16, at 190.

accessible by the public online since 2005,¹⁹ a second question, whether we are still integral to the provision of access to government information to the general public, is also significant. It would seem that shifting priorities and questionable continued import would make leaving the FDLP at least a consideration for many, despite concerns about the withdrawal process.

¶8 Though there are anecdotal accounts of the difficult experience of FDLP withdrawal, there are some published descriptions of the process of withdrawal by law libraries that do not reflect that experience. The most detailed account comes from the Suffolk University Law Library. After sixteen years in the FDLP, several circumstances, including a pending move to a building inaccessible to the public, the loss of the documents librarian, and the retirement of the director at Suffolk, led to the consideration of withdrawal from the FDLP.²⁰ Access to agency information on agency websites, duplicate access to federal statutes, decisions, and regulations, plus the inability to choose among items in the selected subjects needed by the library, meant the receipt of many unwanted documents that required resources to process, and the value of the desired free items was diminishing compared to the extra effort.²¹ In addition, the librarians at Suffolk determined that, as a private school, the need to direct most resources to their affiliates created a conflict between service to primary and lay patrons that “often cause[d] depository patrons to be treated as third-class users.”²² The challenge of delivering services to depository users at the high service level the library staff was able to provide to their primary constituents led to the difficult decision to withdraw from the FDLP.²³

¶9 The process of withdrawal for Suffolk was not as challenging as had been anticipated, and this was attributed, in part, to early investigation and planning.²⁴ The main challenge Suffolk faced was developing a relationship with a commercial vendor selling the needed GPO documents after withdrawal,²⁵ a problem not directly attributable to the GPO at all. Fortunately, a helpful “How-to-Guide” summarizing the details of Suffolk’s process appeared in *AALL Spectrum* in 2000.²⁶

¶10 Another published account of withdrawal from the FDLP focuses on the George Washington University (GW) Law Library.²⁷ A “chronic lack of space” was a key challenge to the GW Law Library.²⁸ Access policies at the law library had long required local attorneys and visiting law students to submit requests to use the library, and GW undergraduates needed to have a class assignment requiring legal materials to enter. This led to the uneven result of those expressing a desire to use depository materials having more access than members of the legal community and

19. John A. Shuler, Editorial, *Informing the Nation: The Future of Librarianship and Government Information Service*, 22 *GOV'T INFO. Q.* 146, 148 (2005).

20. See McKenzie et al., *supra* note 8, at 305, ¶ 2. A practical account of this experience is also published in Elizabeth Gemellaro, *Dropping Federal Depository Status: A How-To Guide*, *AALL SPECTRUM*, June 2000, at 26.

21. McKenzie et al., *supra* note 8, at 307, ¶¶ 7–8.

22. *Id.* at 309, ¶ 14.

23. *Id.* at 310, ¶ 16.

24. *Id.* at 311–13, ¶¶ 21–29.

25. *Id.* at 314–15, ¶¶ 34–38.

26. Gemellaro, *supra* note 20, at 26.

27. Iris M. Lee, *Withdrawing from the FDLP: A Responsible Solution*, *LAW LIBR. LIGHTS*, Fall 2001, at 6.

28. *Id.*

university affiliates.²⁹ With the challenges caused by inaccessibility and a commitment from the law school to add to the library's budget to cover the costs of replacing the GPO-provided resources, GW staff made the decision to withdraw from the Program. Like Suffolk, GW is a private university, and the drain of varying access levels on staff caused tension with service to students paying substantial tuition rates.³⁰ Though library staff was conflicted about limiting service to the public, the strain on resources guided their ultimate decision.³¹

¶11 In view of new challenges, in addition to those faced by GW and Suffolk almost a decade ago, and their accounts of withdrawal that are not as ominous as expected, should more law libraries be considering withdrawal today, or are there other options? One alternative suggested by several academic librarians in the literature of the last two decades is for the GPO to develop a new FDLP model that loosens FDLP guidelines, accounts for growing access to the public away from libraries, and decreases deterrents to library participation.

Librarians Question the Future of the FDLP and Recommend Change

¶12 From the late 1980s, and continuing into the early 2000s, the advent of electronic access to government documents led to questions about the direction the GPO should take toward its goal of maintaining public access to what is now thought of as government information—a less static and format-dependent concept than that of government documents.³² Two successive developments were key to these questions. First, electronic storage by means of devices such as CD-ROMs led the GPO to dictate minimum requirements for public access workstations and guidelines for services in support of access to government information in electronic formats, which some libraries deemed onerous or, given their resources, fiscally imprudent.³³

¶13 Citing the format change and comparing “the process of getting government publications into depository libraries” to an “outdated vacuum cleaner,”³⁴ a group of seven documents librarians from all over the country listed increasing costs, inconsistency in adherence to governing statutes, and the shift to digital government information as overarching issues facing the GPO in the future administration of the FDLP.³⁵ At the time of the article, which they subtitled *The Librarians' Manifesto*, the Office of Management and Budget (OMB) interpreted FDLP distribution requirements to apply to “government publication[s],” defined as “individual publications” produced by the GPO, leaving distribution of electronic government information voluntary.³⁶ With many valuable items excluded from FDLP distribution, the value of the Program came into question. In fact, there

29. *Id.*

30. *Id.*

31. *Id.* at 6–7.

32. Paul T. Jaeger et al., *The Federal Depository Library Program (FDLP), Academic Libraries, and Access to Government Information*, 36 J. ACAD. LIBRARIANSHIP 469, 471–73 (2010).

33. Heisser, *supra* note 12, at 244.

34. Gary Cornwell et al., *Problems and Issues Affecting the U.S. Depository Library Program and the GPO: The Librarians' Manifesto*, 20 GOV'T PUBLICATIONS REV. 121, 122 (1993).

35. *Id.* at 122–23.

36. *Id.* at 124.

was a concern that the problem of fugitive documents—those produced by agencies and deemed outside the FDLP requirements—would be exacerbated by new electronic formats. It was feared these agency documents, which had caused discovery issues in the past, would be separately distributed intentionally in an effort to create new revenue streams for agencies.³⁷

¶14 The changes in government information were “rapid and pervasive [and] the technological nature of the changes . . . made their implications obscure.”³⁸ The challenges initially presented by early innovations that resulted in the need to network CD-ROMs and hefty telecommunications charges for online access³⁹ did not last; the information moved online, and Internet access to government information became free and direct to the end user. This was precipitated by the second development, the enactment of the Government Printing Office Electronic Information Access Enhancement Act of 1993 (the Act), which required online publication of the *Congressional Record* and the *Federal Register*.⁴⁰ Besides making these two important government resources available online, a secondary goal of the Act was to obtain “valuable insights into the most effective means of disseminating all public Government information.”⁴¹ After online publication of these two resources was mandated, additional government information became available online, and gradually more and more government information no longer required expensive networking, telecommunication fees, or even a trip to the library. Though some of this proved a relief, the decreasing connection between the library and government information eventually caused librarians and library associations to stress the need for the GPO to develop a comprehensive plan to address the effect that direct public access to government information on the Internet would have on the FDLP relationship with member libraries.⁴²

¶15 In the years after the Act was passed, there was quickly evidence that government information became not only more *accessible*, but more frequently *accessed*, electronically. For example, while demand for print copies of the 2000 Federal Budget had shrunk (the GPO “sold fewer than 4,500 print copies (a 40% drop from 1998 print sales)”), the budget “was accessed more than 115,000 times online.”⁴³ In just eight years, between 1992 and 2000, the number of print documents available to FDLP libraries shrank from 70,468 to 26,994⁴⁴ and, by 2005, over 90% of the FDLP titles were available electronically.⁴⁵ A 2008 study of FDLP patrons found 77.4% regularly used a commercial search engine to find government information electronically, 9.3% found government information online using GPO

37. *Id.* at 125–26.

38. Jacobs et al., *supra* note 12, at 198.

39. Cornwell et al., *supra* note 34, at 124.

40. Government Printing Office Electronic Information Access Enhancement Act of 1993, Pub. L. No. 103-40, 107 Stat. 112 (codified as amended at 44 U.S.C. §§ 4101–4104 (2012)).

41. William J. Clinton, Statement on Signing the Government Printing Office Electronic Information Access Enhancement Act of 1993, 1 PUB. PAPERS 820 (June 8, 1993).

42. See, e.g., ASS'N OF RESEARCH LIBRARIES, WHITE PAPER: STRATEGIC DIRECTIONS FOR THE FEDERAL DEPOSITORY LIBRARY PROGRAM (Apr. 2009), <http://www.arl.org/storage/documents/publications/fdlp-strategic-directions-april09.pdf> [<https://perma.cc/H8NW-HJTX>]; Jacobs et al., *supra* note 12, at 199.

43. Jaeger et al., *supra* note 32, at 471.

44. *Id.*

45. *Id.*

Access (then the GPO's portal for government information), and only 5.5% continued to use print government documents.⁴⁶

¶16 As users' preferred means of accessing government information transformed and information on the Internet increased, the question of the role of libraries in the FDLP also shifted slightly from whether libraries were financially capable of providing government information through new digital mediums like costly CD-ROMs to whether, with Internet access growing, libraries were a necessary component at all.⁴⁷ Considering the many financial challenges facing libraries during this twenty-year period, academic libraries were left with difficult choices to make about their role in the provision of access to government information. At the beginning of the twenty-first century, a need for FDLP reform became clear.

The combination of infrastructure pressures (funding, space, staff), technological change (the ability to access and disseminate authenticated documents electronically), societal expectations that increasingly favor electronic access to federal information, economic constraints due to recession, and a new technologically-savvy presidential administration make plain the need to modernize the approaches to government information in FDLP member libraries and other academic libraries.⁴⁸

¶17 There were other arguments contemporary with those expressed in *The Librarian's Manifesto*. These included (1) the FDLP was a "costly and inefficient anachronism" since government information, which had grown exponentially, was overwhelming to the Program as originally conceived, and libraries should offset the costs of the Program;⁴⁹ (2) the increase in government information and addition of electronic formats "jeopardized the effectiveness of the print-based FDLP to meet the public's increasing need for government information";⁵⁰ and (3) libraries, which had invested money and time in maintaining FDLP materials, "deserve[d] to be more fully included in congressional and the GPO's mapping of the future of the FDLP and setting its priorities."⁵¹

¶18 While these were all legitimate concerns of the time, and some remain so today, others have proven to be less of an impediment than predicted. First, though there have been periods when access to agency information was threatened by White House policy,⁵² there was a "proliferation of federal agencies publishing directly to the Web [beginning] in the 1990s."⁵³ Though preservation and cataloging of agency information remains a very real concern,⁵⁴ a great deal of current agency information is generally available via the Internet.⁵⁵

46. *Id.*

47. Durant, *supra* note 12, at 30.

48. Jaeger et al., *supra* note 32, at 469.

49. Bruce Morton, *The Depository Library System: A Costly Anachronism*, LIBR. J., Sept. 15, 1987, at 52, 54.

50. Gary Cornwell, *The Federal Depository Library Program: A Call for Action*, 20 J. ACAD. LIBRARIANSHIP 97, 97 (1994).

51. *Id.* at 97.

52. Sarah Potvin & Laura Sare, *Public Goods and Public Interests: Scholarly Communication and Government Documents in Research Libraries*, 16 PORTAL: LIBR. & ACAD. 417, 423-25 (2016).

53. *Id.* at 425.

54. Even when the White House Office of Science and Technology Policy has dictated draft policies for "long term access" to agency information, one in seventeen resulting draft policies failed to mandate retention or preservation. *Id.* at 434.

55. Under a new federal administration, whether this changes remains to be seen. There are

¶19 The costs of access to digital government information is also less harrowing than at the start of the conversion of government information to electronic formats. With data costs shrinking for the end user and widespread WiFi in libraries, coffee houses, and city squares, access to information placed on the Internet is prevalent, and the costs of accessing information online have decreased substantially since the turn of the century. Though fees for public access to government information were briefly charged to the end user in the mid-1990s when GPO Access required subscription, “this initiative was abandoned after [the GPO] concluded the effort was not only counter-productive and a poor business model but, more importantly, that it impaired public access to Government information resources.”⁵⁶ Part of the failure of this plan was the fact that depository libraries retained free access to the service.⁵⁷

¶20 Recommitting to the position that fees for access to government information were not optimal, then-acting and now U.S. Public Printer Davita Vance-Cook stated in 2013 that the GPO does not intend to implement fees for the Federal Digital System (FDsys),⁵⁸ which replaced GPO Access in 2009. This came in response to a call by the National Academy of Public Administration to explore alternative funding models for FDsys, including reinstating fees for end users.⁵⁹ While this pledge is reassuring in the short term, it should be noted that, in 2010, FDsys was severely over budget.⁶⁰ In 2011, while acknowledging the importance of FDsys, the House of Representatives passed legislation defunding it as a part of the FY 2012 appropriations bill, charging the GPO with finding alternate funding for the system.⁶¹ While the ultimate appropriations for that year did fund the GPO revolving fund, which supports FDsys, it was funded in an amount much lower than requested and previously granted.⁶² Fortunately, this allocation was an anomaly; FDsys-dedicated funds

some indicators that policy change is imminent. See, e.g., David Kroll, *EPA Reportedly Ordered to Remove Climate Change Webpage, Rescinded 24 Hours Later*, FORBES (Jan. 25, 2017, 8:30 AM), <https://www.forbes.com/sites/davidkroll/2017/01/25/epa-ordered-to-remove-climate-change-webpage/#349910552263>; Valerie Volcovici, *Trump Administration Tells EPA to Cut Climate Page from Website: Sources*, REUTERS (Jan. 25, 2017, 12:31 PM), <http://www.reuters.com/article/us-usa-trump-epa-climatechange-idUSKBN15906G> [<https://perma.cc/8ZWB-XDEY>].

56. Letter from Davita Vance Cook, Acting Public Printer, Gov’t Publ’g Office, to Bernadine Abbot Hoduski, Librarian/Staff Member, Joint Comm. on Printing (Mar. 3, 2013) (on file with author) [hereinafter Letter from Davita Vance Cook].

57. Jacobs et al., *supra* note 12, at 199.

58. Letter from Davita Vance Cook, *supra* note 56.

59. NAT’L ACAD. OF PUB. ADMIN., REBOOTING THE GOVERNMENT PRINTING OFFICE: KEEPING AMERICA INFORMED IN THE DIGITAL AGE 44 (2013), <http://www.napawash.org/wp-content/uploads/2013/02/GPO-Final.pdf> [<https://perma.cc/6TEY-52A9>].

60. U.S. GOV’T PRINTING OFFICE, FEDERAL DIGITAL SYSTEM (FDsys) INDEPENDENT VERIFICATION AND VALIDATION—TENTH QUARTER REPORT ON RISK MANAGEMENT, ISSUES, AND TRACEABILITY 10 (Assessment Rep. No. 10-05, 2010), https://www.gpo.gov/pdfs/ig/audits/10-05_FinalRptFDsysIVQtr10.pdf [<https://perma.cc/FZK4-4JM2>].

61. Legislative Branch Appropriations Act, H.R. 2551, 112th Cong. (2012); H.R. REP. NO. 112-148, at 27 (2011).

62. See Consolidated Appropriations Act, Pub. L. No. 112-74, 125 Stat. 786 (2011) (funding the revolving fund in the amount of \$500,000 for technology development where the GPO request had been \$5 million); U.S. GOV’T PRINTING OFFICE, BUDGET JUSTIFICATION: FISCAL YEAR 2012, at G2 (2011), https://www.gpo.gov/pdfs/congressional/budget_justification_2012.pdf [<https://perma.cc/R8WP-YQXS>].

have fluctuated between \$12 million in 2010, at the peak of development, to close to \$7 million in 2016.⁶³

¶21 As time passed and a number of the feared consequences of an unchanged FDLP seemed less imminent, some authors continued to question the viability of the Program, at least as it was originally conceived in the 1800s and, with the most significant change being made by the Depository Library Act of 1962,⁶⁴ essentially remains today. Recognizing the need for coordinated dissemination of digital government information to end users through libraries, many scholars began encouraging the GPO to change its relationship with the FDLP depository libraries rather than eradicating the Program altogether. Though the electronic dissemination of government information has become a proven way to simplify free access to current government information to the public, some researchers have argued that a significant gap between the traditional FDLP and online access has led to “the loss of a secure infrastructure for long-term preservation and access to government information.”⁶⁵

¶22 In 2004, the GPO issued a strategic plan that included the introduction of proposals for a new FDLP model,⁶⁶ which some librarians believed woefully dismissed the continued role of libraries, and argued that, though the plan included libraries as partners, their position was not clearly articulated⁶⁷ and clarification of the role for libraries was necessary:

With these goals, the GPO treats libraries as it does other users—no documents are deposited, and libraries are free to “access” materials held by the GPO and other government agencies. This leaves the GPO free to impose access restrictions, or charge for information access, or both. The plan significantly omits any mention of FDLP libraries having collections that they manage and even omits specifying that the public will be permitted to download or print documents.

These omissions are either severe oversights or intentional changes in policy. If they are changes in policy, then this, coupled with the drastic reductions in printed publications, means that the GPO will no longer be depositing documents in depository libraries. This, combined with the GPO’s cost recovery model of distribution of digital information, will mean a reduction in free public access. The government, not libraries, will have collections and will decide what will be in them and who will have what level of access at what cost.⁶⁸

¶23 This was an omission that the GPO could have easily avoided since a change in the format of government information was not necessarily a reason to change the composition of the FDLP, and distribution of government information

63. U.S. GOV’T PRINTING OFFICE, BUDGET JUSTIFICATION: FISCAL YEAR 2017, at [5] (2016), https://www.gpo.gov/pdfs/congressional/Budget_Justification_2017.pdf [<https://perma.cc/A8B3-W2TE>]. Still, in an unknown political environment such as this, the 2012 account remains distressing.

64. The Federal Depository Library Act of 1962 increased to two the number of depository libraries permitted per congressional district, added libraries from independent federal agencies, authorized establishment of regional depositories, and provided for distribution of non-GPO publications. Pub. L. No. 87-579, 76 Stat. 352 (1962).

65. See, e.g., Jacobs et al., *supra* note 12, at 198.

66. U.S. GOV’T PRINTING OFFICE, A STRATEGIC VISION FOR THE 21ST CENTURY 2 (2004), <http://www.gpo.gov/congressional/pdfs/04strategicplan.pdf> [<https://perma.cc/522T-MWJX>].

67. Jacobs et al., *supra* note 12, at 200.

68. *Id.* (citing a 2005 GPO announcement that it planned to continue to print only those titles on “Essential Titles for Public Use in Paper Format,” a list containing only fifty titles; this was eventually reversed after an action alert released by the American Association of Law Libraries).

in electronic form could have simply been made a part of the Program.⁶⁹ Depository library collections had, more than once, prevented the loss of government information removed from the Internet, because it was duplicated in print in depository collections.⁷⁰ Distributed collections of digital government information would address the traditional FDLP goals of free, private, and easy access to authentic information, as well as preserving materials for future use.⁷¹ Libraries in the digital era could act as curators of digital government information, “selecting, acquiring, organizing and preserving the information as well as providing access to and service for that information.”⁷²

¶24 In addition, “[e]volving arguments for a depository role (similar to ones argued for institutional repositories in the private information market) is for the sake of open access and transparency.”⁷³ Supporting the transparency of government information can extend the civic role that libraries play in the dissemination of government information beyond the traditional provision of collections and support to users accessing government information. It has long been recognized that professional research support provided by law librarians and library staff is one of the benefits of the participation of academic law libraries in the FDLP to end users.⁷⁴ The “internet-enabled access [to government information without libraries] means little to users without the expertise of government information librarians to explain to users how to arrange these blocks [of information] in such a way that makes the policy, services, or resources understandable.”⁷⁵ Building on what many FDLP libraries are already doing individually, a move could be made from emphasis on collections to expanded services, which might result in coordination of “organizational arrangements [that] profoundly influence how libraries collect and manage their local resources, access, and public outreach.”⁷⁶ These arrangements could result in the development of “economies of scale, depth, and service expertise,”⁷⁷ between the GPO and member libraries, and among member libraries, resulting in greater support to end users of government information.

¶25 The Association of Research Libraries (ARL), in a 2009 white paper, further suggested a comprehensive change to the FDLP.⁷⁸ With FDsys, by then a functional means of collecting, providing access to, and preserving new government information (now almost all born-digital with much existing in only digital format⁷⁹) and planning to digitize legacy collections of print government documents, ARL proposed new roles for depository libraries. First, citing the need for “enhanced discovery” of pre-1976 government documents, cataloging that was already underway with

69. *Id.*

70. *Id.* at 201.

71. *Id.* at 200–01.

72. *Id.* at 202.

73. Jaeger et al., *supra* note 32, at 473.

74. Pettinato, *supra* note 5, at 708–13, ¶¶ 37–48.

75. Jaeger et al., *supra* note 32, at 475.

76. *Id.*

77. *Id.*

78. ASS’N OF RESEARCH LIBRARIES, *supra* note 42, at 6.

79. ROGER C. SCHONFELD & ROSS HOUSEWRIGHT, DOCUMENTS FOR A DIGITAL DEMOCRACY: A MODEL FOR THE FEDERAL DEPOSITORY LIBRARY PROGRAM IN THE 21ST CENTURY 3–4 (2009), http://www.sr.ithaka.org/wp-content/uploads/2015/08/Documents_Digital_Democracy.pdf [https://perma.cc/3CLQ-57FJ].

the help of several depository libraries had to increase, and ARL recommended that the GPO develop “a plan for access that provide[d] a clearer understanding of the universe of records that still need[ed] processing” and “cooperative action for cataloging and/or machine-based mechanisms for providing access.”⁸⁰ The report also advocated for the GPO to play “a greater role in network-based, collaborative training programs,” and to meet the “pressing need to expand the number of individuals with expertise in government information.”⁸¹ Finally, recognizing that there were regional depository libraries relinquishing their status, ARL recommended “transition[ing] to a smaller number of comprehensive, print, truly regional, legacy collections.”⁸² Citing cases where these recommended courses of action were clearly being taken on smaller scales, ARL concluded that GPO-coordinated efforts in these directions would provide the structure needed for the FDLP program to survive in a different form going forward.

¶26 Later that year, Ithaka S+R released a report funded by ARL and the Chief Officers of State Library Agencies and referred to as the *Schonfeld Report*, which outlined a model for the FDLP for the new millennium.⁸³ Though mostly focusing on the need for the GPO to develop a new structure for the FDLP, some development of the ideas of library participation in the FDLP from the ARL white paper are reflected in the *Schonfeld Report*. The areas of focus in the report in which libraries have a role include digitization and documents management.⁸⁴ Noting that the “incentives that motivated libraries to participate in the [FDLP], reasonably well aligned in a print environment, are decreasingly appropriate to the digital, networked environment,”⁸⁵ and that libraries were already making efforts to meet some of the needs addressed by ARL like preservation, the *Schonfeld Report* stresses the importance of the GPO’s coordination role in activities meant to fill the gaps in the FDLP related to digital information. For example, the report notes several digitization projects meant to capture historical documents. However, these projects are being done by individual libraries or small consortia with a lack of GPO leadership that risks the duplication of digitization efforts.⁸⁶

¶27 On the topic of print collection management, the report predicts that user preference for electronic access will result in the need for fewer print collections developed in a coordinated manner for the sake of preservation and access for users who prefer the continued use of print.⁸⁷ However, the report makes a prediction specific to law libraries that implies most will not participate in collection coordination but will instead make a choice between maintaining a local core print collection, regardless of the proximity to another, to protect superseded legal resources, or withdrawing from the FDLP.

Some law libraries will be fairly cautious in dealing with the focused set of materials of principal interest to them, viewing core legal materials (including, for example, superseded materials that other libraries—even regionals—may discard as a matter of course) as the

80. ASS’N OF RESEARCH LIBRARIES, *supra* note 42, at 6.

81. *Id.* at 7.

82. *Id.* at 10.

83. SCHONFELD & HOUSEWRIGHT, *supra* note 79, at 5–9.

84. *Id.* at 4.

85. *Id.* at 10.

86. *Id.* at 35.

87. *Id.* at 4.

vital records of their profession rather than as published materials to be treated like general collections. For some law libraries, high thresholds for authenticity will militate against withdrawal even when high-quality digital copies are freely available, while for others these concerns will be overtaken by the opportunity to reassign space to higher-value purposes.⁸⁸

If this is true and law librarians see FDLP membership as only a means of retaining superseded core legal materials, increasingly available in fee-based databases that libraries are already likely to purchase, and do not see a need for the digitized versions of these materials provided through the FDLP or a cooperative role for our libraries in digitizing them, one might predict that we are all thinking about cutting our losses and leaving the Program. However, the prediction ignores the significant role law libraries have had in the access of government information throughout our years of participation in the FDLP and assumes law librarians see no future role beyond the maintenance of existing collections.

GPO Polls FDLP Members: The Forecast Survey of 2012

¶28 In 2012, the GPO demonstrated an intent to consider recommendations for changing the Program when it surveyed its members in the *FDLP Forecast Survey*. The survey questions focused on six main topic areas:

1. Affiliations and Community Marketing
2. Collection Management
3. Education
4. Library Services and Content Management (LSCM) Projects
5. Preservation
6. Future Roles and Opportunities

Several of the areas that the GPO selected to study clearly mirror those suggested by librarians, demonstrating an acknowledgment by the GPO of the value of the opinions of librarian scholars.

¶29 Questions in the topic area of “Affiliations and Community Marketing,” which the GPO considers “integral to the continued success of the FDLP and to increasing awareness of FDLP libraries”⁸⁹ and to the growth of the Program,⁹⁰ were asked in an effort to determine whether FDLP libraries were working with other FDLP libraries or groups outside of the Program to deliver access and service. More than half of libraries (fifty-five percent) had no such relationships, and a strong majority (eighty-eight percent) had no intention of forging new relationships.⁹¹ Though facilitation of collaboration was one of the remedies often suggested to the GPO, an interest level supportive of widespread change to the FDLP in this way was not expressed by member libraries.

¶30 There is a clear recommendation in the literature that service and preservation should overcome traditional collection management as the main focus of the

88. *Id.* at 38.

89. U.S. GOV'T PRINTING OFFICE, FEDERAL DEPOSITORY LIBRARY PROGRAM FORECAST STUDY FINAL REPORT 11 (2014), <https://www.fdlp.gov/file-repository/about-the-fdlp/gpo-projects/fdlp-state-forecast/2593-fdlp-forecast-study-final-report> [https://perma.cc/B2GH-8E7T].

90. *Id.*

91. *Id.*

FDLP; however, the responses to collection management–related questions in the *FDLP Forecast Survey*, “reinforce[d] that collection management is a central focus for libraries and is essential to the FDLP.”⁹² Of the ninety-two percent of respondents who considered the FDLP “an important source of both tangible and digital authenticated government information,”⁹³ 439 elaborated, indicating the types of content they deemed essential, and noted that “all formats of materials are important, and also that specific types of users prefer and use certain formats.”⁹⁴ Paradoxically, 273 respondents answered an open-ended question asking for an explanation of reasons the tangible FDLP collection might not be viewed positively, and twenty-eight percent had a negative impression due to the resources required by the library to maintain the tangible collection, including staff, time, and labor. Twenty percent listed reasons related to the management of tangible items as basis for a negative perception; thirteen percent cited low, declining, or barriers to patron use as the reasons for a negative perception;⁹⁵ and fifty-two percent “anticipate[d] barriers [would] exist to access digital only government information in the next five years.”⁹⁶ Further, ninety-one percent of respondents did not have formal selective housing arrangements for collections, and fifty-one percent were not interested in establishing such agreements.⁹⁷ The majority were unwilling to commit to the development of specific subject-focused collections.⁹⁸

¶31 Perhaps the inconsistency between librarians’ belief in the importance of receiving government information in multiple formats and their lack of motivation to take part in maintaining coordinated collections is impacted, at least in part, by the assessment of seventy-nine percent of respondents who “indicate that their patrons use commercial or non-depository resources to find Federal Government information in their libraries,”⁹⁹ resulting in a perception of little need for a coordinated FDLP plan. Although proposals by scholars who urged the GPO to lead depository libraries in determining the appropriate balance of print and digital content in their libraries and in their geographic regions and to develop corresponding collections may be sound in theory, the survey does not show willingness on the part of libraries to participate.

¶32 Survey responses in the next two topic areas, “Education” and “LSCM Projects,” were generally favorable, with most librarians agreeing they would participate in further educational efforts, and rating projects of the Library Services and Content Management business unit highly. The following topic area,¹⁰⁰ “Preservation,”

92. *Id.* at 13.

93. *Id.*

94. *Id.* at 14.

95. U.S. GOV’T PRINTING OFFICE, *FDLP FORECAST STUDY DATA REPORT LIBRARY FORECAST, Question 11*, at 2–3 (2013), <https://www.fdlp.gov/project-list/fdlp-forecast-study> (full report, *supra* note 89; retrieve full report, click on “Library Data Reports” and go to individual question results) [hereinafter *Question [XX]*, in U.S. GOV’T PRINTING OFFICE].

96. U.S. GOV’T PRINTING OFFICE, *supra* note 89, at 14.

97. *Id.* at 14–15.

98. *Id.* at 14.

99. *Question 9*, in U.S. GOV’T PRINTING OFFICE, *supra* note 95, at 2.

100. U.S. GOV’T PRINTING OFFICE, *FDLP FORECAST STUDY DATA REPORT LIBRARY FORECAST, Working Papers, Preservation*, at 15–17 (2013), <https://www.fdlp.gov/project-list/fdlp-forecast-study> (full report, *supra* note 89; retrieve full report, click on “Working Papers” and go to individual topic). The topic area “Future Roles and Opportunities” was a series of open-ended questions giving

demonstrated further inconsistency. Though over eighty percent of library directors and their designees surveyed in a separate 2013 study considered digitized special collections “critical to [their] current strategic direction,”¹⁰¹ and sixty-four percent predicted that “digitizing special collections materials [would be a] top strategic priorit[y] over the next three years,”¹⁰² eighty-seven percent of libraries responding to the *FDLP Forecast Survey* were not digitizing, and eighty-two percent had no plan to digitize government documents.¹⁰³ While many librarian scholars had recommendations for the GPO to save the FDLP by changing its structure, responses to the *Forecast Survey* from depository libraries simply did not demonstrate strong motivation to effect widespread change.

¶33 The second greatest response rate to the *FDLP Forecast Survey* was from academic law libraries; responses were submitted on behalf of seventy-one percent or 109 of the 154 academic law libraries that were FDLP members at the time. Of law library respondents, ninety-five percent agreed that the FDLP is a significant source of tangible and digital government information,¹⁰⁴ with eighty-three percent stating that there were “distinct user groups” that preferred to use digital formats¹⁰⁵ and sixty-seven percent stating there were “distinct user groups” that preferred to use tangible formats.¹⁰⁶ Only forty percent of law library respondents anticipated that there would be barriers to accessing digital government information in the next five years,¹⁰⁷ as opposed to fifty-two percent of all respondents. Perhaps this was because ninety-nine percent reported that law library patrons use commercial and nondepository resources to locate government information,¹⁰⁸ twenty percent more than the general response rate.

¶34 Responses to an open-ended question requesting reasons for any negative views of the tangible FDLP collection were reduced to six categories: (1) issues regarding the management of the tangible collection; (2) resource and cost issues (i.e., storage and staffing); (3) a perception of negative value for tangible items; (4) procedural issues in the logistics of maintaining tangible items; (5) a perception of low or decreasing usage of the collection and reasons there might be limited use; and (6) other.¹⁰⁹ The survey could be completed without a response to this question, and responses were provided on behalf of only twenty-nine academic law libraries. Of those, twenty-eight percent cited collection management challenges, and thirty-eight percent cited resource and cost issues. Both negative value perception and perceived procedural challenges were cited on behalf of fourteen percent

responding libraries an opportunity to express any areas in which they thought the GPO could improve. *Working Papers, Future Roles and Activities*, at 1.

101. NANCY L. MARON & SARAH PICKLE, APPRAISING OUR DIGITAL INVESTMENT: SUSTAINABILITY OF DIGITIZED SPECIAL COLLECTIONS IN ARL LIBRARIES 11 (2013), <http://www.arl.org/storage/documents/publications/digitizing-special-collections-report-21feb13.pdf> [<https://perma.cc/M868-ECM4>].

102. *Id.*

103. U.S. GOV'T PRINTING OFFICE, *supra* note 89, at 18.

104. *Question 8*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

105. *Question 5*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

106. *Question 6*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

107. *Question 16*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

108. *Question 9*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

109. *Question 11*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

of law library respondents, and seven percent cited a perception of less than optimal use of tangible government documents.¹¹⁰

¶35 In the area of preservation, where many of the writings indicated FDLP member libraries could be significant contributors to ensuring continued access to government information, only eight percent of law libraries expressed that they were digitizing or planned to digitize FDLP tangible publications.¹¹¹ This number is extremely inconsistent with the general interest in digitization in law libraries. In 2015, after a successful conference at William and Mary Law School, the Executive Board of the American Association of Law Libraries approved a request to begin a Law Repository Caucus. One of the inaugural projects of the Caucus was to develop a directory of institutional repositories in law schools with links to the collections and lists of their contents. That directory shows only forty-nine law schools where no digital collections with law-specific content were found in a review of both fully and provisionally accredited schools at the time of the chart's development.¹¹² Though digitization is clearly a priority of law libraries, responses to the *Forecast Survey* indicate digitization of FDLP collections is not.

¶36 The *Forecast Survey* directly invited libraries to indicate whether they were willing to make formal commitments to increase their roles in the FDLP, over the next five years. Of law libraries, eighty percent responded that they would not be willing to preserve or host a permanent digital collection of government information,¹¹³ sixty-four percent would not be willing to develop a collection of government information covering a specific subject area and share that collection beyond their local community,¹¹⁴ and one hundred percent saw no potential leadership role for their libraries within the FDLP.¹¹⁵ In fact, the optimism of some scholars for partnerships with FDLP member libraries was not reflected in the responses to the *Forecast Survey* provided by many libraries, including academic law libraries.

A Survey on Law Libraries' Future Involvement in the FDLP

¶37 I developed "A Survey on Law Libraries' Future Involvement in the FDLP" and made the survey available in July of 2016. The survey, which remained open for twenty-seven days, provided three tracks that differentiate libraries: those that were never FDLP members, those that had withdrawn from the Program, and those that were actively participating FDLP members. The complete survey was thirty questions, but because there were branching questions, no library in any category was required to answer all questions. The survey was shared through the Law Library Directors' listserv, as the goal was to learn about strategic directions for continued FDLP membership that would be determined on a managerial level.

110. *Id.* at 4.

111. *Question 14*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

112. AALL Law Repository Caucus, Law School Repositories Directory, <https://docs.google.com/document/d/17TYzSttbmsI-37nJ-TIfU1C7tJHMmKQXwvdq2g-Ck/edit> (last visited June 20, 2017).

113. *Question 28*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

114. *Question 29*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 3.

115. *Question 30*, in U.S. GOV'T PRINTING OFFICE, *supra* note 95, at 20.

Future research could be completed by extending the survey to government documents librarians who might have a more vested interest in the continued participation of their libraries in the FDLP.

¶38 Of the 205 academic law libraries affiliated with accredited law schools at the time of the survey, 150 of which were then current FDLP members, staff from 30 libraries submitted complete responses to the survey. The completed responses represented 14.63% of academic law libraries. Of the 30 responses, 6 represented libraries that are not currently FDLP members and, of these, 3 had never been FDLP members and 3 had previously withdrawn from the FDLP. Of those that were never members, 2 were newer law schools accredited after many government resources were moved online and became accessible without FDLP membership.

¶39 The twenty-four remaining respondents represented 16% of all academic law libraries that are active FDLP members; eleven (45.83%) had considered withdrawing from the FDLP, while thirteen (54.17%) had not. Of those that had never considered leaving, ten schools (76.92%) were public. While this could be expected for reasons such as central public missions and decreasing budgets that might make public schools more dependent on free documents to complete their collections, other considerations such as a desire to limit access to all or some of a library's spaces, as with GW and Suffolk, had led to the supposition that the question of withdrawal would have been considered equally by private schools.

¶40 As a follow-up question to whether librarians had considered withdrawal for their institutions, those who had not were given several possible reasons to choose from to explain that decision. Respondents were permitted to choose as many options as were applicable. The two most frequently cited responses were the value of the FDLP to their institutions (76.92%) and the ease of handling FDLP materials since the GPO now allows collection at low rates for selective depository libraries (84.61%). Collection rates for those libraries where withdrawal had not been considered ranged from 2% to 24%, with an average of 11.30%. Each of these libraries had either maintained or decreased their collection rate in the five years preceding the survey; the greatest drop among these rates during that time was 11%.

¶41 The remaining reasons for not considering withdrawal hovered between 20% and just over 30% of responses. The anticipation of the amount of work it would take to withdraw was a reason given by 30.77% of respondents. Each of the remaining options was cited by 23.08% of respondents: the need for the free resources provided by the FDLP, a decision to get most of their government information online, and the desire to protect historical holdings.

¶42 Eleven libraries had considered withdrawing from the FDLP. Seven were private and four were public. Overwhelmingly, the most popular response to the question of why withdrawal was considered, at 81.81%, was increased access to government information online that a library could provide without FDLP membership. The next most frequently selected choice, at 63.63%, was that the direct and indirect costs of the Program outweighed its benefits to the library. The provision of government information to the general public was deemed not central to one (9.09%) library's mission, and three respondents (27.27%) selected onerous FDLP requirements and the fact that, though their libraries did have public missions, there was no indication that mission could not be met through means other

than FDLP participation, as reasons they had considered withdrawal. The remaining reasons for withdrawal were selected by respondents from 27% to just over 45% of libraries, including adequate geographic access to another FDLP library and evidence of low use of print government documents (both at 45.45%), a lack of space, loss or lack of staff to manage documents, and the need to limit building access for non-university affiliates (all at 36.36%). Two respondents added, by selecting an open-ended “Other” option, that the review of the documents program at their libraries, and consideration of withdrawal, was part of routine evaluations of collections and services made periodically to reconsider institutional priorities.

¶43 Of the respondents that had considered withdrawal but decided to remain in the Program, most (72.72%) cited the anticipated effort of the withdrawal process as a reason their libraries remain in the Program. The majority (63.63%) chose to stay, at least in part, because FDLP members are now permitted to opt for small collection rates, and 27.27% had moved to maintenance of predominantly online collections of government information. The irrevocable nature of withdrawal was also cited by 27.27% of respondents, 18.18% stayed to protect historical government documents they would risk losing if they withdrew, and 9.09% cited fear of backlash from surrounding libraries and a need to receive tangible government documents free of charge as reasons for staying. In response to the opportunity to list other reasons for staying in the FDLP, one librarian cited the benefit of training opportunities provided by the GPO, and a response on behalf of a second library cited some continued user preference for tangible documents and the continued challenge of unauthenticated online government information as reasons to remain FDLP members.

¶44 Costs of the Program outweighing the benefits was a popular reason for considering withdrawal, and four of the respondents had made efforts to determine what those costs were to their own libraries. Of those, two studies focused on labor and two on the replacement costs of materials that would be lost if they ceased to be members of the FDLP. Of the two studies of materials costs, the replacement cost of the items were very close—\$25,000 (for a study done in FY 2015) and \$20,000 (for a study done in FY 2000)—though the studies were done fifteen years apart. Both of these libraries responded that they had been decreasing their collections, but the change of rates for the fifteen-year period was not available, which makes it difficult to glean any comparative information from the values reported.

¶45 The other two respondent libraries where cost studies had been completed focused on the cost of the labor needed to process FDLP materials. Of those, one study was abandoned when allocation of the personnel costs proved difficult. The goal of the second analysis, completed in FY 2012, was to be more comparative as the librarians weighed between withdrawal from the Program and continuing at a reduced rate of selection, particularly for tangible items. As it became clear that the cost of withdrawal would outweigh the costs of continued participation with a decrease in selections, the analysis was curtailed and no final number was established.¹¹⁶

116. E-mail from Jane Wodlow, Assoc. Library Dir. & Adjunct Prof., Julien & Virginia Cornell Library, Vermont Law Sch., to author (Oct. 27, 2016, 3:54 PM) (on file with author).

¶46 Of all survey respondents, only one positively responded to the question:

In 2012, the Government Printing Office circulated the survey FDLP Library Forecast; 109 Academic Law Libraries responded. That survey asked if libraries were planning: 1) to enter new relationships to provide government information, 2) to participate in shared housing agreements to distribute parts of the documents collection, 3) to commit to preserving and hosting permanent digital collections of government documents or 4) to commit to the development of a specific subject area collection of government documents. If you responded yes to any of these plans, or have since made similar plans with regard to government document collections, would you be willing to talk to the researcher about those plans?

¶47 A follow-up call and e-mail revealed that the plans referred to related to a Cooperative Agreement to preserve large collections of historical print documents, relieving the regional library it served and its main campus library from the need to hold those items, which had become difficult due to space constraints.¹¹⁷

¶48 Though it is difficult to make broad conclusions based on the survey due to the low response rate, when viewed with the responses to the *Forecast Survey* it seems fair to question the continued commitment of law libraries to the FDLP beyond the receipt of small print collections with reliance primarily on online government information. If the GPO does push for greater collaboration among libraries, the *Schonfeld Report* prediction that we will continue minimal participation or, if forced to consider collaboration, withdraw, may be fulfilled. The final consideration in making the decision to leave or stay likely depends on what the GPO decides is next for the FDLP.

Current GPO Plans for the FDLP

¶49 In February 2016, the GPO published its *National Plan for Access to U.S. Government Information*.¹¹⁸ With a simply stated vision¹¹⁹ and mission,¹²⁰ the report includes strategic governance and review of the structure of the FDLP as goals for the GPO. Specifically, it plans to “[p]rovide a governance process and a sustainable network structure that ensures coordination across the Federal Depository Library Program and allows the most flexible and effective management of depository libraries and their resources.”¹²¹

¶50 While only a “framework” document,¹²² with more detailed plans required for implementation, the GPO clearly adopts some of the suggestions librarians have made, including (1) increased cataloging development of the pre-1976 government

117. E-mail from Jada Aitchison, Acquisitions/Serials Librarian, Univ. of Arkansas-Little Rock/Pulaski Cty. Law Library, to author (Dec. 6, 2016, 4:06 PM) (on file with author).

118. U.S. GOV'T PRINTING OFFICE, NATIONAL PLAN FOR ACCESS TO U.S. GOVERNMENT INFORMATION: A FRAMEWORK FOR A USER-CENTRIC SERVICE APPROACH TO PERMANENT PUBLIC ACCESS (2016), <https://www.fdlp.gov/file-repository/about-the-fdlp/gpo-projects/national-plan-for-access-to-u-s-government-information/2700-national-plan-for-access-to-u-s-government-information-a-framework-for-a-user-centric-service-approach-to-permanent-public-access> [https://perma.cc/4XSP-LD83].

119. “To provide Government information when and where it is needed.” *Id.* at 7.

120. “To provide readily discoverable and free public access to Federal Government information, now and for future generations.” *Id.*

121. *Id.* at 8.

122. *Id.* at 11.

documents,¹²³ (2) incentivized training programs that include the possibility of a certificate program or continuing education credits,¹²⁴ and (3) the development of the Federal Information Preservation Network (FIPNet) and an increase of digitization projects.¹²⁵ Also included are the development of depository library competencies¹²⁶ and changes to the way depository libraries are assessed to an outcomes-based model,¹²⁷ which could be viewed as added burdens of membership. More detail regarding new expectations of depository libraries should be available after a review of the FDLP guiding document, the *Legal Requirements and Program Regulations of the FDLP*, which is also a goal of the current plan.¹²⁸ For those still considering withdrawal, new details about the future administration of the FDLP might be significant enough to move us from a wait-and-see posture—or they may represent little change and provide no instruction at all.

Conclusion

¶51 It seems safe to say that many believe the FDLP structure is no longer well suited to its mission. A failure to change with the evolution in the means of access to government information has resulted in an FDLP model that arguably does not make the best use of its member depository libraries in the digital age. It is equally clear that the GPO wishes to change in the ways necessary to keep the FDLP viable and to ensure libraries, overall, find value in the partnership. In this time of change, a decision to withdraw from the FDLP may not be timely. The responses to the surveys discussed here indicate that most librarians are either not considering withdrawal for their institutions at all or are considering withdrawal but deciding against it; instead they are reducing their tangible selections, relying primarily on electronic government information, and waiting it out.

¶52 Unfortunately, this holding pattern may be more about tradition and apathy than any expectation of promise in the future potential of the FDLP. To engender more engaged participation than that indicated by responses to the *FDLP Forecast Survey*, it is imperative that the GPO develop a new FDLP model in which all libraries have incentive to participate fully. If, as the *Schonfeld Report* predicts, the perceived benefits of the FDLP for law libraries leave us with the choices of staying in the Program to keep superseded volumes of core legal documents or withdrawing, we may soon perceive no reason to stay and meet strict GPO requirements, no matter how infrequently they are reviewed. The *Forecast Survey* findings that fewer law librarians than other librarians anticipated increased barriers to digital government information within five years of the survey are likely because most law librarians also reported the use of non-FDLP resources by their users. This is probably because we have come to rely on friendly commercial vendors like HeinOnline and academic-driven resources like the Legal Information Institute and LLMC Digital to provide us with searchable government information, some

123. *Id.* at 10.

124. *Id.* at 8.

125. *Id.* at 10.

126. *Id.* at 9.

127. *Id.* at 8.

128. *Id.* at 9.

even integrated with other legal resources. However, in an industry with a history of takeovers and mergers, it is not possible to know that these and other similar sources will remain in their current forms indefinitely.

¶53 With the strain from budget reductions, resulting from shrinking law school class sizes, that threaten the library budget, at least at our library, the loss of positions preceded the loss of our budget for books and electronic resources. This loss of staff is having a direct impact on the ability of academic law libraries to continue providing some traditional services, and new initiatives have led us to replace them with new ones like the development and maintenance of institutional repositories. Processing print government documents has become a low priority as it seems to have a lesser return on investment, as evidenced in the survey results. There is a problem with the perception of the value of the FDLP, particularly the provision of tangible documents, and the GPO must hone in on priorities libraries continue to pursue and align new strategies with them to recapture the interest of its member libraries. Stronger digitization efforts militate in favor of continued participation in the FDLP for law libraries because such efforts intersect with two important components of the missions of most academic law libraries: open access and access to justice.

¶54 It is argued that there is a natural relationship between preservation of government information and scholarly communication. “Government funding of scholarly research has forged a shared space . . . [that] extends government information to encompass scholarly work as it is produced and disseminated.”¹²⁹ Though the thought that “[t]oday these units are brought together not by crisis but by opportunity”¹³⁰ may be a bit optimistic at this time for law libraries, at least in our case, the connection between government documents and scholarly communications supported the decision to place government documents coordination in the job description of the new position being developed to support the institutional repository. Though we currently have several of our own collections to digitize, we can see the digitization of a small government documents collection in our future. While this function is primarily served by one staff member, with periodic support from other staff and students, we would consider participating on some scale if the GPO provided a clear plan for digitization projects. Admittedly, this possibility was not on our radar until our FDLP membership and my research opened discussions; however, our first successful digitization project was born more out of opportunity than foresight, and we are excited about increasing digitization projects. Though it is not certain that FDLP digitization plans will fit our goals and resources, we will not irrevocably withdraw before knowing what part we can play in the GPO’s efforts.

¶55 Law libraries are an important part of the access to justice movement, and the provision of government information and assistance with its use are important components of how we fulfill that role. Though libraries arguably no longer need to be FDLP members to provide effective access to government information to the public, it does not necessarily follow that law libraries *should* withdraw from the FDLP at this time. “Access to justice includes access to information. It is an important mission for the legal profession to ensure that everyone has access to justice

129. Potvin & Sare, *supra* note 52, at 431.

130. *Id.* at 434.

through continued access to information.”¹³¹ “We should all be concerned about making sure credible resources for legal research are available to everyone.”¹³² We can be not just conduits but developers of that information going forward. Participation in FDPL digitization efforts may prove an easy and natural role for law libraries to assist in filling the gaps in the availability of free government information that increase access to this information to the general public.

¶56 With the GPO committed to reform, where available resources are not a significant deterrent to continued FDLP participation, the possibility that the GPO is looking to enhance FDLP priorities that align with current law library initiatives is encouraging. While law library leadership did not seem overly enthusiastic about participation in future FDLP plans in response to the *Forecast Survey*, the results of my survey show 45.83% of respondents still find value in FDLP membership—this could be an indicator of a willingness to grow with the Program in ways not anticipated at the time of the *Forecast Survey*. Even when patron needs are met through other means, we may be on the precipice of opportunities to participate in important initiatives that give us greater roles in the preservation of federal government information. Given the irrevocable nature of withdrawal from the FDLP and the promise of the GPO’s next steps for depository libraries, law libraries for which FDLP participation is not currently burdensome should make plans to work with the GPO as FDLP members to improve and ensure access to government information online. Obviously, where conditions like decreasing staffing levels, access issues, and space constraints are deterrents to participation, the decision to withdraw is legitimate. However, in a climate of threats to the freedom of access to government information, it seems best to hold on to any means by which we can be players in the preservation and dissemination of government information. Hopefully, the GPO is close to making changes to the FDLP that respond to the times and bring member libraries opportunities that make us enthusiastic about a role in the continued support of an informed citizenry, one that is aligned with both the mission and goals of the FDLP and the current conditions facing member libraries.

131. Deborah K. Hackerson, *Access to Justice Starts in the Library: The Importance of Competent Research Skills and Free/Low-Cost Research Resources*, 62 ME. L. REV. 473, 475 (2010).

132. *Id.* at 484.

Leveraging Academic Law Libraries to Expand Access to Justice*

Paul McLaughlin, Jr.**

Academic law libraries are in a unique position to help citizens gain access to the court system and legal information. By creating clinics that focus on helping pro se patrons find and complete legal forms, academic law libraries would not only benefit their schools but also the justice system.

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Introduction: Access to Justice, the Courts, and Legal Information

¶1 Allowing citizens access to the courts and to legal information is a cornerstone of judicial administration in democratic societies and is a human right under international law.¹ Presidents, philosophers, and legal scholars have addressed the issue of equal access to justice, but in practice, there have been few improvements in making the judicial system accessible to all who seek the courts' aid.² The U.S. judicial system is facing a marked increase in the number of pro se litigants due, in part, to the economic slowdowns that have occurred in recent years.³ Access to justice is inextricably mixed with political and societal issues, which complicates the process of making legal aid available to those who need it.⁴ Despite the growing need for legal assistance, funding for legal services has been reduced, Congress has placed limitations on the assistance that Legal Service Corporation attorneys can offer, and social services have reduced the number of ways they offer support.⁵ To help citizens who represent themselves get the legal assistance and information they need, academic law librarians must adapt their methods of delivering legal information and services.⁶ State governments have begun a variety of nonattorney legal aid programs and created a number of online initiatives for those searching for legal information, but the demand for legal assistance by pro se litigants has not been met.⁷ Law libraries, while initially intended for use by legal professionals, have become places that patrons of all kinds can use.⁸ Academic law libraries have expanded their traditional reference services to include e-mail and online sessions,⁹ but their librarians are restricted as to how much aid and information they can provide due to conflicting ethical and legal guidelines governing the unauthorized practice of law.¹⁰ This article examines how academic law libraries can leverage their unique positions to improve access to justice and meet the ethical mandates of the legal profession. By creating self-help clinics, academic law libraries can not only help those needing legal assistance, but they can also bolster the law librarian profession, enhance their schools' standings, and better prepare their students for legal practice.

1. See ACCESS TO JUSTICE AS A HUMAN RIGHT 3 (Francesco Francioni ed., 2007).

2. See generally Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371–72 (2004).

3. See AM. BAR ASS'N, ABA TOOLKIT FOR A RIGHT TO LEGAL COUNSEL IN CIVIL PROCEEDINGS 4–7 (2010).

4. See Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 476–85 (1984).

5. Mary Helen McNeal, *Unbundling and Law School Clinics: Where is Pedagogy?*, 7 CLINICAL L. REV. 341, 342–43 (2001).

6. See Paul J. Jaeger et al., *The Federal Depository Library Program (FDLP), Academic Libraries, and Access to Government Information*, 36 J. ACAD. LIBRARIANSHIP 469, 471–75 (2010).

7. See Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 759, 788–89 (2012).

8. Gerome Leone, *Malpractice Liability of a Law Librarian*, 73 LAW LIBR. J. 44, 45–46 (1980).

9. See Carol Tenopir & Lisa Ennis, *A Decade of Digital Reference, 1991–2001*, 41 REFERENCE & USER SERVS. Q. 264, 265 (2002).

10. Yvette Brown, *From the Reference Desk to the Jail House: Unauthorized Practice of Law and Librarians*, 13 LEGAL REFERENCE SERVS. Q., no. 4, 1994, at 31, 31–34.

Challenges to Ensuring Equal Access to Justice

¶2 Pro se litigants often misunderstand the nature of the problems they face, find legal advice too expensive, believe the process is too cumbersome, or think no sources are available to help with their legal problems.¹¹ Aiding low-income litigants, particularly criminal defendants, in getting the legal assistance they need is not a popular topic with attorneys, politicians, or taxpayers.¹² Despite such outlooks, numerous legal philosophers and scholars have warned that not allowing all citizens access to the legal system is an affront to the notion of justice and undermines the foundations of a democratic society.¹³ In *Farretta v. California*,¹⁴ the Supreme Court held that pro se access to the courts is a constitutional right, but it has not defined how much, if any, assistance a court or other party can offer in helping a pro se litigant gain access to the courts.¹⁵ Litigants faced with criminal charges have the right to legal counsel due to the possibility of their being deprived of personal freedom or property, though they may still choose to enter the court system pro se.¹⁶ Civil litigants have not been held to have the same right to counsel, even when issues such as their children, housing, healthcare, or work are involved.¹⁷

¶3 There are myriad reasons that those seeking access to the judicial system cannot get the aid they need, including monetary limitations, lack of information, geographic location, and the complexity of the laws and rules governing court proceedings.¹⁸ While attorneys are required for some matters, nonattorney specialists can often meet the legal needs of citizens as efficiently as licensed legal professionals.¹⁹ The Supreme Court has held that due process requires both civil and criminal litigants to have meaningful access to the courts, which includes having access to adequate legal information and assistance, whether provided by attorney or nonattorney professionals.²⁰ While helpful, the triage systems employed by the courts and other organizations to determine which litigants receive aid needs to be expanded and refined to ensure that those needing legal assistance receive services.²¹ Gaining access to low- or no-cost legal assistance is particularly important to minority groups, who often have greater legal needs.²²

11. William E. Hornsby, Jr., *Gaming the System: Approaching 100% Access to Legal Services Through Online Games*, 88 CHI-KENT L. REV. 917, 918–23 (2013).

12. Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1293 (2013).

13. Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 38–42 (2002).

14. *Faretta v. California*, 422 U.S. 806 (1975).

15. *Id.* at 835–36.

16. *See Gideon v. Wainwright*, 372 U.S. 335, 341–45 (1963).

17. Lauren Sudeall Lucas, *Deconstructing the Right to Counsel* 1 (Am. Const. Soc'y Issue Brief, 2014), https://www.acslaw.org/sites/default/files/Lucas_-_Deconstructing_the_Right_to_Counsel.pdf [<https://perma.cc/83JE-ND5W>].

18. CHARLES L. OWEN ET AL., *ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS* 15–16 (2002).

19. *See generally id.* at 174–81.

20. *See Turner v. Rogers*, 564 U.S. 431 (2011).

21. Daniel Curry, *The March Toward Justice: Assessing the Impact of Turner v. Rogers on Civil Access-to-Justice Reforms*, 25 GEO. J. LEGAL ETHICS 487, 496–97 (2012).

22. Ronald W. Staudt, *Technology for Justice Customers: Bridging the Digital Divide Facing Self-Represented Litigants*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 71, 71–73 (2005).

Unauthorized Practice of Law Enforcement as a Barrier to Access to Justice

Limits on Assistance from Nonlawyers

¶4 Without nonattorney specialists assisting those who face legal issues, the judicial system would not be able to meet the needs of citizens.²³ Much like specialists in the medical field who work alongside doctors to aid patients, nonattorney specialists can help those seeking legal aid by providing moral support, assembling documents, and explaining procedural steps.²⁴ Nonattorney specialists have been found to be as effective at helping those with routine legal matters as attorneys²⁵ and are often more readily available to those needing aid.

¶5 In some jurisdictions, nonattorney specialists and nonlegal professionals can conduct legal services without attorney supervision, but they must not undertake activities that amount to the unauthorized practice of law.²⁶ A number of professionals perform functions that arguably qualify as the practice of law; these include accountants, insurance underwriters, and labor consultants.²⁷ Though the American Bar Association (ABA) has attempted to clarify the definition of unauthorized practice of law,²⁸ nonattorney professionals often remain unsure as to what actions constitute a violation.²⁹ Punishments for the unauthorized practice of law can range from contempt of court citations and injunctions to criminal misdemeanor charges.³⁰

¶6 Prohibitions on the unauthorized practice of law were created to ensure legal professionalism and prevent fraud, but some have criticized them for too narrowly restricting who can provide legal aid.³¹ The bar has been viewed as having a monopoly on legal services that is backed by the courts, which interpret bans on the unauthorized practice of law broadly to cover paralegals, notaries, and others who provide quasi-legal services, and thus limits the aid such nonattorney specialists can provide.³² Judges and lawyers have been accused of being biased against pro se litigants due to their adherence to the adversarial process of the law, the professional constraints and rules they work under, and the requirements that judicial proceedings strictly follow evidentiary and procedural rules, which make it difficult for pro se litigants to make use of the judicial process.³³ Bankruptcy courts, particularly those in Pennsylvania, have held preparers of petitions and court

23. Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 32–40 (1998).

24. Jonathan Lippman, *The Judiciary as the Leader of the Access-to-Justice Revolution*, 89 N.Y.U. L. REV. 1569, 1586 (2014).

25. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1806 (2001).

26. Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259, 1285–87 (2014).

27. Leone, *supra* note 8, at 50.

28. Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 ARIZ. L. REV. 773, 774–75 (2002).

29. Madison Mosley, Jr., Commentary, *The Authorized Practice of Legal Reference Service*, 87 LAW LIBR. J. 203, 204–05 (1995).

30. Diane Leigh Babb, Comment, *Take Caution When Representing Clients Across State Lines: The Services May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 537 (1999).

31. See generally Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2589–2606 (2014).

32. Bibas, *supra* note 12, at 1295.

33. Goldschmidt, *supra* note 13, at 42–45.

forms to an exacting degree of control when preparing documents, advertising services, or selling do-it-yourself kits.³⁴ Under the U.S. Code, those who do not follow the procedures that allow for document preparation by nonattorneys can be fined and held liable for any damages stemming from an improper preparation.³⁵

Limits on Online Resources and Software Solutions

¶7 In *Unauthorized Practice of Law Committee v. Parsons Technology*, the court held that Parsons Technology had violated Texas's unauthorized practice of law statutes by producing software that allowed customers to prepare their own legal forms using guidance provided by the software package's program, which performed functions traditionally provided by an attorney.³⁶ In reaction to the holding, the Texas legislature amended the state's unauthorized practice of law statutes to allow programs such as Parsons Technology's to be created without violating the state's unauthorized practice of law restrictions.³⁷ While the aftermath of *Parsons Technology* indicates that some policymakers are willing to relax the laws and rules governing what constitutes the unauthorized practice of law, others have expressed concerns over the possibility that information provided through electronic means could lead to mistakes if the author is not knowledgeable about the laws of the state where the visitor is located.³⁸

¶8 Arguments for making legal information available online stem from the idea that legal information should be provided at little or no cost to the public.³⁹ A number of government projects have made legal information free to access through the Internet but have not made the whole spectrum of legal resources available.⁴⁰ Electronic legal assistance in the form of machines such as Quick-Court and software that helps users create legal documents have become widely available through governmental and organizational websites.⁴¹ Courts and other official legal aid sites have provided videos, guides, podcasts, and questionnaires that assist people in finding legal information along with providing online assistance through self-help centers and guided form creation.⁴² The Legal Service Corporation, state and federal legal aid programs, and the State Justice Institute have made efforts to make information available and help pro se litigants by creating simplified forms and

34. Catherine J. Lanctot, *Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law*, 30 HOFSTRA L. REV. 811, 841-49 (2002).

35. Penalty for Persons Who Negligently or Fraudulently Prepare Bankruptcy Petitions, 11 U.S.C. § 110 (2012).

36. *Unauthorized Practice of Law Comm. v. Parsons Tech. Co.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *5-*11 (N.D. Tex. Jan. 22, 1999).

37. Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 65 TEX. B.J. 436, 440 (2002).

38. See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 692-713 (1995).

39. Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CALIF. L. REV. 615, 622-29 (1995).

40. Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 836-37 (2006).

41. Ethan Katsh, *Digital Lawyers: Orienting the Legal Profession to Cyberspace*, 55 U. PITT. L. REV. 1141, 1142-44 (1994).

42. James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 247-53 (2012).

online forms preparation systems for a variety of issues and jurisdictions.⁴³ Even with the development of free online resources such Pro Bono Net, LawHelp.org, A2J Author, Pro Bono Manager, and LawHelp Interactive by judicial and nonjudicial organizations, the need for legal assistance has not been met.⁴⁴

¶9 Academic law libraries have experienced a decrease in physical visits by patrons but an increase in use of their online sources.⁴⁵ While there are many online sources for litigants to gain information, some information may be controlled by a third party that limits access to the information for profit.⁴⁶ Having to pay to access information can strain a pro se litigant's financial resources and his or her ability to access the court system.⁴⁷ To make legal materials more accessible, academic law libraries have begun developing their own micro-archives that allow access to regional materials and specialized information that would otherwise be difficult for researchers to locate.⁴⁸ These archives, often called institutional repositories, have assisted librarians in making a variety of legal literature and materials freely accessible through the Internet.⁴⁹

¶10 While online forms and legal sources have helped pro se litigants get the information they need, under the various definitions and tests developed to determine what the practice of law is, almost any action could be considered the practice of law, including making legal information available online.⁵⁰ When publishing forms, online hosts have to be cognizant of the various rules governing attorney conduct, the potential of forming an attorney-client relationship with website visitors, and the rules controlling website content for legal professionals.⁵¹ Websites that ask visitors for information can create an unauthorized attorney-client relationship, even when they include disclaimers that the questions are for general information only and do not indicate that the services of an attorney are retained through answering the questions.⁵² Posting legal information on social media can also violate unauthorized practice of law restrictions.⁵³ If a visitor to a website with legal information resides in a state other than the host, the host can be held to violate the rules that control the interstate practice of law.⁵⁴

43. Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 94 JUDICATURE 156, 160 (2011).

44. Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 597-99 (2014-2015).

45. See Charles Martell, *The Absent User: Physical Use of Academic Library Collections and Services Continues to Decline 1995-2006*, 34 J. ACAD. LIBRARIANSHIP 400, 403-06 (2008).

46. See Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 220 (2007).

47. See Margaret B. Flaherty, Note, *How Courts Help You Help Yourself: The Internet and the Pro Se Divorce Litigant*, 40 FAM. CT. REV. 91, 95-97 (2002).

48. Mikhail Koulikov, *Beyond Digital Repositories: The (Sometimes) Wild World of Open Online Access to Legal Materials*, AALL SPECTRUM, Dec. 2009, at 24, 24, 26.

49. Yolanda P. Jones, *Libraries Can Help: Institutional Repositories*, 30 T.M. COOLEY L. REV. 253, 254 (2013).

50. See Cynthia L. Fountaine, *When Is a Computer a Lawyer? Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 151-58 (2002).

51. Lindzey Schindler, *Skirting the Ethical Line: The Quandary of Online Legal Forms*, 16 CHAP. L. REV. 185, 193-209 (2012).

52. *Barton v. U.S. Dist. Court*, 410 F.3d 1104, 1108-12 (9th Cir. 2005).

53. Steven C. Bennett, *Ethics of Lawyer Social Networking*, 73 ALB. L. REV. 113, 127-28 (2009).

54. See Babb, *supra* note 30, at 535-40.

Limits on Law Librarian Services

¶11 Law librarians are a unique group of information specialists whose competencies and skills touch on legal matters but whose activities do not rise to the level of the practice of law because librarians do not form attorney-client relationships with those they help and are not compensated for the services they provide.⁵⁵ While other professionals have more defined boundaries as to what services they can offer, law librarians face a unique mixture of often conflicting ethical and legal duties that limit their ability to help patrons.⁵⁶ The Supreme Court, in *Bounds v. Smith*, held that for a citizen facing criminal charges to have meaningful access to the courts requires the ability to access legal information, law libraries, and assistance in finding and using the materials they need.⁵⁷ While civil litigants have not been held to have the right to access legal materials and assistance while advancing their cases, it has been argued that equal protection considerations would require that civil litigants have an equivalent right to access legal materials and assistance.⁵⁸ The American Association of Law Libraries' (AALL) ethical principles require that a law librarian not engage in the practice of law while assisting patrons.⁵⁹ Assisting patrons while avoiding the unauthorized practice of law, whether they hold a J.D. or not, places law librarians in an uncomfortable position that can make them focus on the limits of what they do for patrons rather than on assisting them.⁶⁰

¶12 Under AALL's ethical principles, law librarians are to provide equal access to legal information no matter what a patron's background or level of professional legal training.⁶¹ Different patrons require different degrees of reference services and often require instruction as to how to access the information they need.⁶² Depending on the status of a patron, librarians must tailor the services they offer so they do not commit the unauthorized practice of law, even if it means refraining from providing information that the patron needs.⁶³ Beyond face-to-face reference sessions, law librarians assist patrons using electronic means and allow access to forms or links to forms through their library's websites.⁶⁴ Even when assisting patrons through indirect electronic means, such as posting information on their library's

55. See Randy Diamond & Martha Dragich, *Professionalism in Librarianship: Shifting the Focus from Malpractice to Good Practice*, 49 *LIBR. TRENDS* 395, 404-09 (2001).

56. Maria E. Protti, *Dispensing Law at the Front Lines: Ethical Dilemmas in Law Librarianship*, 40 *LIBR. TRENDS* 234, 236-40 (1991).

57. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

58. See Robert H. Abrams & Donald J. Dunn, *The Law Library's Institutional Response to the Pro Se Patron: A Post-Faretta Review*, 1 *W. NEW ENG. L. REV.* 47, 58-66 (1978).

59. *Id.*

60. See PAUL D. HEALEY, *LEGAL REFERENCE FOR LIBRARIANS: HOW AND WHERE TO FIND THE ANSWERS* 17-20 (2014).

61. See AALL *Ethical Principles*, AALL (approved Apr. 5, 1999), <http://www.aallnet.org/mm/Leadership-Governance/policies/PublicPolicies/policy-ethics.html> [<https://perma.cc/34NG-DLF7>].

62. Paul A. Arrigo, *Taking Time for Legal Research Instruction at the Reference Desk*, 19 *LEGAL REFERENCE SERVS. Q.*, nos. 1-2, 2001, at 75, 78-85.

63. C.C. Kirkwood & Tim J. Watts, *Legal Reference Service: Duties v. Liabilities*, *LEGAL REFERENCE SERVS. Q.*, Summer 1983, at 67, 70-74.

64. See Lee Sims, *Academic Law Library Web Sites: A Source of Service to the Pro Se User*, 23 *LEGAL REFERENCE SERVS. Q.*, no. 1, 2004, at 1, 15-19.

website, librarians have limits on what they can do to help patrons due to the rules that govern law librarian's activities.⁶⁵

¶13 Scholars disagree as to what constitutes an appropriate range of services that law librarians can offer to public patrons.⁶⁶ Richmond recommends that librarians not allow patrons to give narratives about their situations and then to limit assistance to directing patrons to books and materials that could be of use.⁶⁷ Protti encourages a more open approach and writes that law librarians must make the information that a patron accesses understandable to the patron, even if the librarian brushes against the ethical and legal boundaries placed on them; otherwise, they fail in providing complete reference services and helping patrons access the legal system.⁶⁸

¶14 Law librarians also have to be cognizant of the possibility of legal claims being brought against them for providing incorrect information to a patron.⁶⁹ Healey writes that librarians face little risk in being charged with the unauthorized practice of law; he analyzed the few available articles that debated how librarians could be held liable for damages stemming from professional malpractice due to erroneous information given during a reference session.⁷⁰ However, librarians who work in specialized libraries could still face malpractice claims.⁷¹ It has been argued that public law librarians are immune from lawsuits due to their status as government employees and are protected by sovereign immunity.⁷² While the matter has not been settled definitively, experts have come to the consensus that the possibility of librarians facing a claims for damages due to professional malpractice are quite small due to the nature of what librarians do and that librarians are often not considered to hold professional positions.⁷³

¶15 Law library patrons often have misconceptions about what services librarians can offer.⁷⁴ When patrons learn that librarians are limited in what they can do, it may leave them confused and frustrated.⁷⁵ Law libraries, suggests one commentator, could post signage that explains what librarians can do when assisting patrons during in-person reference sessions.⁷⁶ A possible solution to avoid unauthorized practice of law claims when assisting patrons online is to post to library

65. *Id.* at 23–24.

66. Larry D. Richmond, Jr., *The Pro Se Patron: An Ethical Rather than Legal Dilemma*, 22 *LEGAL REFERENCE SERVS. Q.*, nos. 2–3, 2003, at 75, 81–83.

67. *Id.* at 81–82.

68. Protti, *supra* note 56, at 236–40.

69. Leone, *supra* note 8, at 64–65.

70. Paul D. Healey, *Chicken Little at the Reference Desk: The Myth of Librarian Liability*, 87 *LAW LIBR. J.* 515, 516–19 (1995).

71. Mark Mackler & Michael Saint-Onge, Commentary, *The Sky May Yet Fall on Firm Librarians: A Reply to "Chicken Little at the Reference Desk"*, 88 *LAW LIBR. J.* 456, 458–60 (1996).

72. John Cannan, *Are Public Law Librarians Immune from Suit? Muddying the Already Murky Waters of Law Librarian Liability*, 99 *LAW LIBR. J.* 7, 12–14, 2007 *LAW LIBR. J.* 1, ¶¶ 12–14.

73. *Id.* at 30–31, ¶ 53.

74. Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 *LAW LIBR. J.* 129, 134 (1998).

75. *Id.* at 133.

76. Charles J. Condon, *How to Avoid the Unauthorized Practice of Law at the Reference Desk*, 19 *LEGAL REFERENCE SERVS. Q.*, nos. 1–2, 2001, at 165, 171.

websites the institutional policies and clear and visible disclaimers that librarians cannot give legal advice.⁷⁷

Accessibility of Legal Information as a Barrier to Equal Access to Justice

Physical Barriers to Legal Information

¶16 Beyond the limitations on who can give legal aid, considerations such as distance and time can have negative impacts on patrons who have to travel to get legal aid.⁷⁸ The lack of a local law school library is often one of the first barriers that pro se litigants encounter when trying to access the justice system.⁷⁹ During the 1970s, law libraries distanced themselves from providing services to public patrons due to the time commitments involved, the ready availability of public libraries, and the possibility of running afoul of unauthorized practice of law restrictions.⁸⁰ Changes in the requirements for government documents to be made available to the public under the Depository Library Act, the E-Government Act, and the *Faretta* holding have pushed law libraries to become more active in helping members of the public find the legal information they need.⁸¹

Composition of Legal Information as a Barrier to Access to Justice

¶17 The first legal publications, created and used by legal professionals, gave little insight into the law for readers from outside the profession.⁸² William Blackstone, an English judge and legal scholar, first organized legal materials in a way that allowed researchers to efficiently find the information they needed and to organize the concepts of law in an accessible manner.⁸³ In the 1890s, John West adapted Blackstone's concepts by taking U.S. court opinions, binding them in volumes, and creating a system that organized the materials according to their legal topics.⁸⁴ West assigned each topic a corresponding number within a digest system that researchers could use to gather materials that discussed the same legal topic.⁸⁵ West's case publications and organizational scheme later developed into the National Reporter System,⁸⁶ which has profoundly influenced the organization,

77. Artie Berns & Corrine Vogel, *Tell It to the World (Wide Web): Promulgating Academic Law Library Pro Se Patron Policies via the Internet*, AALL SPECTRUM, Apr. 2015, at 29, 29.

78. See Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 504–08 (2014).

79. AM. ASS'N OF LAW LIBRARIES, *LAW LIBRARIES AND ACCESS TO JUSTICE: A REPORT OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES SPECIAL COMMITTEE ON ACCESS TO JUSTICE 7* (2014), <http://www.aallnet.org/mm/Publications/products/atjwhitepaper.pdf> [<https://perma.cc/QR7Z-K7RT>].

80. Paul T. Jaeger & John Carlo Bertot, *Responsibility Rolls Down: Public Libraries and the Social and Policy Obligations of Ensuring Access to E-government and Government Information*, 30 PUB. LIBR. Q. 91, 96 (2011).

81. Leone, *supra* note 8, at 48–49.

82. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 CALIF. L. REV. 15, 16 (1987).

83. Robert C. Berring, *Legal Research and the World of Thinkable Thoughts*, 2 J. APP. PRAC. & PROCESS 305, 308 (2000).

84. Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 160–61 (2006).

85. *Id.* at 161.

86. Robert C. Berring, *Full-Text Databases and Legal Research: Backing Into the Future*, 1 HIGH TECH. L.J. 27, 31 (1986).

structure, and retrieval of American legal information.⁸⁷ But what for years has been considered a success is now being named as a contributor to the imbalance in access to legal information: by giving a small group of publishers control over what legal information is available for public access, the current reporting system's commercial giants exert power over the legal system.⁸⁸ West Publishing, in particular, has been accused of using its influence over judges to ensure that it remains the main publisher of legal information.⁸⁹

¶18 With the vast and constantly increasing amount of legal information, legal professionals have come to rely on electronic searches to find the information they need, and law students are trained to use such tools over print materials.⁹⁰ The shift from print to digital legal materials has allowed researchers to gather legal and multidisciplinary materials efficiently, but it has also made knowing the proper way to conduct legal research more necessary than at any other time.⁹¹ The structure of West's digests and subject divisions has been adapted to fit the digital format, which has led to changes in how legal research is conducted—that is, from thinking about broad legal concepts to picking the words and phrases most likely to retrieve the information a researcher needs based on a search program's parameters.⁹² Natural language searches, a commonly used electronic legal information retrieval method, can return useful or useless materials, depending on the search used and how the information is interpreted by the search program and categorized by the individual who imputed the information.⁹³

¶19 The law has expanded beyond its traditional bounds and includes materials from agencies, local ordinances, municipal codes, and other sources that citizens can access through governmental websites.⁹⁴ Until the development of digital legal sources, libraries served as the primary holders of legal information.⁹⁵ Most law libraries—whether court, county, or private—have scaled down their print collections and increased their use of digital sources.⁹⁶ With the wider use of electronic publishing and increased reliance on computer-aided indexing and natural language searches, the patterns of legal topic organization created by Blackstone and West have begun to shift or dissolve.⁹⁷ Digital searching has allowed new viewpoints into the legal realm, including critical race theory and feminism.⁹⁸ Courts,

87. F. Allan Hanson, *From Key Numbers to Keywords: How Automation Has Transformed the Law*, 94 LAW LIBR. J. 563, 567–68, 2002 LAW LIBR. J. 36, ¶¶ 12–13.

88. *Id.* at 568, ¶¶ 13–14.

89. *Id.* at 567, ¶ 13.

90. Sheila F. Miller, *Are We Teaching What They Will Use? Surveying Alumni to Assess Whether Skills Teaching Aligns with Alumni Practice*, 32 MISS. C. L. REV. 419, 432 (2014).

91. *Id.* at 440–41.

92. See Barbara Bintliff, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, 88 LAW LIBR. J. 338, 345–47 (1996).

93. *Id.* at 347.

94. Yvonne J. Chandler, *Accessing Legal and Regulatory Information in Internet Resources and Documents*, 44 J. LIBR. ADMIN. 263, 300–04 (2006).

95. See Arewa, *supra* note 40, at 833–34.

96. See Lee F. Peoples, *The Death of the Digest and the Pitfalls of Electronic Research: What Is the Modern Legal Researcher to Do?*, 97 LAW LIBR. J. 661, 661, 2005 LAW LIBR. J. 41, ¶ 1.

97. Carol M. Bast & Ransford C. Pyle, *Legal Research in the Computer Age: A Paradigm Shift?*, 93 LAW LIBR. J. 285, 299, 2001 LAW LIBR. J. 13, ¶ 54.

98. Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 OHIO ST. L.J. 847, 847, 853–54 (1991).

including the Supreme Court, now commonly cite to nonlegal materials, which has further blurred the line as to what is considered legal information.⁹⁹ Law libraries are leasing access to information of all kinds through online publishers rather than owning their legal information sources.¹⁰⁰ The trend of legal information becoming available only through online databases has put commercial vendors in control of what materials are available for the public and has eliminated centralized points of access for individuals to search for legal information, even if pro se litigants visit the law library for assistance.¹⁰¹

Law Library–Based Solutions

¶20 Modern legal ethics have begun to articulate more than vague aims and ideas concerning access to justice, equality, and working for the public interest. They may urge concrete actions to improve the legal profession and the justice system.¹⁰² To make legal information more accessible, states have initiated programs to create centralized website networks for those seeking legal information and have offered online, graphically based interview programs that help users determine what documents and information they need.¹⁰³ Law schools and students have begun to contribute to the effort to make legal information available online by creating software that pro se litigants can use to generate documents,¹⁰⁴ but more needs to be done to help those seeking access to justice. Morris Cohen, the influential director of the Yale Law School library and legal scholar, advocated that law libraries serve as central resources for universities, legal professionals, public patrons, and students, with librarians serving as innovators and teachers.¹⁰⁵ Academic law libraries, with their inherent combination of legal information experts and sources, can become indispensable to their communities and schools and make significant contributions to access to justice efforts through the creation of self-help clinics.

¶21 Government officials have prompted law libraries to use Internet-based sources to help patrons access forms for a variety of functions and to help them enroll in medical insurance programs.¹⁰⁶ Mimicking methods used by nonattorney professionals to deliver legal services under Washington State's Limited License Technician program, librarians can work with local bar associations and courts to provide legal aid online without committing the unauthorized practice of law and without creating an attorney-client relationship during electronic assistance

99. Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 500–10 (2000).

100. See John Palfrey, *Cornerstones of Law Libraries for an Era of Digital-Plus*, 102 LAW LIBR. J. 171, 184, 2010 LAW LIBR. J. 11, ¶ 49.

101. Arewa, *supra* note 40, at 833–34.

102. See Trevor C.W. Farrow, *Sustainable Professionalism*, 46 OSGOODE HALL L.J. 51, 53–56 (2008).

103. See, e.g., Staudt, *supra* note 22, at 79–90.

104. Marc Lauritsen, *Liberty, Justice, and Legal Automata*, 88 CHI-KENT L. REV. 945, 947–48 (2013).

105. S. Blair Kauffman, *Cornerstones for Enduring Law Libraries: Morris Cohen's Influence at Yale*, 104 LAW LIBR. J. 45, 46, 2012 LAW LIBR. J. 8, ¶ 5.

106. See John Carlo Bertot et al., *Drafted: I Want You to Deliver E-Government*, LIBR. J., Aug. 2006, at 34, 35–36.

sessions.¹⁰⁷ In Michigan, lawyers, legal aid organizations, law librarians, and a member of the Michigan Supreme Court coordinated their access to justice efforts to create the Michigan Legal Help website, which allows access to online forms and research handbooks for pro se litigants.¹⁰⁸ Librarians can use their libraries' and schools' Internet presence as platforms to publish materials they create and to act as or establish gateways to governmental information hubs.¹⁰⁹ The expansion of online government publications has caused an increase in grey legal literature (publications not categorized and controlled by commercial publishers), which can provide the information that patrons need and that law librarians have skill at navigating.¹¹⁰ By creating online resources and research guides, law librarians can provide structures that facilitate a logical flow of questions or information frameworks that guide patrons to the information they need.¹¹¹

¶22 Meaningful access to information requires more than physical or electronic access alone; it requires patrons to have the means to understand the information they access.¹¹² Beyond helping patrons find the information they need, librarians must assist them to interpret the information.¹¹³ The Oakland County Law Library, as part of a wider access to justice clinic network in Michigan, has created its own self-help clinic that combines its staff's knowledge with the resources available through the Michigan Legal Help website to help pro se litigants.¹¹⁴ Academic law libraries can follow the Oakland County Law Library's example and create their own self-help clinics that use law librarians to teach in-depth workshops in legal topics.¹¹⁵ The establishment of law school legal clinics has been one of the most influential developments in legal education and has helped law schools meet the legal needs of their communities and the educational needs of their students.¹¹⁶ Every state has a student practice rule that allows students to provide all the functions of a lawyer while being supervised by licensed attorneys.¹¹⁷ The vast majority of law schools have legal clinics, which are often one of the few opportunities for students to gain practice experience before completing their studies.¹¹⁸

107. See Kara Noel, *The Unbundling of Legal Service and Its Implications for Law Librarianship*, 34 LEGAL REFERENCE SERVS. Q. 245, 260–63 (2015).

108. Yolanda Jones & Caroline Ilako, *Dynamic Law Libraries: Access, Development and Transformation in Africa and the United States 4* (IFLA WLIC conference paper, Aug. 2015), <http://library.ifla.org/1120/1/114-jones-en.pdf> [<https://perma.cc/57KW-22PE>].

109. See Ellen R. Tise et al., *Libraries Driving Access to Knowledge: A Discussion Paper*, 34 IFLA J. 341, 344 (2008).

110. Taryn L. Rucinski, *The Elephant in the Room: Toward a Definition of Grey Legal Literature*, 107 LAW LIBR. J. 543, 544–45, 2015 LAW LIBR. J. 26, ¶ 3.

111. See Zorza & Udell, *supra* note 26, at 1298–99.

112. See Peter Johan Lor & Johannes Jacobus Britz, *Is a Knowledge Society Possible Without Freedom of Access to Information?*, 33 J. INFO. SCI. 387, 390 (2007).

113. Noel, *supra* note 107, at 251–52.

114. Jones & Ilako, *supra* note 108, at 4.

115. See, e.g., Amy C. Henderson, *Meaningful Access to the Courts? Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 UMKC L. REV. 571, 580–81 (2003).

116. See Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1934 (2002).

117. Elliot S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 376 (2001).

118. Erwin Chemerinsky, *Rethinking Legal Education*, 43 HARV. C.R.-C.L. L. REV. 595, 595 (2008).

Benefits Beyond Helping Pro Se Litigants from Library-Based Self-Help Clinics

Benefits to the Law School Library

Enhances the Library's Position Within Its Community and School

¶23 With limited budgets, pressure to modernize their facilities, and demands to offer a broader array of services, law libraries must find productive means to meet the needs of their patrons, maintain funding, and remain relevant.¹¹⁹ The ABA has changed its accreditation standards for academic law libraries to encourage them to be innovative in their use of their resources and to expand beyond their traditional roles.¹²⁰ An increasing dependence on digital resources has led law libraries to reduce their physical collections and create spaces for classrooms and computer labs.¹²¹ Much as they have shifted their libraries' collections and research methods, law librarians must adapt their roles as legal education professionals.¹²² Through self-help clinics, librarians can teach their students about the numerous nonreporter and nonstatutory sources of legal information, such as formbooks and practice guides, which might not be covered in a standard legal research class.¹²³ Librarians can also use the clinic setting to teach students effective and practical research skills to resolve a client's legal problem rather than having them look for a particular answer to an exercise.¹²⁴

Confirms Law Librarians as Law School Faculty

¶24 Most law librarian positions below the level of library director are not given faculty status in their law schools.¹²⁵ It has been found that academic qualifications and the status of the school where professors earned their J.D. degrees have more impact on their rank within their schools than their teaching ability or other credentials.¹²⁶ While there has been a rise in the number of law professors who hold a degree other than a J.D.,¹²⁷ a noticeable portion of law school faculty hold a J.D. alone.¹²⁸ Law professors must have knowledge of the subjects they teach, but they do not have to have training in conveying that knowledge to students in a classroom

119. See Connie Lenz, *The Public Mission of the Public Law School Library*, 105 LAW LIBR. J. 31, 54–55, 2013 LAW LIBR. J. 2, ¶¶ 56–58.

120. Theodora Belniak, *The History of the American Bar Association Accreditation Standards for Academic Law Libraries*, 106 LAW LIBR. J. 151, 171–73, 2014 LAW LIBR. J. 9, ¶¶ 68–73.

121. Kenneth J. Hirsh, *Like Mark Twain: The Death of Academic Law Libraries Is an Exaggeration*, 106 LAW LIBR. J. 521, 528–29, 2014 LAW LIBR. J. 29, ¶ 23.

122. Terry Hutchinson, *Valé Bunny Watson? Law Librarians, Law Libraries, and Legal Research in the Post-Internet Era*, 106 LAW LIBR. J. 579, 591, 2014 LAW LIBR. J. 32, ¶ 37.

123. Randy J. Diamond, *Advancing Public Interest Practitioner Research Skills in Legal Education*, 7 N.C. J.L. & TECH. 67, 121–24 (2005).

124. *Id.* at 72–82.

125. Barbara A. Bintliff et al., *Rebuilding the Profession: Recommendations for Librarians Interested in Becoming Academic Law Library Directors*, 99 LAW LIBR. J. 101, 106, 2007 LAW LIBR. J. 6, ¶ 26.

126. Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 5 AM. BAR FOUND. RES. J. 501, 521–28 (1980).

127. See Joni Hersch & W. Kip Viscusi, *Law and Economics as a Pillar of Legal Education*, 8 REV. L. & ECON. 487, 489–92 (2012).

128. See Justin McCrary et al., *The Ph.D. Rises in American Law Schools, 1960–2011: What Does It Mean for Legal Education?*, 65 J. LEGAL EDUC. 543, 553 (2016).

setting.¹²⁹ Many law librarian positions now require that applicants hold both a J.D. and a master's degree in library and information science.¹³⁰ Master's degrees in library and information science stress not only information literacy, but also the ability to teach research concepts and methods,¹³¹ which is not emphasized in most advanced degrees' curriculum.¹³² It has been found that without both degrees, law librarians often face challenges in meeting the requirements of their positions in finding legal information and instructing patrons in using legal reference materials.¹³³

¶25 Studies showing that many law schools are not in compliance with ABA standards in providing their library directors a faculty position and changes in the ABA's requirements for directors to hold a J.D. and a master's in library science reflect the prevalent opinion that law librarians of all ranks should not be counted among law school faculty.¹³⁴ Creating self-help clinics would bolster law librarians' positions since a licensed attorney must oversee legal clinic activities.¹³⁵ Using a clinic setting to enhance their roles as instructors, law librarians could assist in creating more effective legal research classes, relieve pressure on legal writing professors by separating legal research from legal writing, and provide knowledge of current research practices and materials to their students,¹³⁶ while affirming their status as full faculty members.

Creates an Opportunity to Define Law Librarians' Service Boundaries

¶26 Defining where librarians' reference assistance ends and where their libraries' self-help clinics' services begin will aid librarians in avoiding the unauthorized practice of law during reference sessions and help them gain malpractice coverage for the actions they undertake when acting as members of the clinics.¹³⁷ One of the key issues that law librarians face when interacting with patrons is determining when their actions could progress into the practice of law.¹³⁸ To avoid possible ethical or legal issues, law librarians can work with their law schools' administrations to define the boundaries of what they can do when helping clinic clients and when

129. Kevin H. Smith, *How to Become a Law Professor Without Really Trying: A Critical, Heuristic, Deconstructionist and Hermeneutical Exploration of Avoiding the Drudgery Associated with Actually Working as an Attorney*, 47 U. KAN. L. REV. 139, 144 (1998).

130. Stephen Young, *The Dual Degree: A Requirement in Search of a Justification*, AALL SPECTRUM, Dec. 2012, at 7.

131. See Claudene Sproles et al., *What the Teachers Are Teaching: How MLIS Programs Are Preparing Academic Librarians for Instructional Roles*, 49 J. EDUC. LIBR. & INFO. SCI. 195, 203-07 (2008).

132. See Nira Hativa, *Becoming a Better Teacher: A Case of Changing the Pedagogical Knowledge and Beliefs of Law Professors*, 28 INSTRUCTIONAL SCI. 491, 493-97 (2000).

133. See Elizabeth Caulfield, *Is This a Profession? Establishing Educational Criteria for Law Librarians*, 106 LAW LIBR. J. 287, 325, 2014 LAW LIBR. J. 19, ¶ 126.

134. Michael J. Slinger & Sarah C. Slinger, *The Career Path, Education, and Activities of Academic Law Library Directors Revisited Twenty-Five Years Later*, 107 LAW LIBR. J. 175, 193, 2015 LAW LIBR. J. 8, ¶ 104.

135. See David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 379, 405-15 (2001).

136. Carol A. Parker, *How Law Schools Benefit When Librarians Publish, Teach, and Hold Faculty Status*, 30 LEGAL REFERENCE SERVS. Q. 237, 240-43 (2011).

137. See Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113, 1179-85 (2006).

138. Mosley, *supra* note 29, at 204.

providing reference services to patrons.¹³⁹ If it appears to a librarian that a patron will require help beyond reference services, he or she can direct the patron to the library's self-help clinic, which will do an intake and explain the limits of the clinic's services.¹⁴⁰

Benefits of Law Library Self-Help Clinics for Law Schools and Students

Law School Benefits

¶27 To remain marketable, law schools must provide students the practical skills that employers now demand of new hires.¹⁴¹ Clinics allow law schools to expand their class offerings into new areas of the law and create dialogues between students and faculty as to whether the schools' courses are preparing students to succeed in their future practices.¹⁴² Law schools must also show that they can provide research support on a wide variety of topics for students while in law school and in their later professional positions.¹⁴³ Increasingly, law school clinics are accepting clients with particular kinds of legal issues to reflect the trend of specialization in legal practice and to make things more predictable for professors and students.¹⁴⁴ By offering broader-based access to justice clinics, such as library-based self-help clinics, law schools can instill in their students the skills needed to help their clients with a variety of issues¹⁴⁵ and demonstrate they have the experts and resources to support their students in their future endeavors, whatever areas of practice they enter into. Broad-based legal clinics also allow schools to show students the many avenues that a legal profession can take, which can help students find the areas of law where they will find satisfaction working, and can help their schools strengthen their alumni relations, which can help their students find jobs.¹⁴⁶

¶28 The ABA has stressed that law schools should do more to encourage their students to be active in social justice projects and in assisting society as a whole.¹⁴⁷ Law schools must teach their students how the law affects their communities, or they fail a key part of educating their students about what legal advocacy means.¹⁴⁸ Through library-centered self-help clinics, law schools can become integral parts of

139. Rovner, *supra* note 137, at 1180–82.

140. See Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *FORDHAM L. REV.* 1971, 2030–37 (2002).

141. Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 *J. LEGAL EDUC.* 598, 605–07 (2010).

142. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *VAND. L. REV.* 321, 323–26 (1982).

143. Jootaek Lee, *Frontiers of Legal Information: The U.S. Law Librarians of the Future*, 43 *INT'L J. LEGAL INFO.* 411, 427 (2015).

144. JoNel Newman, *Re-Conceptualizing Poverty Law Clinical Curriculum and Legal Services Practice: The Need for Generalists*, 34 *FORDHAM URB. L.J.* 1303, 1311 (2007).

145. Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 *CLINICAL L. REV.* 307, 316–21 (2001).

146. Howard R. Sacks, *Clinical Legal Education at the University of Connecticut School of Law*, 16 *CONN. L. REV.* 765, 765 (1984). *But see* Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 *S. CAL. L. REV.* 1231, 1256 (1991).

147. See John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 *WM. MITCHELL L. REV.* 303, 331–32 (2007).

148. Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 *CLINICAL L. REV.* 37, 39–44 (1995).

their communities, create a network of connections for their schools and students, and gain access to resources that otherwise would not be available.¹⁴⁹

¶29 One of the main functions of law libraries in the new era of digital information is to work with organizations of all varieties to exchange ideas, make legal information more widely available, and put their law schools into people's minds.¹⁵⁰ Often, law schools that offer clinic course options and assist the local legal community gain funding and support from their local bar associations.¹⁵¹ If libraries open their clinic training sessions to attorneys outside the school, they can serve as centers of professional camaraderie and development, create links with solo and firm practitioners in their area, and allow networking opportunities for their students with potential employers.¹⁵² Some issues facing those who enter the legal system pro se have become international in scope and require coordinated efforts by governments and organizations around the world to counter.¹⁵³ By creating library-based self-help clinics that develop Internet platforms for legal materials and research and provide services to clients and patrons around the world, law libraries can expose their students to international issues and legal concepts, get their schools' names out on the global market, and potentially gain funding for their schools from organizations such as the United Nations.¹⁵⁴

Benefits for Law Students

¶30 Law students are classified as adult learners and have been found to develop new skills more efficiently when using them in a manner that will directly apply to their professional activities.¹⁵⁵ Christopher Langdell, Harvard law school dean and founder of the case law method of teaching legal theory, perceived the law library as a laboratory where students learned legal concepts and their practical applications.¹⁵⁶ In keeping with Langdell's vision, librarians can establish self-help legal clinics to not only help their patrons but to also create learning opportunities for students.¹⁵⁷ By including students in self-help clinic activities, law librarians can use their knowledge, nontraditional teaching methods, and pedagogy to introduce students to the ethical and practical issues they will face when in practice.¹⁵⁸

¶31 The Socratic Method approach to teaching law does not adequately prepare students for working with a diverse body of clients and within a cooperative group

149. David J. Herring, *Clinical Legal Education: Energy and Transformation*, 31 U. Tol. L. Rev. 621, 627 (2000).

150. Palfrey, *supra* note 100, at 174–75, ¶ 12.

151. Quintin Johnstone, *Law School Legal Aid Clinics*, 3 J. LEGAL EDUC. 535, 537–38 (1951).

152. Joan Rataic-Lang, *The Collaborative Law Librarian: The Partnership Between the Library and the Lawyer's Association*, ALL-SIS NEWSL., Winter 2015, at 16, 16.

153. See Edgar S. Cahn, *Reinventing Poverty Law*, 103 YALE L.J. 2133, 2133 (1994).

154. See Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 PENN ST. INT'L L. REV. 421, 424–28 (2004).

155. See JOHN O. SONSTENG ET AL., *A LEGAL EDUCATION RENAISSANCE: A PRACTICAL APPROACH FOR THE TWENTY-FIRST CENTURY: THE HISTORY AND STATUS OF LEGAL EDUCATION* 113–16 (2008).

156. Richard A. Danner, *Law Libraries and Laboratories: The Legacies of Langdell and His Metaphor*, 107 LAW LIBR. J. 7, 27, 2015 LAW LIBR. J. 1, ¶ 49.

157. See Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. J. INT'L L. 103, 124–25 (2002).

158. See Vicenç Feliú & Helen Frazer, *Embedded Librarians: Teaching Legal Research as a Lawyering Skill*, 61 J. LEGAL EDUC. 540, 556–59 (2012).

setting.¹⁵⁹ Working collaboratively on projects while in the classroom or through electronic forums fosters students' interpersonal skills and awareness of working with a group to accomplish a task.¹⁶⁰ It has been found that students in legal clinic settings tend to use a social networking approach to seek information,¹⁶¹ which enhances their ability to learn concepts at a higher level of understanding and to produce quality works.¹⁶² The traditional classroom method of teaching legal practice also tends to teach students ideologies and methods that are often more harmful than helpful to those seeking legal aid who have limited resources.¹⁶³ Working in clinics that help with a variety of issues, students learn alternative approaches to solving legal needs, such as participating in legal hotline programs and creating legal information packets.¹⁶⁴ Allowing students to approach their clients' issues in a variety of ways provides them an opportunity to develop a broader view of what the judicial system was created to do when examining the concepts of fairness and justice.¹⁶⁵

¶32 Attorneys have begun to employ Internet marketing, including posting on social media sites, as part of their practices.¹⁶⁶ The use of Internet communication services has allowed attorneys new forums to correspond with potential clients and other legal professionals, but its use has also raised a variety of ethical concerns.¹⁶⁷ Posts made on attorneys' personal or professional pages on sites such as Facebook, whether posted by the owner of the page or not, can have serious consequences for legal practices.¹⁶⁸ Through assisting in the creation of online materials for their self-help clinics, law students can learn how legal concepts can be transferred to practical information sites and formatted into working documents.¹⁶⁹ During the process of creating and posting legal materials to the Internet, law librarians can teach students the ethical and professional considerations they must be aware of when making information available online.¹⁷⁰ Students need to understand the possible ramifications of their online activities before they enter into the legal profession

159. See Vernellia R. Randall, *Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools*, 16 T.M. COOLEY L. REV. 201, 211–12 (1999).

160. WILLIAM CLYDE & ANDREW DELOHERY, *USING TECHNOLOGY IN TEACHING* 70–71 (2005).

161. See Yolanda Patrice Jones, "Just the Facts Ma'am?" A Contextual Approach to the Legal Information Use Environment 175–81 (Mar. 2008) (unpublished Ph.D. dissertation, Drexel University), <https://idea.library.drexel.edu/islandora/object/idea%3A2837>.

162. CLYDE & DELOHERY, *supra* note 160, at 55.

163. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1049–53 (1970).

164. Katherine R. Kruze, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405, 409, 417–18 (2002).

165. See Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 290–98 (2001).

166. Margaret M. DiBianca, *Ethical Risks Arising from Lawyers' Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 179 (2011).

167. See Amy-Kate Roedger, Comment, *Wall Posts, Status Updates, and the Bar: How Social Networking Impacts Character and Fitness Requirements*, 35 J. LEGAL PROF. 145, 148–49 (2010).

168. Tal Harari, *Facebook Frenzy Around the World: The Different Implications Facebook Has on Law Students, Lawyers, and Judges*, 19 ILSA J. INT'L & COMP. L. 1, 20 (2012).

169. See Paul D. Callister, *Time to Blossom: An Inquiry into Bloom's Taxonomy as a Hierarchy and Means for Teaching Ordered Legal Research Skills*, 102 LAW LIBR. J. 191, 212–18, 2010 LAW LIBR. J. 12, ¶ 42.

170. See Anna P. Hemingway, *Keeping It Real: Using Facebook Posts to Teach Professional Responsibility and Professionalism*, 43 N.M. L. REV. 43, 53–57 (2013).

since state character and fitness boards can review their posts as part of their bar application process and employers often review candidates' social media presences before making a decision to hire.¹⁷¹

Possible Drawbacks to Library-Based Self-Help Clinics

¶33 Establishing self-help clinics can have a variety of benefits for both law libraries and their schools, but law school clinics can also have their drawbacks. Due to the debate of whether to classify law students as full attorneys or student practitioners under the ethical rules, there could be professional responsibility issues for faculty involved in the clinic.¹⁷² Of particular concern are the rules that control conflicts with clients.¹⁷³ Conflicts of interest can arise between faculty and students, faculty and outside legal groups, and students and their future employers, which can adversely affect students' ability to find a professional position after they have completed their studies.¹⁷⁴

¶34 Clinics can provide law schools with positive standing in their communities, but they can also cause the school to face political pressure to curtail or stop activities that would potentially harm local businesses or touch on politically volatile topics.¹⁷⁵ Clinics that receive funding from community groups can become beholden to those giving the funds, which could compromise the clinics' independence when conducting activities.¹⁷⁶ Clinics can establish rules as to who qualifies to be a client and what topics they will assist with, but they must remain within the limits of the student practice laws of their jurisdiction.¹⁷⁷ There have been incidences of judicial rulemakers being pressured to change the rules that govern student clinic activities by business and political groups when clinics took up controversial topics.¹⁷⁸ If the rules that govern student practice limits change, clinics must adapt their procedures to reflect the new rules, which can limit the services that law clinics offer and diminish the impact they have in their communities.¹⁷⁹

Conclusion

¶35 Access to justice has been an issue concerning legal systems throughout history. Though many approaches have been used, allowing full access to the courts for citizens remains an aspiration rather than a reality. Due to recent economic downturns and limitations placed on social service providers, access to the court system for pro se litigants has become more difficult to obtain. To increase access

171. Harari, *supra* note 168, at 5–12.

172. Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 514–15 (2002).

173. *Id.* at 522–28.

174. *Id.*

175. Peter A. Joy & Charles D. Weisselberg, *Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege*, 4 CLINICAL L. REV. 531, 532–37 (1998).

176. See Abel, *supra* note 4, at 479.

177. For an example of one such clinic, see Sam A. LeBlanc, III, Essay, *Debate over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219, 220 (1999).

178. *Id.* at 221–30.

179. *Id.* at 223–34.

to justice, coordinated efforts from a number of legal organizations must make information easier to access and provide support to those entering the judicial system without legal counsel.

¶36 While criminal litigants have been given the right to access legal information and the corresponding support to use such information effectively, civil pro se litigants have not been found to have the same right. This has left civil pro se litigants to find legal information, interpret the materials they find, and navigate the court system without assistance. Due to a number of considerations ranging from physical location of the legal information and assistance that a pro se litigant needs to information being accessible only through commercial databases, pro se litigants often cannot obtain the information and support they need to advance their cases. While nonattorney specialists have been found to be effective in helping those needing legal assistance, due to the limits placed on them by the laws and regulations that govern the unauthorized practice of law, they are limited in the ways and scope of assistance they can provide pro se litigants. Law librarians, even those who hold a J.D., are classified as nonattorney specialists and have to limit the assistance they provide patrons to reference services.

¶37 The structure of legal information itself can make it difficult for pro se patrons to find the information they need. Due to the unique categorization and indexing system of printed legal materials, pro se litigants may not be able to utilize the sources they access without legal training or without specialized assistance. When searching for information online, pro se litigants must sift through commercial, official, and sometimes misleading websites to find the information they need, if the information is available on the Internet at all.

¶38 Law libraries possess the experts and resources needed to help pro se litigants gain access to the courts and can help ease the pressure on the judicial system by assisting litigants who would otherwise take time from judges or court staff. Beyond the traditional methods of assisting pro se litigants, working with their law schools, and collaborating with community legal organizations, law libraries can expand the services they offer to those who need legal information and procedural guidance. By establishing self-help clinics that focus on legal reference and form completion, law libraries can help their communities, their schools, and the law librarian profession.

¶39 Law librarians are skilled at publishing legal information in usable and understandable formats on the Internet and helping patrons find the information they need through online and in-person reference sessions. Working in a clinic setting, law librarians can expand the services they provide to patrons beyond those of reference services and can help pro se litigants to find the information they need for their cases, put the information in context, and direct them in what actions to take to progress their case. Law librarians can also use the clinic as a dynamic setting to teach law students practical legal skills, ethical concerns about publishing information online, and social justice in a less abstract manner than presented in the classroom. Library-based law clinics would allow schools to make connections within their communities, create programs to attract potential students, and meet the ABA's practical educational requirements.

¶40 Establishing self-help clinics would benefit law libraries and librarians. With budgetary challenges, shifts in their collections, and changing informational

requests by faculty, students, and patrons, law libraries must adapt to meet the needs of their users and emphasize their positions as indispensable parts of their communities and law schools. By working with community legal and social service providers, law libraries can form professional networks that better serve community needs and open new opportunities for law schools to share knowledge and resources with other community service providers. Law librarians can also work with their legal communities to clarify and loosen the rules governing the practice of law while making sure that safeguards such as certifications, malpractice insurance requirements, and ethical training are put into place to ensure that no harm is done to those seeking aid.¹⁸⁰ Through managing and teaching in law library clinics, law librarians would elevate their status as law faculty, particularly directors, who would need J.D. degrees to oversee their clinics' activities. Law library self-help clinics would also allow librarians to define their reference services and those conducted by the clinic, provide more clarity about what can be done during a reference session, and give malpractice insurance for any activities that could rise to the practice of law.

¶41 By taking on new roles and changing to meet their communities' needs, their ethical responsibilities to help those who need legal information, and their schools' goals to teach their students to be socially conscious and skilled legal professionals, law libraries can enhance their status and become the centerpieces of access to justice initiatives. While there are potential ethical and legal issues with establishing self-help clinics, law libraries and their patrons stand to gain substantially from their creation. As integral parts of their communities and law schools, academic law libraries have the potential to become indispensable in the efforts to make the courts accessible to all citizens.

180. See Deborah L. Rhode, *Whatever Happened to Access to Social Justice?*, 42 *Lox. L.A. L. Rev.* 869, 899–907 (2009).

How to Stop Feeling Like a Phony in Your Library: Recognizing the Causes of the Imposter Syndrome, and How to Put a Stop to the Cycle*

Lacy Rakestraw**

As many as one in eight librarians report feeling like frauds in their careers. Shrinking library budgets reduce the training that new librarians receive while high performance expectations remain unchanged. This combination can perpetuate those fraudulent feelings unless librarians are willing to employ strategies to overcome their Imposter state of mind.

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Introduction

¶1 Consider the following three scenarios:

1. It's your first day at the new job. The tour guide has just finished leading you around the library, and you are dropped off at your very own office. Closing the door behind you, you let out a big sigh, hoping that your new coworkers didn't notice your flushed face and sweaty palms. The truth is, you have no idea what you're doing there and feel like it's only a matter of time before everyone else realizes what a fake you are.
2. You sit down at the reference desk of your library and settle in for your shift. Then a student approaches you and asks what seems like such an easy question—but you don't know the answer. There's no way you can let this student know that you don't know, so you make a joke and make the student laugh until he goes away. Dodged a bullet there!
3. The clock strikes 7:45 A.M., and you're still meticulously pouring over your notes for the 8 A.M. class you teach. It's the same class you teach every year, yet you always rewrite your notes, redo your slides, and overall give 120% for every class. That way, the students will think you are an expert on the subject and won't question your lecture.

¶2 Do any of these stories sound familiar? Could the person in one of these situations be you, either now or in the past? Each of these accounts describes an individual exhibiting symptoms of what is known as Imposter Syndrome.¹ This syndrome is very common, can manifest in different ways, and can severely affect a sufferer's health and well-being.

¶3 In 2011, researchers (and curious librarians) Melanie Clark, Kimberly Vardeman, and Shelley Barba conducted a survey of librarians to determine how prevalent Imposter Syndrome might be in the library profession. Their results suggested that “1 in 8 librarians may be experiencing [Imposter Syndrome] feelings to a significant degree.”² Respondents' answers explained that they struggled with “feelings of inadequacy” related to “lack of experience or training, a new position, or an emphasis on new technology in the workplace.”³ Of further importance, “librarians in their first three years of employment” were found to suffer significantly more from Imposter Syndrome “than their more experienced colleagues.”⁴ Fortunately, there are ways to break the imposter cycle so that you do not become a life-long victim.

1. Imposter Syndrome also goes by the name Imposter Phenomenon, but in this article, Imposter Syndrome alone is used.

2. Melanie Clark, Kimberly Vardeman & Shelley Barba, *Perceived Inadequacy: A Study of the Imposter Phenomenon Among College and Research Librarians*, 75 C. & RES. LIBR. 255, 258 (2014); see also Ashley E. Faulkner, Editorial, *Reflections on the Impostor Phenomenon as a Newly Qualified Academic Librarian*, 21 NEW REV. ACAD. LIBRARIANSHIP 265, 266 (2015).

3. Clark, Vardeman & Barba, *supra* note 2, at 259.

4. *Id.* at 259–60.

Symptoms

¶4 The term “Imposter Syndrome” was coined in 1978 by Dr. Pauline Rose Clance and Suzanne Imes.⁵ Clance and Imes recognized that sufferers of the syndrome are generally quite successful, at least when viewed by outside observers. These individuals usually obtain high levels of education and work in demanding fields. In 1985, Joan Harvey further recognized that Imposter victims exhibit three symptoms:

1. “The sense of having fooled other people into overestimating [their] ability.”
2. “The attribution of [their] success to some factor other than intelligence or ability”
3. “The fear of being exposed as a fraud.”⁶

“[Imposter] victims often disown praise and discount the expertise of the people who offer it. They begin to view those who have complimented them as blind to the truth, too dumb to know any better, ‘seduced’ by their ‘tricks,’” and they believe they have to put forth inhuman efforts to perform or can even thwart opportunities to be successful.⁷ Overall, those who suffer from these feelings fear what they think will be exposure of their “true” Imposter identities.

Victims

¶5 At the time the 1978 Clance and Imes paper was written, it was thought that Imposter Syndrome affected mostly females, with the notion that men attributed their success to their own abilities, while women projected “the cause of success outward to an external cause (luck) or to a temporary internal quality (effort) that they do not equate with inherent ability.”⁸ Subsequent studies have shown that Imposter Syndrome is an equal opportunity condition, affecting both genders within a wide range of occupations.⁹ In fact, nearly seventy percent of individuals, both male and female, will experience Imposter Syndrome at least once in their lifetimes.¹⁰

¶6 Although the syndrome is widespread, it “is not easily revealed, nor easily recognizable. By its very nature, it is a secret experience.”¹¹ Some readers learning about the syndrome may even think “some people might be victims, but not me; I actually *am* a fraud.” Sufferers necessarily go to great lengths to hide their “fraudulent” feelings and fear being found out. As a result, they are loath to speak up.

5. Pauline Rose Clance & Suzanne Imes, *The Imposter Phenomenon in High Achieving Women: Dynamics and Therapeutic Intervention*, 15 *PSYCHOTHERAPY THEORY RES. & PRAC.* 1 (1978).

6. JOAN C. HARVEY, IF I'M SO SUCCESSFUL, WHY DO I FEEL LIKE A FAKE? 8 (1985).

7. *Id.* at 119.

8. Clance & Imes, *supra* note 5, at 2; *see also* MADELINE HIRSCHFELD, *THE IMPOSTER PHENOMENON IN SUCCESSFUL CAREER WOMEN* (1982) (e-book).

9. *See* Sonja Rohrmann, Myriam N. Bechtoldt & Mona Leonhardt, *Validation of the Impostor Phenomenon Among Managers*, 7 *FRONTIERS IN PSYCHOL.*, article 821, 2016, at 1.

10. Jaruwan Sakulku & James Alexander, *The Impostor Phenomenon*, 6 *INT. J. BEHAV. SCI.* 75, 75–76 (2011).

11. HARVEY, *supra* note 6, at 109.

Causes

¶7 With such a large number of Imposter sufferers, it is important to recognize what may cause such “fraudulent” feelings to surface.

Change

¶8 Imposter Syndrome can be associated with a change in an individual’s life, be it graduating from formal education, receiving a new job, or navigating changes in a library’s ILS. Each of these examples has the ability to modify a person’s personal point of view, altering the status quo. The syndrome can also come “with unexpected or unanticipated success. Some examples: early promotion, or being the youngest person ever to be elected to a particular position.”¹² Someone entering a new or unfamiliar position “may interpret his lack of knowledge about the role to mean that he isn’t qualified to perform it. He might even begin to believe he has misled his employer about his abilities” unintentionally.¹³

¶9 Librarians are certainly not immune to these change-related Imposter feelings.

Results [of a library survey related to Imposter feelings] show that younger librarians and newer librarians reported higher [Imposter] scores than their more experienced colleagues. This confirms the researchers’ hypotheses about age and longevity being factors in imposter feelings. This finding is not surprising, as older and experienced librarians are usually more familiar with their positions and are likely to feel more secure in their workplace.¹⁴

Objective evidence of achievement (for example, promotion, acceptance to grad school, publication) does not necessarily ease the symptoms of Imposter Syndrome. Sometimes this provokes an even stronger response because recipients feel they need to prove themselves all over again to obtain the same level of success.¹⁵

Family Life

¶10 Like so much in our lives, the issue may take root during our childhoods. In studying the familial relationships of people who suffer from the syndrome, scientists have found a possible link between parental overprotection and later development of the syndrome.¹⁶ Especially prevalent among sufferers is being taught as children that intelligence is a natural gift and positive academic results should come with ease; this can lead to children studying in secret to succeed academically, while hiding the fact that good grades and awards do not simply come naturally.¹⁷ The Imposter cycle may start when parents send mixed messages, “alternating between over-praise and criticism.”¹⁸

¶11 A link also may exist between adults who exhibit Imposter symptoms and the childhood labels they received from parents or siblings. A child, for example,

12. *Id.* at 19.

13. *Id.* at 18.

14. Clark, Vardeman & Barba, *supra* note 2, at 265.

15. Note that Imposter feelings can be temporary, brought on with “a new job, sudden advancement, a financial windfall, fame and recognition, or a public award or honor,” only to later disappear. See HARVEY, *supra* note 6, at 19.

16. Sakulku & Alexander, *supra* note 10, at 84.

17. Clance & Imes, *supra* note 5, at 3.

18. Kirsten Weir, *Feel Like a Fraud?*, GRADPSYCH, Nov. 2013, at 24, 25.

who is labeled “the pretty one” in the family may grow up to feel like she achieves only due to her beauty. Likewise, a child who is labeled “the smart one” may turn himself into a workaholic to maintain that childhood persona. “With so much of his identity invested in his role, the child is afraid to perform it in any way that is less than perfect. If something he does or feels conflicts with the role, he may feel that he really isn’t what he seems.”¹⁹ While not every child who is given a childhood label or role to play will inevitably develop Imposter Syndrome, “[a] child’s family situation . . . can set the stage with all the right props.”²⁰

Perfectionism

¶12 A further link exists between Imposter Syndrome and perfectionism as a personality trait. Syndrome victims suffer from an intense fear of failure. “[T]hey tend to define failure as *any mistake or flaw that reveals them to be less than perfect*. Anything short of brilliance or perfection brings out the . . . victim’s self-doubts.”²¹ Studies have shown that “compared to non-imposters, persons high in imposterism feel they need to achieve perfection in order to gain others’ approval.”²² Thus, Imposters attempt to salvage their perfect intellectual image and reject less-than-perfect performance, while refusing to ask for help for fear of “exposing” themselves.

Cycle

¶13 Because of the success obtained by Imposter sufferers, followed by their own self-doubt, the Syndrome is necessarily cyclical in nature, creating the negative feedback loop shown in figure 1: (1) After being assigned a project or task; (2) they live with fear of discovery; (3) this fear motivates them to cope using an Imposter behavior (overwork to prevent this discovery, pointing to the luck or deceit they think is involved, etc.); (4) they succeed in the assignment; but (5) they believe their success is due to the Imposter behavior (that extra hard work is recognized and rewarded, luck or trickery won the game for the victim). Because they again fear that discovery is imminent if they do not resort to their coping mechanisms, they repeat the cycle with the next assigned task.

What It Is Not

¶14 It is important to quickly note what the syndrome is not.

Nerves

¶15 Imposter Syndrome is not a simple case of nervousness that relates to a specific situation. For example, a new professor is very likely to have butterflies in her stomach prior to her first teaching class because of nerves. She knows the material and has earned her faculty spot, but she has a very common fear of public speaking. As the semester wears on, she eventually settles down and teaching

19. HARVEY, *supra* note 6, at 136.

20. *Id.* at 134.

21. *Id.* at 13.

22. Rohrmann, Bechtoldt & Leonhardt, *supra* note 9, at 3.

Figure 1

Imposter Cycle of Success and Self-Doubt/Fear



becomes routine. This is an example of a person handling a common case of nerves.

¶16 For the syndrome sufferer, however, these nerves may never go away. The professor who is a victim will have anxiety before nearly all, if not every, class he teaches, and the symptoms will likely not get better, or at least will not do so until he is well established in his career. So while both individuals may have the same characteristic sweaty palms, broken speech, and rapid heartbeat, the difference between the two experiences is one of longevity and severity.

Low Self-Esteem

¶17 Because Imposter Syndrome and low self-esteem may share certain manifestations and physical characteristics, it is tempting to equate the two. However, these two psychological conditions are distinct disorders that require separate approaches. The difference between the two is essentially one of quantity. Those who suffer from low self-esteem generally have negative feelings associated with a higher percentage of their lives. “This is not the case for victims of the Imposter [Syndrome]. They often have a highly positive regard for many of the qualities they possess.”²³ Those who suffer from Imposter Syndrome “often believe that they are competent in *certain* areas, but not in the areas that they see as the *real* measure of intelligence and ability.”²⁴ So while a person who suffers from low self-esteem will likely harbor negative feelings associated with all of his job duties, the Imposter

23. HARVEY, *supra* note 6, at 26–27.

24. *Id.* at 115.

Syndrome victim might have a very positive view of her ability to research, write, and teach, but believe that her performance in volunteer opportunities is poor. This victim would then hyperfocus on that perceived poor performance as an indication of her entire worth as a member of the library's faculty or staff.

Manifestations

¶18 While each individual Imposter sufferer presents their symptoms differently and uniquely, a number of behaviors are recognized as classic Imposter Syndrome actions.

Workaholic Imposters

¶19 To single-handedly achieve the near-perfect results described above, some Imposter sufferers “spend[] much more time on a task than is necessary.”²⁵ It is not enough for these types of sufferers to achieve; they must overachieve to feel validated in the short term, until the feelings of the syndrome return. These people tend to become what others call “workaholics.”

¶20 Overpreparing can lead to anxiety and panic attacks. Imposter sufferers report feelings of exhaustion and anticlimax after they have finished projects, the negative side effects of putting in much more effort than necessary to achieve success.²⁶ Yet “they make the assumption that they couldn't have attained their success without those unwavering, intensive efforts,” and thus the cycle continues.²⁷ The librarian Workaholic Imposter may be the staff member who writes the library's newsletter and then spends five full days editing and reediting, when a few hours would have sufficed.

Lucky Duck Imposters

¶21 Lucky Duck Imposter victims believe that all their successes and accomplishments are due not to skill but to luck or to being at the right place at the right time. Because they fear that eventually the luck will run out, every action is a gamble to these sufferers. And while they may not believe in the likelihood of disaster enough to stop “playing the odds,” they worry constantly about exposure. Lucky Duck Imposters do not “attribute their achievement—or their avoidance of failure—to their own abilities, but . . . to external factors, such as luck or favorable circumstances.”²⁸ A Lucky Duck Imposter may be the librarian who beats out heavy competition to land her first library job, but instead of being proud of her polished resume and impressive interview, she immediately thanks her “lucky stars.”

Con Artist Imposters

¶22 Con Artist Imposter victims “think they are ‘getting by’ on their charm, or getting ahead *because* of charm rather than their ‘true’ abilities.”²⁹ These sufferers

25. Weir, *supra* note 18, at 26.

26. See Anna Parkman, *The Imposter Phenomenon in Higher Education: Incidence and Impact*, 16 J. HIGHER EDUC. THEORY & PRAC. 51, 52 (2016).

27. HARVEY, *supra* note 6, at 38.

28. Rohrmann, Bechtoldt & Leonhardt, *supra* note 9, at 9.

29. HARVEY, *supra* note 6, at 47.

often feel that they are manipulating others into thinking they are better at something than they really are, that their “social skills have blinded others” to their “shortcomings.” They often think they are “getting by” on their looks or personality; this type of Imposter is especially prevalent in female sufferers.³⁰ This sufferer may be the librarian who thinks she has to dress a certain way to attract attention to her body and away from her inabilities. Despite the name, Con Artist Imposters are not actually acting with malice or intent to deceive, aside from hiding their “fraud.”

Chameleon Imposters

¶23 Chameleon Imposters go to great lengths to blend into their environments to avoid drawing attention to their “inadequacies.” Should they feel threatened with exposure, they sense the need to double down on efforts to conceal themselves:

The focus becomes one of maintaining the façade for as long as possible until an escape plan can be formulated. The imposter now has to get out before being found out. This leads to a decrease in visibility and turning away from support. When able, the imposter begins to retreat to less public positions or withdraws completely.³¹

¶24 A Chameleon Imposter may be the librarian who works with her door closed or answers questions only via email. This is done in an effort to avoid being cornered by any unexpected questions that she feels would reveal her shortfalls.

Procrastinating Imposters

¶25 Procrastinating Imposters are the opposite of Workaholic Imposters. These people are hyperaware that with every situation they will either succeed or fail. They thus put off trying to act at all to avoid the potential failure. These people recognize that success draws attention to them, and because they fear they will not be able to replicate the performance, any attention translates as potentially bad attention, making them scared to succeed. Procrastinating Imposters may also fear success because they do not think they deserve it and therefore feel guilty.

One defense against the fear of success is literally not to succeed. Some people stay away from any situation that could lead to success. Others make the effort to achieve, but somehow sabotage themselves. Without knowing why, they find themselves procrastinating until it's too late to do a good job . . .³²

¶26 The Procrastinating Imposter is a librarian who may avoid volunteering for committees or attending extra activities. He seemingly has a fear of success and is willing to sacrifice the chance at success if it also eliminates the chance of failure. This person views success or failure to be 50/50 odds, and instead of flipping the coin, he will instead put the coin back in his pocket and walk away from the situation.

30. *Id.* at 48–50.

31. See Parkman, *supra* note 26, at 52–53.

32. HARVEY, *supra* note 6, at 161.

Health

¶27 Although Imposter Syndrome is not listed in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), studies show that continuing in this endless loop of suffering generally creates feelings of anxiety and depression caused by near-constant fear.³³ It is not surprising that a syndrome marked by relentless feelings of doubt and failure, as well as by continuous attempts to achieve artificially high performance rates, would lead to overwork, tie-ins with mental health issues, and eventual burnout.

¶28 Imposter Syndrome clearly affects the library world. In a 2011 survey given to librarians, roughly twenty-five percent of respondents who reported feeling Imposter symptoms either presently or in the past “stated that such feelings drove them to work toward building their skills and knowledge; . . . most stated that the effects of these feelings were demotivation, procrastination, and feelings of stress, anxiety, or burnout.”³⁴

¶29 Once librarians experience Imposter Syndrome long enough to become burned out, they often feel they have no way out of the cycle. “[B]ecause individuals experiencing the [syndrome] may have the tendency to burn out and leave an organization rather than risk being found out as a fraud, the [Imposter Syndrome] negatively impacts employee retention and succession planning . . .”³⁵ These librarians are left with a heavy feeling of helplessness and a lack of control, making stress and anxiety “constant companions.”³⁶

How to Overcome

¶30 There are steps that someone suffering from Imposter Syndrome can take to halt the cycle and “break up” with their stress and anxiety companions. Recognizing the syndrome, itself an accomplishment, is the first step toward recovery.³⁷

Education

¶31 Individuals who suffer from Imposter Syndrome often mistake being *inexperienced* with being *unqualified*. The first indicates a lack of familiarity and knowledge while the second denotes a lack of ability. Most of those who suffer from the syndrome fall into the first category and therefore benefit from education.

¶32 Imposter victims can take control of their inexperience by educating themselves in their professions. Librarians who attend AALL or chapter annual meetings are already working on educating themselves.

Librarians are master networkers from way back; the sheer proliferation of professional e-mail discussion lists, workshops, conferences, and interest groups attests to our reliance

33. See generally Rohrmann, Bechtoldt & Leonhardt, *supra* note 9; Sakulku & Alexander, *supra* note 10, at 75; Weir, *supra* note 18.

34. Clark, Vardeman & Barba, *supra* note 2, at 264.

35. *Id.* at 256.

36. Parkman, *supra* note 26, at 52.

37. Please note that the author of this article is not a medical doctor or a professional psychologist. Nothing in this article should be considered as a substitute for medical intervention. Always consult a medical professional when making health determinations, including mental health decisions.

on each other's knowledge and experiences. The image of a solitary researcher toiling away in a back room is passé; our strength lies in our collaboration.³⁸

¶33 Librarians can go a few steps further toward educating themselves away from the inexperience rut by watching webinars, reading industry publications, and volunteering for professional groups. "Successful . . . librarians take these opportunities to learn from one another, share their own experiences, and, above all, to realize that they are not alone. Teaching and learning from others, beginning to feel part of a larger community, is a large step toward overcoming the sense of being an imposter."³⁹ Many blog posts also address the Imposter issue with librarians, often written by authors who admit that they too suffer or have suffered in the past.⁴⁰

Connect with Mentors

¶34 Along with education, Imposter victims can help themselves by finding mentors, people who are already familiar with the profession and its demands. Often mentors have been through the inexperienced phase of the job and can provide mentees with a better perspective of the landscape. "Mentors can open up about their own experiences with self-doubt and encourage new librarians to recognize their accomplishments as results of internal assets."⁴¹

¶35 The mentor/mentee relationship does not have to be limited to new librarians. Plenty of experienced librarians find themselves confronted with new situations that require insight, which mentors can help give. AALL offers a mentor/mentee program that provides this valuable service to its members.⁴² Librarian Imposter victims may find that establishing a mentor/mentee relationship through a program such as this is an important step on the road to Imposter recovery.

Speak with Professionals

¶36 Sometimes the Imposter Syndrome is so deeply ingrained in an individual's mindset that talking to a mental health professional is appropriate. If, for example, "'imposter' feelings are making you so anxious or depressed that you can't function, or if you feel suicidal, you should seek professional help immediately."⁴³

¶37 Professional help can come in different forms. Traditional therapy involves one-on-one meetings with a doctor or other certified professional, handling the Imposter victim's health issues alone. An alternative to traditional therapy is group

38. Rachel Singer Gordon, *Overcoming the Systems Librarian Imposter Syndrome*, LIBRES: LIBR. & INFO. SCI. E JOURNAL, Sept. 2003, http://libres-ejournal.info/wp-content/uploads/2014/06/Vol13_12_essop_singer_gordon.pdf [<https://perma.cc/3A5J-B4ZH>].

39. *Id.*

40. See, e.g., Erin Miller, *Low Self-Esteem and the Academic Librarian. Maybe It Is Just Me. It Is Probably Just Me.*, ACRLOG (Jan. 15, 2015), <http://acrlog.org/2015/01/15/low-self-esteem-and-the-academic-librarian-maybe-it-is-just-me-it-is-probably-just-me/> [<https://perma.cc/R6BC-Y9DP>]; Annie Pho, *But Am I Really an Activist? Dealing with Imposter Syndrome*, APALA (Jan. 26, 2015), <http://www.apalaweb.org/but-am-i-really-an-activist-dealing-with-impostor-syndrome/> [<https://perma.cc/SP4K-YJ8K>]; Clare Sobotka, *Dealing with Imposter Syndrome and Feeling Like You Belong*, INALJ (May 8, 2014), <http://inalj.com/?p=70926> [<https://perma.cc/J3ZQ-7HD6>].

41. Faulkner, *supra* note 2, at 267.

42. See *Mentor Program*, AALLNET, <http://www.aallnet.org/mm/Member-Resources/Mentoring> [<https://perma.cc/6JXC-NGA8>].

43. HARVEY, *supra* note 6, at 237.

therapy. This option involves meeting in a group setting with other individuals who suffer from Imposter Syndrome. Because of the secretive nature of the syndrome, group therapy can feel extreme to victims who are terrified of owning up to their “imposterism.” However, it has been found that in the group setting, once one person “is willing to share her secret, others are able to share theirs. They are astonished and relieved to find they are not alone.”⁴⁴ Suddenly the secretive spell is broken.

¶38 Librarians are encouraged to search their communities for group therapy settings. Academic librarians may be able to find on-campus groups that have been created to reduce faculty and staff mental health issues and burnout.⁴⁵ Public and governmental librarians may have access to an Employee Assistance Program through their employers that provides treatment with mental health professionals trained to handle anxiety and depression.

Time

¶39 Often the old adage that time heals all wounds is true.

Many people are eventually able to overcome their “imposter” feelings. As they master their new roles, they are able to view their accomplishments as evidence that they are “the genuine article.” The sense of fraudulence passes with time and with further proof of their abilities. They are able to break the cycle of success and self-doubt.⁴⁶

¶40 Because the Imposter Syndrome often surfaces when a sufferer faces something new, it stands to reason that once the newness wears off, the Imposter feelings will as well. Once a librarian becomes more confident in his abilities—as he falls into a routine of teaching a class, for example, or of answering reference questions—the fear of failure may fade into the background until it eventually disappears.

¶41 Another way time may help to break the Imposter cycle is by a librarian learning to respect her own time. An Imposter victim who overworks in an attempt to succeed may find that creating self-imposed deadlines helps alter that behavior. Setting a mindset that “I am allowed three days to create this library guide” and sticking to that deadline may help prevent overwork. The victim must then learn to celebrate success, not perfection. That library guide may never be perfect, but it can be a success without the overwork, and celebrating this realization is a key to breaking away from Imposter Syndrome.

Conclusion

¶42 Imposter Syndrome is a spinning carousel on which many librarians involuntarily find themselves at some point during their careers. Sufferers can feel like they wear permanent masks, which hide their feelings of inferiority and the fraud they believe they perpetrate. Taking a ride on the Imposter Syndrome carousel can

44. Clance & Imes, *supra* note 5, at 6.

45. Parkman, *supra* note 26, at 56.

46. HARVEY, *supra* note 6, at 20.

lead to “a circle of over-meticulous preparation/postponing, short-term relief, and self-doubt,” which can cause Imposter symptoms to grow, thus continuing to fuel the carousel ride.⁴⁷

¶43 Fortunately, victims of the Imposter Syndrome do not have to be life-long sufferers. Librarians who harbor these feelings can step off the Imposter carousel by educating themselves about both their profession and the syndrome. They can meet with mentors or other knowledgeable librarians, who themselves may have worked to overcome feelings of fraudulence. And, if necessary, librarians can seek professional therapy with experts schooled in handling Imposter Syndrome symptoms.

¶44 In the end, perhaps the most powerful tool a librarian suffering from Imposter symptoms can use is time. Imposter Syndrome is driven by unfamiliarity, and the passing of time is a proven way to banish the “newness” associated with the syndrome’s development. By also learning to set reasonable deadlines and to value her successes over the need for perfection, a librarian can make time her ally while she roots out Imposter feelings.

¶45 No matter where a librarian is in his career, what type of library he works in, or what position he holds there, it is likely that with seventy percent of the population at some point suffering from Imposter Syndrome, he either knows someone or is himself a victim. By learning to recognize the symptoms and cyclical nature of the syndrome, he will be better equipped to help a sufferer break free from the Imposter carousel, even when that sufferer is himself.

47. Rohrmann, Bechtoldt & Leonhardt, *supra* note 9, at 9.

Appendix

Clance IP Scale⁴⁸

The following are questions taken from the Clance IP scale,⁴⁹ used to measure the Imposter characteristics a person might have. For each question, please circle the number that best indicates how true the statement is of you. It is best to give the first response that enters your mind rather than dwelling on each statement and thinking about it over and over.

- 1. I have often succeeded on a test or task even though I was afraid that I would not do well before I undertook the task.**

1 (not at all true) 2 (rarely) 3 (sometimes) 4 (often) 5 (very true)

- 2. I can give the impression that I'm more competent than I really am.**

1 (not at all true) 2 (rarely) 3 (sometimes) 4 (often) 5 (very true)

- 3. I avoid evaluations if possible and have a dread of others evaluating me.**

1 (not at all true) 2 (rarely) 3 (sometimes) 4 (often) 5 (very true)

- 4. When people praise me for something I've accomplished, I'm afraid I won't be able to live up to their expectations of me in the future.**

1 (not at all true) 2 (rarely) 3 (sometimes) 4 (often) 5 (very true)

- 5. I sometimes think I obtained my present position or gained my present success because I happened to be in the right place at the right time or knew the right people.**

1 (not at all true) 2 (rarely) 3 (sometimes) 4 (often) 5 (very true)

48. P.R. CLANCE, *THE IMPOSTOR PHENOMENON: WHEN SUCCESS MAKES YOU FEEL LIKE A FAKE* 20–22 (1985). Copyright 1985 by Pauline Rose Clance, Ph.D., ABPP. Reprinted by permission. Do not reproduce without permission from Pauline Rose Clance, drpaulinerose@comcast.net, www.paulineroseclance.com.

49. The entire Clance IP Scale, as well as scoring instructions, can be seen by visiting Dr. Clance's website at http://paulineroseclance.com/impostor_phenomenon.html.

Keeping Up with New Legal Titles*

Compiled by Benjamin J. Keele** and Nick Sexton***

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* The works reviewed in this issue were published in 2016 and 2017. If you would like to review books for "Keeping Up with New Legal Titles," please send an e-mail to bkeele@iu.edu and nsexton@email.unc.edu.

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Chaudry, Rabia. *Adnan's Story: The Search for Truth and Justice after Serial*. New York: St. Martin's Press, 2016. 410p. \$26.99.

*Reviewed by Chi Hyon Song**

¶1 In February 2000, a jury in Baltimore, Maryland, convicted Adnan Syed of murdering Hae Min Lee. Syed was later sentenced to life in prison, plus thirty years. In 2014, Syed's case garnered national attention through the immensely popular *Serial* podcast. Rabia Chaudry, family friend and fierce advocate for Syed, is the author of *Adnan's Story: The Search for Truth and Justice after Serial*. Chaudry is clear that she is "here to tell Adnan's story as, after so many years of living and studying it, I see it" (p.3). Writing in the first person, the author's belief in Syed's innocence shapes and empowers the book's narratives.

¶2 The first half of the book covers Lee's disappearance, the police investigation of Lee's murder, and Syed's trial court proceedings. Chaudry is most persuasive when she challenges the criminal investigation and court proceedings. She presents evidence, timelines, and alternative suspects in a well-organized fashion. Although Chaudry is writing for a general audience, her training and experience as an attorney are evident in the way she presents and analyzes information. Chaudry includes a lot of detail and text-heavy exhibits, such as images of letters and reports. While this may challenge casual readers, those already familiar with the case will likely welcome this approach.

¶3 Chaudry grounds her examination of the police investigation and court proceedings by sharing her life experiences and stories from Adnan Syed, his family, and his friends. By sharing these experiences and stories, Chaudry provides individual and cultural contexts for the events as they unfold. This enriches her explorations of the intersections and relationships between bias, faith, family, and communities with the criminal justice system. Other themes include the power of legal representation and misrepresentation, corruption, and the media's role in the criminal justice system.

¶4 The second half of the book deals with life after Syed's conviction. It also presents a slight shift in focus. The author documents Syed's direct appeals and postconviction relief proceedings in great detail. She provides glimpses into Syed's life in prison. There is extensive coverage of results from postconviction and post-*Serial* investigations and analyses. However, the author's experiences and those of Syed's family move to center stage. Some of the book's most powerful passages are about Syed's family and how they coped with Syed's trial, conviction, and prison life. It is a reminder of the far reaches of the criminal justice system.

¶5 *Serial* fans may recognize Chaudry as the catalyst for the podcast. In the book's second half, Chaudry recounts how she reached out to Sarah Koenig, who would go on to be the host and executive producer of the podcast. Readers can follow the evolution of Chaudry's relationship with the podcast team as the team conducts its own investigations and reaches its own conclusions. Through this complicated relationship, Chaudry explores the media's power to transform an individual's experience with the criminal justice system and the mixed blessings of such widespread interest and coverage. She also explores the different motivations at the heart of journalism and the justice system.

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¶6 Chaudry also documents her forays into social media, including participating in her own podcast, *Undisclosed*. These experiences with social media and online communities highlight the emerging and evolving role of social media in the criminal justice system. For example, crowdfunding is a relatively new financial resource for those who need legal representation, one that the author experiences firsthand.

¶7 The book concludes with the author's proposed version of events for January 1999. Overall, this book would be a thought-provoking addition to a library's criminal justice collection. Chaudry makes it clear from the beginning that she is writing this book as an advocate for Syed and as a firm believer in his innocence. While this perspective influences her presentation of events and analysis, it does not take away from the exploration of the roles that bias, faith, family, community, media, social media, legal representation and misrepresentation, and corruption can play in the criminal justice system.

Edwards, John D., Karen L. Wallace, and Melissa H. Weresh. *Iowa Legal Research, Second Edition*. Durham, N.C.: Carolina Academic Press, 2016. 291p. \$32.

*Reviewed by Marie S. Templo-Capule**

¶8 *Iowa Legal Research* begins with a foreword by Chief Justice Mark S. Cady of the Iowa Supreme Court. He states that "it is essential that the most effective method of performing legal research be the cornerstone" (p.xxv) of law practice. He also believes that "effective legal research is so fundamental [that] a lawyer's education is not complete without it" (*id.*). The newly published second edition of *Iowa Legal Research* is the culmination of this philosophy.

¶9 True to the goal of Carolina Academic Press's Legal Research Series, the book explains concisely the sources of Iowa law and the process for conducting Iowa legal research effectively. The authors start out with a brief review of the basic legal research process and legal analysis and end with research strategies to become an effective and efficient researcher. The book covers secondary sources with a separate chapter for practice aids. Although the book emphasizes Iowa law, it also briefly discusses federal law. The book covers topics such as statutes, constitutions, judicial opinions, reporters and digests, court rules, ordinances, legislative history, and administrative law. The chapter on citators includes the commonly used Lexis Advance's Shepard's Citations and Westlaw's KeyCite. Notably, the authors also examine BCite on Bloomberg Law, Authority Check on Fastcase, and even "Cited By" on Google Scholar. *Iowa Legal Research* includes an appendix that discusses briefly the *Bluebook* and the *ALWD Manual*. Naturally, the authors concentrate on the legal citation format used in Iowa. Unlike other jurisdictions that follow a particular citation manual, Iowa adheres to generally accepted citation practices and the rules of citations found in the Iowa Rules of Appellate Procedure.

¶10 *Iowa Legal Research* contains reprints of sample pages and screenshots from mentioned sources to assist readers with understanding the concepts. Tables, charts, and figures are used to supplement the discussion. The authors note the expansion of online resources and excellently intertwine the discussion of print and online format in each chapter. The book provides for print and electronic resources

* © Marie S. Templo-Capule, 2017. Associate Library Director for Public Services and Adjunct Professor, Thomas Jefferson School of Law, San Diego, California.

specific to Iowa, including commercial databases like Westlaw, Lexis Advance, Bloomberg Law, Fastcase, and VersusLaw, and government and free websites. The book provides the titles of Iowa-specific resources, website addresses for Iowa courts, the legislature, law library catalogs, and a list of tables and figures used. These features enhance the usability and value of the book as a ready reference tool.

¶11 The authors are professors at Drake University School of Law whose previous scholarship appears in prominent publications. Two of the authors, John D. Edwards and Karen L. Wallace, are law librarians. The area of expertise of the third author, Melissa H. Weresh, includes legal writing, ethics, and professional responsibility.

¶12 Refreshingly, the authors highlight the important role that law librarians play in the legal research process. The book identifies law librarians as the “most effective and overlooked resources in the law library” (p.15). The section about research guides in chapter 3 exemplifies the expertise of law librarians. By limiting the discussion to the law librarian’s role in legal research, the authors were able to keep the section objective and not self-serving.

¶13 Another strong point of the book is the chapter on legal ethics research. Given the increasing importance of having a sophisticated understanding of the ethics rules and how they have been applied to other attorneys, the authors’ thorough discussion of sources utilized in legal ethics research and its process offers great value to researchers. The chapter comprehensively and succinctly examines the sources of regulation, ethics opinions, and materials from other states and secondary sources.

¶14 The second edition of *Iowa Legal Research* is a well-designed book suitable for law students. The book meets its goal of providing researchers with the “essential elements of legal research” (p.xxiii) to Iowa legal research. The book may be useful as a primary text for a class specific to Iowa legal research, but not for a first-year legal research course or program. It can also serve as a reference or training tool for attorneys and paralegals.

Lemmer, Catherine A., and Carla P. Wale, eds. *Digital Rights Management: The Librarian’s Guide*. Lanham, Md.: Rowman & Littlefield, 2016. 214p. \$55.

*Reviewed by Annalee Hickman Moser**

¶15 *Digital Rights Management: The Librarian’s Guide* is precisely what it claims to be: a guide for all librarians on digital rights management (DRM), “technology that controls access to content on digital devices” (p.1). While written and edited primarily by law librarians, this book is intended for broader groups in librarianship, and this expanded audience is evidenced by examples, experiences, and analogies from various academic and public libraries.

¶16 From the introduction, it is clear that this book’s purpose is not just to educate (which was my assumption when I started it); it also encourages librarians to influence change in the evolution of DRM. This purpose is successfully satisfied by incorporating direct and specific applications to libraries in almost every chapter, giving guidance and step-by-step instructions to librarians for working more efficiently with DRM and for making changes in DRM to better serve library patrons.

* © Annalee Hickman Moser, 2017. Law Library Fellow, Howard W. Hunter Law Library, Brigham Young University, Provo, Utah.

¶17 If DRM is not your area of responsibility for your law library, that's fine—this book is still for you. It was written for both novices to and experts in DRM. Depending on your previous knowledge of DRM, you can start with the basic chapters, like chapter 1 (“What is Digital Rights Management?”) and chapter 2 (“A Primer on Digital Rights Management Technologies”), or you can skip right into the chapters that present new arguments and ideas to the DRM literature, such as chapter 6 (“Managing Digital Rights in Open Access Works”) and chapter 10 (“DRM Redux”). Any time a technical term (or acronym) is first introduced, it is defined adequately so that the DRM novice can understand the jargon. So, do not worry if you do not know the difference between green OA, gold OA, and plain old OA—this book walks you through it.

¶18 Aside from the first chapter, the book was designed so that its chapters can be read in any order. Each chapter is concise, educational, and applicable to libraries. Some chapters briefly address how libraries are impacted by the material discussed; others involve libraries' roles throughout their entirety, such as chapter 4 (“Organizations and Workflow: Leveraging Your Library to Make the Most of DRM”). While chapters can stand alone, they also work together, making the book cohesive in explaining DRM and how librarians should interact with it and influence it to change.

¶19 A helpful feature would have been a glossary. Not only is this book on a technical topic, with specific jargon with which some librarians may not be familiar, but there were times when multiple chapters had to define words, with some chapters doing a more extensive job than others. For example, chapter 2 defined public and private keys more elaborately than chapter 3 (“Understanding and Utilizing Digital Authentication”) did. With a glossary, the librarian who chose to follow the editors' suggestion in the introduction and read the chapters in whatever order she wanted would be able to benefit from the best technical definitions on the topic of DRM, without having to subject herself to sparse definitions in some of the chapters.

¶20 Should your law library buy it? Of course! This book would be a fine addition to any academic or public library, but mainly because it is useful for the librarians themselves to read, rather than for the law students, professors, and patrons who frequent the library.

Metzmeier, Kurt X. *Writing the Legal Record: Law Reporters in Nineteenth-Century Kentucky*. Lexington: University Press of Kentucky, 2017. 211p. \$50.

*Reviewed by Rena Seidler**

¶21 *Writing the Legal Record: Law Reporters in Nineteenth-Century Kentucky* provides a rare examination of the men behind the forging of Kentucky common law. This is not simply the history of written reporters as we know them today, such as those published by West, but rather a story defined by the men who acted as Kentucky's first reporters. Each chapter is dedicated not only to a particular Kentucky reporter, be it an attorney, judge, politician, or journalist, but also to each reporter's role outside his reporting, from soldier to rebel, from professional to poet. Kurt X. Metzmeier weaves an intriguing account of the development of uniform reporters over the course of nineteenth-century Kentucky through the eyes, experiences, and writings of the men behind the earliest reports.

* © Rena Seidler, 2017. Research and Instructional Services Librarian, Ruth Lilly Law Library, Indiana University, Robert H. McKinney School of Law, Indianapolis, Indiana.

¶22 Unlike present-day reporter volumes, Kentucky's early reports were crafted, annotated, and defined by the men who wrote them, with each reporter deciding every detail of writing and appearance of the physical volume. Metzmeier's introduction is particularly insightful as a chronological history of the Commonwealth system in America, beginning with the mythical origins of common law overseas, through how common law recordings came to be in nineteenth-century Kentucky. Specifically, Metzmeier stresses the importance of the high standards set by historical England's Commonwealth recorders and how such standards were replicated in the United States. The introduction naturally segues through the general creation of Kentucky law reporters, followed by a thorough examination of the thirteen influential Kentucky reporters of the nineteenth century and the parts they played in shaping Kentucky's legal record.

¶23 Starting at the beginning (of recorded Kentucky reports), Metzmeier embarks on a chronological journey through the processes and compiled works of the reporters who wrote each report. Beginning with chapter 1 on attorney James Hughes, who authored Kentucky's first reporter, *Hughes's Reports*, each chapter discusses the life of a reporter, traces how he came to reporting, and even describes the physical appearance of his report volumes in great detail. The focus of each chapter is the professional, and to some degree personal, story of that reporter. It is through the reporter's eyes and life that readers are drawn into how and why that reporter chose to report and inevitably ceased reporting.

¶24 While narrowly focused on nineteenth-century Kentucky reporters, Metzmeier's juxtaposition of attention to detail, the historical background of these reporters, and the state of the United States throughout the nineteenth century weaves a story that seems to resonate beyond Kentucky. It feels natural to extrapolate from the lives of these men to the experiences and hurdles generally facing the early states and their reporters in finding a footing in recording common law. Eventually Metzmeier transitions away from Kentucky's independent reporter history to the advent of the West reporting system and, eventually, to the nature of online reporter access today. He thoughtfully closes by noting that while these early reporters have been relegated primarily to an occasional case footnote or comment, their names live on because of the impact their reports had on recording early Kentucky common law.

ProQuest Regulatory Insight. ProQuest, Ann Arbor, Mich.

*Reviewed by Pamela C. Brannon**

¶25 Launched in December 2015, *Regulatory Insight* is ProQuest's first expansion of its Insight brand of compiled government materials. The Insight series began with *Legislative Insight*, which provides compiled legislative histories for federal statutes. It will continue with the upcoming *Supreme Court Insight*, which will compile court documents related to cases decided by the Supreme Court of the United States.

¶26 *Regulatory Insight* creates regulatory histories for statutes, similar to legislative histories. In *Legislative Insight*, a search for a particular session law retrieves the congressional hearings, debates, and reports related to the passage of that piece of

* © Pamela C. Brannon, 2017. Coordinator of Faculty Services, Georgia State University, Atlanta, Georgia.

legislation. In *Regulatory Insight*, a search for a particular session law will retrieve the notices, proposed rules, and final rules issued under authority of that statute. ProQuest has also linked these services together; legislative histories in *Legislative Insight* contain links to regulatory histories in *Regulatory Insight*, and vice versa.

¶27 The value of both Insight products lies not in their underlying content but in the indexing and organization of that content. While the underlying content in *Legislative Insight* is available in *ProQuest Congressional*, for example, the organization of that material into a legislative history makes ProQuest's resource unique. Similarly, *Regulatory Insight's* source material—the *Federal Register*, *Code of Federal Regulations*, and comments posted on Regulations.gov—is readily available for free from other resources. Without *Regulatory Insight*, however, locating all of the regulations promulgated in response to a particular public law would require a generous amount of time searching and using the Parallel Table of Authorities and Rules. *Regulatory Insight* gathers all of this material in one place.

¶28 *Regulatory Insight* also provides an Agency View option, which enables users to view all proposed and final rules published in the *Federal Register* by a specific agency. The agency view indicates predecessor and successor agencies, as well as agencies with similar jurisdictions. As of this writing, coverage still appears patchy, however. For example, the agency view for the Government Accountability Office includes a link to its predecessor, the General Accounting Office, while the agency view for the Food Safety and Inspection Service contains no reference to its immediate predecessor, the Food Safety and Quality Service.

¶29 Researchers who have used ProQuest's *Legislative Insight* and congressional services will find the search functionality familiar in *Regulatory Insight*. The main screen presents a single search bar in which a user can enter keywords to search within all fields, including full text. The search bar auto-populates with the popular names of public laws, including rider legislation contained within a larger public law. Advanced searching provides researchers with the ability to specify content types to search, as well as the ability to search by popular names, agency names, and subjects. While there is an option to browse the list of agencies and popular law names, there is no way to browse the list of subjects. Subject headings are likely to be unique to this particular database, so this seems to be an odd omission.

¶30 Finally, researchers can also search by identifiers, as in other ProQuest products. In *Regulatory Insight*, this enables a researcher to search by a number of identifiers, from *Federal Register* citation and *United States Code* section to agency docket number and Regulation Identifier Number.

¶31 Within each regulatory history and agency view are several filtering options, similar to *Legislative Insight's* ability to search within a legislative history. Regulatory histories can be filtered by keyword, rule status (proposed or final), agency, or date. Agency views can be filtered by keyword, CFR part, subject, or date.

¶32 *Regulatory Insight's* strict adherence to organizing regulations by public law can lead to some nonoptimal results. Riders are not cataloged separately from the public law of which they are a part, leading to a confused regulatory history for a statute containing provisions on vastly different subjects. For example, while the Emergency Economic Stabilization Act of 2008, Public Law 110-343, primarily implemented the Troubled Asset Relief Program (TARP), it also contained several riders, including the Paul Wellstone and Pete Domenici Mental Health Parity and

Addiction Equity Act of 2008 (MHPAEA). In *Regulatory Insight*, all of the regulations promulgated under the authority of P.L. 110-343 are gathered together. No regulatory history presents the regulations promulgated under the MHPAEA separately from the regulations that implemented the TARP. The MHPAEA is listed as a Cited Act in the regulatory history for the Emergency Economic Stabilization Act, so searches for its name will return the correct legislative history; however, this can lead to confusion if researchers are unaware that the law for which they are searching is only part of a much larger public law.

¶33 Similarly, organizing regulatory histories solely by public law complicates searching by *U.S. Code* citation. A complete history of the regulations involving a *U.S. Code* section that has been amended several times will involve combing through a number of regulatory histories. A search for the code section setting the federal minimum wage, 29 U.S.C. § 206, returns thirty regulatory histories. If a researcher's goal is a comprehensive look at minimum wage regulation, all of these must be reviewed for relevant materials.

¶34 *Regulatory Insight* is still being developed. When completed, *Regulatory Insight* will contain regulatory histories for laws passed from 1936 to the present. Expanding the database's coverage to pre-1936 materials, however, would improve the database tremendously. Statutes enacted prior to 1936, such as the Pure Food and Drug Act of 1906 and the Securities and Exchange Act of 1934, resulted in regulations issued in or after 1936 and found in the *Federal Register* and *Code of Federal Regulations*. Interestingly, ProQuest's *Executive Branch Documents* collection contains agency regulations issued prior to the creation of the *Federal Register*, and providing indexing for these regulations would be invaluable for administrative historians. Future plans include adding comments on proposed regulations, starting with comments posted to Regulations.gov; if this is expanded to include comments not found in Regulations.gov, then *Regulatory Insight* would become a truly unique source of content. As currently implemented, *Regulatory Insight* provides a useful alternative organization of regulatory materials, particularly for those interested in the history of administrative regulation. With a few changes, however, it could be an invaluable resource.

Negotiating Strengths*

Mary Whisner**

Ms. Whisner muses on identifying and evaluating one's strengths, especially in the interviewing context.

¶1 Five years ago I wrote a column about weaknesses.¹ After opening by saying that weaknesses are hard for most people to talk about, I parenthetically noted that strengths are also hard to talk about, but said that was a topic for another piece. This spring one of our law library interns told me she'd found the first piece helpful (swell!) and asked whether I'd ever written the second. Why, no, I hadn't—but that's a good idea.

¶2 Strengths are hard for many of us² to talk about for at least four reasons. First, we are taught that it's unseemly to brag and we don't want to be boastful.³ Second, we might fear that others would disagree with our self-assessment if we spoke it aloud. It would be embarrassing—or disillusioning—to say we have a strength and to have our audience shoot us down. Third, we might have an exaggerated sense of how strong a trait must be to be claimed as a strength. For instance, I'm pretty good at recalling scattered bits of general knowledge, but I'm not as good as Ken Jennings⁴—I'm not even as quick as I was myself when I was younger—so maybe I shouldn't say it's one of my strengths. But Ken Jennings is exceptionally good at it, and my younger self was really quick. I think it's probably fair to say it's one of my strengths because I'm still better at it than most people I interact with. I'm just not going to challenge Ken Jennings to a trivia duel. Finally, we might lack self-knowledge. Perhaps you know someone who is so compassionate and trustworthy that he shines as a confidante and adviser but doesn't recognize how rare

* © Mary Whisner, 2017. I'm grateful to Mariana Newman, Maya Swanes, and Nancy Unger for reviewing a draft of this piece. Even if you think that writing is a strength of yours, it's still helpful to have people whose opinions you trust to read your work before you send it to your editor.

** Research Services Librarian, Marian Gould Gallagher Law Library, University of Washington School of Law, Seattle, Washington.

1. Mary Whisner, *Negotiating Weaknesses*, 104 LAW LIBR. J. 455, 2012 LAW LIBR. J. 32.

2. From here on, when I make a generalization like “strengths are hard to talk about,” please assume that I'm adding “for many of us.” I know that there are exceptions to all of my claims. For instance, there are confident people, overconfident people, and falsely confident people who are happy to discuss their strengths.

3. Pride is one of the seven deadly sins, after all. See, e.g., ADAM SHANNON, SEVEN DEADLY SINS, <http://www.deadlysins.com> [<https://perma.cc/CHB7-SWLR>].

4. Jennings won seventy-four games and \$2.52 million on the TV gameshow *Jeopardy!* in 2004. See *About Ken*, KEN JENNINGS, <http://www.ken-jennings.com/about> [<https://perma.cc/T3UZ-C9CD>].

those attributes are. Maybe someone else is so creative at solving research puzzles that you are frequently dazzled, but that person doesn't recognize her own flashes of brilliance.

¶3 Each of these obstacles to talking about strengths can be addressed and overcome. If you've internalized the idea that saying something good about yourself is vain, think about context. Let's grant that you'd be thought obnoxious if you filled every conversation with comments about your cleverness and skill. If someone makes small talk about the weather or a new series on Netflix, that's not the right occasion to interject a comment about the impressive series of online tutorials you created. If you're waiting in line with strangers at the bus stop, you probably shouldn't start talking about how well you did in moot court. You don't have to start bragging all the time: you just have to give yourself permission—even encourage yourself—to talk about your strengths in the very special context of job interviews. The next step will be to broaden the context a bit: it's also helpful to think and talk about your strengths when you're considering what projects to take on or how to work in a team.

¶4 If you're not sure whether to claim an attribute of yours as a strength—either because you're unsure whether it's strong enough to count or because you're afraid someone will dispute that you have that attribute at all—talk to a person you trust.⁵ For example: “Karen, we've worked on a couple of group projects together in our classes. Do you think it would be fair for me to say that I'm good at organizing a project and getting disparate people to work toward a shared goal?” Or: “Professor Richards, I really valued the opportunity you gave us to create animated database demos, and I felt pretty good about the one I made. Even though I've only created one, do you think it would be okay to talk about it when I go out on interviews? I'm not an expert, of course. Maybe I could say that my strength is being able to learn new technology?”

¶5 And if self-awareness is your challenge, there are ways to deal with that, too. Spend some time thinking about what you've done in different jobs and classes. Are there projects that stand out? What do you think made them successful? Think about feedback you got. Did your supervisors or professors tell you anything that puts you in mind of a strength? What if you got similar feedback in different contexts? If your professors and your supervisors all compliment your writing, maybe you're actually good at it. Think about other feedback you've received. Did a patron thank you for explaining something well? Did a professor send you an e-mail thanking you for a prompt and thorough response to her question? Did a classmate tell you that your edits on his paper were really helpful? All of these comments might point you toward a strength you hadn't focused on. (By the way, I think it's

5. It should be someone with knowledge of the field. For example, I trusted my dad for many things, but not career advice. When I was a senior he suggested I might go to medical school. I knew that I had not taken biology or chemistry, so—no matter how smart and able he thought I was—I would not be a good candidate for medical school.

My sister-in-law Marcia has taught public speaking in college for many years. Once a student disputed a grade, with this evidence: “My mother heard me practice the speech, and she thinks it deserves an A.” Marcia replied, “Well, *my* mother thinks I'm as pretty as Miss America, but that doesn't make it true.”

a good idea to keep a file of thank you notes and other nice comments. You can pull it out when you're feeling discouraged—and you can also use it when you're trying to think of strengths to talk about.)

¶6 Sometimes people have a hard time evaluating how distinctive their strengths are. Some years ago I suggested to an intern that she might list some computer skills on her resume. “But everyone knows those,” she protested. I suggested that she shouldn't be so sure. Maybe her classmates all used the applications she did, but the resume would be seen by search committee members who might not have tinkered with creating infographics or designing web pages (I hadn't). This is another instance where it's useful to talk to trusted advisers.

¶7 Now we've got you warmed up. You're willing to talk about strengths and you have a list of some. Which do you choose to highlight in an interview? One temptation is to parrot back whatever qualities the employer listed in the job ad. But there are problems with this approach. For one thing, the interviewers might recognize the words they wrote and think you're just trying to please them.⁶ Your recitation will be flat and boring if you aren't talking about what's meaningful to you. And sticking to the job ad's script will deprive the interviewers of the opportunity to hear about your strengths—some of which might serve the organization in ways they hadn't imagined. Puffery doesn't stand up. If the interviewers later see that you were just saying these things with little grounding, they might conclude not only that you lack the skill or attribute in question but, worse, that you are less than forthright.⁷ Even if they don't spot the puffery during the interview, it might be revealed later—perhaps when you're on the job—and you don't want to lose credibility then, either.

¶8 Another way of playing to your audience is to tell each interviewing group what you think they want to hear. For example, if you're interviewing to be a middle manager, you might tell the people you'd be supervising that you have a very collaborative management style and respect staff ideas and concerns, but tell the director that you are no-nonsense and you're all about efficient implementation of management's directives. Maybe each answer has some truth to it, but engaging in spin can also hurt your credibility, during the interview or later, on the job.

¶9 Although you don't want to parrot the job ad, you do want to think about which strengths will be relevant to the job. If you have absolute pitch or can juggle flaming torches, that's very impressive,⁸ but it doesn't make you a better candidate for most library jobs. The job ad can be a starting point. If it says “excellent communication skills,” don't just say those words, but think about which of your strengths relate to that—for instance, “I have experience writing for diverse audiences, from appellate judges to high school students, and I can adapt my style to the audience.”

6. In the television show *Leave It to Beaver*, Mr. and Mrs. Cleaver weren't fooled by Eddie Haskell's phony politeness either.

7. It doesn't have to rise to the “Liar, liar, pants on fire!” level to hurt your credibility.

8. About one in ten thousand people has absolute pitch. DANIEL LEVITIN, *THIS IS YOUR BRAIN ON MUSIC: THE SCIENCE OF A HUMAN OBSESSION* 149 (2006). I don't know how many people can juggle flaming torches. Funny search sidelight: if you type “juggling statistics” into Google, you get lots of material about manipulating statistics, rather than statistics on the number of people who juggle.

¶10 Beyond the job ad, think about what makes you good at your job—or what would make you good at the job you want. What strengths have you seen in others? Do you share them? It is critical here to remember that you don't have to have the same strengths as the next librarian to excel at the work. Draw a lesson from another field, acting: veteran actors Jane Fonda and Lily Tomlin approach their craft very differently, but both excel.⁹ Their contrasting styles probably contribute to the success of their ensemble cast. Similarly, a successful library or library department might thrive with different sets of skills. One librarian might be exceptionally well organized, with color-coded calendars, checklists, and files. Someone else might be a little underorganized but have a talent for coming up with good teaching examples on the fly. One librarian's gregarious nature might help the library's outreach efforts while another's careful attention to detail might contribute to a successful digitization project. In short: it's okay for you not to have all the strengths of the librarians you look up to. Think about the strengths you do have and how they can help the library. You can even talk about developing strengths you don't have yet, as one candidate did when she told us she wanted to improve her public speaking and so had joined Toastmasters.¹⁰

¶11 Listing strengths without giving examples can seem vague (and vacuous). It might betray a lack of substance. At the least, it misses an opportunity to drive home the point. The examples will make the strength vivid and memorable.¹¹

¶12 Perhaps this will seem obvious or trivial to readers, but I offer here a bit of advice I've given to years-worth of interns as they head to interviews: Take some index cards (or slips of paper). Write on each card a strength you'd like your interviewers to know about. Then jot a couple of bullet points reminding you of examples. On the plane to your interview, shuffle through the cards several times so the strengths and examples will be fresh in your mind. This will reduce the risk of your mind going blank when someone asks you the inevitable question about strengths. During your interview, throw in the strengths and examples as the opportunity arises. (Opportunities to talk about your strengths come up even when the interviewer doesn't ask explicitly.) Try to mention your best strengths throughout the day. This technique will help you show your best self to the interviewers.

9. See, e.g., *Brooklyn Decker: Two Truths and a Lie, Lie, Lie*, ASK ME ANOTHER (Nov. 11, 2016), <http://www.npr.org/2016/11/11/501707962/brooklyn-decker-two-truths-and-a-lie-lie-lie> (audio at 3:28) (interview with Brooklyn Decker):

I actually feel like Jane and Lily are opposites as actors, in that Jane is so technically precise when it comes to the way you hold your face to camera, where a camera angle is, where a camera's sitting, where the lights [hang]: she's so knowledgeable about the technicalities it takes to film a scene, whereas Lily comes in and it's just like this ball of energy and she's living in her natural self, y'know, and you just film it and it's perfect on camera. So they both bring these incredible strengths, but very opposing strengths, to a scene.

10. Marian Gould Gallagher, who was eventually renowned for her witty speeches, began her career with "terrible stage fright," which she addressed by joining a Toastmistress class. Pegeen Mulhern, *Marian Gould Gallagher's Imprint on Law Librarianship—The Advantage of Casting Bread upon the Waters*, 98 LAW LIBR. J. 381, 397, 2006 LAW LIBR. J. 20, ¶¶ 54–55.

11. On the power of concrete examples and stories, see generally CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2007).

¶13 It took five years, but I've followed through on that idea of writing a piece about strengths. Just as we all have weaknesses, we all have strengths. Like weaknesses, strengths are hard to talk about, but for different reasons. It's good to think about them, if only to prepare for interviews. (Self-knowledge is helpful throughout your life, too.) Remember that you don't have to do all this thinking on your own: you can talk to classmates, professors, or mentors to get some input. Take heart—and good luck on those interviews!

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