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Are Recorded Lectures Better than Live Lectures for Teaching Students Legal Research?*

Jane Bahnson** & Lucie Olejnikova***

This study compares retention of legal research concepts between two LL.M. student groups: one taught by live lecture and one taught using a self-paced, recorded module. No significant difference in retention was found between the two groups. While recorded classes may offer other advantages, student learning was not improved by substituting a self-paced, recorded module for live instruction.

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* © Jane Bahnson and Lucie Olejnikova, 2017. This project was supported in part by a grant from the AALL Research & Publications Committee. We would like to acknowledge and thank Kristina Alayan, our former colleague, currently at the Georgetown Law Library, who was involved during the initial stages of this study. She was a co-investigator and co-awardee of the AALL scholarship grant and assisted in preparing the study application materials, semi-annual report, test slides, and assessment questions. We are also grateful to Jennifer Behrens, Marguerite Most, and Laura Scott for their editorial input into our self-paced module and assessment questionnaire, and for their assistance in incorporating the study materials into their LL.M. legal research sections.

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Introduction

¶1 Ideally every instructor in higher education continually rethinks the best way to deliver educational content to their students, and so the introduction of new educational technologies has felt like an urgent poke in the ribs to many members of the academy. From clickers and in-class polling to interactive videos and self-paced instructional modules, the steady drumbeat of “innovate” has thumped across the literature and into our in-boxes. We assume the millennials who fill our classrooms expect to be technologically engaged by their instructors, and we don’t want to disappoint. But seldom do we stop and question whether this technology is pedagogically superior to, or even equivalent to, traditional classroom lecturing methods. Traditional lectures can be tedious and one-dimensional, but most of us have also had that instructor who kept us in the palm of her hand in a live lecture that left us transformed and inspired.

¶2 Recorded instruction, on the other hand, can be passive and isolating, but it can provide flexibility in terms of timing and the opportunity to repeatedly review presented material. A literature review reveals numerous accounts of student and teacher satisfaction when using recorded lectures, but few offer comparative measures of student retention of the subject material. Our aim in this project was to add to the existing literature by comparing student retention of legal information when the material was presented by a live instructor to student retention when material was presented through a self-paced recorded video module.

Scholarship on the Use of Recorded Classes

¶3 Incorporation of technological advancements into pedagogical methods has become a popular area of study. Nonetheless, numerous gaps in understanding whether these newer instructional methods are effective are evident in the literature. Much of the available literature describes the various ways instructors can use a “flipped classroom,” what a “flipped classroom” is or should be, and how to evaluate students’ satisfaction.¹ Few guidelines emerge that would constitute best practices with regard to either the use of technology or how to measure success.

Experimenting with a Broad Spectrum of Classroom Technology

¶4 All educational institutions are under increasing pressure to improve student learning and demonstrate program effectiveness.² To address these demands,

institutions and instructors, including law schools, have been experimenting with the vast array of available and continually evolving online teaching tools. Ada Le, Steve Joordens, Sophie Chrysostomou, and Raymond Grinnell at the University of Toronto report that online educational technologies are becoming increasingly popular in higher education institutions. A growing number of alternatives to the “traditional in-class method” have been developed, implementing innovative techniques and taking on a variety of forms. Traditional in-class or “face-to-face” instruction characterized legal education for more than a century and utilized before-class preparation followed by use of the “dreaded” Socratic method to facilitate in-class discussion. As instructors and institutions move away from this model, courses can be taught entirely online, either synchronously or asynchronously; and many universities, including law schools, fully embrace this approach. The flipped classroom, as one of the models, can deliver lectures through recordings that students view outside of class, thereby saving in-class time for individual practice exercises with the instructor present to assist and answer questions.

¶5 Gerald F. Hess describes the range of nontraditional options and notes that those methods can still use “Socratic dialogue” through video conferencing and synchronous chat rooms. Lectures can be delivered by video or podcast, and discussions can be conducted through video conferencing, synchronous chat rooms, or asynchronous discussion boards; writing exercises and quizzes can be administered through a course webpage. Another type of class, which Hess describes as “technology-enhanced,” “hybrid,” “flipped,” and “blended” courses, uses recordings to supplement, not replace, the traditional in-class experience. Hess also addresses the current state of instructional technology in the legal classroom and concludes that the purely face-to-face course, which embodies the Socratic method many of us experienced as law students, is no longer the norm in law schools. Similarly, Jacob Lowell Bishop and Matthew A. Verleger report that while there does not seem to be a consensus on what a flipped classroom is, in their opinion, it does “actually represent[] an expansion of the curriculum, rather than a mere re-arrangement of activities.”

¶6 In her study of using recorded lectures with interactive components to teach basics of legal research to international students in an LL.M. program, Catherine Lemmer reported high satisfaction among the sixteen students who completed and

5. Hess, supra note 3, at 52.
6. Id.
7. Id. at 53.
10. Id.
11. Id. at 52.
12. Id. at 51, 83.
13. Bishop & Verleger, supra note 1, at 5.
evaluated the flipped-classroom experience she designed and implemented.\textsuperscript{14} She found increased student class involvement with in-class research labs, increased student interest in research hypotheticals, and better classroom camaraderie,\textsuperscript{15} but did not measure information retention. Susan Park and Denise Farag described the use of clickers in undergraduate legal studies courses as a way to facilitate “active learning,” finding clickers to be an excellent engagement tool,\textsuperscript{16} but the authors did not evaluate an impact on retention.\textsuperscript{17}

\textsuperscript{7} Not all instructors or students embrace technological advances, however. British researchers Beverley Steventon, Sukhninder Panesar, and Jane Wood describe the reticence of law faculty at Coventry Law School to integrate technology into the legal curriculum.\textsuperscript{18} The authors looked at the use of multiple-choice questions, electronic voting, and a peer-review exercise and found that although students positively received these new techniques, issues remained surrounding the depth of student engagement, which limited the practical assessment of the potential of these techniques to improve instruction.\textsuperscript{19} The authors also note the time-consuming aspect of the use and implementation of new technologies and the need for student and instructor buy-in.\textsuperscript{20} Similarly, Maura C. Schlairet, Rebecca Green, and Melissa J. Benton describe their redesigning a fifteen-week fundamentals of nursing course into a flipped class as very time-intensive and requiring extensive in-house administrative and technological support.\textsuperscript{21} Other authors also note the difficulties inherent in producing video lectures and making them accessible to students.\textsuperscript{22}

**Assessing Teaching Effectiveness in Addition to Student Satisfaction and Engagement**

\textsuperscript{8} Studies to date on the introduction of recordings, polling, distance learning, and other technological teaching innovations that have looked at student retention of the material show equivocal results. Adam Butt described an Australian actuary class in which students had access to online lectures accompanied by notes prior to

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\textsuperscript{14} Lemmer, \textit{supra} note 8, at 490, ¶ 81.
\textsuperscript{15} \textit{Id.} at 489–90, ¶¶ 77–81.
\textsuperscript{17} \textit{Id.} at 87.
\textsuperscript{18} Beverley Steventon et al., \textit{Moving the Law School into the Twenty-First Century—Embedding Technology into Teaching and Learning}, \textit{38 J. Further & Higher Educ.} 107, 126 (2014).
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} Maura C. Schlairet et al., \textit{The Flipped Classroom: Strategies for an Undergraduate Nursing Course}, \textit{39 Nurse Educator} 321, 324 (2014) (noting no robust measure of student retention).
\textsuperscript{22} See Susan D. Landrum, \textit{Drawing Inspiration from the Flipped Classroom Model: An Integrated Approach to Academic Support for the Academically Underprepared Law Student}, \textit{53 Duq. L. Rev.} 245, 271 (2015) (“[A] flipped classroom requires a major time investment on the front end of the process, when the professor must identify the topic of each module, plan how the module integrates with what will happen during class, draft a script or develop other materials for the module, develop competency in using the technology needed to create the video, and creating and editing the video. . . . [S]tudents who are less technologically proficient or lacking access to high speed Internet may have difficulty using video modules. . . . If the video is too long, its demands on law students’ limited time may be too onerous. Finally, it may be challenging to make sure that students are actually watching the video before coming to class, an essential requirement to achieve academic objectives.”).
class and spent class time completing hands-on activities.\(^{23}\) Students were asked to evaluate in-class activities and the online activities in comparison to the in-class activities in the traditional lectures.\(^ {24}\) The author reported that only about half the students were satisfied with the flipped classroom, although this number grew over time, while a fourth of the students did not see any improvement in their learning.\(^ {25}\) The author also noted the substantial amount of time that instructors needed to prepare classes and resources.\(^ {26}\) In their experiment involving a community college fire science course, Joseph Collins and Ernest Pascarella found that students receiving instruction through a two-way interactive telecourse did no better than students receiving instruction in a traditional face-to-face format, although the authors noted that students who self-selected a remote-learning method performed better than students randomly assigned to either a face-to-face or remote-learning group.\(^ {27}\)

\(^9\) Some researchers have observed possible benefits of offering and using alternative methods of information delivery. Eric DeGroff describes a study of the effect of new teaching techniques on law students’ learning styles over the course of an academic year.\(^ {28}\) The results suggest that using experiential-type methods might positively impact the development of analytic skills, although the effect of other traditional in-class courses taken concurrently could not be ruled out.\(^ {29}\) Similarly, Bishop and Verleger reviewed twenty-four studies related to the flipped-classroom method and found that most studies focused on measuring students’ perception and satisfaction show generally positive evaluation, but noted that students “prefer in-person lectures to video lectures, but prefer interactive classroom activities over lectures.”\(^ {30}\) They conclude that “there is very little work investigating student learning outcomes objectively,”\(^ {31}\) stating that out of all the reviewed studies in June 2012, “there [was] only one (Day & Foley)\(^ {32}\) that has examined student performance throughout a semester.”\(^ {33}\) Jason Day and James Foley found in their senior-level computer interaction course that students who watched PowerPoint videos outside of class while spending in-class time on interactive learning activities “scored significantly higher on all homework assignments, projects, and tests” than those who did not.\(^ {34}\)

\(^{10}\) M.B. Wieling and W.H.A. Hofman looked at the benefit in terms of course grade of allowing students access to video-recorded lectures and interactive feedback

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24. *Id.*
25. *Id.* at 41.
26. *Id.*
29. *Id.* at 283–85.
31. *Id.*
34. *Id.*
as compared to students having access only to live lectures. Students who attended fewer lectures benefited more from viewing the online lectures than students who had access to online lectures but also attended most of the face-to-face live lectures. The authors concluded that offering recorded lectures to students who were often absent from the regular face-to-face lectures had improved their course grades, but the total number of lectures students viewed online and attended in person was the only factor that contributed positively to the course performance when controlling for GPA, study habits, and time invested. The authors reported that their conclusion was in line with that of Thomas L. Russell, who also found that the influence of viewing online video lectures and attending lectures in person were approximately equal. Wieling and Hofman concluded that “there is a need for designing and delivering the right content, in the right format, with the right media often providing a mix of different tools including face-to-face learning.”

A few studies suggest that online classes may be better suited to some types of learning than others. Thomas K. Ross and Paul D. Bell compared online education with traditional classroom education in a quality management course. They found that online education compared favorably to classroom education when students were learning memorized or lower-level functions, such as knowledge retention, recollection, or comprehension; however, when learning higher-level tasks, such as application of rules and facts to problems, analysis, or synthesis, online students were significantly disadvantaged.

Debora L. Threedy and Aaron Dewald describe the development of thirty-seven short videos for a first-year contracts course to address whether flipped environments can offer the appropriate atmosphere to teach higher-level tasks such as problem solving and analytical skills. Directly addressing the criticism that law professors do not teach what they test, the authors developed a hybrid flipped-classroom course to convey “basic rules, concepts and principles, that is, the black-letter law,” through online instruction while classroom time was used for active analytical learning exercises. Similarly, Le et al. measured student performance in a math class using a blended online/live-learning approach and discovered that those students who augmented the live lectures with online viewing, and those who used the “pause” feature the most, had the poorest performances in examinations. The authors attributed students’ repeated viewing of the lecture to their attempts to memorize material presented, a technique that is less useful in a math class than in other subjects for which memorization is a central component. Moreover, the authors noted that

36. Id. at 996–97.
37. Id. at 996.
38. Id. at 997.
40. Wieling & Hofman, supra note 35, at 997.
42. Id.
43. Debora L. Threedy & Aaron Dewald, Re-conceptualizing Doctrinal Teaching: Blending Online Videos with In-Class Problem-Solving, 64 J. LEGAL EDUC. 605, 605–06 (2015).
44. Le et al., supra note 4, at 317–18.
45. Id. at 318.
level of performance was directly linked to students’ level of motivation and their approach to studying, so that those applying superficial strategies performed more poorly than those who engaged with the material in more depth.⁴⁶ Studies report that students also sometimes overestimate what they have learned from video-recorded modules, and this can negatively impact their long-term retention of the material.⁴⁷

Although some studies suggest that distance learning may not present significant benefits when compared to traditional in-class instruction, research indicates that it may be just as effective.⁴⁸ During a four-week introductory psychology course, Scott A. Jensen had students attend either an in-class lecture or an online video lecture with an in-class active learning session; he found that learning outcomes were similar when the quiz scores were compared.⁴⁹ Students appreciated the online lectures for their convenience but preferred in-class lectures because they offered structure, increased students’ motivation, and decreased distraction.⁵⁰ Similarly, Jacqueline E. McLaughlin and colleagues reported that while using a flipped classroom enhanced the academic experience, examination performance stayed the same when compared to traditional course offerings;⁵¹ students preferred face-to-face learning, citing higher engagement.⁵² In their study, McLaughlin et al. had designed the lectures to be delivered synchronously through video across two satellite campuses.⁵³ The study incorporated preclass recorded lectures and in-class live clicker questions, presentations, and quizzes.⁵⁴ Fletcher Lu and Manon Lemonde carried out a study in their undergraduate statistics course at the University of Ontario to gauge whether online teaching delivery methods would yield student results comparable to the traditional in-class approach.⁵⁵ They evaluated the performance of students in the online and face-to-face groups and found that online teaching delivery is just as effective. But notably, the comparable performance results applied only to students who were already performing better than the average, while the results of the already lower-performing students were even poorer when instruction was delivered online.⁵⁶

Attempts to measure student performance have not established an advantage of recorded lectures over live teaching. Jacqueline O’Flaherty and Craig Phillips from

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⁴⁶. Id.
⁴⁷. See Karl K. Szpunar et al., Overcoming Overconfidence in Learning from Video-Recorded Lectures: Implications of Interpolated Testing for Online Education, 3 J. APPLIED RES. MEMORY & COGNITION 161, 163 (2014) (noting that this effect can be partially overcome by including interpolated questions within the recordings, which reduces mind wandering).
⁴⁹. Id. at 302.
⁵⁰. Id. at 301–02.
⁵². Id. at 5.
⁵³. Id. at 3.
⁵⁴. Id.
⁵⁵. Fletcher Lu & Manon Lemonde, A Comparison of Online Versus Face-to-Face Teaching Delivery in Statistics Instruction for Undergraduate Health Science Students, 18 ADVANCES HEALTH SCI. EDUC. 963 (2013).
⁵⁶. Id.
the University of South Australia published an in-depth scoping review, which evaluated twenty-eight articles identified as focusing on the “exploration of key aspects of the flipped class that influence its effectiveness and contribute to an improved student flipped learning experience.”57 Each article was evaluated by examining student outcomes and comparisons between existing courses taught in a traditional manner with courses imbedding a flipped class.58 Although many of the articles acknowledged a number of positive aspects associated with using a flipped classroom, “very few articles used a robust scientific approach to evaluate educational outcomes as it relates to improved student learning particularly of higher-order thinking cognitive skills such as improved problem solving, inquiry and critical or creative thinking.”59 O’Flaherty and Phillips concluded that in the quest to redesign the curriculum,

[t]he flipped model has the potential to enable teachers to cultivate critical and independent thought in their students, building the capacity for lifelong learning and thus preparing [the] future [work force]. . . . However, . . . educators . . . may not [always] fully understand the pedagogy of how to effectively translate the flipped classroom into practice.60

The authors further emphasized that a successful hybrid course should foster student learning, “facilitate critical thinking,” and “improve student engagement.”61

Applying the Literature Review to Our Study Design

¶14 Our study incorporated design aspects authors found effective for recording-based teaching, and it tested aspects of recording-based teaching that were either not addressed or only tangentially mentioned. In the studies we reviewed, the most successful recorded classes were based on lower-level, memorized material; they included some element of student-teacher engagement; and the recordings were relatively short and interactive. Very little of the literature compared information retention between students taught with a recording and students taught using a live lecture or offered descriptions and examples of the best type of assessment tool for making such a comparison. Studies also generally did not look for an association between recorded teaching effectiveness and student demographics. Nor did they focus on the relative advantages of the delivery method itself as opposed to the advantage of increased in-class instruction time.

¶15 Accordingly, our study was designed to maximize the effectiveness of our module by selecting topical material that lends itself to memorization while preserving the personal interaction between teacher and student. The study module itself was designed to be self-paced and relatively short to improve usability and maintain the focus on the method of delivery, and it included interpolated questions. The assessment comprised various types of question formats, including demographic questions, so that we could look for possible associations with overall scores.

57. O’Flaherty & Phillips, supra note 2, at 86.
58. Id. at 89 (citing eighteen out of the twenty-eight examined articles on the topic).
59. Id. (citing only three out of the twenty-eight examined articles).
60. Id. at 94.
61. Id. at 95.
Methodology

Preliminary Considerations

¶16 This study focused on our Duke University Law School LL.M. students, who come from all over the world to study law for one year. This is generally an engaged and enthusiastic group of students who greet our assurances about the American legal system with a healthy degree of skepticism as they offer their own wry observations. These students are required to take U.S. legal research as part of their curriculum, and with a predictable class size of approximately one hundred students, we had a reasonable student sample. The majority come from countries governed by civil law systems, in which judges play a much less significant role in shaping the law than legislators and legal scholars do, and for many of these students English is their second language. We selected as the subject matter for our study those research topics our LL.M. students typically struggle to master. We reasoned that if the self-paced module offered an advantage, it would most likely manifest when teaching doctrinal material that is particularly challenging.

¶17 During the planning stages, we contacted Duke’s Institutional Review Board to determine whether consent was needed from the LL.M. students before implementing this study. We were advised that assessing the effectiveness of a teaching strategy does not meet the definition of research with human subjects, so institutional review board approval was not needed.

The LL.M. Research Class

¶18 The study was carried out in the Legal Analysis, Research, and Writing for International Students (LARWINT) class offered in the fall semester as part of the LL.M. program. A total of 106 LL.M. students were randomly divided into four sections of roughly equal number by the law school registrar. All sections met for a total of four sixty-minute in-class legal research lectures where attendance was taken. Two sections were randomly assigned to view the self-paced module, and the other two were assigned to receive live instruction of the same material.

Class Format and Teaching Materials

¶19 Teaching responsibilities for LARWINT are rotated each year among the research instructors. Over the years, a bank of teaching materials, including various handouts and slides, has been collected and is available to the teaching team. These represent the collaborative efforts of current and past Duke law reference librarians, and they undergo updating and modification every year as research platforms and educational emphasis evolve to meet current student needs. The basic format of each class is similar across sections. The first lecture covers secondary sources of the law, the second covers statutes and regulations, and the third and fourth lectures cover case law research. The section on case law, court structure, legal precedent, and case law publication is taught in the third lecture. The intent in planning the self-paced module was to adhere as closely as possible to that portion of the established curriculum, utilizing slides that had been created and vetted for instructional use in prior years as the visual foundation for the module.
All four instructors followed the same syllabus, gave out the same handouts, and used the same teaching materials in each of the four classes, with the exception of the test portion of the third lecture. In addition to the lectures, all students in all sections were asked to read chapter 3 in Cohen and Olson's *Legal Research in a Nutshell* prior to the third class. All students in all sections were given the same handouts on publishing and finding case law. Approximately thirty PowerPoint slides accompanying the third lecture explain case law, case law publication, precedent, and court structure, and these were the slides used as the visual component of both the in-class lecture and the self-paced module.

**Creation of the Self-Paced Module**

The self-paced module was created using Articulate Storyline software (articulate.com/360/storyline). As described above, the chosen thirty slides formed the backbone of the self-paced module. The script was written over a one-week period, and all research instructors were given an opportunity to provide feedback, which was incorporated. The script was then recorded, slide by slide, and the text was also typed into side panels so that students could choose to read along while watching the recording. The module included a main menu allowing students to watch any of the four subtopics as separate segments. The last slide in each segment ended with one interactive question and a link to the main menu. The total uninterrupted viewing time for the self-paced module was estimated to be ten to fifteen minutes, depending on how quickly the viewer advanced the slides. The final product was uploaded to the Duke Law School server.

The self-paced module was designed to be viewed on all devices, including laptops, tablets, and mobile phones. The module was inconsistently accessible on PC computers largely due to browser compatibilities. After republishing the file several times to incorporate software updates, we were advised that periodic updates to Adobe Flash, a program on which Articulate Storyline is designed to run, could cause slow loading times when using some browsers.

**Designing the Quiz Assessment**

We wrote an assessment in the form of review questions to measure students’ retention of the subject material. The questions targeted only the study subject materials. The assessment included some questions specific to the material in the module and the corresponding lecture slides. The questions included true/false or multiple-choice format, with some questions having more than one correct answer. Students were advised prior to the third lecture that they would be completing an anonymous assessment at the end of the fourth lecture, and that this assessment would have no impact on their course grade. They were further advised that the assessment was for the purpose of evaluating the effectiveness of this newly incorporated legal research teaching method.

The assessment also sought general demographic information, including the student’s age, region of origin (Europe, Near East, Middle East, Far East, Africa, Australia, North America, or South America), and home country legal system, so

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that we could look for possible demographic influences on the results. Each of 
these demographic questions included the option “prefer not to answer.” The
assessment distributed to students who used the self-paced module also included
questions about the device they watched the module on, whether they viewed it
more than once, whether they read the script along with the narration, and whether
they found the module helpful.

Implementation

¶25 For purposes of this study, the four sections were paired up to create two
equal groups of fifty-three students each. Each of the four sections was taught all
four research classes by the same research instructor.

¶26 The study topics were covered at the start of class three during the first fif-
ten to twenty minutes. Students receiving the live lecture were shown the thirty
slides on case law, case law publication, precedent, and court structure as part of the
regular class. The research instructors offered in-class explanation of this material,
and students were able to ask questions, hear other students’ questions, and engage
with the instructor about the material. Students receiving the self-paced module
were given access to the module after the second class, along with instructions on
how to best access it, and they were asked to watch it before the third class. This
group was advised about the different features of the video, and students were
couraged to replay it multiple times if desired and to view it at times convenient
for them. For the first fifteen minutes of the third class, students assigned the self-
paced module were allowed to ask questions in an undirected format. The remain-
der of the third lecture was the same for both groups.

¶27 At the end of the last lecture, all students were given the twenty-question
assessment in paper form to complete, which they handed in as they left the
classroom.

Results

¶28 Of the students who attended the classes in which the self-paced module
was used, forty-five attended the last class and completed the assessment. Of the
students who attended the live lecture classes, forty-nine attended the last lecture
and completed the assessment.64 All students were able to complete the assessment
within the final ten minutes of the class. No student asked for clarification of any of
the questions, stayed after class, or requested extra time.

Overall Scores

¶29 Of the students attending the live lectures, the median score was fifteen out
of twenty questions correct. The average percent correct was 73.75%. Of those stu-
dents who used the self-paced module, the median score was also fifteen out of
twenty correct, and the average percent correct was 73.67%. Entering the raw scores
and using Welch t-test results, the two-tailed P value is 0.9761, which is considered
to be not statistically significant.65 (See table 1.)

64. One response from the live-lecture section, in which an entire page of questions printed on
the back side of the first page was left blank, was omitted from the results.
65. Calculated using the free GraphPad program (http://graphpad.com/quickcalcs/ttest2/).
¶30 Of the forty-eight students who attended the live lecture, twenty-six (54%) achieved a score of fifteen or higher. Of the forty-five students who used the self-paced module, twenty-seven (60%) achieved a score of fifteen or higher.

¶31 Of those students who were assigned the self-paced module, ten (22%) watched it more than once, and these students averaged a score of fifteen on the assessment. Thirty-two read along with the narration as they listened to the module, and those students achieved an average score of 14.67. Of the thirty-nine students who responded to the question of whether the module was useful, thirty-eight answered that it was useful.

Results Based on Question Format and Topic

¶32 Students across both sections missed the same questions in roughly equivalent proportions. (See figure 1.) These included questions 4, 7, 13, 17, and 20, which were the questions most directly tailored to the lecture and module. There was no discernable pattern in correct answers based on the type of question (multiple choice or true/false), nor were correct answers related to the order in which questions appeared in the assessment.

¶33 There also did not appear to be a pattern based on the topic of the question. The questions most frequently missed were on the topic of case law publication. Both groups missed each question in roughly the same numbers.

Results by Demographic Categories

¶34 The majority of students were from the Far East and Europe, followed by the Near East, South America, and the Middle East. North America, Africa, and Central America were represented by fewer than five students each, and three students declined to identify their regions of origin. While there were subtle variations in scores for some regions between the group viewing the recorded module and the group receiving the live lecture, the differences were not significant, particularly when considering the sample sizes. (See figure 2 and table 2.)

¶35 Approximately seventy-five percent of students were from countries with a civil law legal system. Those students who self-identified as coming from civil law system countries averaged 14.62 questions correct, whereas students who self-identified as coming from common law system countries averaged 15.1 questions correct. The only perfect score was achieved by a student from a mixed law system country, while the three lowest scores were from students from civil law system countries.66 (See figure 3.)

¶36 There was also no significant correlation between age group and score. The largest groups were those aged twenty to twenty-five and twenty-six to thirty, with fewer than five students in the highest age group (forty-one to forty-five). One student did not disclose his or her age. (See figure 4.)

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66. These results are consistent with our observation that students from civil law jurisdictions tend to struggle with case law and court structure concepts, thereby validating our decision to use these topics as the basis of our study.
ARE RECORDED LECTURES BETTER THAN LIVE LECTURES?

Table 1
Overall Score Results

<table>
<thead>
<tr>
<th></th>
<th>Live Lecture</th>
<th>Recorded Module</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of students</td>
<td>48</td>
<td>45</td>
</tr>
<tr>
<td>Mean score</td>
<td>14.75</td>
<td>14.73</td>
</tr>
<tr>
<td>Standard error of the mean</td>
<td>0.32</td>
<td>0.45</td>
</tr>
<tr>
<td>Standard deviation</td>
<td>2.24</td>
<td>3.03</td>
</tr>
</tbody>
</table>

Figure 1
Number of Incorrect Answers by Question Topic

Figure 2
Average Correct Answers by Region
Table 2
Number of Responses by Region

<table>
<thead>
<tr>
<th>Region</th>
<th>Number of Student Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Africa</td>
<td>4</td>
</tr>
<tr>
<td>Central America</td>
<td>1</td>
</tr>
<tr>
<td>Europe</td>
<td>20</td>
</tr>
<tr>
<td>Far East</td>
<td>26</td>
</tr>
<tr>
<td>Middle East</td>
<td>9</td>
</tr>
<tr>
<td>Near East</td>
<td>15</td>
</tr>
<tr>
<td>North America</td>
<td>4</td>
</tr>
<tr>
<td>South America</td>
<td>11</td>
</tr>
<tr>
<td>n/a</td>
<td>3</td>
</tr>
</tbody>
</table>

Figure 3
Type of Legal System in Student’s Country of Origin

Figure 4
Average Correct Answers by Age
Discussion

¶37 Our results did not show any benefit to using a self-paced module over live instruction, or vice versa, when teaching legal research in terms of student information retention. Other authors report that students “really like” using recorded videos, and we received positive comments on our video as well. However, if the goal is to increase efficiency and improve student learning, it is not clear from our experience that recorded modules are the best approach. We found drawbacks in preparing and using self-paced modules that left us questioning the economic and pedagogical justification for routinely including recorded classes in the curriculum.

Producing the Recorded Module

¶38 Despite having some prior experience using Articulate Storyline software to create educational recordings, the entire process from preparing the script to producing the final, accessible product proved time-consuming and at times frustrating. Some versions of Firefox, Internet Explorer, and Google Chrome were not fully compatible with the file, resulting in unacceptably long loading times, referred to by some of our colleagues as the “spinning wheel of death.” We tried decreasing the file size by removing pictures and some interactive functions, but loading times did not improve. After reporting the problem to the software company, we republished the file twice to incorporate software updates. This seemed to initially improve loading times, but it quickly reverted back whenever new updates to Adobe Flash were made. Because we could not control when Adobe Flash or Storyline updates would be released or what equipment students would use, we provided students with instructions on which browsers worked the best with different types of computers.

¶39 As a last resort, we recommended that students refresh each slide if they experienced long loading times, and we provided contact information if they encountered any problems. This was an unexpected complication that tempered our enthusiasm for using this software in the future. Although it is possible that slow loading times might have deterred some students from viewing the module more than once or in its entirety, no students reported any issues or complained about this aspect. In fact, the comments we received about students’ satisfaction with the module were overwhelmingly positive.

Challenging Our Results

¶40 From the outset, we recognized that some aspects of this study design would qualify any potential conclusions we could draw from the results. We did not want to completely overhaul the course format. The goal was to preserve the in-person instruction, as that has historically been one of the most satisfying aspects of legal research teaching for both instructors and students. The goal was to isolate one section of the curriculum and compare the effectiveness of in-person teaching by an instructor with teaching the same subject using a recording. However, students in the live lecture group had access to slides without audio narrative, and students in the recorded module group were allowed to ask questions about the material. This provided some benefit of both methods to both groups. The lectures also partially repeated the readings (although it is unclear how many students completed them), and the degree to which students supplemented their lectures with other sources is unknown. We elected not to control for these aspects because we
wanted to adhere to realistic teaching methods (which would not restrict student questions or access to slides or readings) and compare the success of these respective methods when used in a realistic way.

¶41 It was important to ensure that our assessment results reflected student learning from the self-paced module and live lecture, but not learning from some other source. The inclusion of a number of assessment questions that were in the self-paced module and the corresponding slides, but not in any of the readings, was intended to address this possibility. The fact that students in both groups answered most of those questions correctly and that there was no significant difference between groups in their respective scores for those questions offers some evidence that students did learn material from both methods and that both methods in our study worked equally well.

¶42 As with any assessment of student retention, the results will depend on the quality of the questions as well as the level of engagement of students when completing them. Drafting assessment questions that were neither too easy nor too difficult was one of the more difficult aspects of the project. We were aware that limiting questions to true/false formatting, while susceptible to the lucky guesser, would have simplified the process of answering the questions for students, but in the end, we decided to include a combination of question formats that could be used to ask about the same subject matter in different ways. In addition, since the assessment was both anonymous and ungraded, it is possible the results did not reflect students’ best efforts at answering the questions. Yet the fact that the majority of students completed the assessment and provided written comments shows most students expended some effort, and the finding of no significant difference in assessment scores between the two groups seems consistent with the observations of other researchers. Giving the assessment as a graded exercise may be something to consider in the future.

Should Recorded Modules Be Adopted if There Is No Proof of Improved Learning?

¶43 Some authors who find no improvement in student learning nonetheless advocate for the widespread adoption of recorded classes into the curriculum.67 Some posit that the flipped-classroom strategy is one that “nearly everyone agrees on.”68 But this broad embrace ignores serious questions about the limitations of recorded teaching. Studies of student achievement when recorded lectures are incorporated into the curriculum present a complicated picture at best.69 In our study, students in the self-paced module group were highly engaged during the brief student-led question-and-answer discussion period that was made available by incorporating the module into class, and they focused during that time on what they perceived as important. Both instructors who used the module reported that

this was one of their best class sessions. One could argue that any method that gives an instructor additional in-class time with students should be utilized and that whatever benefit there is to be gained by incorporating recorded modules may be largely the result of enabling increased student-teacher interaction.

However, if increasing student-teacher interaction is the ultimate goal, using recorded modules may not be the most efficient way to achieve this. Creating educational modules is time-consuming and resource-intensive. The production process is often tedious, and it typically involves multiple repetitive tasks before a satisfactory final product is created. As such, if student and teacher accessibility are not an issue, instructors might think about using the time that would have gone into producing a module to simply add class time. In the end, if the delivery method itself offers no pedagogical advantage for the type of material taught, as we found in our study, this may ultimately be the most efficient way to improve student learning.

**Future Research**

We designed this study to determine whether our LL.M. students would achieve better information retention if they were given material through a self-paced module than through a live lecture. Although our results did not show this to be a superior method for information delivery, they do not diminish the potential usefulness of recorded material in legal research instruction. Supplementing live teaching with recorded lectures may be particularly useful for those who need remedial help, as some of the studies we described earlier suggest. One area that deserves more study is the benefit of using recorded lectures on particular student subgroups. It would be interesting to conduct a comparison study with students for whom English is a second language and determine whether access to information at a convenient pace and time aids in their learning.

Keeping track of the overall grade point average (GPA) of students participating in a study while comparing recorded and live-lecture material retention might also reveal interesting and useful results. Student GPA traditionally has been not only a measure of academic success but also a predictor of future success. It may add to our collective understanding of who benefits the most from using recorded lectures to note student participants’ baseline GPAs and see whether the effectiveness of the delivery method in improving class scores shows any correlation with students’ average baseline grades.

Finally, it often is not only the instructor’s time that is invested in successfully launching a nontraditional course, but also the time of the administrative and technical support staff. This cost is not insubstantial. Studies tracking the time invested in planning, preparing, implementing, and evaluating a model alternative to in-class lecture into the curriculum as compared to what is required to support a traditional lecture may prove interesting, and could speak to the relative cost and benefit of “flipping the classroom.”
Conclusion

¶48 In our study, offering course material as a self-paced recorded module yielded no advantage to students, in terms of retention of the subject material, over offering the same material through a live lecture. Using the time spent designing, planning, and implementing the recorded self-paced module to instead offer additional class time might be a more cost-effective and efficient approach, at least for this population of students and for this type of educational curriculum. Nevertheless, recorded interactive modules are well accepted by students, and they may play a useful role in reinforcing or supplementing regular classroom teaching.
Resurrecting (and Modernizing) the Research Treasure Hunt*

Nancy Vettorello**

This article identifies the weaknesses in the research skills of new attorneys, traces the debates over how to teach research and the recommended solutions, and proposes a return—with modern modifications—to the largely abandoned research treasure hunt.

Introduction

First-year associates will spend forty-five percent of their time on legal research; second- and third-year associates will spend thirty percent.¹ And unfortunately, employers find their associates’ research skills lacking.² This is not a new

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* © Nancy Vettorello, 2017. Thanks first and most importantly to my research assistant, Andrew (AJ) Dixon, J.D. 2014, who inspired the treasure hunt, infused it with humor, and did most of the hard work of creating the interesting and fun problems. Thank you, too, to Charles (CJ) Ramsey, J.D. 2015, who took up the mantle in the second year and continued the hunt with fresh ideas of his own. Thank you also to Howard Bromberg, University of Michigan Legal Practice Professor, for his valuable input and suggestions.

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Employers have been complaining for more than a hundred years that recent law graduates cannot research well.³

¶ 2 None of this is lost on those who teach legal research, who have long debated the best way to do so. Techniques for teaching research have changed over time, and methods once thought appropriate were sometimes later disfavored. Changes were driven both by pedagogy and by the ever-changing interface of legal research.

¶ 3 This article explores the types of research skills employers see lacking today; traces the debate over teaching methodology for research instruction and reviews modern proposals; and suggests that those who teach legal research reconsider one of the methods that has been disfavored—the research treasure hunt. Incorporating the treasure hunt as a small part of the curriculum achieves several goals. It exposes students to a greater number of research resources, gives them more opportunity to research, allows students small victories, allows them to customize their experiences, and marries well with the skills and expectations of the millennial law student. It also reflects the type of quick-turnaround research projects that students are asked to do in their summer employment.

What Type of Research Skills Do Students and Novice Attorneys Lack?

¶ 4 Legal research involves several different skills. Attorneys must know where to look, they must know how to judge the quality of the resources used,⁴ they must be able to utilize resources efficiently, and they must be able to plan and execute a research plan that integrates analysis along the way. Despite the fact that most law students believe themselves to be good researchers,⁵ novice attorneys are criticized in all four areas, and that criticism is long-standing.⁶

¶ 5 First, employers are frustrated that students are not exposed to, or taught to master, a variety of research resources. Knowing how to research case law and statutes is not enough. Employers expect new attorneys to also be competent in researching administrative codes and legislative histories.⁷ New attorneys’ inability to research federal regulations, the Federal Register, and legislative histories was lamented back in the 1990s⁸ and continues today,⁹ and the ability to perform

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7. Meyer, supra note 2, at 3.


administrative law research is even more pressing with the growth of federal regulation. Indeed, a number of law schools have created required legislation and regulation classes as part of the first-year curriculum. “Legal methods” classes, responsible for the instruction of analysis, writing and research, have responded accordingly and have increasingly included administrative research in their courses.

¶6 Despite the focus on litigation in many first-year courses, students may also not know how to find various litigation documents, including pleadings, motions, briefs, schedules, and other information available in court dockets; jury instructions; and jury awards and settlements.

¶7 Research skills related to transactional work are also deficient, despite the fact that such skills are valuable for the many students who will practice transactional law, not litigation, evidenced in part by the sharp increase in clinics devoted to transactional law. And with increased globalization, law schools are exposing students to international and foreign law, some in the first-year curriculum, and research skills should complement this exposure.

¶8 Finally, the noticeable increase in courts’ willingness to cite to nonlegal materials means that students need to be familiar with how to research such materials. These include, as examples, news articles and academic journals from other
Employers report that recent law graduates are deficient in finding nonlegal information such as statistics and economic data.\textsuperscript{19} Second, in addition to finding the correct resources to use, novice attorneys must be able to judge the validity of their sources, a skill that some employers and many in academia believe is lacking.\textsuperscript{20} "Avoiding ‘information obesity’ in a world saturated with data may be one of the greatest challenges facing lawyers today."\textsuperscript{21} Employers want their attorneys to be more discerning about the provenance of the data they use and to strive for the best answer, not just an adequate one.\textsuperscript{22}

Third, employers complain that novice attorneys do not conduct cost-effective research,\textsuperscript{23} with one survey suggesting that partners may write off up to one-half of the research costs of newer attorneys.\textsuperscript{24} Relatedly, novice attorneys are expected to make judicious use of secondary materials, but fail to do so.\textsuperscript{25}

Lastly, employers lament the inability of novice attorneys to create a research plan and to understand how legal resources are organized. For example, new attorneys lack the ability to work with legal concepts, relying instead on key words,\textsuperscript{26} and do not use Boolean searches or citators effectively.\textsuperscript{27} Also, in one poll, law firm librarians observed that more than eighty percent of summer associates did not know how to “attack” a legal research problem.\textsuperscript{28} Attorneys who work with recent law graduates were more generous, although still almost twenty percent believe that recent law school graduates could not develop an effective research plan.\textsuperscript{29}

\textbf{The Ever-Evolving Debate on How to Teach Legal Research}

Just as criticism of legal research skills has been long-standing, so too has the debate over how to best teach legal research. Legal methods classes began in

\begin{itemize}
  \item \textsuperscript{18} \textit{Id.} at 115.
  \item \textsuperscript{19} ALL-SIS REPORT, \textit{supra} note 9, at 94 (finding that more than forty percent of those who work with new graduates think that the graduates cannot effectively find economic data and statistics).
  \item \textsuperscript{21} Koo, \textit{supra} note 20, at 3.
  \item \textsuperscript{22} \textit{Id.} at 6.
  \item \textsuperscript{23} ALL-SIS REPORT, \textit{supra} note 9, at 88; Carolyn R. Young & Barbara A. Blanco, \textit{What Students Don’t Know Will Hurt Them: A Frank View from the Field on How to Better Prepare Our Clinic and Externship Students}, \textit{14 CLINICAL L. REV} 105, 122 (2007).
  \item \textsuperscript{24} Aliza B. Kaplan & Kathleen Darvil, \textit{Think [and Practice] Like a Lawyer: Legal Research for the New Millennials}, \textit{8 LEGAL COMM. & RHETORIC: JAWLD} 153, 159–60 (2011).
  \item \textsuperscript{25} ALL-SIS REPORT, \textit{supra} note 9, at 78; Meyer, \textit{supra} note 2, at 2.
  \item \textsuperscript{26} Sokkar Harker, \textit{supra} note 4, at 86, ¶ 21.
  \item \textsuperscript{27} Young & Blanco, \textit{supra} note 23, at 117.
  \item \textsuperscript{28} Joan S. Howland & Nancy J. Lewis, \textit{Effectiveness of Law School Legal Research Training Programs}, \textit{40 J. LEGAL EDUC.} 381, 383 (1990).
  \item \textsuperscript{29} ALL-SIS REPORT, \textit{supra} note 9, at 77.
\end{itemize}
earnest in the 1950s, with intermittent flurries of review and criticisms of the programs starting as early as the 1970s.\textsuperscript{30}

\¶13 Some of the early criticisms of research instruction suggested that the relative unimportance placed on the class by both law school administration and students—as evidenced by the few credits earned by the course, the pass/fail nature of most of the courses, and the low status of those teaching the course—was at least in part to blame for students’ poor research skills.\textsuperscript{31} Distressingly, that worry remains nearly thirty years later.\textsuperscript{32} Others suggested that the myriad different skills that were required to be taught in so few credit hours in part explained students’ poor research skills.\textsuperscript{33} Again, the concern that there is limited room for research instruction and practice amid the ever-expanding curriculum remains today.\textsuperscript{34} Some commentators, believing the bar itself was responsible because it discounted the importance of research skills, suggested adding research-related questions to the bar examination.\textsuperscript{35} Model programs experimented with who taught the class, whether the class was offered over one or two terms or over a more intensive period, whether research instruction should stand alone or be combined with instruction in analysis, and whether tests or oral examinations should be administered to test student retention of research skills.\textsuperscript{36}

\¶14 The focus of the debate changed over the years as those who taught legal instruction began to focus more on teaching methodology itself and less on considerations of staffing and the type of class in which research instruction was offered.\textsuperscript{37} This is likely due to the fact that programs became more uniform, and hiring full-time professors to teach legal methods classes also became more popular.\textsuperscript{38}

\begin{itemize}
  \item \textsuperscript{31} Thomas A. Woxland, Why Can’t Johnny Research? or It All Started with Christopher Columbus Langdell, 81 Law Libr. J. 451, 454–55 (1989) (noting that research skills are left to “atrophy” after the first-year curriculum).
  \item \textsuperscript{32} See, e.g., Barbara Glesner Fines, Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills Throughout the Curriculum, 2013 J. Disp. Resol. 159, 160, 167–70 (noting that while research skills are purported to be highly valued, reformers still view them as mechanical and continue to ignore them in reform suggestions); Timothy W. Floyd et al., Beyond Chalk and Talk: The Law School Classroom of the Future, 38 Ohio N.U. L. Rev. 257 (2011) (suggesting that we rethink the traditional classroom by incorporating more skills activities into doctrinal courses, but not listing research as a skill to be added to such courses).
  \item \textsuperscript{33} Dunn, supra note 8, at 52 (suggesting that the increased focus on writing has worsened research skills); Mills, supra note 30, at 345, 346.
  \item \textsuperscript{34} Fines, supra note 32, at 183–84.
  \item \textsuperscript{37} This is not to say that such discussions are not ongoing. In fact, ¶¶ 23–25 of this article include some proposals that question when research should be taught and by whom.
  \item \textsuperscript{38} Susan P. Liemer & Jan M. Levine, Legal Research and Writing: What Schools Are Doing, and Who Is Doing the Teaching (Three Years Later), 9 Scribes J. Legal Writing 113, 121 (2003–2004) (describing the trend toward hiring full-time professionals to teach legal writing).
\end{itemize}
What follows is a highlight and summary of some of the debates and proposals that have been offered over the years. Those who teach legal research continue to consider new options for teaching as they adjust to the changing resources available to their students, but no one method of teaching research has been universally acknowledged as the best.

The Original Debate: Bibliographic vs. Process-Based Research

The first major debate in teaching methodology began with the debate between bibliographic instruction and a more process-based approach to legal research. Bibliographic research, also called research treasure hunts, focuses on individual research resources. Students are taught what a resource is and how to use it. They are then tasked with using that resource, typically in a small, discrete research task that involves limited analysis and no written component. For example, a professor might explain the purpose, function, and organization of *American Jurisprudence* and then have students complete a worksheet to show that they understood the lecture and perhaps solve a mini-research question by using the resource. In process-based research, by contrast, students’ research is focused on solving a larger problem. Students are required to research and use various legal sources to solve the problem, and the solution is written as a formal analysis, typically a legal memorandum.

Bibliographic instruction was roundly criticized in an article by Christopher and Jill Wren in 1988, who suggested that the more context-oriented approach provided by process-based research was superior. The Wrens suggested that bibliographic instruction was artificial and failed to provide the necessary instruction in research as a larger process. Helene Shapo and Christina Kunz continued the criticism in 1996, although their criticism included an additional component—not only should the bibliographic research no longer be the primary method of teaching legal research, but instruction in legal research should not be taught as a stand-alone topic. These views were validated by the important and influential American Bar Association McCrate Report, which specifically suggested that research training include more process-based training.

In my own experience, I abandoned the research treasure-hunt-type problems years ago because I saw several weaknesses in the method. First, because the research tasks were unattached to analysis and a larger assignment—such as a

40. *Id.*
42. *Id.* at 32.
43. Shapo & Kunz, *supra* note 39, at 78. In fact, this might be the earliest debate in how to teach research—the debate between doing so as a stand-alone class, almost always taught by librarians, or incorporated into a legal research and writing class, typically not taught by librarians. *Id.*
memorandum, a brief, or an oral report—they were perceived as busy work, and I suspected that my students forgot how to use the research tool the minute the mini-research project was done. Second, because the students had used the resource in isolation, they failed to see how it would fit into a larger research project. They did not necessarily know when to use the resource and how the resource could lead to other resources. Even if this information was provided, it is probable that it was not retained because the students did not need to put that information to immediate use.45 My criticisms correlate to those of Judith Rosenbaum, who rejected the idea of testing students on individual resources because, among other reasons, the exams could not capture the “trial-and-error aspects of research” and did not reference the “decision points” necessary in real research.46 As a result, the process-based research approach became popular at many law schools, and bibliographic instruction less so.47

The Recent Debate: How to Incorporate Computer-Aided Legal Research—Should Process Still Be the Focus?

¶19 The bibliographic vs. process-based instruction debate became “largely overshadowed” by more pressing concerns—how best to incorporate computer-aided legal research (CALR) into the curriculum and whether to continue to teach students how to use print-based research resources.48 This debate recognizes the ever-changing world of legal research.

¶20 For example, one commentator advocates abandoning the old method of teaching print-based resources first and then introducing CALR; she instead encourages professors to introduce the two resources at the same time to better emphasize which is more efficient for the task at hand.49 Another commentator advocates teaching online legal research first and then showing students how and when to take advantage of traditional print-based legal resources.50

¶21 A third option is more radical—abandon instruction in print-based sources altogether.51 Here, the theory is that research instruction should not be driven by instruction in research process, but instead by the goal of information literacy,
which incorporates research process as just one of five steps necessary to become information literate. Accordingly, students would be taught five skills: (1) the ability to recognize the nature and extent of information necessary; (2) the ability to access that information efficiently; (3) the ability to evaluate the sources used critically; (4) the ability to use the information to solve the problem at hand; and (5) the ability to use the information ethically and legally. In this paradigm, professors would not provide information about particular resources or how to start or go about the research, but would instead present a brief problem and see what the students find. At that point, the discussion would turn to an evaluation of the different sources used by the students and a review of their research techniques.

The emphasis on helping students make sense of the myriad choices before them is common to the suggestion that professors focus on analytical skill and “meta-cognition” when teaching legal research. Instead of simply teaching students where to find legal information and how to conduct basic legal research, professors should focus on helping students “make sense of the information” they have found and choose the right information from so many choices available.

Curriculum-Based Solutions

Solutions to the dilemma of how best to teach research expand beyond suggestions about improving the first-year legal methods class. For example, several recent suggestions involve moving research out of a single class and instead integrating research opportunities and instruction across the curriculum. Another suggestion is to provide research help when the students are working on real cases, and thus to embed librarians within law school clinics to provide students with one-on-one research guidance as the students face the more complex legal research that the real world presents.

A third approach is to take research instruction largely out of the 1L curriculum, where the process of teaching legal research is being taught to the “wrong people,” that is, to students who lack the background necessary to integrate the lessons.

The Modern Research Treasure Hunt

While many of the above solutions for the 1L legal methods course and beyond are sound, and I have integrated several of them into my course, they all

52. Id. at 120.
53. Id. at 127–28.
54. Id. at 154–55.
55. Id. at 155.
56. Sokkar Harker, supra note 4, at 92–93, ¶ 45.
57. Id. at 92, ¶ 42.
lack, or at least do not directly address, one of my primary concerns: the lack of exposure to a wide variety of research sources. Because I have long preferred a project-based research approach, the types of resources I can work into a single project are limited.61 My switch from teaching bibliographic research to a more process-oriented approach meant that my students learned a few research tasks well—mainly case law, statutory research, and prominent secondary sources—but did not get any exposure to or practice in other research tasks.62 This was true whether I instructed students in the use of print-based material or not. I was particularly concerned that although I exposed students to the Code of Federal Regulations, they were not learning enough research skills related to administrative law, let alone transactional work, a concern echoed by law firms. All of this was exacerbated by the fact that the topics and skills that I needed to address in the course ballooned.63 And while changes to the curriculum as a whole are highly appealing—particularly to increase the opportunities students have to research throughout their years in law school—they are beyond my ability to change. Second, many of the solutions did not solve a second concern: the inability to work in more research practice.64

¶27 Thus, I looked for another solution, and with prompting and a great deal of help from an incredibly inventive research assistant, AJ Dixon, we together resurrected the research treasure hunt.

¶28 I had several goals: (1) to increase students’ exposure to different types of research databases, especially government databases, and to help them see the richness of the research world beyond Westlaw, LexisNexis, and Bloomberg Law; (2) to get students to research more often; (3) to force students to evaluate the sources they were using; and, (4) to pique and further students’ interests in both research and different areas of the law. An overriding concern was to make the treasure hunt fun and interesting and to escape the banality of earlier bibliographic instruction.65 I was guided in part by some of the good research habits espoused in Matthew Cordon’s discussion of research “task mastery,” including encouraging students to practice more; be curious, confident, creative, and competitive; and cover the details.66

61. See Nancy P. Johnson, Best Practices: What First-Year Law Students Should Learn in a Legal Research Class, 28 LEGAL REFERENCE SERVS. Q. 77 (2009) (recognizing that space has not been found in legal research analysis and writing classes for some research resources, such as administrative materials).

62. See Lynch, supra note 47, at 432 (agreeing that process-based research projects “are rarely designed to require a researcher to use multiple aspects of a research tool”).

63. As noted previously, commentators already believed back in 1977 that research instruction suffered because so much was packed into the course, including an introduction to the legal system and common law, and instruction in analysis, writing, research, and citation. Mills, supra note 30, at 345, 346. Today, the course covers so much more, including ethics, drafting, client communication, negotiation, cost-effectiveness, and more. And with the recent push for more experiential education, my course now incorporates live-client work.

64. See Rachel Arnow-Richman, Teaching Transactional Skills in Upper-Level Doctrinal Courses: Three Exemplars, 2009 TRANSACTIONS: TENN. J. BUS. L. 367, 381 (Special Report) (noting that when teaching skills, “[r]epetition is essential”).

65. See Perry M. Goldberg & Marci Rothman Goldberg, Putting Legal Research into Context: A Nontraditional Approach to Teaching Legal Research, 86 LAW LIBR. J. 823, 825 (1994) (recognizing the importance of providing interesting questions and making research mastery enjoyable).

The Design of the Modern Research Treasure Hunt

\[29\] The treasure hunt took place throughout the year, although most problems were assigned in the second semester. The problems were assigned when students were less busy (relatively)—in other words, when they were not deeply involved in another research project or in writing. Weeks where I was individually conferencing with students after a draft was due were ideal, for example.

\[30\] In the first year of reintroducing the research treasure hunt, students received five problems spaced throughout the second semester. Encouraged by the solid participation rate of students in the first year, discussed in the following section, we improved the program. In the second year, students received ten problems throughout the two semesters. The problems were provided on five occasions, with a choice of two problems each time. Students received the schedule of problems and topics ahead of time, allowing them to plan. Students chose how many research exercises to undertake (with a minimum requirement of two), and more important, chose which ones they completed. We offered a variety of subject matter to meet individual interests. Topics included international law, prison regulations, sentencing guidelines, SEC filings, legislative history, administrative rulemaking, patent filings, and legal ethics. The remaining two problems corresponded to what the students were studying in two other 1L courses at the time the assignment was given. Two sample problems are provided in the appendix.

\[31\] The hunt involved quick turn-around problems\(^{67}\) whose answers were not always found in Westlaw/LexisNexis/Bloomberg Law. For example, in the first year of the project, students used the USPTO trademark database, EDGAR, a state prison website, Thomas, the Federal Register, HeinOnline, and ProQuest Congressional to answer the treasure hunt questions.

\[32\] Most important, we modernized the research treasure hunt by not providing instruction in how to use the research resources that would be required to answer the questions, and often we did not tell them which resources to use. They were told instead to use any resource available except one another. Students were encouraged to use Google, their research books, handouts from my course and other law schools, librarians, and anything else they could think of.

\[33\] We modernized the hunt in a second way. Instead of worksheets that the students completed to show that they had found the correct answer and had used the resource, answers were required in the form of an e-mail. Students were asked to provide professional, polished answers and to detail the resource used. This latter piece of information allowed us to address those who, in the beginning of the project, used unreliable resources.

\[34\] The projects themselves came from several sources, and one of the keys to being able to incorporate some hunts into the curriculum is to have ready access to interesting and realistic hunts. Thus, the best source for hunt material is the summer positions of former students. Students appreciated being able to do research problems borrowed directly from practice. Legal clinics are another valuable source of problems, and several problems were fashioned directly from recent legal news.

\(^{67}\) Students had twenty-four hours to provide an answer.
¶35 Students did not receive individual feedback on their e-mails. Instead, an answer key was provided. Because the questions themselves were usually not complex, the answer key focused mostly on the research process and the validity of the resources used, and less on the substantive answer to the hunt. For example, some answers listed the various research sources students used to answer the same question, showing students that there were multiple ways to find the same information and that some were superior to others. The answer pointed out when a less reliable research source was used and how that source might have led the student to a more reliable source. (For example, the key might point out that treaty language replicated on a trade association website is not “good enough,” but that the information provided there could lead the student to a more reliable source, such as a government-run website.) Other answers detailed common mistakes in the research process and included advice on efficiency and shortcuts.

The Results of Incorporating the Hunt into Class

¶36 First, students participated. Even when I made the exercises completely voluntary in year one and offered no grade advantage for completing them, a stunning sixty-eight percent of my class completed at least one hunt, while twenty-three percent did all five of them. When I required students to complete two of the ten problems assigned in year two, twenty-three percent completed five, and all completed the two required. Some students reported being motivated by the need to have good research skills before summer employment. Others liked the game-like nature of the hunt and the fact that they could research in any area of interest.

¶37 Surprisingly and happily, students used sources that few students in my years of teaching had used before. They made phone calls to government agencies. They consulted librarians. They investigated secondary sources to dig for answers. When left with little guidance, they experimented.

¶38 Will they be better researchers in the long run? I cannot make that prediction, but my hope is that they will have more confidence in their summer employment and will understand that research need not be a task conducted in isolation. I also hope that they start to develop a sense of how fun research can be.

Advantages of the Modern Treasure Hunt

¶39 Incorporating research treasure hunts into the curriculum is relatively painless and has some nice payoffs for student and professor alike.

¶40 First, the flexible approach and varied topics allow students to control the projects they undertake. In my experience, students increasingly enter law school with an idea of the type of law they might pursue, and the feedback I received is that students greatly appreciate working on a small research project that meets their interests. If they know who their employer will be for the summer, they may be able

to choose a research project that would be useful for the summer experience. For that reason, most of the research projects were assigned in the second term. They appreciated that their varied interests were recognized.

¶41 Second, the research treasure hunts allow students to practice research more often, a critical component in achieving research mastery,69 without adding too much of a burden to their already bloated schedules and to their professors’ workload. It is also useful that the projects can be a small way to connect to a doctrinal course.70

¶42 Third, while students do not become experts in the research resources used, they do become aware of their existence. They gain exposure to just how large the research world is beyond statutes and cases, and beyond the large, paid research services. Laura Justiss suggests that online legal research materials fall into six categories: (1) primary source materials; (2) court docket information; (3) secondary sources; (4) financial/business news; (5) public records; and (6) “other,” including both legal and nonlegal information about science, technology, patents, trademarks, medicine, and others.71 Yet students may have limited exposure to four of the six in their first years—court docket information, financial/business news, public records, and nonlegal information. The varied tasks also help to foster curiosity, another quality that benefits researchers.72

¶43 Fourth, the projects allowed me to discuss the reliability of the resources used, in context. For example, when looking for the text of a treaty, students relied on various websites for that information. The answer key to the problem addressed the reliability of the various sources used and how to use a questionable source to find a more reliable one. The variety of resources used allowed us to evaluate specific sources rather than warn about reliability in a vacuum. For me, this was a critical advantage of the project as those who teach legal research continue to recognize the need to teach students how to judge the reliability of the sources used.73

¶44 Fifth, while I do not advocate abandoning detailed instruction in process-based research, allowing students to do some research without prior guidance may be an appropriate way to meet the millennial student on his or her own terms. For example, millennials may respond better to an approach in which the student is the focus.74 They highly prefer “active learning” to lecture,75 and the modernized treasure hunt allows them to skip the lecture. They also highly prefer self-directed learning opportunities,76 and the research treasure hunt allows them to do that for at least some of the coursework. They want assignments that hold personal mean-

69. Bowman, supra note 58, at 551; Cordon, supra note 66, at 399–400, ¶ 11.

70. See Valentine, supra note 10, at 225 (suggesting that a legal research class that references issues being discussed in other courses better supports student learning).

71. Laura K. Justiss, A Survey of Electronic Research Alternatives to LexisNexis and Westlaw in Law Firms, 103 LAW LIBR. J. 71, 72, 2011 LAW LIBR. J. 4, ¶ 6. Justiss’s survey also provides an excellent source of ideas for treasure hunt problems as she lists the various databases and services used in practice.

72. Cordon, supra note 66, at 400, ¶ 12.

73. See Koo, supra note 20, at 3; Margolis & Murray, supra note 20, at 141.

74. Kaplan & Darvil, supra note 24, at 155.


76. Leah Taylor & Jim Parsons, Improving Student Engagement, 14 CURRENT ISSUES EDUC. 1, 23 (2011).
ing, so the more choices provided, the better.\textsuperscript{77} While I am not advocating that preferences of students dictate teaching methodology, it is realistic to take into consideration the experiences and preferences of the students being taught when possible.\textsuperscript{78}

\textsuperscript{¶}45 Sixth, the projects allow students to practice e-mail communication, an increasingly important skill for all practicing attorneys.\textsuperscript{79} Before the hunts began, I spent some class time discussing the appropriate format of an e-mail response and provided various readings to help students think about the form and function of the e-mail response.

\textsuperscript{¶}46 Finally, resurrecting the research treasure hunt need not be limited to 1L legal methods courses. It works well with any course and is a solution that need not wait for curriculum change or committee action.

**Important Limitations and Caveats**

\textsuperscript{¶}47 The research treasure hunt deserves a small space in the curriculum. The research projects are discrete, however, and thus lack several important qualities. First, the projects do not provide an explanation of the research source used in the larger context of the research world. They therefore do not contribute to illustrating the research “system behind the madness,” that is, they do not teach students the existence and advantage of hierarchically organized legal subjects and legal taxonomies.\textsuperscript{80} These lessons can be covered in larger problem-based research problems, however.

\textsuperscript{¶}48 Second, the projects require little legal analysis. Most legal research is complex and requires complex analysis. Nevertheless, treasure hunts can and do include real-world problems,\textsuperscript{81} so while much research in practice is more complex, not all is. I am confident in that assessment given that several of the problems assigned were variations on assignments former students had been given in their summer employment.

\textsuperscript{¶}49 Third, the hunt does not provide a way to give individual feedback to students on their research trials and errors, at least not without increasing the professors’ time expenditure in the program substantially. Nor do students receive guidance during the process itself, a desirable attribute in teaching complex skills.\textsuperscript{82} Answers are provided, and typical research qualms can be addressed both in written answers

\textsuperscript{77} Id.

\textsuperscript{78} Lynch, supra note 47, at 436 (‘Any proposal to teach law students must take into account the preferences of the students for how much attention and time they will devote to the enterprise.’).

\textsuperscript{79} See, e.g., Kristen Konrad Robbins-Tiscione, \textit{From Snail Mail to E-Mail: The Traditional Legal Memorandum in the Twenty-First Century}, 58 J. LEGAL EDUC. 32, 33 (2008) (advocating that teaching substantive e-mail communication be favored over teaching the traditional legal memorandum); Ellie Margolis, \textit{Incorporating Electronic Communication into the LRW Classroom}, 19 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 121, 121 (2011) (noting that teaching e-mail communication better meets the need of the attorney who prefers reading electronically); Gerald Lebovits, \textit{Legal Writing in the Practice-Ready School}, N.Y. Sr. B.J., Sept. 2013, at 72, 67 (noting that first-year programs must be broad enough to incorporate e-mail communication, and not just the traditional memo).

\textsuperscript{80} See Keefe, supra note 50, at 127, ¶ 41.

\textsuperscript{81} See Lynch, supra note 47, at 434 (noting that treasure hunts can be realistic).

and brief classroom discussions, but students may not learn very well from guidance that is too general.

¶50 Finally, students may have found the correct answer by using poor research methods and may not have utilized the resource efficiently in finding the answer. This can be addressed in part by including in the answer an explanation of how best to use the resource and by highlighting common mistakes that decreased efficiency. Further, to the extent that our primary goal was simply to make the students aware that certain research resources existed, that goal was met even if the students used that resource less than efficiently.

Conclusion

¶51 As a profession, we continue to think deeply about how to teach research, as we well should. As a professor, I have incorporated many of the proposed solutions to the dilemma of teaching legal research noted above, but have also found room for the modernized treasure hunt.

¶52 I do not advocate the return to teaching bibliographic research. The primary focus of research instruction should remain the research process, and the results of that research should be put to work in complex projects requiring analysis and communication. However, the research treasure hunt should occupy a small space in the curriculum, as it is an ideal way to increase students’ exposure to research resources that are not often used in the 1L curriculum. It is also a good vehicle to enhance students’ information literacy, to question where they found their information, and to teach them how to use potentially unreliable research resources to “back into” more credible resources. Indeed, judging the credibility of sources may well be the primary research dilemma of the future.83 Finally, our experiment suggests that as professors, we should continue our focus on teaching the “what, why, and when” of legal resources—what is the source, what is its reliability, why use it, and when—and ease off teaching the “how” of those resources, as students seem to be able to handle the how well on their own.

83. See Margolis & Murray, supra note 20, at 131–32 (describing information literacy, which includes the need to critically evaluate sources of information, as the “new frontier”); Sokkar Harker, supra note 4, at 85, ¶19 (noting importance of assessing the credibility of information so that it can be used “wisely and ethically”), 92–93, ¶45 (noting that more attention should be focused on examining and evaluating sources); Kristen Purcell et al., How Teens Do Research in the Digital World, Pew Research Center (Nov. 1, 2012), http://www.pewinternet.org/2012/11/01/how-teens-do-research-in-the-digital-world/ [https://perma.cc/K3G2-XH8J] (reporting that “the vast majority of [] teachers say a top priority in today’s classrooms should be teaching students how to ‘judge the quality of online information’”).
Appendix

Research Problem Example—SEC Filings

We’ve just been retained by a nutritional-supplement manufacturer named Herbalife Ltd. (stock ticker HLF). Herbalife sort of stepped in it: they’ve been accused of engaging in fraudulent business practices. Well, to be more specific, the entirety of their corporate model has been called a massive pyramid scheme. A few weeks ago, the FTC announced it had opened an investigation into Herbalife’s business—http://dealbook.nytimes.com/2014/03/12/herbalife-discloses-f-t-c-inquiry/?_php=true&_type=blogs&_php=true&_type=blogs&_r=1. Wisely, they’ve dumped their old counsel and hired us.

It’s not clear yet whether Herbalife knew of the FTC’s investigation during the last fiscal year. If it did, it probably should have disclosed that information to investors in its last 10-K—http://en.wikipedia.org/wiki/Form_10-K. Or, at the very least, it should have included it in a subsequent 8-K Report—http://en.wikipedia.org/wiki/Form_8-K. As you know, under the Securities Act, publicly traded companies need to disclose material information (like an FTC investigation) to shareholders.

So, here’s what I want you to do. Jump onto the SEC’s filing database, find Herbalife’s last filed 10-K, and quickly see if the company disclosed anything about the FTC’s current investigation. If not, look to see if it made the disclosure in a subsequent 8-K.

I’d also like to know when the last 10-K was filed, what Herbalife reported its net income as for the 2013 fiscal year, who its independent auditor is, and in what jurisdiction it is incorporated.

E-mail answers to me with the subject line “Research Answers #7,” and, so I know for future reference, include a description of how you found out each piece of information.

Thanks,
Prime Minister
Blackheart, Sharkscream, Dixon & The Devil, LLP

Research Problem Example—Legal Ethics

It is not often that legal ethics questions come up here at Blackheart, Sharkscream, Dixon & The Devil, LLP. I can only assume that’s because of our honesty. We’ve got a puzzler now, though, and I need you to look into it.

One of our (now former) clients, Granger Thunkers, recently retained us to represent her in a dispute with the clothing store Forever 21 for leading her to believe, falsely it seems, that its clothing could indefinitely halt the aging process. Because Ms. Thunkers has little to no assets of her own, her mother, the wealthy baroness Basley Thunkers, covered the cost of our considerable retainer fee. Unfortunately, and much to our surprise, it quickly became clear that Granger had some unrealistic expectations about her case. For one thing, she was insistent that we “bring capital murder charges” against the store and, despite our repeated
explanations that “murder charges” require both a murder and a prosecutor, she grew frustrated at our reluctance. Ultimately, we were forced to withdraw.

But here’s the problem: normally, upon withdrawal from representation, we return any unused portion of our retainer fee. Here, though, it isn’t clear to me to whom that fee should be returned. Granger Thunkers insists we give it to her, while her mother, Basley Thunkers, argues that since she paid us the fee, she’s entitled to the return of the unused portion. I don’t really care who we give it to; I’d just like to be done with the whole mess.

We need to get some authority to cover ourselves on this. Find me any applicable provisions of the Model Rules of Professional Conduct, as well as any applicable ethics decisions and rules in Maryland, California, and Washington (we want to cover all of the states in which we have offices for future reference).

E-mail me what you find with the subject line “Research Answers #9,” and, so I know for future reference, include a description of how you found out each piece of information.

Best,

Space King
Blackheart, Sharkscream, Dixon & The Devil, LLP
Blurred Lines—Intersexuality and the Law: An Annotated Bibliography

Pat Newcombe

This bibliography gathers, organizes, and annotates relevant law review articles (and one monograph) dealing with legal issues concerning intersexuality. Articles are included to introduce researchers to the intricacies involved in the discussion of intersexuality, to examine issues of medical interventions, and to explore possibilities of judicial relief within the existing framework.

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Introduction

¶1 Boy or girl? This is often the first question upon the birth of a child or upon learning of a pregnancy.

¶2 “Intersex” is an umbrella term for a variety of congenital conditions that lead to ambiguity about an individual’s biological sex. The physical effects can be subtle or clear. While genital ambiguity is the most obvious manifestation, intersex can present genetically, hormonally, or anatomically, as when internal reproductive or sexual anatomy does not conform to standard definitions of male or female.¹ From the late nineteenth to the early twentieth centuries, physicians determined sex solely based on an individual’s gonads: an individual with ovaries was considered a female, and an individual with testicles was considered a male.² By the 1950s, the focus of sex determination moved to the appearance of the external genitalia.³ Physicians considered intersexuality discovered at birth as an emergency requiring surgical intervention to “normalize” genitalia in affected infants to mitigate the stigma that may be associated with being perceived as sexually variant.⁴ There were two reasons for this development. First, physicians developed surgical methods to alter genitalia to look cosmetically consistent for the assigned sex. Second, it became a pervasive belief among the medical establishment that one’s gender identity was dependent on nurture not nature.⁵ Doctors did not believe that infants had an innate sense of being male or female; rather, this was learned behavior. Researchers theorized that if early genital-normalization surgery enabled parents to raise their child as the sex that matched the child’s genitals, the child would not


³. Id.

⁴. Id. at 15–17; see also Am. Acad. of Pediatrics, Evaluation of the Newborn with Developmental Anomalies of the External Genitalia, 106 Pediatrics 138, 138 (2000) (“The birth of a child with ambiguous genitalia constitutes a social emergency.”). Surgery other than genital-normalization surgery may be medically necessary at times, however, to assist in bowel and bladder activity or when there is a risk of cancer, such as with nonfunctional testes. Catherine L. Minto et al., Long Term Sexual Function in Intersex Conditions with Ambiguous Genitalia, 14 J. Pediatric & Adolescent Gynecology 141, 141–42 (2001).

⁵. See, e.g., Joan G. Hampson et al., Hermaphroditism: Recommendations Concerning Case Management, 16 J. CLINICAL ENDOCRINOLOGY & METABOLISM 547 (1956).
suffer gender identity confusion in spite of any differences in chromosomes or hormones.6

§3 Without surgery, physicians were concerned that “abnormal” genitalia would make a child suffer deep psychological distress.7 Physicians also believed that intersex genitalia made people uncomfortable and that parents would not be able to accept or bond with their intersex children unless the ambiguity was “erased” with such surgery.8 Because there was much stigma and shame surrounding this atypical condition, many families kept the condition secret. Parents were often told half-truths about their child’s condition and were advised never to tell the child about his or her condition.9 Genital-normalization surgery became the standard of medical care for intersex infants. The choice, traditionally, has been which sex to assign to the baby, not whether to perform genital-normalization surgery.10

§4 By the late 1990s, this medical protocol was challenged by intersex activists and experts in various disciplines, including law.11 Studies confirmed that one’s sense of being male or female relates more to brain and hormonal functions than the cosmetic appearance of one’s genitals, and therefore if the surgically altered genitalia did not conform to the child’s own sense of being male or female, a child would be greatly harmed.12 Additional evidence established that the irreversible surgical procedures had troubling risks, supported by numerous personal accounts of individuals with intersex traits who feel permanently scarred and traumatized.13 The procedures may have serious permanent effects, including sterility, a loss or diminishment of the ability to experience sexual pleasure, chronic pain or pain associated with dilation of a surgically created vagina, incontinence, lifetime mental suffering,14 and impairment

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8. Id. at 44–45.
12. Id. Dr. John Money’s nurture over nature theory was debunked in 1997, when it was discovered that what he reported as a “successful” experiment with his test of behavioralism was actually a lie. Id. See also Milton Diamond & H. Keith Sigmundson, Sex Reassignment at Birth: Long-Term Review and Clinical Implications, 151 Archives Pediatric & Adolescent Med. 298, 300 (1997).
14. Many of these children suffer from depression, and some consider suicide as adults. There are many personal accounts, such as Jim Ambrose’s, who had an X and Y chromosome, but had surgery as an infant to have his genitals appear more female-like. He later took female hormones and had a vagina constructed. Jim obtained his medical records when he was an adult and discovered the circumstances of his birth. As an adult, he began to take testosterone shots and had surgery to remove his breasts. Greenhouse, supra note 10. Jim’s father remembers that the doctors did not make it appear as if there was much of a choice when Jim was an infant. The doctors said they could simply fix the problem. When Jim discovered that he was born intersex, Jim’s parents told Jim that they felt that were doing the best thing for him, but Jim was very angry about it. Id.
of the parent-child relationship. In fact, the growing consensus was that no compelling evidence supports a finding that the presumed social benefits of such “normalizing” surgery outweigh the potential costs.

¶5 Intersex activists advise against nonconsensual genital-normalization surgery and counsel acceptance for affected children. It is perhaps an expected continuance of the gender-blurring evolution. Feminism and the gay and transgender rights movements have smoothed the path for greater acceptance of individuals who do not conform to the standard male or female model. Although the general public is often confused by the difference between intersex conditions and gender identity issues, they are quite distinct. As a starting point, reference to one’s gender identity describes the individual’s internal, deeply held sense of his or her identity as male or female, or neither; intersex involves biological characteristics.

¶6 Currently, advocates are advancing efforts to alter the approach taken in planning healthcare for children with intersex traits. For example, the Gender and Sex Development program at Chicago’s Ann & Robert H. Lurie Children’s Hospital, launched three years ago, is one of several U.S. programs that uses a collaborative multidisciplinary care team of specialists experienced in this area: pediatric endocrinologists, urologists, surgeons, nurses, genetic counselors, neonatologists, pediatric gynecologists, ethicists, and child psychologists. The team works to assist families in weighing their options, including whether surgery should be contemplated at all.

¶7 There is an increasing awareness of intersexuality today, which has led more families to explore treatment options. The new treatment approach results partially from a 2006 Consensus Statement on Intersex Disorders by U.S. and European medical specialists and intersex advocates who met to consider treatment protocols, including genital-normalization surgery. The Consensus Statement advocated a more cautious approach before proceeding with genital surgery, noting the resulting impact to quality of life, such as decreased sexual sensitivity. It also noted that evidence for early genital-normalizing surgery is not substantiated; promoted a more open dialog between patients and families, along with the provision of psychosocial support; and encouraged patients’ and families’ participation in decision making. Although this Consensus Statement was a step in the right direction, it

15. “If such interventions are performed solely with a view to integration of the child into its family and social environment, then they run counter to the child’s welfare. In addition, there is no guarantee that the intended purpose (integration) will be achieved.” Swiss Nat’l Advisory Comm’n on Biomedical Ethics, On the Management of Differences of Sex Development: Ethical Issues Relating to “Intersexuality” 13 (Opinion No. 20/201, Nov. 2012), http://www.nek-cne.ch/fileadmin/nek-cne-dateien/Themen/Stellungnahmen/en/NEK_Intersexualitaet_En.pdf [https://perma.cc/D6E-KGEA].
19. Id. at e490.
did not recommend a cessation of genital-normalization surgeries, a point that activists criticize.

¶8 The Consensus Statement recommendations are a natural outgrowth of the patients’ rights movement in U.S. medicine toward better communication between doctors and patients treatment that is more patient-focused. With intersex conditions, communication between doctors and parents/patients is particularly laden with emotion and controversy, and not all families are ready to accept a change in treatment philosophy. Even after advisement on the risks and concerns of genital-normalization surgery, some families still opt for the surgery due to deep-seated concerns that their children will be considered abnormal if they fail to take any immediate action. Unfortunately, genital-normalization surgery has a long history of acceptance in healthcare, and even after the 2006 Consensus Statement there was no abrupt change in medical practices. The Chicago consensus “does not seem to have percolated down to frontline care in many cases.”

¶9 In 2016, there was an update to the 2006 Consensus Statement. Most significant is that the update notes that physicians working with families should be aware that there has been movement in recent years for legal and human rights bodies to increasingly emphasize the importance of maintaining patient autonomy. It also encourages that peer support be provided on a routine basis at the earliest possible time for parents, and integrated with clinical care to ease parental distress. Care recommendations include the use of a team approach, full disclosure to patients and parents, and a focus on the best possible outcome for quality of life.

¶10 Many physicians in the United States still regard genital-normalization surgery as necessary to avoid psychological damage, and data supports that there is little change in practice. “There is still no consensual attitude regarding indications, timing, procedure and evaluation of outcome” of this surgery. The perceived visibility of the intersex condition, along with the standardized reaction from the medical community and an expectant society has put much pressure on

21. There have been few reviews on the effect of the 2006 Consensus Statement, clitoral surgeries on children under the age of fourteen have increased since 2006, and “recent publications in the medical literature tend to focus on surgical techniques with no reports on patient experiences.” Id. at 38.
24. Id. at 160, 169–70.
physicians and parents to take an aggressive and intrusive approach at an early age. However, it is possible that we are on the very brink of a sea change in the medical standard of care, as surgical practices have become a controversial issue in public and professional discussion, and as we now see legal and human rights institutions increasingly focus on patient autonomy.

**Scope and Organization**

¶11 This annotated bibliography offers a survey of law review articles (and one monograph) to introduce researchers and scholars to the issues involved in the discussion of intersexuality and the law. Although there is limited scholarship in this area, it is a topic of burgeoning interest, and it is useful to review and update existing scholarship. The annotations include a brief summary of a particular focus within each article. In this way, the breadth of available scholarship in a wide variety of subject areas is provided. Before each grouping of annotations is an overview of each topic incorporating any available updated information.

¶12 Searching for legal literature on intersexuality requires the use of multiple words and phrases to describe the issues. All of the search terms listed below were used in compiling this annotated bibliography. The selected articles were compiled by conducting Westlaw searches using the following search terms in the title field: intersex!, hermaphrodit!, “genital normaliz!” assign! /3 sex, disorder /2 “sex development,” difference /2 “sex development,” DSD, sexing /4 child!, “third gender,” “ambiguous!” /2 sex, and “ambiguous genital!”

¶13 Since this issue is an evolving one of increasing awareness, articles are from 2001 to the present. This annotated bibliography is divided into sections that cover resources that provide a background on the medical intervention for individuals with intersex traits and its legal framework, the confines of treating gender as a binary system, discrimination against intersex individuals, the human rights issues surrounding intersexuality, the impact of the intersex activist movement, some foreign approaches to intersexuality, and possible U.S. judicial and statutory reforms. Within each section, the items are arranged alphabetically by author.

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27. Greenberg, supra note 2. This title is included as it is the sole monograph that focuses on the role that legal institutions can play in protecting the rights of people with intersex traits, and it is a very highly regarded work.

28. Much cutting-edge work on the topic of intersexuality is published in nonlegal journals. Although I am focusing on law review literature in this article, it is important to note that there are excellent articles in, for example, medical journals that delve into legal issues, which researchers would be wise to examine.

29. All the annotated articles resulted from this search, except for one outlier written by one of the leading experts on the topic of sex testing and sports policies that ban women athletes for having naturally high testosterone. Katrina Karkazis et al., Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes, Am. J. Bioethics, July 2012, at 3.
Terminology

Intersex

¶14 At birth, infants are classified as male or female, usually determined by the presentation of their external anatomy. In reality, however, an individual’s sex is a combination of bodily characteristics that comprises chromosomes, genitals, hormones, and gonads. If any of these do not fit typical definitions of male or female, they can result in additional variations in secondary sexual characteristics such as muscle mass, hair distribution, breast development, hip-to-waist ratio, and stature. All of these factors encompass the wide array of variations in sex characteristics in intersexuality.

¶15 Medical science has progressed so that we now have a greater understanding of the origins of intersexuality. Genetic male and female embryos are anatomically identical through the first six to seven weeks of gestation. After that, hormonal and genetic influences trigger the beginning of development of testes or ovaries. However, hormonal and genetic occurrences in the womb may cause biological variation so that at birth, chromosomes, hormones, gonads, or external anatomy do not correspond to the typical male or female.

¶16 These hormonal and genetic occurrences may cause an intersex individual to be born with one of several medical conditions that lead to the individual’s biological sex being ambiguous. For example, an infant may be born with genitalia that have characteristics of both males and females. A female child may be born with an unusually large clitoris or without a vaginal opening; a male child may be born with a micropenis or with a scrotum that is divided in the formation typical of labia.

¶17 However, not all intersex conditions involve ambiguous genitalia, so they may not be immediately identified at birth. Some individuals with intersex traits have external genitals of one sex, but the internal anatomy of the other sex. Some individuals have the chromosomes of one sex, but the sexual anatomy of the opposite sex. Some may possess male genitals, small testes, and ovaries. Others may have atypical chromosomal configurations, such as XXX or XXY or XYY, while some may have different chromosomal compositions in different tissues, a condition referred to as mosaicism. There is an array of congenital conditions including,
among others, hypospadias,\textsuperscript{34} Turner syndrome,\textsuperscript{35} congenital adrenal hyperplasia,\textsuperscript{36} complete androgen insensitivity syndrome (CAIS),\textsuperscript{37} partial androgen insensitivity syndrome (PAIS),\textsuperscript{38} and 5-alpha-reductase deficiency (5-ARD).\textsuperscript{39}

\¶18 Doctors’ assessments about what specific conditions should be classified as intersex has been controversial.\textsuperscript{40} Due to this lack of consensus, and the various terms used to refer to intersex, estimates for the prevalence of intersex conditions are not exact. Medical experts, however, estimate that when looking at the number of infants born with visibly anomalous genitalia that prompts medical investigation, the average is about 1 in 2000 births, or 0.05\% of births.\textsuperscript{41} However, some advocates believe many more people are born with more subtle types of sex variations than ambiguous genitalia, which are not discovered upon birth, and that they constitute 1.7\% of births.\textsuperscript{42} Sometimes intersexuality does not come to light until puberty\textsuperscript{43} or during later stages in development, such as when adults find that they

\textsuperscript{34} Hypospadias is a condition in which individuals with XY chromosomes have the urinary opening of the penis located somewhere along the underside of the penis, instead of the tip. The severity of hypospadias can vary; sometimes it is such that the penis resembles labia. This can occur as an isolated symptom in men with otherwise typical sex development or in conjunction with other intersex conditions. Hypospadias, ISNA: INTERSEX Soc’y of NORTH Am., http://www.isna.org/faq/conditions/hypospadias [https://perma.cc/W2WZ-PSFZ]. Although ISNA became defunct in 2008, this informative website remains accessible for historical purposes. Dear ISNA Friends and Supporters, ISNA: INTERSEX Soc’y of NORTH Am., http://www.isna.org/ [https://perma.cc/GX27-DYGD].

\textsuperscript{35} Turner syndrome is a chromosomal condition in which girls have only one X chromosome; female sex characteristics exist but are immature in comparison to the average female. Turner Syndrome, ISNA: INTERSEX Soc’y of NORTH Am., http://www.isna.org/faq/conditions/turner [https://perma.cc/DL2L-BFKM].

\textsuperscript{36} In congenital adrenal hyperplasia, the adrenal glands cannot produce cortisol, causing a large production of other hormones that cause virilization. Infants with XX chromosomes may develop larger than average clitorises, or even a clitoris that resembles a penis, or labia that appear more like a scrotum. Congenital Adrenal Hyperplasia (CAH), ISNA: INTERSEX Soc’y of NORTH Am., http://www.isna.org/faq/conditions/cah [https://perma.cc/7YDM-NC8D].

\textsuperscript{37} Complete androgen insensitivity syndrome (CAIS) is a genetic condition in which, because of a receptor defect, the body is unable to process the testosterone produced by the testes, so the body develops as female. CAIS individuals have XY chromosomes and a short vagina or none at all. External female genitalia form, but no internal female reproductive organs develop. Individuals with CAIS have undescended or partially descended testes. Melissa Hines et al., Psychological Outcomes and Gender-Related Development in Complete Androgen Insensitivity Syndrome, 32 ARCHIVES SEXUAL BEHAV. 93, 93 (2003). Most individuals with CAIS never learn the reason they do not menstruate or are unsuccessful in becoming pregnant. Sharon E. Preves, Out of the O.R. and into the Streets: Exploring the Impact of Intersex Media Activism, 12 CARDozo J.L. & GENDER 247, 249–50 n.7 (2005).

\textsuperscript{38} In contrast, individuals with partial androgen insensitivity syndrome (PAIS) are able to partially process testosterone, so their genitals will masculinize to a certain extent. Greenberg, supra note 9, at 854 n.6.

\textsuperscript{39} An enzyme deficiency, 5-alpha-reductase deficiency (5-ARD) results in XY genetic individuals who most often appear to be females when born, but virilize at puberty when testosterone increases. What Is 5-Alpha-Reductase Deficiency (5-ARD)?, ACCORD ALLIANCE, http://www.accordalliance.org/faqs/what-is-5-alpha-reductase-deficiency-5-ard/ [https://perma.cc/BW3Y-XGLX]. Children are often raised as girls, but usually come to have a male gender identity.


\textsuperscript{42} Id.

\textsuperscript{43} For example, if a doctor does not know that an infant who possesses typical female genitals
are infertile. Sometimes individuals are determined to have an intersex condition only upon autopsy. Others live all their lives with intersex conditions without any one knowing it, including themselves.

Disorders/Differences of Sex Development

¶19 A more recent term used to connote intersexuality in the medical community is “disorders of sexual development” (DSD). This term is defined by the 2006 Consensus Statement on Intersex Disorders as “congenital conditions in which development of chromosomal, gonadal, or anatomic sex is atypical.” Accord Alliance, an advocacy organization, notes that older terms such as “hermaphrodite” and “intersex” are not preferred because the terms are imprecise, and label individuals, not specific medical conditions.45

¶20 The term “disorder” of sex development is itself a controversial term, even though it is the most common term used in the medical literature now. Individuals with intersex traits, activists, and academics have challenged the use of the term “DSD” with its designation as a “disorder,” viewing this as offensive to those who feel there is nothing wrong with them and feel stigmatized by the medical connotations.47 An alternative term suggested, which uses the same acronym “DSD,” is “differences of sex development.”48 Many individuals with intersex traits still choose to embrace the term “intersex,” however, as the term “DSD” simply contributes to pathologizing their reality and indicates the need for a medical “cure.”49

Hermaphrodite50

¶21 Individuals with intersex traits were formerly referred to as “hermaphrodites,” an outdated term that is both misleading and stigmatizing, although some

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44. Lee et al., supra note 18, at e488.
50. The term “hermaphrodite” was named after the mythological Greek figure Hermaphroditus, “the product of a union between Hermes and Aphrodite.” Jessica L. Adair, In a League of Their Own: The Case for Intersex Athletes, 18 Sports Law J. 121, 124 (2011).
use the term as a form of reclamation. The term “hermaphrodite” is from mythology, conveying that an individual is both thoroughly male and thoroughly female (an anatomical impossibility). The term has been used to identify those with both testicular and ovarian tissue (ovotestes). Up until the mid-twentieth century, the term “hermaphrodite” was used to refer to all individuals with intersex traits, but it is no longer an accurate term as it refers only to a distinct observable gonadal anatomy of an individual. The term “intersex” refers to a much more complex array of permutations involving both physical appearance and genetic makeup.

**Medical Intervention and Its Legal Framework**

¶22 Some scholars have suggested litigation as a way to protect, and to achieve justice for, infants with intersex traits. This includes the use of the informed consent doctrine, medical malpractice, and constitutional rights. Examining the various legal strategies is critical, as individuals with intersex traits who have had their rights violated require a legal avenue for effective remedy, including redress and compensation.

**Informed Consent**

¶23 The informed consent doctrine requires that physicians must disclose all pertinent information about medical procedures and the alternatives, including no treatment at all, and must ensure that parents understand. However, because many intersex conditions are not legitimate medical emergencies, the normalization surgeries themselves are not medically necessary and may therefore mislead an intersex infant’s parent(s) into consenting to surgery that would make true, “informed” consent absent.

**Medical Malpractice**

¶24 A medical malpractice strategy is another option discussed by scholars. However, it may be argued that the doctors followed standard medical practice when they performed genital-normalization surgery. Because the medical establishment determines the medical standard of care, proving that a specific standard of care is negligent presents many challenges.

¶25 The medical malpractice strategy may have only a slight possibility of success in those jurisdictions that no longer follow the customary practice standard; these jurisdictions may assert that the customary practice might itself be negligent, and adopt a reasonableness standard instead. In those jurisdictions where physicians can no longer be sheltered by the customary practice standard, the trier of
fact must balance the comparative risks of a medical procedure and avoidance of the procedure without any expert testimony.  

The trier of fact, of course, is subject to the same societal influences regarding gender norms as the doctors who perform genital-normalization surgeries, and therefore this medical malpractice strategy may not be fruitful.

### Constitutional Rights

**¶26** Nonconsensual genital-normalization surgery potentially infringes on the fundamental rights of a child with intersex traits in various ways. Due to the fact that the surgeries cause irreversible damage to intersex children's physical bodies, and often leave them sterile, the fundamental rights to bodily integrity and procreation may be infringed. The U.S. Supreme Court should recognize and safeguard the individual right to freedom from these damaging and nonessential surgeries. Despite these considerations, current U.S. jurisprudence does not sufficiently address the many injuries experienced by individuals with intersex traits.

**¶27** While there has been some success internationally in litigation in this area, access to reparation in the United States is as yet unknown, as no federal case

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58. Id. at 15.
59. Id.
60. The term “genital-normalization” surgery throughout the text of this article refers to “nonconsensual” genital-normalization surgery, unless otherwise stated.
63. In Germany, Christiane Völling was the first individual with intersex traits who won an award for damages in a lawsuit brought for genital-normalization surgery. _In re Völling_, (Regional Ct. Cologne, Ger.) (Case No. 25 O 179/07, Feb. 6, 2008), http://ici2.wengine.com/wp-content/uploads/2008/02/In-re-Volling-Regional-Court-Cologne-Germany-English.pdf [https://perma.cc/V3VN-TXZQ]. Völling was a teenager when she underwent genital surgery. She was born with XX chromosomes with ambiguous genitals and was brought up as a boy. When Völling was fourteen years old, she required an appendectomy; at that time, surgeons discovered she had two ovaries. Völling had never been told that she had XX chromosomes, and when she turned eighteen years of age, she had an operation to remove her ovaries. Eventually, Völling identified as a female and, upon investigation, her medical records revealed the truth about her diagnosis. _Id.; see also Christiane Völling: Hermaphrodite Wins Damage Claim over Removal of Reproductive Organs_, ZWISCHENGESCHLECHT.ORG (Aug. 12, 2009), http://zwischengeschlecht.org/pages/Hermaphrodite-wins-damage-claim [https://perma.cc/QAG6-9YNB]. The surgeon was ordered to pay €100,000 in damages after a legal battle that began in 2007, thirty years after the removal of her reproductive organs. A second successful case in Germany, filed by Michaela Raab, was reported in 2015. Seelenlos, _Nuremberg Hermaphrodite Lawsuit: Michaela “Micha” Raab Wins Damages and Compensation for Intersex Genital Mutilations!, STOP INTERSEX GENITAL MUTILATIONS IN CHILDREN'S CLINICS!_ (Dec. 17, 2015), http://stop.genitalmutilation.org/post/Nuremberg-Hermaphrodite-Lawsuit-Damages-and-Compensation-for-Intersex-Genital-Mutilations [https://perma.cc/9QMQ-XBAP]. Raab sought medical advice as she did not begin to menstruate or develop breasts by the time she was twenty years old. Physicians started her on female hormonal treatment and minimized the size of her clitoris. Raab learned years later that she had XY chromosomes, information that her physicians had withheld from her. _Intersex Person Sues Clinic for Unnecessary Op_, LOCAL (Feb. 27, 2015), http://www.thelocal.de/20150227/intersex-person-sues-doctors-for-unwanted-op [https://perma.cc/BB42-WEQV].
has established injury from genital-normalization surgery. However, in 2013, for the first time in the United States, a lawsuit was filed on behalf of an individual with intersex traits alleging a violation of constitutional rights because of genital-normalization surgery. M.C. was born with ambiguous genitals and became a ward of the state of South Carolina. During this time, the South Carolina Department of Social Services held the authority to provide medical care for M.C.

Medical testing determined that M.C. had “ovotesticular DSD,” which is characterized by the presence of both ovarian and testicular tissue. Although there was no medical need for surgery, one of the named defendants, a doctor employed by a state university hospital, decided on operations that would assign a female sex to M.C., while other named defendant employees of the same hospital concluded that M.C. could be raised as a boy or girl, and there was no way to make a determination at the time of future gender identity. At sixteen months of age, M.C.’s surgeons performed “corrective” surgery to remove most of his ambiguous phallus, a testis, and testicular tissue on one gonad, and surgically encourage the appearance of female genitals. These procedures caused M.C. to be sterilized; without the surgeries he may have been capable of producing sperm.

A Columbia, South Carolina, couple, the Crawfords, adopted M.C. after the surgery and raised M.C. as a girl according to the sex assignment. M.C. grew up to self-identify as a male. The Crawfords realized the constraints M.C. suffered through his genital-normalization surgery and joined with the Southern Poverty Law Center (SPLC) and interACT Advocates for Intersex Youth to file suit. They brought two complaints—one in federal court and one in state court—and filed suit against the doctors who participated in M.C.’s surgery and the South Carolina Department of Social Services and its employees.

The federal complaint alleged that M.C.’s substantive due process rights of procreation, privacy, liberty, and bodily integrity were violated under the Fourteenth Amendment.

This was a case of first impression in the United States, as M.C. is the first intersex plaintiff to assert constitutional claims in a federal court against a defendant for performing genital-normalization surgery. Groundbreaking SPLC Lawsuit Accuses South Carolina, Doctors, and Hospitals of Performing Unnecessary Surgery on Infant, SOUTHERN POVERTY LAW CTR. (May 13, 2013), https://www.splcenter.org/news/2013/05/14/groundbreaking-splc-lawsuit-accuses-south-carolina-doctors-and-hospitals-unnecessary [https://perma.cc/4VR2-U96N].


Id. at 11.

Id. at 12.

Id. at 13–14.

Id. at 15.

The Crawfords had hoped to prevent the unnecessary surgery once they saw M.C.’s profile on the State of South Carolina’s child adoption website, but it had already been completed. Id. at 19.

Id.

Id. at 1.


The SCDSS employees consented to M.C.’s surgery because the child was a ward of the state. The substantive due process claim is dependent on a government actor providing consent. If M.C.’s biological parents agreed to the surgery before parental rights were terminated, then a Fourteenth Amendment claim would not have been a feasible legal strategy. The Fourteenth Amendment does not protect against unjust private actions. Sweeney, supra note 62, at 183.
Amendment as a result of unnecessary, merely cosmetic genital surgery.\textsuperscript{75} The complaint also asserted a violation of M.C.’s procedural due process rights under the Fourteenth Amendment by subjecting M.C. to this procedure without a predeprivation hearing to examine whether the procedure was in M.C.’s best interest.\textsuperscript{76} The case was accepted by the federal district court to go to trial, and the court acknowledged that M.C. sufficiently alleged both a violation of his substantive due process right to procreation\textsuperscript{77} and his procedural due process right to a pre-deprivation hearing.\textsuperscript{78} The district court then rejected the defendants’ motion to dismiss and rejected their defense of qualified immunity.\textsuperscript{79} Subsequently, the defendants interlocutorily appealed the rejection of this defense. In January 2015, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded with instructions to dismiss the complaint.\textsuperscript{80} The Fourth Circuit found that M.C.’s asserted rights were not sufficiently clear at the time of the operation so as to give officials reasonable fair warning of their violation.\textsuperscript{81}

\textsuperscript{31} M.C.’s state complaint was filed against the Medical University of South Carolina (MUSC) and the Greenville Hospital System, alleging medical malpractice,\textsuperscript{82} and the South Carolina Department of Social Services (SCDSS), alleging gross negligence.\textsuperscript{83} The case against the Greenville Hospital System has been settled by the parties.\textsuperscript{84} While this disposition leaves the law unclear at this moment, and may indicate that litigation over such issues might be a difficult path for plaintiffs, there is still a pending lawsuit against MUSC and SCDSS. This case is likely to be litigated in spring 2017, and the results will be significant. “There is a growing community of intersex individuals seeking answers and apologies for the medical treatments they received as children,”\textsuperscript{85} and litigation involving victims of intersex infant surgeries is likely to increase.\textsuperscript{86}

### Annotated Bibliography


This student comment analyzes the factual and legal background of *M.C. v. Aaronson* and further explores how causes of action arise from genital-normalization surgeries. Medical malpractice considerations arise when physicians fail to inform parents that medical surgeries are not medically necessary. Constitutional issues are borne out of genital-normalization surgeries that result in irreversible damage to sexual

\textsuperscript{75} Complaint, *supra* note 65, at 21.

\textsuperscript{76} *Id.* at 22–23.

\textsuperscript{77} *Id.* at 9–10.

\textsuperscript{78} *Id.* at 11–12.


\textsuperscript{80} M.C. *ex rel.* Crawford v. Amrhein, 598 F. App’x 143, 148 (4th Cir. 2015).

\textsuperscript{81} *Id.* at 149.

\textsuperscript{82} Complaint, *supra* note 73, at 13–17.

\textsuperscript{83} *Id.* at 17–18.

\textsuperscript{84} Public Index Search for Case No. 2013CP4002877, Richland Cty.; 5th Jud. Cir. Pub. Index (2013). http://www6.rcgov.us/SCJWEB/PublicIndex/(X(1)S(uwx3krpqg4ksaaaiqkwnfvy)) /CaseDetails.aspx?County=40&CourtAgency=40002&Casenum=2013CP4002877&CaseType=V.


\textsuperscript{86} Greenberg, *supra* note 2, at 107.
function and reproductive ability. The author suggests that *M.C. v. Aaronson* opens the door for more conversation related to the protection of intersex individuals. Specifically, the author proposes that legal mechanisms should be put in place to protect intersex infants from genital-normalization surgeries performed by the state, as well as those consented to by their own parents.


Here, the authors examine whether a parent should have the authority to consent to infant genital-normalization surgeries. The article questions “whether parents and intersex infants share a community of interests sufficient to grant parental authority” (p.30), or if societal influences have transformed a socially necessary surgery into a medically necessary surgery grossly favoring the interest of the parents. The authors set the story of David Reimer (the subject of Dr. John Money’s failed nurture versus nature study) as the backdrop of the article, a reminder that David’s death should serve as a caveat to those involved with genital normalization. The authors argue that even a heightened informed consent model cannot justify a medically unnecessary surgery, premised only on concerns about social stigma and gender conformity.


This article injects constitutional law considerations into the conversation about intersexed individuals and the informed consent doctrine. Establishing the modern informed consent doctrine, Benson states the general legal rule: a parent or guardian can legally consent on behalf of a minor child to intersex surgery so long as the surgery is in the child’s best interest. Benson proposes a new informed consent standard, one that imports constitutional principles, specifically, the fundamental right to bodily integrity, personality, sexuality, and gender identity. According to Benson, the inclusion of the fundamental rights would force the courts to balance the constitutional right of the child to choose his or her own future with the right of the parent to control the upbringing of the child.


This student note argues that parents cannot legally consent to their child’s genital-normalization surgery. Ford questions whether the emergency exception to the informed consent doctrine can be applied to genital-normalization surgeries and if the surgeries can be fairly characterized as nonexperimental. Answering both questions in the negative, Ford labels parental informed consent to this type of surgery a fiction, warning doctors who have performed the surgery that legal informed consent has not been established. Ford concludes her piece by stating, “a moratorium should be declared on the use of defenseless infants as the experimental subjects of genital normalizing surgery” (p.488).


This article examines the proffered justifications for male circumcision and compares them to those held out in support of intersex surgeries. The authors criticize scholars who have dismissed the relevancy of drawing parallels between the two types of infant surgeries. Enforcing the connection, the authors offer that at the very core, both procedures are derived from “the involvement of health
professionals in surgical interventions which remove healthy tissue from the body of a child who is unable to provide consent” (p.84). The authors suggest that the acceptance of both procedures involved a certain combination of medical practice, class, and gender, but that male circumcision may have paved the way for intersex surgeries.


The author, the leading legal scholar on intersex issues, details the surgical interventions performed on intersex infants to conform genitalia to the medically created definition of “normal.” She examines the unique challenges the intersex community faces in securing legal protection against these unnecessary cosmetic genital surgeries and explores how the law can operate to safeguard the rights of intersex individuals. The author considers potential ways that the intersex movement might use legal arguments and strategies to further its goals.


This student note draws from the facts of M.C. v. Aaronson and asks whether government officials have the ability to consent to sex assignment surgery on behalf of an intersex child in the custody of the state. Huddleston argues that, for the purposes of state foster care procedures, sex assignment surgery is neither a medical emergency nor is it routine. Huddleston contends that sex assignment surgery must then be classified as extraordinary, a classification under certain state laws for procedures that require judicial approval. Based on this analysis, Huddleston concludes that government officials must seek judicial approval prior to electing sex assignment surgery on behalf of an intersex child in their custody.


This article addresses three questions: (1) What is the appropriate and evolving standard of care for the intersexed individual? (2) What constitutes informed consent when physicians treat the intersexed individual and his or her family? (3) What other torts might concern the medical professional when treating an intersexed individual? Analysis of these issues leads the author to call for new treatment protocols, ones that specifically incorporate the opportunity to explore the needs of the intersex community, to evaluate current treatment standards, and to investigate how other countries are tackling this issue—or, as Martin calls it, a “time out.”


The foundation of this student piece is derived from M.C. v. Aaronson and asks whether surgical sex assignment of intersex children violates their substantive due process rights. The author explores the application of the following due process rights that have been previously recognized by the courts: the right to privacy, liberty, and preservation of bodily integrity. While the author acknowledges the viability of a substantive due process claim in a case like M.C. v. Aaronson, where the child was a ward of the state, he recognizes the limitations of the substantive due process claim in a case void of the state actor requirement and with parental consent.
Tamar-Mattis, Anne. “Sterilization and Minors with Intersex Conditions in California Law.” California Law Review Circuit 3 (2012): 126–35. This article analyzes how a California court might rule on a motion to authorize an intersex surgery that would result in the sterilization of the intersex child. The author analogizes the sterilization of intersex children with the sterilization of a developmentally disabled individual, a situation already addressed in the California Probate Code. Expanding this framework to intersex infants/children, the author states that this scheme would allow for judicial intervention, including court-appointed counsel for the intersex child. According to the author, since California has already recognized the need to protect minors and those who cannot consent when reproductive freedom is at stake, extending the same rights to intersex minors is a natural, and necessary, next step.

White, Ryan L. “Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson.” Fordham International Law Journal 37 (2014): 777–821. This student note compares four international sex assignment cases to the seminal lawsuit in the United States, M.C. v. Aaronson. The author applies the legal rationales from decisions in Colombia and Germany to M.C. v. Aaronson to argue that genital-normalizing surgery violates an individual’s fundamental right to liberty. Specifically, the author argues that the timing of the surgery and the resulting deprivation of the individual’s right to self-determination render the genital-normalizing surgery unconstitutional. The author concludes by suggesting that the protection of fundamental rights for intersex individuals in the United States is near.

Confines of a Binary System

¶ 32 While the term “gender” refers to social and cultural differences, and the term “sex” refers to an individual’s biological sex, the difference between the meaning of the terms “sex” and “gender” goes frequently unnoticed in society and in official documents. In the annotations of this bibliography, I have used whichever term the author uses, “gender” or “sex,” as the two terms are often used interchangeably in the legal realm.

¶ 33 Over time our society has become more accepting of “gender” as a spectrum, where male and female lines blur, but the same cannot be said about “sex.” In 2014, Facebook initiated the use of many possible terms for people to describe their gender; some of these terms are intersex, agender, bigender, pangender, gender-queer, and androgyne, among others. In the same year, the dating website OKCupid added new gender options for those individuals who do not fall in the


binary; these now include agender, adrogy nous, bigender, cis man, cis woman, genderfluid, genderqueer, hijra, intersex, nonbinary, other, pangender, transfeminine, transgender, transmasculine, transsexual, trans man, trans woman, and two-spirit.90 Previously, OKCupid allowed users to select only from male, female, straight, bisexual, and gay.

¶34 The adoption and use of nonbinary gender classifications by academic institutions is another sign of the social evolution. The use of preferred personal pronouns in universities and colleges in the United States is gaining traction,91 and many provide these preferences to faculty in class rosters. Some of these personal pronoun preferences that expand the he/she binary include “xe,” “xyr,” and “xem,”92 among many other options.

¶35 Although there has been real progress in challenging traditional gender stereotypes and rigid gender norms, and accepting that gender is but a social construct, there is less acceptance that sex itself does not comply with rigid binaries.93 Our bodies are simply subject to biological variation, but somehow the binary perspective of two sexes—male and female—and the pathologizing of deviation from this norm is firmly rooted in our society. However, there is some evidence that the tide may be turning ever so slowly. In June 2016, a landmark ruling in Oregon held that an individual who did not identify as male or female is now legally considered nonbinary.94 This ruling in the Circuit Court of the State of Oregon, Multnomah County is believed to be the first nonbinary legal classification in the United States.95

¶36 Another sign of change can be seen in a decision filed in a 2015 federal discrimination lawsuit against the U.S. State Department on behalf of an individual with intersex traits, Dana Zzyym.96 Dana was denied a U.S. passport because Dana did not choose either male or female on a passport application form; no other gender categories are provided on the form, and Dana does not identify as male or

93. The same cannot be said in all cultures, some of which include intersex individuals in a “third gender” category. See infra annotations following ¶ 41.
96. The complaint asserts that the U.S. State Department violates the Due Process and Equal Protection Clauses of the Fifth Amendment to the U.S. Constitution, as well as the federal Administrative Procedure Act. Complaint at 15, 17, 12, 14, Zzyym v. Kerry, No. 1:15-cv-2362 (D. Colo. Oct. 25, 2015), 2015 WL 6449495.
female. A federal judge pressed the State Department to issue a gender-neutral passport stating, “A lot of things are changing in our world.”97 In November 2016, the court found that the administrative record did not provide evidence that the Department “followed a rational decisionmaking process in deciding to implement its binary-only gender passport policy.”98 The court remanded the case to the U.S. State Department “to give it an opportunity either to shore up the record, if it can, or reconsider its policy.”99

¶37 Some scholars theorize that a third sex category would support individuals with intersex traits by denouncing the binary system.100 However, many intersex activists view these proposals to be outside the “primary” focus of their movement to end nonconsensual genital-normalization surgery, and that “until there is a prohibition on the practice . . ., proposals for an alternative solution must take a step back.”101 The intersex community advocates that all children should receive a binary sex assignment dependent upon the medical condition discovered at birth; once the child develops a gender identity, the child may decide to have surgery or not, but would be able to consent to this intervention.102 The Council of Europe expressed concerns about recognition of third and blank classifications in a 2015 Issue Paper, stating that these may lead to “forced outings” and cause heightened strain on parents of children with intersex traits to select a sex for their child. The Issue Paper argues that “further reflection on non-binary legal identification is necessary.”103 Some scholars contend that the sex binary system itself validates and compels the continued practice of genital-normalization surgery.104

¶38 Other scholars propose that we not only eliminate sex classifications that determine peoples’ rights by opposing the binary system, but also via the eradication of government-required sex classification on official papers such as birth certificates and passports.105 Two of the most cited reasons given for sex classification for legal purposes, military combat and marriage, are no longer essential. The fact that one’s sex must be noted on every official identifying paper illustrates how our society emphasizes the legal significance of this characteristic. Some activists state that dispensing with sex and gender classifications from

99. Id.
100. Hofman, supra note 57, at 19.
102. CONSORTIUM ON THE MGMNT OF DISORDERS OF SEX DEV., CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 38 (2006), http://www.dsdguidelines.org/files/clinical.pdf [https://perma.cc/S69P-9Y93]. Intersex activists’ recommendations to assign a gender to an intersex infant is often based on protecting intersex children and adults, likely due to their own experiences of ostracism and distress from sex nonconformity.
official documents, similarly to race and religion, is a long-term strategic goal for the movement.106

¶39 Various countries have moved to recognize third gender designations, and progressive groups have welcomed the laws as a sign of success for intersex rights. In 2013, Germany became the first country in Europe to acknowledge a third gender designation: X, for indeterminate or intersex.107 An infant with intersex traits will not be required to endure medical intervention when born with ambiguous sex characteristics. In that case, an infant will have an “X” marked on the birth certificate, rather than the rigid categories of M or F. This step allows intersex children to decide their gender identity when they reach adulthood, rather than legally or surgically forcing a gender identity upon them without their consent. At the same time, the interior ministry declared that German passports would similarly allow a third designation, X, for intersex citizens.108 The German third gender designation has angered some intersex-rights groups, which object to its stipulation that a child who is classified as neither female nor male will be noted in the register of births without such assignment.109 The law appears to “necessitate” exclusion from the binary classification, so it still leaves judgment to the medical world, not as an option for the parents.110

¶40 Other countries issuing passports or national identity cards with an “X,” “other,” or “E” (eunuch)111 marker for nonbinary categories include Australia,112
Bangladesh, Colombia, Denmark, India, Malta, Nepal, New Zealand, and Pakistan. These are examples of jurisdictions using a tool other than the judiciary to recognize intersex or otherwise gender-variant individuals.

¶41 Intersex activists’ paramount goal and efforts are to see a moratorium on nonconsensual genital-normalization surgery, not to first champion a movement to reform the binary sex classification system. Banning nonconsensual genital-normalization surgery would be a breakthrough in intersex rights, and, once this issue is resolved, we should see more focus on support for the termination of our preoccupation with the male/female sex binary.

Annotated Bibliography


This article provides an outline of the author’s research project for the Beatrice Bain Research Group on Gender at the University of California, Berkeley, entitled, “Open Sex—Undoing Gender.” The project focuses on issues related to a multiple sex/gender model, and asks whether an alternative to the binary system could initiate new approaches to intersex treatment. Although the author is not “purposely opposed” to a multiple sex/gender model, she acknowledges that it raises collateral issues. She advocates instead for an increased focus on recognizing a broader range of sexual possibilities: “[R]ecogniz[ing] a broader range of sexual possibilities in general and for patients would subvert and replace heterosexist ideologies in current intersex management in the long run” (p.125).


This article examines how certain legal rights related to fundamental aspects of life depend on the cultural and social views on gender and sex. Hofman criticizes the law’s continued reliance on binary categories in spite of scientific advance-


117. Dalli, supra note 107.


ments that reveal the complexity of sex. Reliance on the binary results in the legal exclusion of those who do not fit neatly within the categories, such as intersexed individuals. Hofman explores a number of possible solutions to this issue, but maintains that “the best solution would be to eliminate sex as a category that determines peoples’ rights” (p.19).


The author first identifies three major areas of law that depend on sex-based distinctions: (1) official documentation, such as passports, birth certificates, and driver’s licenses; (2) marriage rights; and (3) protection from discrimination. The legal definition of sex as applied within these areas of law prescribes a male/female binary. According to Knouse, this is just one example of society’s attempts to eradicate biological diversity. Another example is the medical treatment of intersex individuals and, in particular, genital-normalization surgeries. Knouse proposes a complete eradication of sex assignment, which she argues will enable biological diversity and liberate individuals from repressive categorization.


The REAL ID Act of 2005 requires states to adhere to federally mandated requirements in the issuance of all state identification cards and driver’s licenses. One of the minimum requirements prescribed by the statute is an identification of the individual’s gender. In this article, McGrath criticizes the gender identification requirement for two main reasons: (1) the statutory construction of this requirement bars any state from attempting to eliminate the gender identifier in an effort to protect its gender-variant citizens and reduce complications; and (2) gender is not an accurate method of verifying a person’s identity. Further, McGrath argues that requiring a gender identification enforces the gender binary and may pressure parents of intersex individuals to consent to unnecessary gender assignment surgeries. Finally, McGrath argues that the gender identification requirement should be considered discriminatory against particular sexual minorities.


This author’s proposal is crystal clear: “[W]e must cease using the Birth Certificate to assign sex to a child” (p.308). Reilly illuminates three distinct reasons why assigning sex at birth is problematic: (1) an individual’s sexual identity is not determinable at birth, nor is it unchanging; (2) the medium on which the assignment is made—an official legal document—has permanent legal implications; and (3) sex is assigned by medical professionals, further enforcing the fallacy that biological sex is easily determinable. Reilly’s proposal calls for complete removal of the sex category from the birth certificate, stating that data related to sex identity will be reported only for medical and health purposes in a specific vital statistics section that accompanies all birth certificates. Under this model, the formalization of sex identity will be self-reported on other documents, such as passports and driver’s licenses.


This article explores how the intersex and transgender movements have increased the recognition of sexual indeterminacy and shattered the assumptions about sex
and gender that the entire U.S. legal system is built on. The failure to recognize sexual diversity in the law has created a legal uncertainty for transgender and intersex individuals, and has further marginalized both groups. This author argues that “[g]ender is truly between the ears, not between the legs” (p.245) and endorses gender self-identity as the sole criterion for the determination of legal sex. Calling for the elimination of all sex assignment, and sex-assignment surgeries in particular, the author acknowledges the challenges of implementing such radical changes, yet maintains that gender self-identification is the “only rational and humane criteria for legal sex” (p.246).

**Discrimination**

**Discrimination Generally**

¶ 42 Individuals with intersex traits frequently find themselves facing discrimination if their intersexuality becomes known or if they are recognized as gender nonconformists. Laws against discrimination do not generally address discrimination against intersexual individuals, leaving them unprotected in an array of environments, such as healthcare, education, public services, employment, and sports.\(^1\) The U.N. Human Rights Office of the High Commissioner urges that we “prohibit discrimination on the basis of intersex traits, characteristics or status . . . and address such discrimination through relevant anti-discrimination initiatives.”\(^2\)

**Annotated Bibliography**


This student note discusses the ways that prison officials house and treat intersex prisoners. Potential constitutional challenges and equal protection claims are analyzed in light of housing classifications. The author suggests that intersex discrimination is a form of sex discrimination; thus, a classification differentiating intersex persons from non-intersex persons is one that merits heightened scrutiny to determine whether there is a violation of the Equal Protection Clause. The author examines various prison system approaches in an attempt to find a humane solution for housing intersex individuals.


This student comment sets out to answer the general question of whether an intersex individual is protected from sex discrimination under Title VII or by state antidiscrimination laws that prohibit discrimination based on sex. After providing a brief background of what he identifies as sexual minorities, the author discusses the limited relevant case law, most of which pertains to transgender individuals. The author advances the argument that the most sensible

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1. See *infra* “Foreign Approaches to Intersex Rights—Discrimination,” ¶¶ 73–78, for a discussion of foreign jurisdictions that address discrimination.
interpretation of Title VII protects an intersex individual and argues for a cause of action for discrimination based on anatomical nonconformity.


Highlighting the parallels between race discrimination and sex discrimination, this author proposes that sex categories be recognized as suspect classifications for the purposes of the equal protection doctrine. Ezie acknowledges that the idea is not novel, but contends that the approach—“asserting that the constructed character of sex, and its mutability, provide an independent basis for finding sex classifications suspect” (p.179)—is new and is not without support. Recognition of sex as a social construction for the purposes of an equal protection sex discrimination analysis, Ezie argues, will foster a greater understanding of gender discrimination in general.


This author criticizes previous scholarly work that suggests adding a third category specifically for intersex individuals, stating that instituting such an idea would perpetuate gender stereotyping and further reinforce the notion that sex and gender categories should and do exist. As an alternative, Gelfman proposes a model that interprets Title VII protections to extend to an individual’s “perceived sex.” Perceived sex is defined in the article as “the gender assignment applied by the discriminating party to the employee” and “the gender assignment applied by the discriminating party to the gender expressions of the employee” (p.111). According to Gelfman, this interpretation is flexible and sensitive to the social reality of discrimination, which is why it is appropriate in the context of sex and gender.


Greenberg chronicles the historical and current medical treatment of intersex individuals and the unique healthcare issues confronting the intersex community. Greenberg focuses on the movement’s primary goal to stop certain medical procedures from being performed on infants with DSD. Now that courts have recognized statutory protections against sex discrimination based on sex and gender stereotypes, Greenberg argues that a similar framework could be applied to bar the medical procedures. Greenberg writes, “If physicians and hospitals recommend these procedures because they decide that a child is not sufficiently masculine or feminine, they are arguably engaging in a form of sex discrimination” (p.896). Greenberg goes beyond the sex discrimination analysis by exploring whether current medical procedures performed on infants with DSD could also be considered a form of disability discrimination.


This article tracks the early Supreme Court decisions that first opened the door for the potential inclusion of sex and gender nonconformists under Title VII.
Greenberg reveals that while most legislative acts use the word “sex,” courts, legislators, and others replace the word “sex” with “gender.” Even though the two terms are understood to be different, in the legal realm, “sex” and “gender” are used interchangeably. The failure to distinguish between the two, and to further acknowledge the existence of other individuals along a sex and gender spectrum, reflects the law’s failure to adequately protect the sex and gender nonconformists. Along with the terminology issues, Greenberg states that most of the early case law was entirely undeveloped. In her conclusion, she urges scholars to encourage the courts to adopt a coherent theory of sexual harassment law that would protect all sexual minorities.


This student note examines whether the Americans with Disabilities Act, particularly in light of recent amendments to the statute, provides an intersex individual with legal protection against discrimination. Menon highlights a section of the statute that excludes certain categories of individuals from its scope of protection, including individuals who identify as gay, lesbian, bisexual, or transgender. Menon argues that absent any express reference to the intersex community, this section opens the door for the intersex, provided the individual is able to meet the other statutory requirements. Whether the ADA is an ideal avenue for the intersex community to pursue legal protection, Menon writes, remains a critical question.

**Discrimination in Sports**

¶ 43 Female athletes with intersex traits face many difficulties. They may have their sex disputed and find themselves excluded from competitions because of intersex traits, and many have been disgraced, disqualified, or forced to give back medals once their intersexuality became known.¹²³ Females with body shapes that are more male-like or who display extreme speed or strength may have their sex called into question; it may be conjectured that the athlete possesses a distinct edge in a competition as a result of sex characteristics. It is possible in some instances that the athlete is intersex.

¶ 44 Sex verification was initiated at the Olympics in 1968 with confirmation by physical examination; verification was later made using chromosome testing. This issue presented many problems for intersex athletes, as there are females who possess XY chromosomes (such as individuals with CAIS or PAIS) and males who possess XX chromosomes.¹²⁴ Additionally, there are genes on chromosomes other than the X or Y that also affect sex development. Simply determining whether an athlete has XX or XY or some other variation will not determine definitively the individual’s sex.

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¹²³ For example, Santhi Soundarajan, an Indian athlete who competed in the 800-meter race at the 2006 Asian Games, was forced to return her silver medal when she did not pass a sex verification test because she had androgen insensitivity syndrome. Other athletes’ sex is questioned after death, such as happened to Stanisława Walasiewicz. Daniel Gandert et al., The Intersection of Women’s Olympic Sport and Intersex Athletes: A Long and Winding Road, 46 IND. L. REV. 387, 395–96 (2013).

¹²⁴ This condition occurs when a gene of the Y chromosome resides on an X chromosome, which results in the X chromosome operating more like a Y chromosome.
These problems with chromosomal sex verification became apparent to the International Olympic Committee (IOC) in 1996, when they confronted difficult decisions with the results of sex testing. Seven of the eight women who were found to have male chromosomes had androgen insensitivity syndrome, and, thus, were unable to use the testosterone they made. It is worth remembering that most of us know whether we are men or women even though we have no idea what our “sex chromosomes” are. Gender identity is about who you know yourself to be, not about how your sex chromosomes look on a microscope slide. Doctors look at the “sex chromosomes” of people with DSD as part of coming up with a diagnosis, but they do not treat the “sex chromosomes” alone as a simple answer to anything. Our “sex chromosomes” are just part of the picture of who we are.

Therefore, in 1999, since it was impossible to identify an athlete as completely male or female, the IOC eliminated “compulsory” sex verification. However, the IOC and the International Association of Athletics Federations (IAAF) reserved the right to test an athlete’s chromosomes if uncertainty about her sex emerged and to require a hormonal test, a gynecological exam, and a psychological assessment.

The IAAF, in 2011, instituted testing for hyperandrogenism in women athletes, due in large part to the Caster Semenya controversy. Testing is done when there are reasonable grounds for believing that a woman has the condition. A female athlete who possesses testosterone levels within the male range is prohibited from competition, unless either she is insensitive to testosterone or she decreases her testosterone.

Similarly, IOC officials instituted testosterone level testing for the 2012 Olympic Games. The testing is not used for “all” athletes in women’s competitions; this testing is done only when requested by the chief medical officer of a national Olympic committee or by a member of the IOC’s medical commission when an individual’s sex identification is called into question. Female athletes are barred from women’s events if testing shows testosterone levels in the normal range for males. Those athletes with CAIS are permitted to participate in the games.

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127. Caster Semenya is a South African runner. She won gold at the World Championships in 2009 in the women’s 800-meter race. Due to her appearance, she was subjected to gender verification testing by the International Association of Athletics Federations (IAAF). The results were not released, but unconfirmed reports claim that although physically appearing to be a woman, she has internal testicles and does not have a uterus or ovaries. Ariel Levy, Either/Or, New Yorker, Nov. 30, 2009, at 46, 48–49. Semenya was suspended for nearly a year by the IAAF before being cleared to run in 2010. Runner Wins Three Titles in Four Hours, N.Y. Times, Apr. 17, 2016, at SP6.

128. This IOC policy is discriminatory on its face because there are no guidelines on what is an acceptable level of testosterone for men competing in men’s events. For example, the intersex condition Diplo (XYY) causes higher levels of testosterone than in nonintersex men, yet the IOC policy does not ban men with Diplo from events, and these men could also be seen as having an unfair physical advantage. Kathryn E. Henne, Testing for Athlete Citizenship: Regulating Dope and Sex in Sport 91 (2015).
¶49 Scholars have criticized hyperandrogenism testing in female athletes, stating that it is significantly flawed. There are privacy concerns the athletes will face. The testing means that many women athletes will face mandatory, but unnecessary, hormonal therapy, or have undescended testes surgically removed, if they want to continue to participate in competition. It is likely that “sex policing” will become more rampant. Recommendations have been made that athletes be allowed to participate in accordance with their legal sex or their gender identity.

¶50 In 2014, the British Medical Journal reported on a study of four young female athletes with 5-ARD who had gonadectomy and partial clitoridectomy procedures to participate in athletics after testing showed elevated androgen levels. The study maintains that this invasive and irreversible medical intervention was not medically necessary and undermines ethical care. All four athletes reside in developing countries where they may likely have difficulty with receiving lifetime hormone replacement therapy. The OIC and IAAF testosterone-based eligibility policies that mandate intervention conflict with the medical approach to hyperandrogenism, which considers the athlete’s health, symptoms, and fertility goal.

¶51 In July 2015, the International Court of Arbitration of Sport, the ultimate arbiter for conflict in sports, ruled that the IAAF’s policy regarding natural testosterone is not supported by current scientific research. The court acknowledged that while natural testosterone may impact competitive advantage, exactly what that impact is, and how significant it is, is unclear at this time. The court declared that

while the evidence indicates that higher levels of naturally occurring testosterone may increase athletic performance, [the court] is not satisfied that the degree of that advantage is more significant than the advantage derived from the numerous other variables which the parties acknowledge also affect female athletic performance: for example, nutrition, access to specialist training facilities and coaching, and other genetic and biological variations.

¶52 Thus, the court found that mandating medical intervention for participation in sports was indefensibly discriminatory and suspended the IAAF’s testosterone policy. The court provided the IAAF time to substantiate the claim that naturally high testosterone in females is equivalent to men’s advantage in sports. If such proof does not materialize by July 2017, the testosterone policy will be declared void.

129. See generally Karkazis et al., supra note 29, at 3.
135. Id.
%53 Although the IOC relied upon the same science in its testosterone policy, it did not immediately suspend its policy, as the IAFF was compelled to do. In February 2016, the IOC did agree that it would not police women's natural testosterone levels until the controversy is settled.\textsuperscript{136} The IOC encouraged the IAAF to substantiate its claim before the policy could be declared void, so that the IOC could reinstate their policy.\textsuperscript{137}

\textit{Annotated Bibliography}


This article examines the legal remedies available to intersex athletes who are excluded from competition based on the intersex condition. As the author points out, as a preliminary matter, not all student athletes are protected equally under the law, which provides a significant hurdle for intersex individuals who have been discriminated against. Nevertheless, the article explores the potential legal causes of action, including equal protection and due process claims, as well as federal and state civil rights protections. Adair is not optimistic that a court will produce a favorable outcome for intersex individuals, but is hopeful that the discrimination of intersex individuals will be recognized by the judicial system in the future.


The authors use the personal narratives of multiple Olympic athletes who have been stigmatized following compulsory sex testing to illustrate the many issues associated with defining sex and gender in the realm of competitive sports. This article examines the history of sex testing in athletic competitions and the existing policies in Olympic sports. As the authors point out, regulations as applied to intersex athletes are particularly challenging due to the diverse nature of intersex conditions. The authors caution against future regulations that would be discriminatory in nature, such as the initiation of testing based on an athlete’s appearance and any regulation that would unintentionally adopt or reinforce traditional sex stereotypes.


In this student note, Glazer criticizes the traditional justifications for sex-testing Olympic athletes—the existence of the sex binary and the notion that fairness in sport requires separation of sexes—and argues that they “reflect a flawed understanding of sex and competitive advantage” (p.546). Glazer argues that sex-testing Olympic athletes for hyperandrogenism predominantly discriminates against women. Specifically, any policy requiring only female athletes to undergo sex testing for hyperandrogenism is facially discriminatory because it fails to address the acceptable level of androgen for male athletes. Glazer concludes that a discrimination lawsuit challenging the hyperandrogenism policy may be an effective avenue for female athletes to pursue.

\textsuperscript{136} Padawer, \textit{supra} note 133.
\textsuperscript{137} \textit{Id.}

This article examines the IOC’s and IAFF’s policies on hyperandrogenism. Karkazis and her colleagues question the legitimacy of these policies on three grounds. First, the underlying scientific assumption that atypically high levels of testosterone in females creates an unfair advantage is notably flawed. “[T]here is no scientific evidence showing that successful athletes have higher testosterone levels than less successful athletes” (p.8). Second, the policymaking process was flawed because the IOC and IAFF relied mainly on the expertise of those individuals connected to the questionable policies of the prior two decades. Third, the policies raise unsettling concerns about the potential to achieve fairness for female athletes, given the documented harms that female athletes have faced with evaluation and sex testing. It is unlikely that these policies will protect against breaches of privacy and confidentiality due to inconsistencies and suspension when undergoing evaluation. The authors believe that true consideration of fairness would promote a strategy that permits all legally recognized females to compete with other females, regardless of hormonal levels, as long as the hormones are naturally produced. The author urges that the IOC and IAFF policies be rescinded.


This student note questions the place of intersex under Title IX, examining the statute’s prohibition against sex discrimination specifically in the context of athletics. Zaccone notes the complexity of identifying biological distinctions within athletics, highlighting as a preliminary matter that one standard is not appropriate for all sports. Further, she argues that even sex-based differences, including those rooted in biology, are influenced by social and cultural judgments. Relying on the courts’ history of interpreting Title IX as analogous to Title VII, Zaccone hypothesizes that recent case law prohibiting discrimination under Title VII against a transgender employee for failure to conform to the employer’s gender expectations should open the door for intersex protection under Title IX. Under this theory, she argues that a student’s self-identified gender should determine eligibility in Title IX athletics.

Human Rights

¶54 Numerous local, national, and international human rights institutions; health institutions; national ethics bodies; and civil society organizations have been closely scrutinizing medical practices and discrimination faced by individuals with intersex traits. Generally, these organizations advocate for an end to nonconsensual genital “normalizing” interventions, viewing them as human rights abuses.138 Research in the field of human rights acknowledges an increasing consensus that there is a wide array of biological variation in the human

138. Many of these organizations have published investigations and reports on the human rights of intersex people. For example, the Human Rights Commission of San Francisco published one of the first human rights reports on the treatment of intersex individuals. City & Cty. of S.F. Human Rts. Comm’n, A Human Rights Investigation into the Medical “Normalization” of Intersex People 17 (Apr. 2005) (concluding that genital-normalization surgeries performed without an individual’s informed consent are inherent human rights violations).
body, even if some of these are uncommon.\textsuperscript{139} Because their bodies are viewed as different, children and adults with intersex traits are often stigmatized and subject to multiple human rights violations. In addition to discrimination and unequal treatment, these areas of concern include infringement of the right to health and physical integrity, the right to be free from torture and ill-treatment,\textsuperscript{140} and the right to procreate.\textsuperscript{141}

\textsection{55} In 2013, the U.N. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Mendez, reported that genital-normalization surgery was an abuse in medical care that crosses a threshold of mistreatment commensurate with torture or cruel, inhuman, or degrading treatment or punishment, and disguised as forms of reparative therapies.\textsuperscript{142} The report calls for all states to “repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery . . . when enforced or administered without the free and informed consent of the person concerned.”\textsuperscript{143}

\textsection{56} The World Health Organization (WHO) joined with other U.N. organizations in 2014 to condemn the forced sterilization of persons with intersex traits, stating that “if possible, irreversible invasive medical interventions should be postponed until a child is sufficiently mature to make an informed decision, so that they can participate in decision-making and give full, free and informed consent.”\textsuperscript{144}

\textsection{57} The U.N. Office of the High Commissioner for Human Rights (OHCHR), in 2015 recognized genital-normalization surgery as an irreversible, unnecessary intervention to enforce the sex binary, which can result in “severe, long-term physical and psychological suffering.”\textsuperscript{145}

\textsection{58} During 2015, the Council of Europe,\textsuperscript{146} the European Union Agency for Fundamental Rights,\textsuperscript{147} and the Inter-American Commission on Human Rights\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{139} Pediatric Gender Assignment: A Critical Reappraisal 155–56 (Stephen Zderic et al. eds., 2002).
  \item \textsuperscript{140} For example, when a surgeon surgically creates a vagina, children must suffer through regular procedures on a lifetime basis where dilators must be inserted to maintain the vaginal structure. This has been described as a “routine sexual invasion.” Irene Habich, Boy, Girl, Other: Intersex Advocates Call for Surgery Ban, SPIEGEL ONLINE INT’L (Nov. 1, 2013), http://www.spiegel.de/international/germany/intersex-activists-call-for-ban-on-surgical-operations-on-children-a-931213.html [https://perma.cc/97XF-JRE8].
  \item \textsuperscript{141} Many, but “[n]ot all children with intersex conditions are sterilized. Some are born infertile, and some retain fertility after medical treatment.” Anne Tamar-Mattis, Sterilization and Minors with Intersex Conditions in California Law, 3 Cal. L. Rev. Circuit 126, 129 (2012).
  \item \textsuperscript{143} Id. ¶ 88.
  \item \textsuperscript{144} World Health Org., Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: An Interagency Statement 7–8 (2014), http://apps.who.int/iris/bitstream/10665/112848/1/9789241507325_eng.pdf [https://perma.cc/YSC4-7FCL].
  \item \textsuperscript{145} U.N. High Comm’r for Human Rts., Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity ¶ 53 (May 4, 2015).
  \item \textsuperscript{146} Council of Europe, supra note 103, at 19.
  \item \textsuperscript{148} Comisión Interamericana de Derechos Humanos, Violencia Contra Personas
\end{itemize}
also each called for a review of the unnecessary medicalization of intersex traits, which interfere with the individual’s right to health, noting many of the human rights issues intersex people confront—forced sterilization; pain; incontinence; loss of sexual sensation; and lifelong mental suffering, including depression. Recognizing the adverse effect on physical integrity and autonomy, the recommendation was to cease genital-normalization surgery without the consent of the affected person.

¶59 In the same year, 2015, the Astraea Lesbian Foundation for Justice established the first Intersex Human Rights Fund supporting organizations, projects, and campaigns led by intersex activists working worldwide to ensure the human rights, bodily autonomy, physical integrity, and self-determination of people with intersex traits.149

¶60 The African Commission on Human and Peoples’ Rights, in 2016, also expressed concern over the treatment of intersex people, considering bodily integrity, autonomy, freedom, and security of the individual related to nonconsensual, medically unnecessary treatment of intersex infants, children, and adolescents.150

¶61 The Asia Pacific Forum on National Human Rights Institutions, in its 2016 report, discussed the rights to physical integrity, nondiscrimination, recognition before the law, and effective remedies and redress.151

¶62 German and Swiss ethics institutions have also reported on this issue. A Swiss National Advisory Commission on Biomedical Ethics report argues against genital-normalization surgery due to the effect on physical and psychological integrity, and advocates for the delivery of better psychosocial support.152 The Swiss report advocates that all “(non-trivial) sex assignment treatment decisions which have irreversible consequences but can be deferred should not be taken until the person to be treated can decide for him/herself.”153 The report also suggests that questions of criminal sanctions for sex assignment interventions should be examined.

¶63 The German Ethics Council reported that intersex people should be recognized, supported, and protected from discrimination.154 Noting the importance of the right to physical integrity, preservation of sexual and gender identity, and right
to an open future and procreative freedom, the German Ethics Council recommended that irreversible medical sex assignment in persons of ambiguous gender should be taken only by the individual concerned; in the case of a minor, the Ethics Council stated that

[i]n the case of an affected individual who has not yet attained decision-making capacity, such measures should be adopted only after thorough consideration of all their advantages, disadvantages and long-term consequences and for irrefutable reasons of child welfare. Such a reason at any rate applies if the measure concerned serves to avert a grave concrete risk to the life or physical health of the affected individual.155

¶64 While these various reports and recommendations are all positive steps for the human rights of individuals with intersex traits, it is the enactment, codification, and administration of human rights protections that is vital in each country’s judicial opinions, statutes, and regulations. This process has been more measured.156

Annotated Bibliography


The premise of this article rests on the notion that one must have a classifiable sex to be considered as a human by the law. Bird argues that an intersex child—born without a classifiable sex—is not considered human, and therefore the human rights of the intersex child are regarded as nonexistent. She evaluates the applicability of international human rights discourse to intersex individuals, particularly the regulation of medical ethics under international law. Bird concludes that human rights law has failed to make a space for intersex individuals, rendering them invisible to the law and the human rights violations against them unrecognized.


Over the last twenty-five years, opponents of female genital mutilation (FGM) have successfully lobbied to have the practice banned by federal statute in the United States, formally condemned by the United Nations, prohibited by many European countries, and deemed illegal in a majority of the countries where it is commonly practiced. Yet, FGM opponents fail to recognize a different type of genital cutting that occurs in their well-developed countries. This article challenges the mainstream anti-FGM activists’ refusal to embrace intersex causes. The authors argue that the plight of the two communities are similar; genital-normalization surgeries parallel the cultural FGM surgeries in that they are largely medically unnecessary and result in similar side effects such as sexual dysfunction. While both practices are rooted in cultural behavior, the selective condemnation of the anti-FGM discourse is grounded upon Western/North American exceptionalism. The intersection of these two issues, the authors argue, demonstrates the ‘‘pitfalls of narrow, group-focused activism’’ (p.79).

155. Id. at 164.
156. See infra “Foreign Approaches to Intersex Rights,” ¶¶ 73–83, for country-specific action.

This article discusses the reasons why intersexuality has been primarily considered a medical issue rather than a fundamental human rights concern. The author examines two of the first “identifiable official document[s]” (p.127) that address the treatment of intersex individuals as an issue of human rights: a report by the San Francisco Human Rights Commission and a Colombia Constitutional Court decision. Holmes advances the idea that not only should intersex be considered principally a human rights issue, but more narrowly, as a children’s rights issue.

Intersex Activist Movement

Intersex Activist Movement Generally

§65 Intersex organizations and activist groups have been in existence since the mid-1980s. The groups concentrate on providing peer and family support and addressing health concerns and human rights. In the United States, there are several such organizations: Accord Alliance,¹⁵⁷ interACT Advocates for Intersex Youth,¹⁵⁸ and Organization Intersex International USA (OII-USA).¹⁵⁹ These organizations all support the goal of ending the medical standard of cosmetic, nonconsensual genital “normalizing” surgeries. There are many foreign and international organizations as well.

§66 Since 2011, three International Intersex Forums have been held, supported by the ILGA (International Lesbian, Gay, Bisexual, Trans and Intersex Association) and ILGA-Europe. Intersex activists and organizations from all over the globe convened and released joint statements about human rights and bodily autonomy. In 2013, the third statement advocated for a cessation of genital-normalization surgeries.¹⁶⁰ Intersex activists have frequently been disfigured and suffered trauma from genital surgeries themselves; they advocate that these surgeries end, or at least that decisions be postponed, in the face of normative standards and cultural pressure. The position held by these organizations is that intersexuality is not an anomaly that needs to be met with an automatic “fix.”


In 2007, ISNA sponsored and convened a national group of health care and advocacy professionals to establish a nonprofit organization charged with making sure the new ideas about appropriate care are known and implemented across the country. This organization, Accord Alliance, opened its doors in March, 2008, and will continue to lead national efforts to improve DSD-related health care and outcomes.

Dear ISNA Friends and Supporters, supra note 34.

¹⁵⁸. InterACT Advocates for Intersex Youth (http://interactadvocates.org/) works to raise intersex visibility, empowering young intersex advocates and promoting laws and policies that protect intersex youth. It was formerly known as Advocates for Informed Choice.

¹⁵⁹. Organization Intersex International (http://oii-usa.org/) is a multi-gendered, multi-orientation, multi-racial NGO working for human rights for intersex people, particularly the rights to bodily integrity, self-determination, legal recognition, and depathologization of intersex traits and nonbinary identities in medicine and society. Its goal is to create a world where all intersex people are viewed and treated equally.

Intersex activists argue that while psychosocial reasons are often the reason given to perform genital-normalization surgery, this type of treatment is socially driven and, therefore, ethically questionable. When surgery and hormone treatments are considered, healthcare professionals must ask themselves whether they are truly needed for the benefit of the child or are being offered to allay parental distress.\[161\

Intersex activists have worked tirelessly to educate society about these issues. They have publicized their stories via mass media, reaching many people; they have also connected with the healthcare industry by working with researchers, presenting at medical conferences, and reaching out to medical students.\[162\] While it may appear that this work will succeed and one day eradicate, or at least limit, nonconsensual genital “normalizing” surgeries, the formation of new standards of care take a long time to impact actual medical practices.\[163\] This slow evolution is taking too much time for much of the intersex community, who desire an immediate ban on genital-normalization surgery. This position is shared by many legal scholars.\[164\]

**Annotated Bibliography**


Hupf first acknowledges the difficult role that encompasses being an ally to any given community. Acting as an ally requires an individual to place the lived experiences of harmed individuals at the forefront of any movement and requires a challenging balancing act between enthusiastic goals and the immediate needs of the community’s individuals. Hupf asserts that the intersex community continues to call for a moratorium on all cosmetic, nonconsensual genital-normalizing surgeries as its main objective. This article explores this proposal, as well as alternate proposals by intersex activists, allies, and other scholars. Through examination of the adoption and implementation of several of the proposed solutions, Hupf argues, “[u]ntil there is a prohibition on the practice of cosmetic, non-consensual genital normalizing surgery, proposals for an alternative solution must take a step back” (p.104).


This article traces the history of the intersex movement and explores the role of mass media in the increased recognition of the intersex identity. Preves focuses on one organization in particular, the Intersex Society of North America (ISNA). Preves identifies ISNA as one of the pioneers of the intersex movement, highlighting the organization’s polarizing transition from peer support group to political activist group. Preves credits ISNA and its use of mass media as a tool for advancing their political platform for the increased awareness of intersex issues. Preves

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164. Id.
admits that this recognition is not without controversy, foreshadowing the movement's tensions over where discourse of the intersex people belongs.


This article is borne out of the author's personal experience as an ally working on behalf of intersex people. Stone maintains that the current tightrope that allies must walk—advocating for the interests of the group and gathering emotional information regarding injustices, while recognizing the limitations of personally understanding an individual's struggles—requires a careful balancing of attitudes and behaviors to facilitate effective advocacy. Since intersex people are only a small percentage of the population, Stone argues that allies will be crucial to the intersex movement.

Intersection with Other Movements: LGBT and Same-Sex Marriage

The general public has been made more aware of the variations of gender and sexual orientation due to the LGBT and same-sex marriage movements. With the increased openness about sexual orientation and the growing visibility of the LGBT community and their challenge to expectations about gender roles and identity, there has been increasing social acceptance for individuals who do not fit the traditional classifications of gender and sexuality. This awareness that sexual anatomy does not dictate an individual's gender identity or sexual orientation has benefited the intersex movement's progress. “[T]ransgender identity is far less of a story than it used to be,” while intersexuality is now the more marginal classification, in need of increased public awareness.

However, the transgender community and the intersex community sometimes have disparate objectives. The intersex community’s focus is not about making decisions on whether to have surgical intervention to “normalize” their bodies to their correct gender; the concern is about decisions regarding their biology being made with a lack of consent on their part. This has created some worries among the intersex community about the development of LGBT groups that include an “I” for the inclusion of persons with intersex traits. Other concerns are that including the “I” would encourage the public to assume that individuals with intersex traits should automatically be considered lesbian, gay, bisexual, or transgender. Some fear that parents of intersex infants who might reach out for assistance and education would not do so with an LGBT group, and might even be more

165. Transgender is “[a]n umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth.” GLAAD Media Reference Guide—Transgender, GLAAD, http://www.glaad.org/reference/transgender [https://perma.cc/V8VZ-PNZE].


167. Noa Ben-Asher, The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties, 29 Harv. J.L. & Gender 51, 51 (2006) (“Transsex individuals often desire the future body that they should have, while intersex individuals often mourn the body they had before an unwarranted normalizing surgery interfered with it.”).

168. Intersex individuals, like all people, have various sexual orientations and gender identities. Paulo Sampaio Furtado et al., Gender Dysphoria Associated with Disorders of Sex Development, 9 Nat’l Rev. Urology 620, 622 (2012). Furtado states that between 8.5% and 20% of individuals with intersex traits may realize gender dysphoria due to their sex assignment at birth; this figure is dependent on the type of DSD. Id. at 626.
likely to advocate for genital normalization for their children out of fear about their later sexuality or gender identity. Intersex activists are also concerned that their identity would be lost if joined with the larger LGBT movement, and believe that it is critical that the intersex movement gain visibility and provide specific resources for their own community.

Despite divergent paths, the transgender movement and the intersex movement do intersect in some ways. In both movements, individuals find their bodies are pathologized in a way analogous to the way psychiatry viewed homosexuality decades ago. Transgender individuals may still find themselves categorized as having a “gender identity disorder.” From this perspective, intersexuality is simply a different sexual minority that is considered “abnormal” and is pathologized.

Another similarity in both movements is that surgical intervention for intersexuality is prompted by prejudice, discrimination, and fear of homosexuality. Our society’s healthcare system determines the functionality of male and female genitals by the ability to engage in heterosexual intercourse. The fact of the matter is that the LGBT movement, same-sex marriage movement, and other social movements have all helped spur on the intersex movement. Social change requires evolution, and whatever the sequence, it is clear that diverse expressions of gender and sexuality are becoming more accepted and mainstream.

**Annotated Bibliography**


This author examines the tensions between intersex and transsex advocacy groups by deconstructing each group’s distinct advocacy goal and the medical-scientific theories employed to support them. The transsex movement generally promotes surgeries and, more specifically, seeks to obtain Medicaid coverage for sex reassignment medical procedures. In contrast, the intersex movement generally opposes surgeries and calls for a moratorium on genital-normalization procedures on intersex infants and young children. At the center of the controversy is the distinction between sex and gender, the subject of a two-sided ongoing medical-scientific debate. Ben-Asher describes the main litigation propositions and structures of the two movements as the “legal representations of opposing medical positions and (perhaps more importantly) experts who have been challenging each other for years regarding meanings of sex and gender” (p.90). The author advances the idea that both movements should sever their reliance on medical-scientific theories and instead formulate legal arguments based on positive and negative liberties. According to Ben-Asher, this shift in framework would not only reconcile the two movements, but also liberate their respective legal arguments from the control of the scientific community.

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170. *Id.*
171. *Id.*
172. *Id.*

This essay provides an extensive overview of U.S. judicial decisions in marriage-related cases that turn on the legal recognition of a litigant’s sex change. The author criticizes the majority of the lawyers’ arguments and judicial opinions as either advancing heterosupremacy or reinforcing the notion of sex as a biological fact by ignoring the root of the legal issue. According to the author, the greater issue here is the use of sex as a regulatory tool to determine what identities and relationships to legally recognize. He further condemns the academic realm for limited-scope investigations that fail to consider the larger circumstances and continue to give the control of legal determinations to the medical community. The author argues, “It misdirects our focus, to someone’s political detriment, to appeal to the natural or to ‘the facts’ of sex (as proclaimed by medical practitioners) as the basis for what are really political judgments about what identities and relationships to recognize” (p.217).


This article examines two sources of tensions relating to intersex activists: the “intrasex debate” and “intersex disagreements” (p.102). The intrasex debate stems from the intersex community’s wide separation on the issue of whether to call for a complete moratorium on all infant intersex surgeries. Intersex disagreements encompass the intersex movement’s interactions with other activist groups related to sex and gender discrimination and specifically the conflicts that arise from decisions about whether to form alliances with certain groups. Greenberg argues that the intersex movement, to endure as a successful social justice movement, must embrace other groups that share a common goal of ending sex and gender discrimination.


In this student note, the author considers the application of same-sex marriage statutes in cases involving a transsex or intersex party and the unintended and often unreasonable outcomes that follow. Through her analysis of two leading Massachusetts cases, the author concludes that even a legal right to same-sex marriage may fail to consider the rights of transsex and intersex individuals. The author argues that the most comprehensive solution to this problem would be the elimination of a binary legal system of sex and gender.


By looking at a series of marriage cases involving a transsexual or intersex individual, Kogan sets out to challenge the assumption that an opposite-sex marriage requirement is easily enforced. Kogan argues that “these cases illustrate the difficulty and even foolishness in looking to a person’s sex as a criterion for marriage” (p.371). Kogan specifically highlights several insights from the transsexual and intersexual marriage cases. For example, Kogan deduces that the determination of an individual’s sex is not related to the goals of marriage and does not help a court enforce legal prohibitions against same-sex marriage. Kogan concludes that the ultimate lesson derived from the transsexual and intersexual marriage cases is that marriage should be available to all couples.

Rosin traces the history of intersexuality alongside the history of the courts’ attempts to define sex in the context of marriage cases. Rosin highlights two courts that use different single-factor tests to determine whether an individual should be classified as a woman or a man. The single-factor approach, Rosin argues, is not always decisive and can have unintended legal consequences. The author argues that sex is analogous to race and is thus a social construct that cannot be confined to clear-cut categories. Rosin advances the concept of “universal marriage,” the right of any two unmarried (not closely related) adult persons to marry each other and enjoy the legal benefits (and obligations) of marriage regardless of the genital activities made possible and impossible by their sexual anatomies” (pp.56–57).

Foreign Approaches to Intersex Rights

Discrimination

¶73 Individuals with intersex traits are frequently stigmatized and suffer a variety of human rights abuses. The international community has been working effectively to change standards on an international level. Presently, four countries protect “intersex” people from discrimination: South Africa, Australia, the island of Jersey, and the United States (on a very limited basis); three other countries protect such discrimination on the grounds of “sex characteristics”: Malta, Greece, and Bosnia-Herzegovina.

¶74 In South Africa, which expressly protects against sex discrimination in its constitution, the Judicial Matters Amendment Act, 2005 amended the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act 4 of 2000) to incorporate intersex within its definition of sex. The Promotion of Equality and Prevention of Unfair Discrimination Act begins with a schedule of definitions, and two new definitions were added: (1) “sex” includes “intersex,” and (2) “intersex means a congenital sexual differentiation which is atypical, to whatever degree.” This change made intersex part of the meaning of “sex” in the equality clause, thus protecting intersexual individuals from discrimination.

¶75 In Australia, “intersex status” was added in 2013 as a protected biological attribute in the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act on August 1, 2013, differentiating intersex status from sexual orientation, gender identity, and sex. This legislation protects intersex individuals as a stand-alone prohibited ground of discrimination. Similarly, the island of Jersey added “intersex status” to its definition of sex in 2015. Since discrimination on the basis of sex is prohibited, intersex status is protected in Jersey.

174. Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013, (Cth) s 4(1).
176. States of Jersey (2015), Discrimination (Sex and Related Characteristics) (Jersey) Regulations 201, sched. 1, para. 7.3; see also DAN CHRISTIAN GHATTAS, STANDING UP FOR THE RIGHTS OF INTERSEX PEOPLE 15 (Dec. 2015), http://www.ilga-europe.org/sites/default/files/how_to_be_a_great_intersex_ally_a_toolkit_for_ngos_and_decision_makers_december_2015_updated.pdf [https://perma.cc/7ZSJ-XBL5].
¶76 The United States issued a much narrower protection when the U.S. Department of Health and Human Services provided a response to a comment clarifying section 1557 of the Affordable Care Act. This response stated that when dealing with health programs administered by the Department of Health and Human Services, “the prohibition on sex discrimination extends to discrimination on the basis of intersex traits or atypical sex characteristics.”

¶77 In 2015, Malta adopted the Gender Identity, Gender Expression and Sex Characteristics (GIGESC) Act that protects intersex individuals from discrimination on grounds of “sex characteristics.” The Maltese act states that “public service has the duty to ensure that unlawful sexual orientation, gender identity, gender expression and sex characteristics discrimination and harassment are eliminated, whilst its services must promote equality of opportunity to all, irrespective of sexual orientation, gender identity, gender expression and sex characteristics.”

¶78 The GIGESC Act was a landmark piece of legislation in Europe. Greece and Bosnia-Herzegovina also categorize “sex characteristics” as a prohibited basis of discrimination.

Genital Surgery Practices

¶79 Colombia and Malta have legally addressed the practice of nonconsensual genital surgery. The United States currently has a pending court case that addresses this issue and will likely be litigated in 2017.

¶80 The Constitutional Court in Colombia addressed this issue judicially by considering consent standards for such surgery with the country’s constitution and

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179. Individuals with intersex traits are covered under the language of “sex characteristics” because “[i]ntersex people are born with sex characteristics (including genitals, gonads and chromosome patterns) that do not fit typical binary notions of male or female bodies.”

180. Gender Identity, Gender Expression and Sex Characteristics Act of 2015, No. XI. This act also acknowledges a right to bodily integrity and physical autonomy; U.N. Office of the High Comm'r for Human Rts., supra note 122; see also infra “Genital Surgery Practices,” ¶¶ 79–83.


international norms in mind. Originally, the court declared that genital surgery was an infringement on one’s fundamental right to human dignity and gender identity, and it demanded that the patient him- or herself must provide the informed consent. In two later cases, the court’s holding was narrowed, allowing informed written parental consent for children younger than five years old, if the doctors provided parents with detailed information about the risks and benefits of surgery, and time to deliberate. Even though the final holding does not safeguard the rights of the youngest citizens, the controversy was acknowledged, and a heightened level of consent was required by the court.

¶81 In 2015, Malta became the first country to legislatively prohibit medically unnecessary genital surgery and treatment on the sex characteristics of minors without their informed consent, strengthening the rights of intersex persons. The legislation acknowledges a right to bodily integrity and physical autonomy, and directly bans surgical intervention driven by social factors. The Maltese Parliament advises other states to reassess and reform their legislation similarly.

¶82 Other countries and government entities have recognized the issues at stake but not taken any formal legal action, as can be seen in the government findings of Australia, Kenya, Chile, Argentina, and the United States. The Australian Senate, in 2013, issued a report recommending that genital-normalization surgery be deferred until the individual can give his or her own fully informed consent. A Kenyan court, in 2014, found that medical intervention on intersex infants should face regulation, but then punted the issue to Parliament, stating that Parliament was the proper body to administer these regulations. Chile’s Ministry of Health and


188. The court called for the institution of what could be called “exceptional informed consent” before the performance of sex-assignment surgery. Hofman, supra note 57, at 13–14.

189. Haas, supra note 185, at 54.


Argentina’s National Institute Against Discrimination, Xenophobia and Racism (a government agency) acted in a similar fashion after examination of this matter.

¶83 Most recently, the U.S. Department of State, on October 26, 2016, issued a statement on Intersex Awareness Day, noting that intersex individuals “routinely face forced medical surgeries that are conducted at a young age without free or informed consent. These interventions jeopardize their physical integrity and ability to live free.” While the recommendations, reports, and statements above do not involve legal action or legislation, they do help to spread awareness of the human rights issues involved and show leadership while many individuals with intersex traits await stronger protections.

Annotated Bibliography


In 2012, author Milton Diamond received a consultation request from the Constitutional Court of Colombia regarding the case of an intersex individual and the Colombia system of national registration. The questions posed by the Colombia court related to the gender binary, such as whether the state should recognize a category other than male and female, and who would be in the best position to decide an individual’s categorical placement. In this article, Diamond and co-author Hazel Glenn Bah expand on the answers provided to the Colombian courts. The article also explores recent changes in Nepal and Germany, such as the right to self-identify and the right to select an indeterminate sex designation on birth records, respectively.


This article centers on the decision in *Pant v. Nepal*, the landmark case that declared full, fundamental rights for all sexual minorities in Nepal and legally established a third gender category. The authors focus on the implementation of the new policy, comparing the process to other countries that have changed sex and gender documentation (e.g., Australia, India, New Zealand, and Pakistan). Highlighting some of the early challenges in Nepal, the authors write, “The bureaucratic processes of implementing an identity-based third gender category shed light on the complexity of such a category existing in a society” (p.34).

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This article provides a comprehensive look at a series of Australian High Court opinions involving the doctrine of informed consent, specifically where a parent or guardian is acting on behalf of a child. After exploring a number of different circumstances invoking this doctrine, Gurney surmises that the only credible basis for the judicial involvement of the Family Court is when irreversible surgical procedures, such as sex assignment surgery, are involved. Gurney argues that parents cannot be allowed to consent for sex assignment surgeries because there is no definitive way to determine the child’s innate sexual identity. According to Gurney, the risk of error is therefore too high to justify surgeries in the absence of an immediate threat to life.


After noting the lack of case law available in the United States, the author surveys three Colombian court cases involving the legality of genital reconstruction surgeries performed without the child’s consent. The cases resulted in a new standard for parental consent, one that prohibits parental consent for genital reconstruction on children over the age of five. In regard to decisions made on behalf of intersexed children under five years old, Colombian law now requires parents to be fully informed prior to giving consent. The author urges the United States to follow Colombia’s lead in addressing the situation, but to take it one step further by prohibiting genital reconstruction surgeries altogether.


Rellis’s article tells the story of India’s sexual minority group called the hijras. The hijras, a group composed of intersexed, transgendered, or transvestite men who identify as women, have undertaken efforts to engage in the political sphere by running for elected positions on an antidiscrimination platform. Rellis credits the hijras’ grassroots advocacy efforts with the increased recognition of a third gender in India, demonstrated by the inclusion of a third gender identity option on Indian passports. According to Rellis, India’s third gender identity option is particularly noteworthy because it allows the individual to self-identify.


This article describes recent legislative changes to the treatment of intersex individuals in Germany and Colombia. In Germany, a law now provides the option to identify sex as “X” on an infant’s birth certificate. Colombia has passed legislation that restricts a parent’s ability to consent to infant genitalia surgeries and has recommended following Germany’s lead in allowing for an intersex designation on birth certificates. Thorn also looks to advocacy efforts at the U.N. level and by the European Union to contrast the lack of action being taken to protect intersex children in the United States. After drawing attention to the efforts made by other countries to address the policy of infant intersex surgeries, Thorn concludes by urging the United States to follow suit.
U.S. Reform/Recommendations

¶84 Some scholars have proposed mandatory judicial oversight whenever parents pursue genital-normalization surgery for their child.196 This would assure the best interest of the child is the exclusive focus of a neutral decision maker, providing sufficient procedural and substantive due process protections.197 Another proposal is that a two-step approach be instituted that would necessitate guidance from an ethics board (including psychiatrists, pediatricians, and other relevant experts) and a recommendation by the court prior to any surgery.198 In her proposal, Julie Greenberg suggests that the board would provide an advisory opinion to the court, and the court would make the final determination.199 Greenberg’s proposal also includes that a child advocate be appointed by the court to advocate for the child’s interests.200 In the face of the above judicial oversight proposals, parents may argue that the U.S. Supreme Court acknowledges parents have a protected liberty interest in the way they raise their children under the Fourteenth Amendment;201 however, this right has been found to have its limitations.202

¶85 It is also possible that hospitals and physicians may take action to advocate for court review before performing genital-normalization surgeries, as they start to be aware of the increasing possibility of litigation by former patients who are dissatisfied with their surgery results.203 The criticisms of immediate surgery on infants have been made known more broadly, and, over time, it is becoming increasingly uncertain exactly what risks physicians are required to acknowledge to conform to the standard for informed consent.204

¶86 Although unpopular in the legal literature, there are those scholars who argue that genital-normalization surgery, if requested by parents, should not be prohibited.205 Instead, this minority of scholars argues primarily that parents need to be informed of known risks and different treatment options.206 Some scholars suggest a model that focuses largely on parental and familial needs, requiring doctors to openly discuss the intersex condition with parents, as well as inform parents of all available remedies from a neutral standpoint.207

¶87 Some scholars believe that it is the legislature, not the judiciary, that is the appropriate venue for protecting infants “with any power or consistency.”208 Scholars and intersex activists urge a complete legislative moratorium on early genital-normalization surgeries on children, contending that parents lack the authority to

196. Hofman, supra note 57, at 11.
197. Curtis, supra note 85, at 849.
198. Greenberg, supra note 2, at 42.
199. Id.
200. Id. at 43.
202. These limitations are seen in cases concerning organ donation and sterilization of minors. Alison Davidian, Beyond the Locker Room: Changing Narratives on Early Surgery for Intersex Children, 26 Wis. J.L. GENDER & Soc’y 1, 18 (2011).
203. Tamar-Mattis, supra note 163, at 107–08.
204. Id. at 108.
206. Id.
207. Id. at 256–57.
208. Hofman, supra note 57, at 16.
consent to these practices because they compromise the children's fundamental right to procreate and the right to bodily integrity. Children can manifest informed consent autonomously at a later time if they desire treatment.

§88 Some scholars express concern that a moratorium avoids the issue of psychosocial damage to children with intersex traits who must wait for years until decision making becomes finalized. Other scholars believe that banning genital-normalization surgeries without also pursuing reconstruction of our societal perspective toward sex and gender “puts the proverbial cart before the horse.” Scholars advocate legislation recognizing the right to self-identify as a third gender, while codifying the expansive judicial interpretations of Title VII in response to the increasing awareness of human biological variation. “Statutory reform in the U.S. can be an immediate remedy while advocates begin building a constitutional right to self-identify outside the gender binary based on the fundamental right to privacy and bodily integrity derived from the 14th amendment’s Due Process Clause.”

§89 There has been a bit of attempted reform at the state legislative level. In 2016, Indiana State Representative Ed Clere proposed a bill focused on intersex children in state custody or under state supervision to prevent medically unnecessary surgery done to “normalize” a child's physical appearance. While Clere prevented the controversy between parental rights and children's rights from impeding this issue by focusing solely on children in state custody, he believes this will eventually be an unavoidable debate.

**Annotated Bibliography**


Looking through the lenses of the fundamental right to privacy, this student author asks whether the privacy doctrine supports or opposes a moratorium on early gender assignment surgery. Aliabadi ultimately concludes that proponents on both sides of the debate could use the privacy doctrine to support their

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214. Id. at 256–57.

215. Henriques, *supra* note 22. Clere’s bill did not receive a hearing before the Committee on Family, Children and Human Affairs and died during the 2016 session. H. 1242, 2016 Sess. (Ind. 2016). The bill also provides that a juvenile court having jurisdiction over the intersex child may allow the intersex child to provide consent for a gender differentiation procedure if:

   1. the intersex child has undergone an evaluation by:
      1. A a psychologist; and
      2. B a physician;
      who are each experts in the treatment of intersex conditions;
   2. the intersex child has been provided full knowledge of the possible risks and benefits of the gender differentiation procedure; and
   3. the court believes that the intersex child has the maturity to provide informed consent.

H. 1242 § 4.
respective arguments. However, Aliabadi herself argues that the imposition of a moratorium would be premature and would fail to adequately protect the intersex individual as it would be grossly overinclusive in denying all intersexed infants the opportunity to undergo surgery until they were old enough to competently choose surgery for themselves.


The author acknowledges in her student note the complications and risks of gender assignment surgeries, recognizing that surgeries often fail the interests of the intersex individual, but nevertheless argues that a legal moratorium should not be placed on the surgeries. A “one-size-fits-all judgment” (p.429) by courts and legislators to impose a moratorium, she argues, would be “inappropriate, premature, and potentially harmful to a large number of individuals” (p.428). According to this analysis, parents, with the help of doctors and other medical professionals, are better suited to make a medical decision based on the needs of the specific intersexed individual. She supports her argument by examining the legal tradition of deference to parental wishes in regards to their ability to consent to medical procedures on behalf of their minor children.


This student author utilizes juvenile law to propose a statutory framework that would allow intersex minors to consent to a gender transition, removing the necessity for parental consent. The framework would also include a provision equating any active parental interference with the child’s desire to transition with neglect. Historically, minor consent laws regard a minor as competent to consent to certain medical treatments as long as the minor is aware of the procedure and the consequences, as well as any treatment alternatives. The author highlights that this model would presume that intersex minors could legally consent to counseling and to assistance with a social gender transition. The note’s conclusion enumerates potential unresolved issues with this framework, but nonetheless maintains that it would be a step in the right direction.


This article explores the legal approach to parental consent to certain medical treatments on behalf of individuals with mental disabilities who do not have the legal capacity to consent for themselves. Courts have held that parental consent is inadequate to authorize certain types of medical procedures for the mentally disabled, specifically procedures such as intentional sterilization that place a fundamental right at stake. In these circumstances, many states require a judicial hearing in which a third party is appointed to represent the interests of the minor child prior to the approval of the intentional sterilization. Curtis parallels infant intersex surgeries and the potential deprivation of the child’s fundamental rights, ultimately arguing for the expansion of required judicial hearing procedures to protect intersex children.

In this article, Davidian distinguishes between parental intentions and interests by raising the question of whose interests are actually being protected under an informed parental consent model. Looking further into the idea of parental consent, Davidian highlights the fact that the authority of parents to make medical decisions on behalf of their children is not absolute. Generally, parents are unable to authorize the sterilization of children without a court order, based largely on the rationale that the right to procreation is a fundamental right. The author argues that similar judicial approval should be required for intersex surgeries. Davidian acknowledges that the court may not prove a better decision maker, but argues that it will develop a better decision-making process. According to the author, “Moving the debate into the courtroom also has the potential to make public what has been shrouded in secrecy, behind a medical veil” (p.19).


Hermer responds to two proposals published in the *Cardozo Journal of Law & Gender*’s 2005 Symposium—one by Jo Bird and the other by Hazel Glenn Beh and Milton Diamond—which either advocate for, or would result in, a moratorium on intersex surgeries. Hermer believes both approaches fall short in addressing the deeper issues related to intersex surgeries, citing social and psychological reasons as examples. She also argues that either proposal would eliminate ongoing scientific research focused on intersex treatment practices. Hermer’s own position is consistent with that of her earlier work and calls for greater counseling of the parents prior to any decision making. She thinks that parents need to be informed of the risks and benefits of a myriad of treatment options, including immediate and delayed “cosmetic” genital treatment options. According to Hermer, a parent should then be able to elect for their child’s early “cosmetic” genital surgery.


This author argues for an approach to intersex treatment that balances the intersex individuals’ rights (as expressed by intersex activists) with other concerns such as parental interests, cultural considerations, and family dynamics. Hermer first evaluates medical malpractice and informed consent actions, ultimately concluding that neither legal avenue will provide adequate relief for the intersex individual. In its place, Hermer proposes a model that focuses largely on parental and familial needs, which Hermer argues may be just as critical as the intersex individuals’ needs. The model requires physicians to openly discuss the intersex condition with parents, as well as inform parents of all available remedies from a neutral standpoint. Hermer states that parents, together with the physician, should choose the gender of the child. Notably excluded from her model is any moratorium on infant surgeries, which Hermer believes should remain a treatment option for intersex infants.


This student note contends that the most immediate and effective way to remedy the harms suffered by intersex individuals and change treatment protocol for
the future is through legislation. Lloyd proposes a model statute that subjects intersex surgeries to judicial order, requiring a parent or guardian of an intersex individual to file an application for consent with a specific court. Among other requirements, the statute mandates the court to appoint an uninterested party to provide legal counsel to and represent the interests of the intersex child. Under the guidelines of the model statute, for a judgment to be entered in favor of surgery, the judge must find that: “(1) The surgery proposed is an accepted method within the particular field to address the intersex condition presented; and (2) That the proposed surgery is medically necessary to protect the health or life of the intersex child; and (3) That the potential benefits substantially outweigh the risks and potential adverse effects on the intersex child” (p.194).


This author illustrates the broad discretion afforded to parents through the personal narratives of four children who underwent medical and surgical interventions at the election of their parents. Ouellette is critical of the current legal model because it allows parents to subordinate their child's interests to their own. As an alternative legal model, Ouellette proposes a trust-based construct, in which parents are the trustees, bound by fiduciary duties to act on behalf of the child's best interest. Under Ouellette's framework, any decisions that might serve a parental interest at the expense of the child would be subjected to a neutral third-party review.


Because genital-normalizing surgery is medically unnecessary and carries real risks of parental conflict of interest, the author proposes that courts should have jurisdiction to intervene and protect the fundamental rights of the infant in the same way they do for children who are potential organ donors or who face elective sterilization. Tamar-Mattis looks to these existing categorical exceptions for a model of decision making that she suggests will ensure independent consideration of the child's interests. Factors that make genital-normalizing surgeries an appropriate case for a categorical exception are noted, along with benefits and possible objections to the use of this model. The author argues that the categorical exception model provides a protective and proven structure for making difficult medical decisions affecting the fundamental rights of children when their parents face a conflict of interest, thus helping to ensure that intersex children's fundamental rights are protected until they have the ability to decide for themselves.


In this student note, Uslan stresses the effects of gender-normalizing surgeries and their potential interference with a child's fundamental right to an open future, specifically the fundamental right to marriage. According to Uslan, parental consent to a child's surgery should not be allowed where the fundamental right of a child may be compromised by the decision. Further, she argues that even judicial oversight alone will not sufficiently protect the rights of intersex children. Instead, Uslan calls for a legislative ban on all genital-normalizing surgeries that are not consented to by the intersex individuals themselves, except in the case of a medical emergency.
Conclusion

¶90 Recently, there has been heightened interest in the issue of intersexuality among government, nongovernmental organizations, and policymakers. The general public is exposed now to much more media coverage and human rights statements about intersexuality. The subject is of burgeoning interest in the legal arena. This annotated bibliography abstracts articles to provide a reference point as well as an understanding of the history of the scholarship in this area. As scholars continue to examine intersex issues and various strategies to abolish discriminatory systems, I plan to continue building this collection of articles. I fervently hope that scholars will continue to document the struggle and continue to propose solutions to enable the law to move forward to stop the unfortunate practices that have injured children with intersex traits.
“Are You a Member of the Law School Community?”
Access Policies at Academic Law Libraries and Access to Justice*

Sarah Reis**

This article explores access policies at academic law libraries and offers two proposals intended to help law schools comply with ABA Standards 303 and 304, improve the image of law schools and the legal profession, better equip law students with legal research skills, and address unmet legal needs in communities.

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Introduction

¶1 Access to justice cannot be achieved without access to relevant legal materials. Law libraries, therefore, play a key role in facilitating access to justice. However,
the missions of academic law libraries are generally geared toward assisting faculty members with their legal scholarship and providing law students with the resources required for their legal education. Assisting the general public usually is a low or secondary priority.

¶2 This article examines the access policies of law libraries at the top twenty-five law schools and in the three metropolitan areas with the largest populations. It also presents a case study of the options available for members of the general public who wish to conduct legal research in Seattle. In addition, the article argues that academic law libraries and law schools, which are primarily focused on serving the law school community, should be doing more to promote access to justice for the general public.

¶3 The mission of the American Bar Association (ABA) is to “serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”¹ The ABA presents four goals, each of which contain a set of objectives, to achieve this mission.² Two objectives geared toward achieving the goal of improving the legal profession are “[p]romot[ing] the highest quality legal education” and “[p]romot[ing] pro bono and public service by the legal profession.”³ One objective geared toward achieving the goal of advancing the rule of law is “[a]ssur[ing] meaningful access to justice for all persons.”⁴

¶4 In August 2014, the ABA introduced revised standards for approval of law schools,⁵ which went into effect beginning with the 2016–2017 academic year.⁶ One new standard—ABA Standard 303(a)(3)—requires students to take one or more experiential courses for a total of at least six credit hours.⁷ An experiential course is “a simulation course, a law clinic, or a field placement.”⁸ ABA Standard 303(b) indicates that a law school curriculum “shall provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities.”⁹

¶5 This article offers two recommendations for how academic law libraries can assist law schools in increasing student participation in public service activi-
ties and offer opportunities that would allow students to fulfill the experiential learning requirement. First, I recommend that law schools introduce a legal research clinic where the students would have the opportunity to assist members of the public who are pursuing pro se lawsuits. Second, I recommend integrating real-world legal problems into advanced legal research courses. Law librarians will play important roles in ensuring the successful implementation of both proposals.

6 The legal profession as a whole suffers from a poor public image in the United States. Many Americans believe that lawyers are dishonest and overpaid. Additionally, within the legal profession, law school graduates are frequently criticized for lacking the professional skills required to practice law, specifically strong legal research and writing skills. The two recommendations in this article address these criticisms.

7 Whereas law libraries at public institutions are usually open to the general public, law libraries at private institutions typically are not. This article does not recommend for all academic law libraries to open their doors to the general public because physical access to resources is not the same thing as access to justice. However, I do suggest that law libraries at both public and private institutions can actively assist their law schools in increasing student participation in public service activities. In facilitating access to justice in communities, law schools would benefit from the implementation of the two proposals presented in this article because these recommendations will improve the image of law schools, help law schools better meet the educational goals set out by the new ABA standards, and better prepare law students to practice after graduation.

Missions of Public Academic Law Libraries Versus Private Academic Law Libraries

8 In the United States, there are eighty-four ABA-approved public law schools and 120 ABA-approved private law schools. The mission statements of law libraries at public institutions differ from those at private institutions. A mission statement “articulate[s] the goals, visions, values, and strategic behavior of the institution or organization,” and thus influences a law library’s access policy.


11. See, e.g., White Paper: Hiring Partners Reveal New Attorney Readiness for Real World Practice, LexisNEXIS (2015), http://www.lexisnexis.com/documents/pdf/20150325064926_large.pdf [https://perma.cc/M8SU-VDHH] (finding that “95% of hiring partners and associates . . . believe recently graduated law students lack key practical skills at the time of hiring” and “skills that were lacking primarily consisted of writing and drafting documents, briefs and pleadings, and skills beyond basic legal research”).


Law Libraries at Private Institutions

¶9 The mission statements of law libraries at private institutions typically focus on serving or supporting the law school community, consisting of law faculty and law students, but may also mention serving the larger university community. For example, the mission of the law library at Yale Law School states, “The Lillian Goldman Law Library supports the rich educational and scholarly programs of Yale Law School and Yale University.”  

15 The goals and objectives at that law library are faculty and student oriented—one goal is to “[p]rovide highly valued, relevant services to our faculty and students,” while another is to “[c]ollect quality resources that meet the needs of current faculty and students, as well as future generations of scholars.”

16 Similarly, Harvard Law School Library asserts that its mission is “to support the research and curricular needs of its faculty and students by providing a superb collection of legal materials and by offering the highest possible level of service.”

17 Faculty and students are clearly the law library’s first priority, but the law library also welcomes other members in the Harvard community—the mission of the Harvard Law Library continues with the following: “To the extent consistent with its mission, the Library supports the research needs of the greater Harvard community as well as scholars from outside the Harvard community requiring access to its unique collections.”

18 Harvard Law Library is only intended for use by those who are members of the Harvard Law School community or Harvard University community, not members of the general public.

¶11 Law libraries at other private law schools not among the most elite law schools in the nation have similar mission statements. For example, at Tulane University Law School, which was ranked fiftieth by the 2017 U.S. News & World Report Best Law Schools rankings, the law library’s website indicates, “The Library’s primary mission is to serve the educational and research needs of the faculty, students and staff of Tulane University Law School,” but adds that “[t]o the extent possible, the Tulane Law Library also supports the research needs of the greater community as well as scholars from outside the Tulane community.”

Law Libraries at Public Institutions

¶12 The mission statements of law libraries at public law schools generally prioritize serving or supporting faculty and students within the law school community, but these mission statements also typically mention members of the general public.
public. For example, the mission statement of the Gallagher Law Library at the University of Washington School of Law states:

The primary purpose of the Marian Gould Gallagher Law Library is to support the curricular and research needs of the University of Washington School of Law. The law library's collections and services are available to the University of Washington community at large. As a publicly supported institution, the law library makes its resources available to the general public, including the legal, business, and academic communities of Washington State and to all libraries through cooperative agreements. Financial resources and academic priorities may limit services and materials to secondary patrons.²¹

¶13 The Gallagher Law Library’s mission statement makes it clear that members of the law school community are the law library’s top priority, followed by members of the University of Washington community. Unlike the mission statements at most private institutions, this mission statement specifically indicates that the law library is open to the general public. However, the mission statement classifies public patrons as “secondary patrons,” clearly indicating that law faculty and law students are the top priority of the law librarians.

¶14 As another example, the law library at the University of Iowa College of Law indicates that it has “three central missions.”²² The first mission refers to supporting scholarship and teaching in the law school, the second mission refers to providing materials necessary to support the research and teaching activities occurring in the greater University of Iowa community, and the third mission refers to serving “the legal research needs of Iowa government officials, the Iowa legal profession, and the Iowa general public for legal information resources not otherwise available to them.”²³ Although not quite as explicit as the mission at the law library at the University of Washington, the order of these missions alludes to differing priorities and levels of service offered by the library.

Access Policies at Law Libraries at the Top Twenty-Five Law Schools

¶15 Access to legal materials is not the same thing as meaningful access to justice. However, access to legal materials is a necessary first step if one hopes to ever achieve access to justice on one’s own. This section examines the access policies of law libraries at the top twenty-five law schools in the 2017 U.S. News & World Report Best Law Schools rankings.²⁴ Table 1 illustrates whether each law school is a public or private institution and whether the law library at that law school is open to the general public.

Methodology

¶16 Table 1 lists twenty-seven law schools instead of twenty-five because three schools were tied for twenty-fifth place in the rankings, so all three of those schools were included in the table. The order of the list is based on the 2017 U.S. News & World Report Best Law Schools rankings. The table was compiled in April and May

²³. Id.
²⁴. See Best Law Schools, supra note 19.
so the access policies at these law libraries may have been revised since data for this table were collected. Data were collected by visiting each law library’s website to check its access policy. If the access policy was not entirely clear or not posted online, the access services librarian at that law library was contacted to obtain clarification.

¶17 In the last column of table 1, the “general public” refers to anyone who is not a student or faculty member at the law school or its parent institution, a member of the bar, a student with a valid student ID from another law school or from a school with which the law school has a reciprocal agreement, or anyone who is

### Table 1
Law Library Access Policies at the Top Twenty-Five Law Schools

<table>
<thead>
<tr>
<th>Rank</th>
<th>Law School</th>
<th>Public or Private Institution?</th>
<th>Law Library Open to the General Public?</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Yale Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>2</td>
<td>Stanford Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>2</td>
<td>Harvard Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>4</td>
<td>Columbia Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>4</td>
<td>University of Chicago Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>6</td>
<td>New York University School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>7</td>
<td>University of Pennsylvania Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>8</td>
<td>UC Berkeley School of Law</td>
<td>Public</td>
<td>Yes</td>
</tr>
<tr>
<td>8</td>
<td>University of Michigan Law School</td>
<td>Public</td>
<td>Yes</td>
</tr>
<tr>
<td>8</td>
<td>University of Virginia Law School</td>
<td>Public</td>
<td>Yes</td>
</tr>
<tr>
<td>11</td>
<td>Duke University School of Law</td>
<td>Private</td>
<td>Yes</td>
</tr>
<tr>
<td>12</td>
<td>Northwestern Pritzker School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>13</td>
<td>Cornell Law School</td>
<td>Private</td>
<td>Yes</td>
</tr>
<tr>
<td>14</td>
<td>Georgetown University Law Center</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>15</td>
<td>University of Texas at Austin School of Law</td>
<td>Public</td>
<td>Yes</td>
</tr>
<tr>
<td>16</td>
<td>Vanderbilt University Law School</td>
<td>Private</td>
<td>Yes</td>
</tr>
<tr>
<td>17</td>
<td>UCLA School of Law</td>
<td>Public</td>
<td>No</td>
</tr>
<tr>
<td>18</td>
<td>Washington University School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>19</td>
<td>USC Gould School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>20</td>
<td>Boston University School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>20</td>
<td>University of Iowa College of Law</td>
<td>Public</td>
<td>Yes</td>
</tr>
<tr>
<td>22</td>
<td>Emory University School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>22</td>
<td>University of Minnesota Law School</td>
<td>Public</td>
<td>Yes</td>
</tr>
<tr>
<td>22</td>
<td>Notre Dame Law School</td>
<td>Private</td>
<td>Yes</td>
</tr>
<tr>
<td>25</td>
<td>Arizona State Sandra Day O’Connor College of Law</td>
<td>Public</td>
<td>Yes</td>
</tr>
<tr>
<td>25</td>
<td>George Washington University Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>25</td>
<td>Indiana University Maurer School of Law</td>
<td>Public</td>
<td>Yes</td>
</tr>
</tbody>
</table>
required to obtain prior permission to enter the law library, such as a visiting researcher or scholar. In other words, “open to the general public” means that the law library allows anyone to walk inside, even if the hours when the law library is open to everyone are more restricted than the hours available for law students and faculty to use the library. For instance, many law libraries are open to the general public during normal business hours on Monday through Friday, but are restricted to law students and law faculty outside of those normal business hours.

¶18 To clarify, two examples of law libraries that were coded as open to the general public are the law libraries at the University of Michigan Law School and the University of Virginia School of Law. The University of Michigan Law School Library’s website indicates who may access the library: “The . . . Law School welcomes researchers to the underground Smith Addition to use the collection, including U.S. depository materials, for their legal research. Those with no legal research need are welcome to use the unrestricted portion of the Reading Room, which is open for general study.”

25 Similarly, the access policy at the law library at the University of Virginia School of Law states, “The Law Library is open to the University community as well as the general public.” Thus, these law libraries were coded as open to the general public.

¶19 In contrast, the law libraries at Boston University School of Law and at George Washington University Law School are examples of law libraries that were coded as not open to the general public. Boston University’s access policy states, “The BU School of Law Libraries are open to all Boston University students, faculty, staff, and alumni until 8pm. The Law Complex has a card swipe entry system in place from 8pm to 11pm for the law school community.”

27 Similarly, the access policy at the Jacob Burns Law Library at George Washington University Law School indicates that the law library is reserved for use by four groups of people: (1) faculty, students, and staff of the law school; (2) faculty, students, and staff of the George Washington University “who need to use the library for legal research”; (3) alumni of the law school; and (4) “friends of the Jacob Burns Law Library.” Because a public patron who is not a part of one of the designated groups cannot enter these libraries to browse or use the legal resources inside, these law libraries were coded as not open to the general public.

¶20 Law libraries—even those at private institutions—that participate in the Federal Depository Library Program (FDLP) must allow members of the general public to access the government collections.

29 Most law libraries are selective

27. Access Policy, Boston Univ. Sch. of Law Library, http://www.bu.edu/lawlibrary/about/access.html [https://perma.cc/Q49Y-WYXG]. Other individuals outside of the Boston University community who request prior permission for access may also be admitted—the access policy designates these individuals as researchers or current students, faculty, or staff from other colleges and universities in the Boston Library Consortium or the New England Law Library Consortium—but not members of the general public who do not fall into any of the aforementioned categories. Id.
depository libraries. Whereas “[r]egional depository libraries agree to receive all publications made available to federal depository libraries and retain them permanently,” “selective depository libraries may receive only those publications they wish to add to their collections.”

Although “[d]epository libraries must provide free access to FDLP information resources in all formats to any member of the general public without any impediments,” libraries are still permitted to impose “[s]ecurity measures to protect library users, staff, and collections” and are still permitted to “establish[] different privileges for primary and non-primary library users.”

Although several librarians have expressed that participation in the depository program creates a public right of access to an academic library, others have interpreted this requirement as creating a public right to access only the government collections within an academic library, not a right to access the entire library.

Selective depository libraries are required to allow the general public to access their federal government information collections for free. However, several depository law libraries permit members of the general public to enter the library to use materials in the government documents collection only, but no other resources in the library, or even require members of the general public to set up an appointment to use materials in the government documents collection in advance. Law libraries that only allow public patrons to use materials that are part of the depository libraries must offer free, public access to their Federal collections, even if the depository library is part of a private academic institution.


34. For example, the website for the MacMillan Law Library at Emory School of Law states, “Members of the public may do research in our government documents collection only.” Using the Library, EMORY LAW, http://library.law.emory.edu/about-the-library/using-the-library.html [https://perma.cc/8L65-24FH]. Beyond this exception for the general public to view government documents, the only other groups of people allowed in the law library include “Emory faculty, staff, students, alumni and healthcare employees as well as members of the local legal community (Bar members and firm employees) or visitors who have made prior arrangements for their research.” Id.

35. For example, at the law library at Northwestern Pritzker School of Law, the access policy indicates:

Patrons needing to use the library’s government documents depository collection may be admitted by appointment only, from 9:00 a.m. to 6:00 p.m. Monday through Thursday or 9:00 a.m. to 5:00 p.m. Friday, provided they present a photo ID and register at the circulation desk (depository visitors must restrict their use of the library to the government depository collection). Access, NW. LAW PRITZKER LEGAL RES. CTR., http://www.law.northwestern.edu/library/services/access/ [https://perma.cc/B8XF-ZPHT].
of the FDLP and no other materials in the law library collections were coded as not open to the general public.

Analysis

¶22 Of the twenty-seven schools listed in table 1, eighteen are private institutions, while nine are public institutions. As expected, law schools that are private institutions generally have law libraries that are not open to the general public: fourteen of the eighteen law libraries at private institutions are closed to members of the general public. Meanwhile, law schools that are public institutions generally have law libraries that are open to the general public: eight of the nine law libraries at public institutions welcome members of the general public.

Law Libraries at Private Institutions Open to the General Public

¶23 Four of the law libraries at private institutions listed in table 1 are open to the general public, breaking the general pattern. These law libraries include the law libraries at Cornell, Duke, Notre Dame, and Vanderbilt. All four of these law libraries are open to the general public during ordinary business hours on Monday through Friday, but are restricted to the law school community after hours or on weekends.

36. Policies, CORNELL UNIV. LAW SCH. LIBRARY, https://law.library.cornell.edu/about/policies [https://perma.cc/3KFC-BW44] (“The Cornell Law Library serves the education and research needs of its students, faculty, and staff. Visitors with research needs are allowed to use the library’s collections, providing use does not conflict with its primary responsibility to members of the Cornell community. . . . Reference assistance is available to the general public during our regular reference desk hours.”); After Hours Policy, CORNELL UNIV. LAW SCH., https://law.library.cornell.edu/about/policies/afterhours [https://perma.cc/9SLZ-VJXK] (“The law library is open to all Cornell University students and the public. Access to the law library after hours however is restricted to the law student community. Law library staff circulates at closing to ensure only faculty and members of the law student community remain.”).

37. Hours & Directions, DUKExE LAW, https://law.duke.edu/lib/hours/ [https://perma.cc/XB8T-4NXJ] (“The Duke Law community enjoys 24-hour access to the Law School and Goodson Law Library with a current DukeCard. Current members of the Duke University community may access the library during service desk staffing hours. A DukeCard will be required for entrance to the Law School building after 5:00 p.m. on weekdays and on the weekend. The Duke Law School and Goodson Law Library entrances are open to the general public from 8:00 am–5:00 pm, Monday through Friday. After these hours, only current Duke Law or University students, faculty, and staff are authorized to be in the Law School building; others are required to leave.”).

38. Library Hours, NOTRE DAME LAW SCH., http://law.nd.edu/library/library-information/library-hours/ [https://perma.cc/44UJ-76US] (“Notre Dame Law Faculty and Law Students have 24 hour access to the collection. Policy on use of the Kresge Library by non-law patrons: The Kresge Library is a legal research facility. Its use is intended primarily for law school faculty, law students, and other members of the law school community. Non-law patrons are welcome to use the collections Monday–Friday during regular business hours 8:00 a.m.–5:00 p.m.”).

39. Visitor Services, JEAN & ALEXANDER HEARD LIBRARY, http://www.library.vanderbilt.edu/law/visitors/ [https://perma.cc/VM5X-JDIR] (“The mission of the Alyne Queener Massey Law Library is to serve the research needs of the Vanderbilt Law School faculty, students, and staff. While we welcome visitors Monday through Friday between the hours of 7:00 a.m. and 6:00 p.m., access during other times is restricted. After 6:00 p.m. and on weekends, access to the Law Library is limited to Law School faculty, students, staff, and other users who have received prior authorization to be here from Law Library Administration.”).
¶24 The law libraries at Cornell and Vanderbilt are not organizationally separate from the other university libraries on campus, but instead are organized within the university library system. These law libraries are open to the general public because they adhere to policies established for all of the university libraries.

¶25 Geographical locations of law libraries may affect whether they are open to the general public. One common argument in favor of a public access right to academic libraries is that “[i]n a democratic state, academic libraries, which possess some of the greatest resources in the land, are required to be open to the public so people may educate themselves to be informed and active citizens.” Although this article later examines access policies of law libraries in the three largest metropolitan areas, one possible explanation for why some private law libraries are open to the general public is because “[f]requently, especially in the case of rural institutions, the small regional university may be by far the most comprehensive and robust source of information available to area residents, students, and businesses.”

¶26 Whereas a county law library in a large metropolitan area may be located merely a couple of miles away from an academic law library, which would not impose a significant burden on patrons if they are required to visit the county law library instead of the academic law library, this is not the case in all areas. For instance, in North Carolina, there are no nonacademic, public law libraries within close distance of Duke University School of Law. Even though the law library at Duke University School of Law has always been open to the general public, there has been very little use of the library by the general public. Melanie Dunshee, Assistant Dean for Library Services, believes this may be attributed to its location and lack of parking available at the law school.

¶27 The law library at Notre Dame Law School has been open to the general public for many years. Dwight King, Associate Director for Patron Services, indicated that one of the main reasons for the law library’s access policy, in addition to the fact that the law library is a selective depository, is because “as a Catholic institution, we feel an obligation to help the community.”

**Law Library at a Public Institution Not Open to the General Public**

¶28 The law library at one public institution—UCLA School of Law—has an access policy that does not allow members of the general public to enter the law library. Several public institutions have access policies specifically indicating that members of the general public are welcome to visit the library only if they are conducting legal research and need to use the materials available in the library, but UCLA is an anomaly for being closed to the general public.

42. E-mail from Melanie Dunshee, Assistant Dean for Library Servs., Duke Univ. Sch. of Law Goodson Law Library, to author (May 19, 2016, 5:48 AM PST) (on file with author).
43. *Id.*
44. E-mail from Dwight King, Assoc. Dir. for Patron Servs., Notre Dame Kresge Law Library, to author (May 11, 2016, 9:40 AM PST) (on file with author).
45. For example, at the law library at Indiana University Maurer School of Law, the facilities policy states:
The access policy for the law library at UCLA states, “The Library is not open to the general public except that members of the general public may have access to United States government documents acquired by the Law Library through its membership in the Federal Depository Library Program.”

According to Donna Gulnac, Director, Access and Information Services, the current access policy of being closed to the general public was implemented in January 2012, though the law library has historically had limited access policies that have become gradually stricter over the years. With regard to the current policy, Gulnac states:

The Law School’s proposal to close the Law Library to the public was under consideration for more than two years, and the decision was not made quickly or without serious discussion and reflection. It was also made in consultation with the UCLA Campus Counsel to insure the changes were in keeping with University of California policies. In the end, the Law School concluded that to properly meet the research and study space needs of the UCLA Law School community and to remain in good standing with the ABA (as well as meet the legal research needs of the larger UCLA and UC student, faculty and staff community), the library could no longer allow physical access to public users.

Even though members of the general public cannot access the physical space of the law library, the law librarians at UCLA still provide them with reference assistance via telephone and allow the public to use the document delivery service. Additionally, the law library is committed “to pursuing campus-wide licenses for all of our legal databases so that public users can access those databases from anywhere on campus.” Public users can already access databases including Lexis, HeinOnline, and Nolo Press from anywhere on campus. The law library is also working with the law school’s clinical program to compile a comprehensive research guide geared toward members of the general public about finding a lawyer and legal aid. Gulnac notes, “Our experience [is] that by providing a combination of phone assistance, access to online legal databases, and copies of our print materials, we are able to meet most of the needs of our public users.”

The law library at UCLA is a good example of how law libraries can strike an appropriate balance between meaningfully assisting the general public and responding to the demands or concerns of the law school community. Although the physical space is not open to the general public, it is clear that the law library is committed to serving the general public and goes beyond providing mere access to legal resources.

Some people assert that “[t]he public nature of public universities creates a right of public access to the university library,” an argument that “may also be framed as a taxpayer’s right to use services partially or substantially funded by...
In recent years, public law schools have shifted toward self-sufficiency financial models, even though many of these public law schools still articulate public missions. As demonstrated with the evolution of UCLA’s access policy, “[g]iven the increased demands from their faculty and students, public academic law libraries must curtail some of the services historically available to external constituencies.” This is an exciting time for law libraries to develop new, creative solutions for assisting members of the general public that go beyond welcoming them into the library’s physical space.

Access Policies at Law Libraries in the Three Largest Metropolitan Areas

This section examines the access policies of academic law libraries in the three cities with the largest populations in the United States. Members of the general public are shut out of academic law libraries located within New York City (Manhattan) and Los Angeles, but fare slightly better in Chicago.

New York City (Manhattan)

The 2010 U.S. Census indicated that New York City had a population of 8,175,133. This section focuses only on Manhattan to represent access to legal materials in New York City. All five of the law schools located in Manhattan are private institutions, and none of their law libraries are open to the general public (see table 2). A report issued November 2015 by the Permanent Commission on Access to Justice noted that “more than 1.8 million litigants attempted to navigate the civil justice system without counsel last year” in the state of New York. In New York City, the report notes that “91% of petitioners and 92% of respondents are unrepresented in child support matters in Family Court,” “96% of defendants are unrepresented in consumer credit cases,” and “99% of tenants were unrepresented in Housing Court in New York City in 2014.”

The access policy at the law library at New York University School of Law specifically states, “The Law Library is not open to the general public. Pro Se patrons do not have access to the Law Library.” However, the law library’s website offers a

52. Id. at 33, ¶ 4.
53. Id. at 49, ¶ 43.
56. Id.
research guide about law collections in Manhattan that are open to the general public and provides contact information for lawyer referrals in the New York City metropolitan area. Similarly, the law library at New York Law School states, “As a private institution New York Law School is not open to the public. While you are welcome to all the information available on our website, our reference services are restricted to the members of the law school community.” The law library’s website includes links to lists of resources compiled by the New York Public Library, the New York Courts, and the New York State Unified Court System for public patrons.

¶34 New York state law requires each county to “have a court law library with access to the general public.” New York City consists of five boroughs, which are also state counties: Manhattan (New York County), Bronx (Bronx County), Brooklyn (Kings County), Queens (Queens County), and Staten Island (Richmond County).

For public access libraries in Manhattan, the New York County Public Access Law Library is listed on the New York State Unified Court System’s website as the law library located in New York County. This county law library is only open from 9:30 a.m. to 4:30 p.m., Mondays through Fridays, and is closed on New York state holidays. A few other libraries that are not law-specific libraries contain some legal materials, such as the New York Public Library and City Hall Library. There is a significant amount of unmet legal need in New York City, and these unrepresented litigants face limited options for accessing legal resources at law libraries within the city.

<table>
<thead>
<tr>
<th>Law School</th>
<th>Public or Private Institution?</th>
<th>Law Library Open to the General Public?</th>
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</thead>
<tbody>
<tr>
<td>Benjamin N. Cardozo School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>Columbia Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>Fordham University School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>New York Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>New York University School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
</tbody>
</table>

61. Id.
64. See Public Access Law Libraries, supra note 62.
66. Law Collections in Manhattan, supra note 58.
Los Angeles

¶35 The 2010 U.S. Census indicated that Los Angeles had a population of 3,792,621.67 Four law schools are located within the city of Los Angeles, only one of which is public. However, all four of the law libraries at these law schools are closed to the general public (see table 3).

¶36 As described above, even though UCLA School of Law is a public law school, the law library is closed to the general public. The law library does not allow members of the general public to enter the physical space, but serves the public in other ways, such as by offering them access to certain legal databases anywhere on campus.

¶37 At Loyola Law School, Los Angeles, the only people allowed inside the law library who are not students, faculty, staff, and alumni of Loyola Law School or its parent institution, Loyola Marymount University, are “members of the legal education community, the bench and the bar.”68 This policy clearly excludes pro se patrons. The law library indicates that “members of the general public should contact the L.A. Law Library for legal resources and services.”69

¶38 Access to the law library at USC Gould School of Law is limited to USC law students, faculty, staff, as well as USC non-law students, USC staff and faculty, USC alumni, law students and faculty from other law schools, and attorneys and members of the judiciary (although “at certain times of the year, access will be further restricted to members of the USC Gould Community, USC faculty and staff, and eligible visitors with a demonstrable need to use the Law Library’s resources”).70 The website indicates that “members of the general public should contact the LA Law Library for assistance with legal research.”71

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68. Law students and faculty from other ABA-accredited law schools must show current law school identification upon entry, while lawyers and members of the judiciary must show a current California bar card. Access to the Library, LOYOLA LAW SCH. L.A. (Oct. 17, 2014), http://www.lls.edu/resources/library/aboutthelibrary/accesstothelibrary/ [https://perma.cc/Y8MQ-4E2D].

69. Id.


The L.A. Law Library is the “second largest public law library in the United States,” located in downtown Los Angeles near the Stanley Mosk Courthouse, and offers a collection of “Federal and State materials, a comprehensive California collection and one of the nation’s largest foreign and international law collections.” Users may access Lexis Advance, Westlaw, and other legal databases, but are limited to two computer sessions per day—either one hour per session for a database session or twenty minutes per session for an Internet session. The law library is open Monday through Friday and also on Saturdays. The L.A. Law Library has one director of research and reference services and six reference librarians. Like in New York City, members of the general public in Los Angeles face very limited options available for accessing legal resources within the city because they are largely all referred to the L.A. Law Library.

Chicago

The 2010 U.S. Census indicated that Chicago had a population of 2,695,598. Six law schools are located in the city of Chicago, but all of them are private law schools. In the state of Illinois, there are nine law schools—the three law schools located outside of Chicago are the public law schools in the state: University of Illinois College of Law (Champaign), Northern Illinois University College of Law (DeKalb), and Southern Illinois University School of Law (Carbondale). However, even though all of the law schools in Chicago are private, the law libraries at two of these schools are open to the general public (see table 4).

<table>
<thead>
<tr>
<th>Law School</th>
<th>Public or Private Institution?</th>
<th>Law Library Open to the General Public?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chicago–Kent College of Law, Illinois Institute of Technology</td>
<td>Private</td>
<td>Yes</td>
</tr>
<tr>
<td>DePaul University College of Law</td>
<td>Private</td>
<td>Yes</td>
</tr>
<tr>
<td>John Marshall Law School</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>Loyola University Chicago School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>Northwestern Pritzker School of Law</td>
<td>Private</td>
<td>No</td>
</tr>
<tr>
<td>University of Chicago Law School</td>
<td>Private</td>
<td>No</td>
</tr>
</tbody>
</table>

¶41 The law library at DePaul University College of Law is open to the general public as long as visitors ring a buzzer to gain entrance, sign in, and show photo identification. The law library at Chicago-Kent College of Law, Illinois Institute of Technology, is “generally open with free use of the full print collection to all,” but operates under a restricted access policy during final exam periods to maximize study space for students during December and May—during these periods, the library is only open to members of the IIT community and law students from John Marshall and the University of Chicago as a result of reciprocal agreements.

¶42 The law library at Northwestern Pritzker School of Law has a strict policy for entering the law library, and callers to the reference desk who are not affiliated with Northwestern University are frequently referred to the Cook County Law Library. The D'Angelo Law Library at the University of Chicago Law School, also not open to the general public, offers a list of law libraries open to the general public in the Chicago area on its website, including the Cook County Law Library.

¶43 The Cook County Law Library has one main library located in downtown Chicago and five branches in courthouses around the county, only one of which—the Criminal Court Branch—is also located within the city. The Cook County Law Library is open from Monday through Friday, but access is restricted on Saturdays for “attorneys and current litigants with a valid government-issued photo ID. Attorneys must also present a current ARDC card. Self represented litigants must present court papers stamped within the past year.” Users can access Westlaw, Lexis, HeinOnline, and other legal research databases at the library. Members of the general public in Chicago have more options for obtaining access to legal resources compared to those in New York City and Los Angeles, whose options are primarily limited to county law libraries.

78. E-mail from Eric Neagle, Access Servs. Librarian, IIT—Chicago–Kent College of Law Library, to author (May 12, 2016, 7:40 AM PST) (on file with author).
80. See Access, supra note 35.
81. I worked at the Pritzker Legal Research Center as a reference associate during my 3L year at Northwestern University School of Law. One question we had to frequently ask when fielding phone calls at the reference desk was, "Are you a member of the Northwestern Law community," because this would determine the type of databases that could be used in providing reference assistance. The title of this article is loosely based on that question.
83. The four other courthouses with law libraries are located in Skokie, Maywood, Bridgeview, and Markham. Law Library Branch Locations, Cook County Gov’t, https://www.cookcountyil.gov/service/law-library-branch-locations [https://perma.cc/JH3X-FHGC].
84. Law Library, Cook County Gov’t, https://www.cookcountyil.gov/agency/law-library [https://perma.cc/9FV3-G4Z3].
85. Legal Research @CCLL, Cook County Gov’t, https://www.cookcountyil.gov/service/legal-research-ccll [https://perma.cc/NV83-354M].
Seattle Case Study

¶44 Two law schools are located in Seattle: University of Washington School of Law and Seattle University School of Law. The Gallagher Law Library at the University of Washington School of Law is open to members of the general public—no identification is checked at the door, and anyone is welcome to use the library’s print resources as well as certain electronic resources. The law library at Seattle University School of Law is open to members of the Seattle University community, but its access policy allows members of the general public to purchase a day pass for $5 to access the library.86

¶45 The Washington Administrative Code (WAC) contains regulations regarding access to the law library at the University of Washington.87 The WAC states:

Access to the Marian Gould Gallagher Law Library is limited. Only University of Washington faculty and University of Washington law school students may use the library as a study hall (i.e., for use not related to that library’s materials). In general, the reading room is open for use by any person having need of the library’s legal materials. However, when necessary to serve the University of Washington faculty and University of Washington law school students effectively, the law librarian may restrict access to the library or any part of the library.88

¶46 Even though the WAC indicates that “[a]ll eligible library users other than University of Washington faculty, staff and students must present identification and register at the circulation desk upon entering the library,”89 in practice, this policy has not been enforced, or at least not during the 2015–2016 academic year. Access to the Gallagher Law Library is even more unrestricted and free than what the WAC depicts.

¶47 At the Gallagher Law Library, during the academic year when classes are in session, the library is open from 8:00 a.m. to 11:00 p.m. on Monday through Thursday, 8:00 a.m. to 6:00 p.m. on Friday, and 11:00 a.m. to 6:00 p.m. on Sunday.90 Public patrons frequently visit the reference office at the Gallagher Law Library, perhaps even more so than law students and faculty members, who generally prefer to submit their research requests or questions via e-mail.91

 [https://perma.cc/P77C-RRL9].
88. Id. § 478-168-070. Additionally, the Washington Administrative Code notes: In the use of library materials, the Marian Gould Gallagher Law Library serves the students, faculty, and staff of the law school, the students, faculty, and staff of other university departments, faculty of other colleges and universities, librarians of other libraries, judges, members of the Washington bar and persons who have a degree from the law school. The law librarian has discretion to specify other groups of patrons and to set priorities of use among all groups of patrons. However, University of Washington law school faculty and law school students have priority when other patrons need the same materials. The law librarian also has discretion to establish restrictions specific to particular library materials or a single library item.
89. Id. § 478-168-090.
90. Id. § 478-168-096.
91. Library Hours, Gallagher Law Library, http://guides.lib.uw.edu/law/hours#s-lg-box-7542441
 [https://perma.cc/Y2WS-T23Z].
91. I worked as an intern in the reference office during the 2015–2016 academic year as part of the University of Washington Law Librarianship program. Much of this section about the Gallagher Law Library is based on that experience.
The Gallagher Law Library permits public patrons to submit questions electronically and receives questions from people from across the United States through QuestionPoint. The responses provided to public patrons are generally much briefer than responses to questions posed by law faculty or students, and the amount of time spent answering these questions is typically much less than the amount of time spent answering questions from faculty and students. Questions from public patrons often pertain to landlord/tenant issues, divorce or child custody issues, or personal injury issues, and many of these questions cross the line into the realm of seeking legal advice. These types of questions are answered by pointing these patrons to resources where they can find the answers themselves. Responses to these questions typically include links to Gallagher Law Library research guides or resources available on the Washington Law Help website or on the Washington State Bar Association website, as well as referrals for where to obtain free legal assistance.

Public patrons are permitted to access certain databases, such as Lexis Academic, while at the Gallagher Law Library and are free to peruse the print materials. Popular print materials with public patrons include the Washington Law Practice series and the Nolo Press books. However, public patrons cannot access certain databases such as Lexis Advance and Westlaw due to the terms set out in the licensing agreements. When public patrons request access to one of these databases, they are directed to resources available online or referrals to organizations that provide free legal assistance.

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92. QuestionPoint is a system used by various libraries to manage reference transactions. Features, QUESTIONPOINT, http://www.oclc.org/en/questionpoint/features.html [https://perma.cc/73TR-A5YB] ("The QuestionPoint reference management service gives librarians tools to manage all aspects of reference service, including in-person, chat and email interactions, statistical reporting tools, and the ability to reach users on websites they use most."). For research questions pertaining specifically to the law of other states, a standard response is: "We are an academic law library in Washington State affiliated with the University of Washington School of Law. While we field research questions from people not affiliated with the University of Washington, we do not have sufficient resources to answer research questions that do not have to do with Washington State or U.S. Federal law."

93. A standard response to a question that solicits legal advice is: "While we cannot answer specific legal questions or provide you with legal advice, we are able to suggest resources that may help you. Here is more information about our reference service policies: http://lib.law.washington.edu/ref/ref.html."


95. A standard response to a question that makes it clear the patron needs assistance from a lawyer or attorney is: "The King County Bar Association also provides Neighborhood Legal Clinics for King County residents (no income restrictions). More information available here: http://www.kcba.org/pbs/NLC.aspx. The Northwest Justice Project has a toll-free telephone service called CLEAR for eligible low-income people and seniors to obtain free legal assistance with civil legal problems. More information is available here: http://www.nwjustice.org/what-clear."

96. The Westlaw User Agreement, for example, states: These terms and conditions govern your use of Westlaw and The West Education Network ("TWEN"). . . . If you are registered as a student, you may use Westlaw and West software solely for purposes directly related to your law school coursework (including pro bono and public service programs, minimal law school-paid stipend work, unpaid public internships or externships that are part of your graduation requirements), or for bar preparation purposes. Any other use, including any use in connection with your employment outside of the law school and any student...
restricted databases, reference librarians refer them to the Public Law Library of King County, which has different subscription agreements with Westlaw and Lexis Advance that allow the general public to use these legal databases there. The Seattle branch of the Public Law Library of King County has two computers that provide access to Westlaw and one computer that provides access to LexisNexis. The library limits computer use to two hours per person per day, and patrons cannot make reservations for computer use prior to their visit to the library.

The Public Law Library of King County has a branch in Seattle and a branch in Kent. The Seattle branch is located in the King County Courthouse, less than a mile from Seattle University School of Law and approximately five miles from the University of Washington School of Law. The Seattle branch at the Public Law Library of King County is open Monday through Friday from 8:00 a.m. to 5:00 p.m. Public patrons who work full-time jobs may find it difficult to visit the county library during these hours, but they are welcome to visit the Gallagher Law Library at the University of Washington on Sundays. Members of the general public who live in Seattle are more fortunate than those who live in metropolitan areas where all academic law libraries within the city are closed to the general public. Patrons in Seattle have more options for where they can go to conduct legal research.

The Seattle branch, located within the King County Courthouse, consists of only one floor. At any given time, nearly half of the library users typically are members of the general public, while the other half consists of attorneys conducting legal research while at court. The information desk is positioned right near the entrance to the library and is highly visible, but there are no chairs for patrons to sit down by the desk, so patrons must stand while obtaining reference assistance. According to Sarah Dunaway, Assistant Law Librarian, the information desk receives a higher volume of visitors than a reference desk at an academic law library probably receives. The lack of chairs at the desk encourages briefer encounters, allowing the law librarians to accommodate more patrons, but the librarians feel more pressure when patrons are standing by the desk instead of sitting down.

internship or externship where you receive remuneration of any kind, is prohibited. . . . Lawschool.westlaw.com is an Internet-based service that provides access to Westlaw and TWEN. We grant you a non-exclusive, nontransferable, limited license to use lawschool.westlaw.com. Westlaw User Agreement, WESTLAW, https://lscontent.westlaw.com/images/content/2012ClickwrapAll.pdf [https://perma.cc/FC3F-RS77].

100. This estimate and information in this section about the Public Law Library of King County is based on an interview conducted with Sarah Dunaway, Assistant Law Librarian for Reference Services, on May 4, 2016, as well as on three observations completed in May 2016. On Monday, May 9, 2016, at approximately 4:15 p.m., forty-five minutes prior to closing of the library but after various offices in the courthouse had closed, there were approximately ten users in the library, two of whom were using the computers. On Tuesday, May 10, at 12:45 p.m., toward the end of the lunch rush, there were approximately ten users in the library, three of whom were using the computers. On the morning of Friday, May 13, at 9:15 a.m., there were again approximately ten users in the library: several attorneys were working at tables or meeting in the conference room, a public patron was asking a question at the information desk, and three users who looked like members of the general public were using the computers. The busiest time of day, according to the interview with Dunaway, is generally during lunch hour because attorneys who are at the court visit the library to conduct research.
Members of the general public visit the information desk much more frequently than the attorneys using the library, but everyone who wishes to use a computer must request registration and login information from the information desk. The library has ten computers available for use by patrons, two of which provide access to Westlaw and one of which provides access to LexisNexis and SupportCalc, a “software program for compiling child support forms.”

Forms are commonly requested resources, but the law librarians cannot assist patrons with filling out the forms because they abide by a policy to not provide legal advice. However, these law librarians walk a finer line regarding the distinction between reference assistance and legal advice compared to law librarians at academic law libraries. Law librarians at the county law library frequently refer patrons who need legal assistance to either the Rita R. Dermody Legal Help Center, a clinic located at the library, or to neighborhood clinics.

Statistics from the King County Superior Court clearly illustrate unmet legal need in the area—in sixty-three percent of general civil cases, at least one party was not represented by a lawyer, while at least one party was not represented by a lawyer in eighty percent of domestic or family law cases. Additionally, “[i]n 91% of the landlord/tenant or eviction cases, only the landlord was represented by a lawyer,” while “[i]n 50% of family law cases, neither side was represented.”

The legal help center at the law library seeks to address some of this unmet need by providing “free, limited legal assistance to the library’s patrons.” The legal help center is managed by Marc Lampson, who serves as the library’s public services attorney and whose “newly created position is an innovative response to the ever growing phenomenon of people representing themselves in legal proceedings.”

The legal help center assists patrons with finding and completing court forms, “getting information about what court rules to follow,” or “learning how to initiate or respond to legal proceedings.” Patrons who need legal assistance must arrive at the law library between 8:45 and 9:00 a.m. and are assisted in an order determined by a lottery. Each person is eligible for one-time assistance—the purpose of this policy is to avoid giving the appearance of attorney representation.

101. Services, supra note 97.
102. Marc Lampson, Trends in Law Libraries: The Law Wants to Be Free, King Cty. Bar Ass’n (Apr. 2016), https://www.kcba.org/news/events/barbulletin/BView.aspx?Month=04&Year=2016 &AID=lawlib.htm [https://perma.cc/9TBN-PFHB] (“And finally a few law libraries in the United States, including the Public Law Library of King County, are now providing actual legal assistance for patrons who are or may be representing themselves in legal proceedings. This trend has been driven by at least two developments: one, changes in statutory and ethical rules that now allow lawyers to provide limited legal assistance to individuals without committing to full-scale representation of them; and two, the enormous rise of self-represented people in legal proceedings, many of whom find their way to the law library for help.”).
104. Id.
105. Lampson, supra note 102.
106. Orr, supra note 103.
¶54 The Rita R. Dermody Legal Help Center is one example of how law librarians can assist unrepresented litigants who visit law libraries. Some law libraries in other states have similar self-help centers where patrons can receive both research assistance and legal assistance. For instance, the model for the Rita R. Dermody Legal Help Center is the clinic at the Sacramento County Public Law Library. The Sacramento Civil Self-Help Center, located at the law library, “provides limited legal assistance in qualifying civil cases to those without attorneys, if they have a case in the Sacramento County court or reside in Sacramento County.” Although the staff of this clinic can assist patrons with simple complaints and answers for breach of contract, personal injury, and property damage, as well as enforcements of judgment or oppositions to civil forfeitures, the staff cannot assist patrons with landlord/tenant issues, family law, criminal law, employment law, or medical, dental, or legal malpractice problems.

¶55 Public patrons in Seattle have more options about which law libraries to visit when conducting legal research compared to public patrons in other cities, so the county law library does not receive visits from all patrons in Seattle who need to use legal materials.

Law Library Services

¶56 Law librarians are permitted to provide legal reference, but not legal advice. Not all academic law librarians are members of the bar, and most states forbid those who do not have a law license from practicing law. For example, the California Business and Professions Code states, “No person shall practice law in California unless the person is an active member of the State Bar.” Even if a law librarian is a member of the bar in the state where he or she works, he or she generally cannot provide legal advice in his or her capacity as a law librarian because academic law libraries have policies against providing legal advice for liability reasons. Whereas legal reference services consist of “recommend[ing] books and other sources, teach[ing] legal research techniques, and help[ing] in constructing searches,” legal advice consists of “interpreting and making conclusions about the legal problem.”

108. Orr, supra note 103.
Existing efforts of law librarians to assist the general public through online resources should not go unrecognized. As mentioned above, numerous academic law libraries compile lists of law libraries open to the general public or lists of law clinics where public patrons can obtain free legal assistance. Law librarians at various schools have also created extensive, detailed research guides specifically intended for use by members of the general public. For instance, the law library at Arizona State University Sandra Day O’Connor College of Law offers a “Self-Help Guide to Legal Information”—this guide “was designed to help public patrons with legal research needs on a variety of topics,” ranging from civil rights to family law to healthcare to taxes. Some public patrons may find these online resources to be convenient sources of information and adequate substitutes to stopping by the law library reference desk in person, but many other public patrons desire in-person or one-on-one attention.

Although some academic law libraries that are open to the general public offer reference assistance to public patrons, their main service priorities are geared toward addressing the needs of students and faculty members. Due to limited staff and resources, law librarians may only have the time to direct public patrons to certain resources for self-help, such as the Nolo series, desk books, or websites like WashingtonLawHelp.org, instead of being able to spend a significant amount of time assisting public patrons with their research questions. On the other hand, because public patrons are frequent visitors to the reference desk, the time that law librarians spend assisting these patrons in the aggregate may distract from the time they have to provide faculty members with thorough, in-depth responses to reference requests.

Mere access to legal materials is not the same thing as access to justice, which is why I do not argue that all law libraries should open their doors to the general public as the solution to the problem of unmet legal needs. Indeed, some collections at academic law libraries may not even contain the type of materials that would actually help public patrons: “The public law school library’s traditional relationship with external constituencies also faces challenges as collecting policies are necessarily redefined in ways that will limit the library’s ability to serve practitioners and members of the public.” Whereas the Gallagher Law Library collects certain types of materials specifically for public patrons, such as Nolo Press books or form books, other academic law libraries do not have these types of materials available in physical formats. Online databases that contain this content are likely restricted for student and faculty use. Instead of advocating for modifying access policies to libraries, this article focuses on alternative approaches to facilitate the provision of meaningful legal research assistance to public patrons.

Even though access to legal materials is recognized as a necessary prerequisite to achieving access to justice, access to justice extends beyond physical access to legal materials. In a 2014 report, the AALL Special Committee on Access to Justice wrote,

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116. Lenz, supra note 51, at 50, ¶ 44.
Access to justice includes affordable legal services; readily available legal information and forms; the ability to bring a case to trial without hiring an attorney; the unbundling of legal services; fair treatment and equality in the justice system regardless of social standing; and confidence that the outcome will be fair and just.117

ABA Standards 303 and 304

¶61 ABA Standards 303 and 304, which revise the law school curriculum requirements by adding an experiential learning requirement, went into effect beginning with the 2016–2017 academic year.118 The new ABA Standard 303(a)(3) “changed the ‘other professional skills requirement’ of former Standard 302(a) (4).”119 ABA Standard 303(a)(3) mandates that a law school curriculum require, among other things, that students complete at least six credit hours in one or more experiential courses.120 An experiential course must be “primarily experiential in nature” and must “(i) integrate doctrine, theory, skills, and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302; (ii) develop the concepts underlying the professional skills being taught; (iii) provide multiple opportunities for performance; and (iv) provide opportunities for self-evaluation.”121

¶62 Experiential courses include simulation courses, law clinics, and field placements,122 which are defined in ABA Standards 304 and 305. A simulation course, according to ABA Standard 304(a), is a course that “provides substantial experience not involving an actual client, that . . . is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member.”123 In contrast, a law clinic, according to ABA Standard 304(b), “provides substantial lawyering experience that . . . involves advising or representing one or more actual clients or serving as a third-party neutral.”124 Both simulation courses and law clinics must fulfill the same three requirements: “(i) direct supervision of the student’s performance by a faculty member; (ii) opportunities for performance, feedback from a faculty member, and self-evaluation; and (iii) a classroom instructional component.”125

¶63 ABA Standard 303(b) indicates that a law school must “provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service

118. Transition to and Implementation of the New Standards and Rules of Procedure for Approval of Law Schools, supra note 6.
120. Id.
121. Id.; 122. Id.
123. Id. at 17.
124. Id.
125. Id.
Interpretation 303-3 notes that “Rule 6.1 of the ABA Model Rules of Professional Conduct encourages lawyers to provide pro bono legal services primarily to persons of limited means or to organizations that serve such persons” and mentions that “law schools are encouraged to promote opportunities for law student pro bono service that incorporate the priorities established in Model Rule 6.1.” Interpretation 303-4 provides examples of law-related public service activities. The proposals in the following sections are aimed at addressing these new standards. Both proposals seek to meet the requirements of ABA Standards 303 and 304.

Proposed Legal Research Clinics

§ 64 Students at both public and private law schools can receive hands-on legal experience in specific areas of law by participating in a law clinic. For instance, Stanford Law School offers eleven clinics—some examples include the Criminal Defense Clinic, Environmental Law Clinic, Immigrants’ Rights Clinic, and Supreme Court Litigation Clinic. Outside callers to reference desks at academic law libraries often ask the reference librarians whether the law school has a clinic where they can receive legal assistance. Generally, clinics have specific intake policies or application processes, so law librarians do not transfer these patrons to the clinics at the law school, but instead may refer them to free legal aid clinics located nearby.

§ 65 Inspired by initiatives at county law libraries, this article proposes that law schools add a legal research clinic where law students are given the opportunity to assist members of the general public with legal research questions. This clinic would help reduce the amount of unmet legal need in the community and would help develop law students’ professional skills in interesting, engaging ways.

§ 66 Law librarians at many law schools currently provide support to clinics, and recent job postings indicate that law libraries are seeking librarians to specifically serve as liaisons with the clinics. But with a legal research clinic, law

126. Id. at 16.
127. Id. at 17.
128. Examples include
   (i) helping groups or organizations seeking to secure or protect civil rights, civil liberties, or public rights; (ii) helping charitable, religious, civic, community, governmental, and educational organizations not able to afford legal representation; (iii) participating in activities providing information about justice, the law or the legal system to those who might not otherwise have such information; and (iv) engaging in activities to enhance the capacity of the law and legal institutions to do justice.
130. For example, in April 2016, the Pritzker Legal Research Center at Northwestern Pritzker School of Law posted a job opening for a Clinical Services Law Librarian, who is responsible for “providing dynamic and proactive research, teaching, and reference support to the Bluhm Legal Clinic’s faculty, students and staff.” Tom Gaylord, Two Librarian Positions Available: Clinical Services Law Librarian & Special Collections, Digitization and Archival Services Librarian, PRTZKER LEGAL RESEARCH CTR. BLOG (Apr. 28, 2016), https://libraryblog.law.northwestern.edu/2016/04/28/two-librarian-positions-available-clinical-services-law-librarian-special-collections-digitization-and-archival-services-librarian/ [https://perma.cc/UK5L-9W7L]. The job description states, “With both live-client and simulation programs, the Clinic [is] an important part of the experiential learning
librarians would have the primary role in training the students and overseeing their work. However, the existence of a legal research clinic may ease the burden on law librarians in other ways. For instance, at a law library open to the general public, the existence of a legal research clinic would likely reduce how many public patrons come to the reference desk for assistance. A legal research clinic would also improve the law school’s image and the legal profession’s image because members of the community would begin to see the law school as a place that is willing and eager to engage with the community rather than as an elitist, closed-off institution.

§67 Some law schools already offer legal research clinics geared toward facilitating access to justice. Cornell University Law School operates a clinic similar to what is being proposed in this article.\textsuperscript{131} The Cornell Legal Research Clinic welcomes research questions from local nonprofit and legal aid offices, and these research questions are answered by law students under the guidance of an attorney instructor.\textsuperscript{132} The clinic’s instructors include a librarian at the Cornell Law Library.\textsuperscript{133} The website indicates that the clinic’s “[s]ervices may include drafting legal research memoranda, providing referrals to articles, cases, or other resources, preparing training or public education materials, and assisting in the preparation of speeches or presentations.”\textsuperscript{134} Students may present their research results “formally or informally, in writing or orally, depending upon client need.”\textsuperscript{135}

§68 This article proposes a legal research clinic similar in structure to the Cornell Legal Research Clinic, where law students assist unrepresented litigants with legal research questions. Such a clinic would provide law students with the opportunity to conduct comprehensive, thorough legal research for members of the general public, eclipsing the level of service law librarians are generally able to offer to public patrons. One or more law librarians would be responsible for providing legal research instruction to the students prior to allowing the students to handle research questions. This librarian or these librarians would also be responsible for distributing research questions, checking over the work completed by the law students, and responding to questions or concerns by the students, all of which are undeniably time-consuming tasks.

§69 The most obvious challenge in implementing a legal research clinic at a law school are the resources required for starting a new clinic. For instance, the legal research clinic would require one or more law librarians to oversee it. This is a huge task that would take them away from other job duties or may even require the law school to hire an additional law librarian, whose primary responsibility would be to oversee the clinic. Another possible challenge is that ABA Standard 303(3) specifies that a “faculty member” must oversee the courses used to fulfill the experiential opportunities and obligations that are a critical and required part of a student’s legal education, while providing a valuable and critical service to under-served members of society.”\textit{Id.}

\textsuperscript{131} Cornell Legal Research Clinic: About the Clinic, CORNELL UNIV. LAW SCH. LAW LIBRARY, https://law.library.cornell.edu/legal_researchClinic_about [https://perma.cc/2TFY-V4V5].

\textsuperscript{132} Id.

\textsuperscript{133} Amy Emerson is the director of the Legal Research Clinic and adjunct clinical professor of law. Cornell Legal Research Clinic: Instructors, CORNELL UNIV. LAW SCH. LAW LIBRARY, https://law.library.cornell.edu/legal_researchClinic_instructors [https://perma.cc/X588-QJS4].

\textsuperscript{134} Cornell Legal Research Clinic: About the Clinic, supra note 131.

\textsuperscript{135} Id.
learning requirement. Law librarians do not have faculty status at all law schools, so it is unclear whether student participation in a legal research clinic would only fulfill the experiential course requirement at schools where law librarians are considered to be faculty members.

Proposed Restructuring of Advanced Legal Research Courses

¶70 Not all students are interested in participating in a clinic, but these students should still receive opportunities to use and improve their legal research skills in meaningful ways to help those who need legal assistance. This article proposes integrating real-world legal research problems into advanced legal research courses, transforming the course from a professional skills course into an experiential course.

¶71 In the envisioned advanced legal research course that would meet the criteria of an experiential course, possible assignments throughout the quarter or semester include responding to research questions from public patrons. Law librarians at law libraries that serve the general public juggle with balancing requests from faculty members, students, and public patrons, but the level of service offered for faculty members and students is much greater than the level of service offered to public patrons. Whereas law librarians sometimes have to provide general, brief answers to questions from public patrons due to an overwhelming number of requests, each student in the class could take a research question from a public patron and respond to it thoroughly, with a significant amount of detail.

¶72 As a possible final project, students could be assigned to prepare comprehensive research guides to assist public patrons with researching certain subjects, such as family law, small claims, or civil procedure. At the end of the semester, the library could post these research guides on its website for members of the general public to use. Students would benefit from this assignment because they would need to familiarize themselves with and become experts in the resources available for a particular area of the law that interests them. Students would also receive practice writing about the law in a clear, easy-to-understand style, which will prepare them to communicate more effectively with clients in the future.

¶73 For students who are interested in pursuing a career in academia and would like to obtain some experience with teaching, or for students who wish to improve their presentation skills, another possible assignment would be for students to teach workshops to members of the general public. The workshops could cover topics such as where to find resources on specific legal issues or provide an overview of how the court system works.

136. For examples of standard answers to questions from public patrons submitted to the Gallagher Law Library via QuestionPoint, see supra ¶ 48 and accompanying notes.

137. Discussions of access to legal resources and access to justice frequently arise in the context of prison law libraries. For a similar proposal involving law students teaching legal research in that context, see Emily Shepard Smith, May It Please the Court: Law Students and Legal Research Instruction in Prison Law Libraries, 29 LEGAL REFERENCE SERVS. Q. 276 (2010) (proposing a program where law students would teach legal research in prison law libraries).
Law students are likely to be much more engaged and interested in working on assignments they know real people will rely on instead of just completing class exercises or homework assignments that are not put to use outside of the classroom. Working on real assignments that help members of the community will make the research skills learned in those classes much more memorable for students. This proposal requires a significant amount of effort from law librarians to agree to restructure their advanced legal research courses and experiment with new classroom ideas.

Benefits for Law Schools, Law Students, the Legal Profession, and Communities

The success of both proposals depends on the willingness of law librarians to oversee legal research clinics and to restructure advanced legal research courses. Within the law school, “[a]cademic law librarians are obvious candidates for promoting access to justice. Not only are they experts at providing access to legal information, but they are also in constant contact with students preparing to become lawyers.” Law librarians always need to think of creative new ways to prove their value to law school administrations, and taking on the role of helping the law school meet the new ABA Standards 303 and 304 is a great opportunity.

Both private and public law schools would benefit from adding legal research clinics and restructuring advanced legal research courses. Not only would these proposals fulfill the experiential course requirements of ABA Standards 303 and 304, but implementation of these proposals would also support a law school’s claim that the school is committed to producing practice-ready attorneys who engage in public service activities. These proposals seek to improve the perception of both law schools and the legal profession as a whole. It is no secret that the legal profession suffers from an image problem—“popular culture treats lawyers with contempt,” and many Americans believe that lawyers are both dishonest and overpaid. The proposed legal research clinics and restructured advanced legal research courses would allow law schools that have closed access policies for their law libraries to become more actively involved in facilitating access to justice, stripping away notions that law schools are elitist institutions that do not care about members of the general public.

Law students would benefit from the opportunities afforded to them by the legal research clinics and restructured advanced legal research courses. One obvious benefit is that students would receive the opportunity to utilize their legal research skills in meaningful, practical ways, which will help them become more effective attorneys after graduation. Law students will also hopefully recognize the value of public service through their experiences in law school and will retain a commitment to public service throughout the rest of their careers. Students will also have the opportunity to apply what they learn in professional ethics courses to

140. Americans Find Lawyers Necessary, but Overpaid and Dishonest, supra note 10.
situations encountered in experiential courses—for instance, when assisting public patrons for an assignment in an advanced legal research course, students must be careful not to give the impression that an attorney–client relationship has been formed. As one scholar has noted, “[b]y prioritizing the engagement of students in public service, law schools not only encourage higher student motivation and performance, but they also support the moral, emotional, and psychological health of law students and the legal profession.”

Finally, and perhaps most important, these proposals would benefit the community by reducing unmet legal needs and offering unrepresented litigants additional options for obtaining research assistance. These proposals do not alter the access policies at academic law libraries. These proposals go beyond offering physical access to resources in law libraries, instead taking another step closer to facilitating meaningful access to justice.

\section*{Conclusion}

This article explored the access policies of academic law libraries at the top twenty-five law schools and in the three largest metropolitan areas to determine whether members of the general public who live near those schools or in those cities have adequate access to legal materials. In consideration of the rationales behind closed access policies, this article concluded that although having an access policy that welcomes members of the general public at a law library is a traditional means by which a law library can facilitate access to justice, other alternative, effective options can be pursued instead. Rather than proposing that all law libraries should open their doors to the general public as the solution to the problem of unmet legal needs, this article instead proposed two recommendations that would allow law schools to offer meaningful opportunities for law students, under the guidance of law librarians, to assist members of the general public with their legal research needs.

Law librarians are the best-suited candidates to oversee legal research clinics at law schools and have the power to transform advanced legal research courses into experiential courses. The success of both proposals presented in this article depends on the willingness of law librarians to embrace leadership roles in these initiatives. These proposals offer exciting new opportunities for law libraries to demonstrate their value and importance in law schools.

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The Academic Law Library in the Age of Affiliations: A Case Study of the University of New Hampshire Law Library

Nicholas Mignanelli**

Difficult financial times have forced law schools to look for ways to restructure. One promising opportunity, especially for independent law schools, is affiliating with another law school or a university. How does this change impact the law library? This study of the University of New Hampshire Law Library seeks to provide a partial answer.

Introduction: The Age of Affiliations

¶1 There can be little doubt that the last several years have been a trying period for the American law school. Because of the Great Recession, law firms began to downsize drastically in 2010 and 2011.1 This created a “lost generation” of graduates who finished law school in the spring of 2010 and 2011 and entered a world of dismal employment prospects.2 Indeed, in 2011 the percentage of new law school graduates employed in full-time positions that require a bar license dropped to a

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staggering 70.6%, and the number of graduates employed in private practice dropped to less than half.³

¶2 As a result, the number of law school applicants fell from 87,900 in 2010 to 78,500 the next year, a difference of 10.7%.⁴ In 2012, the number of applicants fell further still to 67,900, a difference of 13.5% from the previous year.⁵ Law school applications have continued to fall in every subsequent year.⁶ As of 2015, the number of prospective students applying for admission to an ABA-accredited law school stood at 54,500.⁷ This trend is also evident in the number of people sitting for the LSAT, down to 101,700 in the 2014–2015 cycle from 171,500 in the 2009–2010 cycle.⁸

¶3 This decline in applicants has forced law schools to choose between (1) lowering admissions standards to keep enrollment at pre-downturn levels, or (2) keeping admissions standards the same and accepting fewer students.⁹ A school that chooses to lower admissions standards risks falling in the U.S. News & World Report rankings¹⁰ and damaging its reputation, thus creating a death spiral in which the quantity and quality of applicants deteriorates over time.¹¹ On the other hand, a school that keeps its standards the same will begin to lose tuition dollars immediately and will have to spend more money on scholarships to compete for the remaining applicants who meet those standards.¹²

¶4 All this has put law schools in a lose-lose situation in which they are condemned—regardless of which path they choose—to find ways to cut costs and restructure while they continue to weather the storm. Faced with this challenge, some law schools have chosen to affiliate or merge with other educational institutions.¹³

¶5 The first of these affiliations took place just before the trouble began. Southern New England School of Law (SNESL) had sought acquisition by the University of

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5. Id.
6. Id.
7. Id.
11. Huffman, supra note 9.
12. Id.
Massachusetts as early as 2005. In 2009, SNESL finally succeeded in its bid to become part of the University of Massachusetts System when the system’s board of trustees consented to allowing the Dartmouth campus to begin granting the degree of Juris Doctor. In 2010, the affiliation was finalized when SNESL donated its $23 million worth of assets to the newly formed University of Massachusetts School of Law.

§6 Just to the north, a similar deal was struck later that same year when Franklin Pierce Law Center located in Concord, New Hampshire, signed an agreement on April 27, 2010, to affiliate with the University of New Hampshire in Durham. Shortly thereafter, legal academe began to feel the aftereffects of the downturn, and other schools began to explore the possibility of affiliating as well.

§7 After over a year of negotiation, Texas A&M University reached an agreement to acquire Texas Wesleyan University Law School on August 12, 2013. Thus, Texas A&M University School of Law was born.

§8 Almost exactly one year later, Thomas M. Cooley Law School, the largest law school in the country, with several campuses in Michigan and Florida, formally affiliated with Western Michigan University and became Western Michigan University Cooley Law School.

§9 Eight months after that, the Rutgers University Board of Governors approved a proposal to merge the university’s two law schools, Rutgers School of Law–Camden and Rutgers School of Law–Newark, into one. On July 31, 2015, the merger was finalized when the American Bar Association (ABA) approved the merger and the two law schools became Rutgers Law School, a single entity with two locations.

§10 In December of that same year, longtime rivals William Mitchell College of Law and Hamline University School of Law, both located in Saint Paul, Minnesota, merged to become Mitchell Hamline School of Law.


16. Id.


19. Id.


22. Id.

¶11 In March 2017, Arizona Summit Law School, an InfiLaw System law school located in Phoenix, Arizona, signed an affiliation agreement with Bethune-Cookman University, a historically black college in Daytona Beach, Florida.\(^{24}\)

¶12 A distinction should be made here between the two types of affiliations: acquisitions and mergers. An acquisition takes place when a law school that was formerly independent or affiliated with another institution is acquired by a university. The University of Massachusetts School of Law, the University of New Hampshire School of Law, Texas A&M University School of Law, and Western Michigan University Cooley Law School are the results of affiliations.

¶13 A merger takes place when two law schools become one entity. Rutgers Law School and Mitchell Hamline School of Law are the results of mergers. The case of Mitchell Hamline School of Law is particularly interesting in that it is a merger in every sense of that word. The newly formed entity possessed two campuses, two libraries, and two of each faculty and staff position. Accordingly, difficult decisions had to be made. However, this article is a case study on how an affiliation agreement affects a law school library in the instance of an acquisition. Subsequent scholarship will be necessary to judge what happens to an academic law library facing a pure merger.

¶14 Will more law schools affiliate? At least one commentator suggests it is highly likely.\(^{25}\) Despite the major change in legal education that this trend represents, scholarship on the subject is lacking. In particular, no research examines how an affiliation affects the law school library. For this reason, a survey was conducted on the ways the 2010 acquisition of Franklin Pierce Law Center by the University of New Hampshire has impacted its law library. This article reports the results of this survey in the hope that it might serve to inform law librarians who face the prospect of a similar change at their institutions.

**A History of the Law School Formerly Known as Franklin Pierce**

¶15 Franklin Pierce Law Center (FPLC) was founded in 1973 by MIT lecturer Dr. Robert H. Rines, after both MIT and Dartmouth refused his proposal to establish a new kind of law school.\(^{26}\) Interestingly, Rines was also an inventor with more than 800 patents to his name, a composer who wrote music for off-Broadway productions and played a violin duet with Albert Einstein at the age of eleven, and a monster hunter who developed new technologies in a pursuit of Nessie that lasted more than three decades.\(^{27}\) Most significantly, Rines was a Georgetown-educated patent attorney who had grown frustrated with the state of intellectual property


(IP) coursework in legal education.\textsuperscript{28} Traditionally, IP training consisted of a very small number of highly theoretical courses, but Rines sought to create a law school that offered a wide variety of IP courses taught by practicing attorneys.\textsuperscript{29} He envisioned a law school in which students would learn by working alongside their professors on live cases, and where the board of trustees would consist of attorneys, scientists, and engineers.\textsuperscript{30}

\textsuperscript{\S}16 The school began its life in a former bull-breeding barn on the outskirts of Concord, New Hampshire.\textsuperscript{31} The name of the school was derived from a temporary affiliation with Franklin Pierce College in Rindge, New Hampshire, undertaken to boost the new law school’s chances of obtaining accreditation.\textsuperscript{32} The faculty was expected to spend significant amounts of time teaching students outside the classroom, and the curriculum emphasized cooperation over competition.\textsuperscript{33} This created a nonhierarchical environment that encapsulated the countercultural spirit of the late 1960s and early 1970s.\textsuperscript{34}

\textsuperscript{\S}17 At this time, the law library consisted of 30,000 volumes shelved in small rooms that had once served as cattle stalls.\textsuperscript{35} This collection was first developed by Phillip Hazelton, a retired law librarian who previously served the New Hampshire Supreme Court and the National Labor Relations Board in Washington, D.C.\textsuperscript{36} Hazelton agreed to come out of retirement for one year to establish FPLC’s library.\textsuperscript{37} He was assisted in this endeavor by Donald Garbrecht, the law library director at the University of Maine School of Law\textsuperscript{38} for whom that school’s library is named.\textsuperscript{39}

\textsuperscript{\S}18 Hazelton was soon succeeded by Louis von Gunten, who came to FPLC from the Los Angeles County Law Library and served as director for the next five years.\textsuperscript{40} It was in 1976, during his tenure, that the school moved from the old bull-breeding barn to its current location across from White Park and half a mile from the New Hampshire statehouse.\textsuperscript{41} By this time the collection had grown to 60,000 volumes, the whole of which was transported to the new location by students driving small vans in the middle of a heavy snowstorm.\textsuperscript{42}

\textsuperscript{\S}19 Director von Gunten was succeeded by Thomas Steele, who came to FPLC from Southern Methodist University.\textsuperscript{33} Steele served for three years and oversaw

\begin{itemize}
\item 29. Id.
\item 30. Id.
\item 31. Id.
\item 32. Richards-Stower, supra note 26, at 12.
\item 34. Id.
\item 37. History of the Law Library, supra note 35.
\item 38. See Pinsonneault, supra note 36, at 5.
\item 39. L. Kinvin Wroth, Memorials: Donald L. Garbrecht, 72 LAW LIBR. J. 341 (1979).
\item 40. History of the Law Library, supra note 35.
\item 41. Id.
\item 42. Id.
\item 43. Id.
\end{itemize}
further development of the law library’s holdings. In 1983, he was succeeded by Judith Gire, who previously served as assistant law librarian at FPLC and first came to FPLC from the University of Akron Law School Library. It was in this same year that the collection first exceeded 100,000 volumes.

Although he remained heavily involved in the life of his brainchild, Rines stepped down as dean in 1976 and was succeeded by Robert Viles. Before coming to FPLC to teach and serve as associate dean in 1973, Viles had served as the research director for the Commission on the Bankruptcy Laws of the United States and as an associate professor at the University of Kentucky College of Law.

With Viles at the helm, FPLC’s reputation as a center for the study of IP continued to grow. Under his leadership, the school’s reach became global when Viles pushed for the development of a master’s in intellectual property program designed to meet the needs of foreign nonlawyers working in the fields of science and technology. As the school’s IP program grew, so too did the amount of IP material in the law library.

In 1995, the only IP library in the Western Hemisphere opened on the newly renovated third floor of FPLC’s law library. The Intellectual Property Library would house “the school’s print and CD-ROM collection of materials dealing with patents, trademarks, trade secrets, copyright, licensing, and technology transfer.” The IP Library would also house the office of the IP librarian, the first position of its kind in the United States.

In June 1997, Viles stepped down and was succeeded by Interim Dean James Duggan, a member of the faculty and a future associate justice of the New Hampshire Supreme Court. Viles, who remained involved with the law school as president of the board of trustees, later died in a tragic swimming accident off the coast of Brittany while vacationing in August 1999.

In July 1999, Duggan was succeeded by Eric Neisser, who came to FPLC from Rutgers Law School–Newark. He served as dean for only four months before dying unexpectedly of a heart attack in November of that same year. He was succeeded by Professor Richard Hesse, who served as interim dean until a permanent

44. Id.
45. Id.
46. Id.
48. Id.
49. Id.
50. Duggan, supra note 33, at 4.
51. History of the Law Library, supra note 35.
52. Id.
54. Interview with Jon R. Cavicchi, Prof. of Legal Research & IP Librarian, Univ. of N.H. Sch. of Law (Apr. 25, 2016) [hereinafter Interview with Jon R. Cavicchi].
55. Robert Marshall Viles, supra note 47.
56. Interview with Jon R. Cavicchi, supra note 54.
57. Id.
replacement could be found.\(^5^8\) In July 2000, John D. Hutson, a decorated rear admiral and judge advocate general of the United States Navy, was named dean.\(^5^9\)

\(^25\) Discussions with the University of New Hampshire concerning the possibility of an affiliation commenced in October 2008 when the two institutions issued a joint press release announcing the creation of study committees charged with making recommendations.\(^6^0\) In March 2010, upon the recommendations of these committees, the affiliation was approved by the FPLC Board of Trustees and the University System of New Hampshire Board of Trustees, respectively.\(^6^1\) In April 2010, Hutson and UNH President Mark Huddleston signed an affiliation agreement at a ceremony attended by New Hampshire Governor John Lynch.\(^6^2\) That summer, the affiliation was approved by the ABA and the New England Association of Schools and Colleges.\(^6^3\) On Aug. 30, 2010, Franklin Pierce Law Center changed its name to the University of New Hampshire School of Law.\(^6^4\) Consequently, the Franklin Pierce Law Library became the University of New Hampshire Law Library. Shortly after the affiliation was finalized, Hutson announced his retirement, and former New Hampshire Chief Justice John T. Broderick Jr. succeeded him as dean in January 2011.\(^6^5\)

\(^26\) At the end of the 2011–2012 academic year, library director Gire retired after more than thirty years of service to the law library and the law school community.\(^6^6\) In February 2016, the newly created archive at the UNH Law Library was named for her.\(^6^7\) She was succeeded by Susan Drisko Zago, who came to UNH Law from Northeastern University School of Law in Boston, Massachusetts.\(^6^8\)

\(^27\) On Jan. 1, 2014, the law school formally merged with the University of New Hampshire when the two separate legal entities became one.\(^6^9\) The law school’s board of trustees was dissolved and replaced with the more informal “dean’s advisory council.”\(^7^0\)

\(^28\) In June 2014, Broderick stepped down as dean and was succeeded by Jordan Budd, a member of the faculty who previously served as associate dean for aca-

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\(^5^8\) Id.

\(^5^9\) Id.


\(^6^2\) Langley, supra note 17.


\(^6^7\) Sue Zago, Gire Archives at UNH Law, UNH LAW LIBRARY BLOG, http://library.law.unh.edu/archives [https://perma.cc/B7MX-4EU9].

\(^6^8\) Susan Drisko Zago, Univ. of N.H. Sch. of Law, https://law.unh.edu/faculty/zago [https://perma.cc/74A4-LZEJ].


\(^7^0\) Id.
On Mar. 7, 2016, Budd announced his intention to step down as interim dean at the end of the 2017 term.\(^7\)

On Mar. 8, 2017, the law school announced that Megan Carpenter, a professor of law and founder of the Center for Law and Intellectual Property at Texas A&M School of Law, will succeed Budd.\(^3\) Notably, she will be the first woman to lead the institution.\(^8\)

### How Affiliation Affects the Law Library

To create a guide to the ways an affiliation might affect a law school library, a semester was spent surveying the librarians of the UNH Law Library about their jobs and the way the affiliation has impacted their respective areas. What follows is the result of this effort.

### Reference

The affiliation has affected reference services in two ways.\(^9\) First, it has provided patrons with access to new databases like EBSCOhost and JSTOR.\(^10\) However, acquiring access to these databases for the benefit of patrons can be a challenging process because obtaining licensing across several campuses is a complicated matter.\(^11\) Whether one of the university’s campuses can gain access to a database that another one of the university’s campuses is licensed to use depends entirely on the policies of the publishing company hosting that database.\(^12\)

Second, members of the faculty at other colleges within the university have begun consulting the law library’s reference librarians with inquiries about issues of law relevant to their scholarly research.\(^13\) As integration continues and word of the legal reference services available to faculty members in other disciplines spreads, it is likely that this constituency will continue to grow.\(^14\)

### Interlibrary Loan

Even in the age of electronic resources, interlibrary loan remains an important function of the law library because it provides patrons with access to rare and special resources that are unavailable otherwise due to scarcity or cost.\(^15\) Additionally,
participation in the consortia created for the process of establishing a system of interlibrary loan provides librarians with the opportunity to share ideas and resources.  

¶34 Because of the affiliation, the law library gained access to two consortia: the Boston Library Consortium and the New Hampshire College and University Council.  

82 Additionally, because the law school and the main campus have yet to integrate systems, interlibrary loan still takes place between the law school and the University of New Hampshire's Durham and Manchester campuses.  

83 Since the affiliation, the University of New Hampshire's Durham campus has served as the law school's first preference for interlibrary loan requests.  

84 To cut down on the cost associated with interlibrary loan within the university, a van now circulates between the campuses several times a week.  

85 In this way, the affiliation has been positive for the law library in that its patrons now have access to material found in the collections of the university’s other libraries.  

Cataloging  

¶35 Cataloging is a complicated process that requires attention to detail and knowledge of the Anglo-American Cataloguing Rules. So long as the law library has physical volumes, it will need the services of a cataloguing librarian in some form. However, due to the affiliation, the day might come when the duties of the law library’s cataloguing librarian are transferred to one location where cataloguing for all the university’s libraries would take place.  

Archives  

¶36 While the affiliation has not had an immediate impact on cataloging, it has directly precipitated the creation of an archive.  

86 As the law school changed its name and reorganized, countless documents and artifacts faced possible disposal and needed a new home where they would be preserved for posterity.  

87 Thus, the Gire Archive was established.  

88 Housed in a room within the law library that formerly served as a classroom, the archive’s holdings include “documents, pictures, programs, awards and other types of materials related to the law school.”  

89 Matthew Jenks, the cataloging librarian, oversees the organization and preservation of the archive’s holdings.  

90 To publicize the archive’s highlights, Jenks has even taken to writing a series of posts entitled “Marking Passages, Preserving the Past: Icons and Moments” for the law library’s blog.  

82. Id.  

83. Id.  

84. Id.  

85. Id.  

86. Id.  

87. Id.  

88. Interview with Matthew Jenks, Cataloging Librarian, Univ. of N.H. Law Library (Feb. 18, 2016).  

89. Id.  

90. Id.  

91. Id.  


93. Id.  

Digital Repository

¶38 On a similar note, access to software gained as a result of the affiliation has enabled the UNH Law Library to join the “open access” movement.95 Sharing the University of New Hampshire's bepress-hosted Institutional Repository, the law library has created a section dedicated entirely to scholarship authored by the law school's faculty.96 The UNH Law Scholars’ Repository has enabled members of the public to access these scholarly works from anywhere in the world at no cost.97 An interactive map found at the bottom of the repository’s homepage reflects the impressive fact that material from the repository has been downloaded by users across six continents.98

Technical Services

¶39 The major change facing the law library’s technical services department is the potential for a merger of the law school’s integrated library system (ILS) with the main campus’s ILS.99 An ILS exploration team—consisting of professionals from the law library, the main campus library, and the Manchester campus library—has been formed.100 This team is tasked with discussing the benefits of adopting one ILS and evaluating potential products.101 Although a merger of systems is likely in the near future, a final decision has yet to be made.102

Special Collections

¶40 The Intellectual Property Library at UNH Law is not quite a special collection.103 It is, rather, a special library within a special library, akin to the Environmental Reading Room at Vermont Law School’s Julien & Virginia Cornell Library and the John Wolff International & Comparative Law Library at Georgetown University Law Center.104 However, for purposes of this article, readers will more readily identify UNH Law’s IP Library with the special collections found in law school libraries around the country.

¶41 While the affiliation has not had a major impact on the IP Library per se, it has provided patrons with access to specialized electronic resources, such as scientific databases hosted by Elsevier.105 However, gaining access to these databases has not been easy for the reasons discussed in the section on reference.106

96. Id.
97. Id.
100. Id.
101. Id.
102. Id.
103. Interview with Jon R. Cavicchi, supra note 54.
104. Id.
105. Id.
106. Id.
Additionally, the affiliation has provided the IP Library with new opportunities outside of its walls. Currently, the IP librarian, Jon R. Cavicchi, is exploring ways to serve students throughout the university by giving presentations on patent searching, open access, and copyright in undergraduate classrooms, especially those in the College of Engineering and Physical Sciences. This would help students to understand the ways in which the law affects their respective areas of study, while promoting IP law as a possible career path.

**Directorship**

Under the terms of the integration agreement governing the affiliation, the law school library retained its autonomy. However, a new role was added to the position of law library director: the director of the UNH Law Library now collaborates with the leadership of the UNH Manchester Library and the Diamond Library at UNH’s main campus in Durham, respectively.

So far, this has taken the form of meeting periodically to exchange ideas and coordinate efforts to share resources. As integration continues, however, more opportunities for the UNH Law Library to work with its counterparts in Manchester and Durham are sure to arise.

**Conclusion**

The prospect of any affiliation can cause anxiety, and for good reason: an affiliation could result in drastic cuts to a law library’s staff and budget. This was not the outcome in the UNH Law affiliation. Indeed, this article highlights the many new opportunities that can result from such a change.

These opportunities include serving new patrons, reaching out to other parts of the university, creating new departments within the library, and increasing the breadth of available resources. UNH Law proves that an affiliation can be as much about new beginnings as the end of an old order. However, this depends on the attitude of the library staff. By welcoming change and embracing innovation, the librarians of the UNH Law Library made the affiliation work for them and their patrons.

As mentioned previously, this article deals with the consequences of an affiliation that is an acquisition. It is imperative that research of this sort continue and that a survey be performed at an institution that has faced an affiliation in which two academic law libraries have been forced to merge and consolidate. Affiliations—both acquisitions and mergers—will continue, and it is important that law librarians prepare themselves through the exchange of information.

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107. *Id.*
108. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
In this brief essay, Professor Lind argues that rare books have an important place in the law school curriculum, and that by proposing a model bibliographic course, to be taught by law librarians, the subject of legal history can continue to further the educational mission of the modern law school enterprise.

Introduction

¶1 During the late nineteenth century, as the practice of law diversified to meet the evolving needs of a changing society, so too did legal education. No longer was it sufficient for law schools to merely supplement a student's practical apprenticeship through lectures and the reading of treatises; legal education was now approached as a “science” requiring both broad and in-depth instruction similar to a university education, the laboratory being the classroom and the library.¹ Since this science-based model of legal education was introduced, the intellectual content and curricular offerings have been debated, and standards have been written and rewritten to establish the appropriate criteria for educating future members of the legal profession without demanding that schools conform to a one-size-fits-all model.

¶2 In the 1920s, Alfred Zantziger Reed, under commission by the Carnegie Foundation, examined and reported extensively on the then current state of legal

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Douglas W. Lind**
education and its historical development. In so doing, he identified several “borderland subjects” that straddle the dividing line between legal and general university education, which included international law, comparative law, legal history, and jurisprudence. Reed noted that the presence of these subjects in the curriculum was ultimately a decision based on institutional needs and mission, but that as far back as 1891, a quarter of law schools considered jurisprudence important enough to be offered. Reed concluded his findings regarding the historic trend toward increased acceptance for borderland subjects as being “most clear that legal education demanded a widening rather than an intensifying of the law school curriculum.”

Almost one hundred years later, this trend has continued, and these borderland subjects, including legal history, have become more mainstream in modern legal education. History and jurisprudence courses are not explicitly required by the American Bar Association (ABA) in its standards of approval, and can arguably be seen as outside of the “Objectives of Program of Legal Education,” which seek simply to ensure that schools prepare students “for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.” Nevertheless, these courses are often standard offerings in the law school curriculum, and many consider them to be foundational to modern legal education.

Similarly, the significance of rare books to the study and understanding of legal history is equally well known and convincingly documented by both faculty and librarians within the legal academy. Professor Michael Hoeflich, writing of the dissemination of legal information and the development of the profession, succinctly concludes that “the history of law is also the history of the law book.” Joel Silver, representing the profession of librarianship and addressing the importance of rare book collections in law schools, points out that “contact with rare books touch[es] the spirit in ways that the law library’s other holdings cannot.” It is surprising, then, that despite this symbiotic relationship between textual history (taught by doctrinal law faculty) and the textual artifacts themselves (collected and curated by law librarians), the production, distribution, and reception of law books in the development and practice of law is largely ignored in the curriculum of modern law schools.

Within a broader university setting, the pedagogical importance of the textual artifact is well established, and courses examining the book as an object are not uncommon. Harvard, for example, has regularly offered book history courses in

2. Alfred Zantzinger Reed, Training for the Public Profession of the Law (1921) [hereinafter Reed, Training for the Public Profession of the Law]; Alfred Zantzinger Reed, Present-Day Law Schools in the United States and Canada (1928) [hereinafter Reed, Present-Day Law Schools].
3. Reed, Present-Day Law Schools, supra note 2, at 224.
4. Reed, Training for the Public Profession of the Law, supra note 2, at 300–01. Reed included legal history in the category of jurisprudence. Id. at 301.
5. Id. at 303.
both its Fine Arts and English departments since 1910. As one would expect, the objectives of those courses include an appreciation of the book as an art form and the study of the production and reception history of books in order to place an author’s works or a literary genre within a broader cultural context. Although indeed important to the understanding of both literature and art, analytical bibliographic knowledge is even more important in the study of law. The understanding of any given text is indispensable to historical legal scholarship, but what is often overlooked is that textual analysis is merely a subcategory within the larger discipline of analytical bibliography—not the other way around.

¶6 The famous bibliographer D.F. McKenzie, in his groundbreaking Panizzi Lecture on the Sociology of Texts, expanded the traditional definition of bibliography to be “the discipline that studies texts as recorded forms, and the processes of their transmission, including their production and reception.” Simply put, because form affects meaning, to speak and write convincingly about the content of any printed legal text, one must also understand the object in which the information was packaged, delivered, and received. Therefore, students of legal history should not only analyze the text (as it has been reproduced and is read in modern textbooks), but look beyond the intellectual content to the artifact itself and strive to learn everything they can from the physical evidence that has been preserved.

¶7 Although the production and distribution of legal information has been curricularly overlooked in law schools, it has not been ignored entirely. As a part of any legal history course, a librarian might be invited to visit briefly, bearing books to illustrate a text or a legal concept. But to a great extent, historical texts in their originary forms have been treated simply as physical supplements to the legal history curriculum. Unfortunately, this is simply not sufficient. A bibliographic examination of the artifact leads to greater textual and cultural understanding, it improves textual analysis by allowing for a better appreciation of a legal topic’s development and growth, and it improves legal research through bibliographic fluency. Put another way, an understanding of the production, distribution, and reception of legal texts leads to a more rich and complex understanding of legal history. To be truly effective from a pedagogical standpoint, this information needs to be presented in a semester-long, for-credit course, taught by librarians, and bearing the authority of being listed in the law school’s academic catalog.

Get Off My Lawn

¶8 Legal history faculty may bristle at the idea of a course such as this, taught by librarians, as encroaching upon their areas of teaching and scholarship. There might even be a fear of creating some sort of backdoor to be used by librarians wishing to become part of the doctrinal law faculty, the proverbial camel’s nose under the tent. Nothing of the sort. A course on the history of the law book is not a textual analysis course but a study of bibliography—of the objects themselves, of the production, distribution, and reception of the text. It is the study of the role of the printed book in the development of legal thought, the legal profession, and legal

education. Because expertise in bibliography, the underlying arrangement and architecture of legal texts, and methods of historical research resides within the library profession, librarians are the ones best suited to teach it.

¶9 While recognizing the importance of bibliographic instruction, an argument could be made that this is more suited to a class period or two within an existing legal history course. This argument ignores the reality that in-depth bibliographic instruction does not easily fit into a class or two of a course whose primary objective is textual analysis. Although a legal history course could surely touch upon many of the bibliographic concerns raised here, it would likely omit important discussions, such as the roles of the author and publisher in the distribution of the text; its cost and contemporary availability; the reception, proliferation, and reprinting of a given title; and the development of forms, indexing, and finding aids for use in the practice of law.

¶10 Legal history faculty should champion the cause of a stand-alone rare book course in the curriculum. Because law books are artifacts that are part of the historical social fabric, and therefore woven into the development of the law itself, a separate book history course creates many opportunities for faculty and librarians to work together. One can envision, for example, companion courses on the development of American legal thought: one analyzing text, the other discussing the cultural and economic factors underlying the production and availability of those texts, which allowed legal thought to proliferate.

Show and Tell for Credit?

¶11 Those charged with approving or denying academic law school courses (primarily deans and curriculum committees) can have their fears assuaged that a rare law book course would be a semester-long, rotating museum exhibit where librarians trot out treasures they have found in the library and hold them up for display to the ooohs and ahhhs of the paying student. A rare law book course is much more than that, but in a sense it is show and tell, and in a sense it is art appreciation. Students of legal history need to understand all of the human presences involved in the production, distribution, and reception of foundational legal texts, and this is best accomplished through the senses of sight and touch. The tactile nature of a book history course allows students to see the illustrations that accompany the text, to feel the differences between laid and wove paper, to see the impressions left by the hand-press type, to understand the underlying cultural purposes behind Blackletter type and the use of Law French, and to better understand the reciprocal relationships between printer, binder, seller, and consumer. A physical interrogation of the textual object and a determination of the number of extant copies can reveal the cultural and economic undercurrents not otherwise apparent in the reproduced text itself. A discussion of the printing and publishing practices of court reports can reveal, for example, that because early American court decisions such as *Dred Scott* were not readily available to the public, many had to rely on the heavily biased accounts presented in newspapers. Within a law book history course, students can also better understand the cultural and legal barriers to the proliferation of ideas through the control of the press and seventeenth-century requirements of imprimatur. Additionally, students can better see the development of legal topics such as slavery, women's rights, and LGBT rights
through collections of print artifacts and ephemera than they could in a traditional legal history course. A thorough examination of the adoption and adaptation of any legal text over time provides meaning to law; it tells not only the legal but the contextual cultural story; and although in part “show and tell,” it is intellectual nourishment. As such, it should be a welcome addition in the furtherance of the mission of all law schools.

The Spirit Is Willing but the Budget Is Weak

¶12 Assuming one generally buys into the idea of accepting a book history course into the law school curriculum, gatekeepers who are hesitant can point to budgetary constraints to deny its birth. Because most legal history courses work from reproduced texts, there is minimal fiscal impact; on the other hand, building a collection of rare books for instructional purposes simply sounds expensive. There is an assumption that the law school will have to build a separate room and divert money away from the general collection—the working research collection that has been built and maintained over years to meet the curricular and research needs of the institution. This is simply not true. I hesitate to use the phrase “rare books” to describe any proposed law book history course, but in some sense it is unavoidable. “Rare” is one of those wiggly words without defined parameters; it is probably best defined by Justice Stewart’s “I know it when I see it” test.11 Although difficult to define, it should not be avoided due to an assumed associated cost that later might have to be rationalized. In fact, it should be used liberally when promoting a book history course, as the word captures the attention of students, faculty, and administrators. It signifies something different. Something important. Something the institution can use to distinguish itself and point to with pride.

¶13 Regarding the content of any law library collection, librarians, not law school administrators, have the professional knowledge resulting from being the ones who decide what is rare. “Rare” need not describe only a manuscript copy of Bracton or a first edition of Blackstone. In fact, many items currently in most law libraries’ open stacks could be identified as “rare” and help tell the story of legal history. For example, maps commonly found in nineteenth-century government-produced documents can tell the narrative of westward expansion of legal thought, such as Indian removal, or the development of water and mining law. Additionally, the cost of building a collection of instructional materials is not as prohibitive as one might assume. Compare, for example, the cost and intellectual worth of a seventeenth-century nominative volume in folio and a single volume of a West regional reporter. One is an invaluable vehicle to illustrate the development of common law through the printing, publishing, and availability of legal precedent in printed form. Scholars can use it to examine signatures, woodcut initials, watermarks, catchwords, subscriber lists, illustrations, and ownership marks. The other, also a collection of cases, derives its educational and practical importance primarily from its textual content, which is more easily and preferably accessed electronically. It might be surprising to many that a usable copy of a more than three-hundred-year-old nominative costs roughly the same as one or two volumes of a current West regional reporter. As academic law libraries redefine their collections to better meet user

preferences and needs, it is interesting to consider the annual cost of maintaining in print a title that not only generates multiple volumes annually, but is also available and likely to be used in an electronic format, and then to reconsider the assumption of prohibitive fiscal impact of building a working rare book collection.

\[14\] Indeed, law schools have a fiduciary responsibility to both the institution and their students, and schools are also beholden to the accrediting body, requiring them to remain focused on their academic mission. But do law schools not also have a role in the stewardship of a liberal legal education in the true sense of cultivating a free (\textit{liber}) human being through offering instruction in “borderland subjects”? As stated earlier, legal history courses could arguably be removed from the curriculum and the school would still pass muster with the ABA, but legal academia feels (and rightly so) that these courses are important. Because an understanding of legal bibliography broadens an understanding of legal history, to deny instruction in book history denies the student a complete understanding of the larger topic. If a school is truly committed to providing a more complete appreciation of legal history, money can be found to build a good collection of “rare” materials for instructional purposes.

\section*{A Proposed Course Model}

\[15\] Because every law school differs in its mission and library collection depth, no single template can be used as a model for a law book history course, but at its core, instruction should focus on the history of the production, distribution, reception, and proliferation of legal information. One option is to mirror the course after ones currently offered at Southern Illinois University School of Law,\textsuperscript{12} and as part of Rare Book School held at Yale,\textsuperscript{13} but modified to the individual school’s mission or curricular needs. For example, a large research institution could devote more time to the bibliographic intricacies of the civil or canon law publications of continental Europe. A smaller regional law school could include units on the westward expansion of printing in the United States and its relationship to the practice of law, detailing the development and distribution of practitioner materials such as forms, summonses, and justice of the peace manuals. Course topics could also include the relationship of the common law system of precedent to the publishing of reported cases—from early English nominatives to Kirby’s Reports to the West National Reporter System; the human presences in the hand-press period versus the mass production of the machine press period and how they are tied to the growth and development of the practice of law; the expansion of legal education and its relationship to the printed book—from Blackstone’s lectures as Vinerian chair to Langdell’s first contracts coursebook to West’s standardization of casebooks; the symbiotic role of newspaper editors and readers in the publication and reception of legal information; and the impact of certain


\textsuperscript{13} Mike Widener, C-85—Law Books: History and Connoisseurship, Rare Book Sch., http://rarebookschool.org/courses/collections/c85/ [https://perma.cc/Z2PA-75FJ].
genres of legal publishing, such as trial pamphlets originally intended for the general public. Additionally, although the tactile nature of any book history course would require as much hands-on use of books as possible, digital artifacts and the present need for increased digital literacy should not be ignored. The changing nature of historical research methodology requires in-depth instruction in the benefits and drawbacks of digital collections as well as knowledge of finding aids and bibliographies available in both print and electronic formats.

**Conclusion**

¶16 Particularly in an age of increasing user preference for and reliance upon legal information in a digital format, knowledge of law books as textual artifacts not only has a role in the law school curriculum, it has a determining role. Because textual analysis is a subcategory within the larger discipline of analytical bibliography, a firm grasp of legal bibliographic knowledge will necessarily improve not only textual understanding, but historical research methods. An in-depth course examining the historical law book will undoubtedly open new avenues for both legal thought for future scholars and legal argument for future attorneys. To accept a course devoted entirely to the study of the law book requires a different, broader approach to legal education and, in some institutions, a shift in educational philosophy. It requires a new mindset to allow room where before there has been none.

¶17 The politics of survival requires that libraries reevaluate their roles in the larger law school setting. To simply collect and warehouse rare books is to deny libraries’ relevance in the mission of the law school and ignores the opportunity that librarians have to become invaluable as interpreters in the borderland between bibliography and textual analysis. The curricular gatekeepers and doubters should be reminded that when C.C. Langdell broke away in 1870 from the traditional instructional approach of lectures and memorization from treatises and began a style of teaching later to be called the “case method,” it was wildly unsuccessful, with all but seven students withdrawing from the course.14 Nevertheless, the Socratic Method is almost universal in some form in today’s law schools. Books are artifacts that tell the story of legal history and should not be forgotten. If a library currently owns a collection of rare books, it is incumbent upon the librarians to ensure that those items be used to further the educational mission of the institution. If it does not, build it and promote it, and they will come.

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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 2015 and 2016. If you would like to review books for "Keeping Up with New Legal Titles," please send an e-mail to bkeele@indiana.edu and nsexton@email.unc.edu.

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Reviewed by Angela Hackstadt*

* © Angela Hackstadt, 2017. Librarian, University of Arkansas School of Law, Fayetteville, Arkansas.
ters arranged by type of resource: secondary sources and practice materials, constitutions, case law, statutes and ordinances, legislation and legislative history, administrative and executive law, court rules, and updating. Chapters 2 through 9 begin with an overview of the resource, followed by information about Arkansas-specific sources, then federal sources. Descriptive chapter headings and subheadings throughout make it easy to navigate this book as a quick reference guide. Additionally, each chapter includes multiple tables, providing research steps, types of documents and where they are produced, and search connectors at a glance.

While the book is arranged by type of document or resource, the authors emphasize the importance of good legal research across the board. The book describes in detail types of legal authority and the government bodies that promulgate authority in Arkansas. Chapter 1 outlines the research process, including basic steps, a focus on the evaluative component of research, and the importance of reflecting on the process. Furthermore, the authors remind readers of the recursive nature of legal research throughout the text. This text could easily be adapted to a legal research course arranged by type of resource or to a course centered on legal research competencies.

The second edition has some organizational updates and expanded material. Chapter headings and subheadings are more detailed than in the first edition, and chapter 1 includes a new section on making a research plan. Updating research has its own chapter in the second edition. This new chapter describes the particular features of premium citators and gives side-by-side comparisons of different citator results for a single case and a single statute. The section on legal citation from chapter 1 of the first edition was expanded and made an appendix in the second edition. This new appendix explains the importance of proper citation, gives detailed instructions for citing specific sources, and gives examples in table format for both academic and practitioner citations. It also includes specific instructions for some Arkansas legal resources and describes the proper use of short-form citations. A new appendix provides a list of free and commercial online, print, CD-ROM, and PDF sources for Arkansas law.

The text explains important foundational concepts of government structure and authority in the context of the federal government and Arkansas government. The authors are careful to point out that not all secondary sources are created equal, and they give valuable tips on assessing how much authoritative weight a source may have. Readers are also reminded to revisit the original research question and to reflect on their own experience as part of the research process. The book emphasizes the importance of synthesizing multiple authoritative sources into a cohesive and persuasive argument, including addressing any authority that may conflict with a client’s arguments. This book is recommended for all law libraries in Arkansas and any academic law libraries that may serve students or the public who have an interest in researching Arkansas law. This book would be an excellent text for a legal research course and will be a valuable resource for law students beyond graduation.

**Reviewed by William R. Gaskill* **

§5 When President Donald Trump took the oath of office, did he gain the unreviewable, unstoppable power to order interrogators to waterboard prisoners and a whole lot worse, send Navy SEALs and Delta Force commandoes to track down and kill the newborn children of terrorists, and abandon allies who did not pay up, as he promised in his campaign? While Judge David J. Barron is highly unlikely to have had those questions in mind as he wrote the very timely *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS*, he would surely say the President did not gain those powers. Barron's answer is based on his review of the history of congressional-executive disputes over which branch has the final say on how America wagers war. He covers this new area of law and constitutional practice well and persuasively and sets the standard for others who will take up the issues involved in the future.

§6 Drawing from archival primary sources, Barron presents his thesis that who decides how to wage war is not answered in the Constitution because the powers to declare war, raise armies and navies, and direct spending are given to Congress, while the position of commander in chief is given to the President. He argues that the answer to the question “who decides?” is found in the practice of the branches asserting authority, reaching occasional crises, and everyone backing down in compromise. He starts with the Revolutionary War and explains how then General Washington allowed New York City to stand rather than burn it down as a military necessity in order to obey the Continental Congress. He covers President Jefferson’s decision to order that a blue-water navy be built despite Congress having appropriated no money to do so, assuming the money would be forthcoming when Congress returned. He recounts the different views on presidential authority between President Buchanan, who believed himself hemmed in by militia acts from decades earlier, and President Lincoln, who called up armies and suspended habeas corpus in open violation of the Constitution, believing the very survival of the nation demanded such acts. Barron also covers the familiar stories of President Franklin Roosevelt’s efforts to get around the Neutrality Acts in the 1930s to aid Britain and Congress’s ultimately successful efforts to end U.S. involvement in Southeast Asia in the 1970s. He concludes with an account of the more recent disputes between Congress and the Bush and Obama administrations over treatment of prisoners, surveillance, and other issues in the age of the war against terrorism.

§7 While Barron does not provide a “lesson learned” section, several themes develop throughout the book. First, Presidents tend to claim the power to do whatever they want in conducting war and similar military operations. President Jefferson did so in retirement; President Franklin Roosevelt threatened to impose certain economic regulations, despite statutory bars, as a matter of inherent authority; and President George W. Bush based much of his policy on the view that he had power to decide without interference. Second, Congress tends to reject such
claims and often makes the rejection stick; examples include ending the Vietnam War and imposing restrictions on how the war against terrorism should be waged. Third, there has yet to be a full-blown crisis about who decides; one side has always backed down and a workable compromise reached.

¶8 Fourth, lawyers have been intimately involved from near the beginnings of the Republic, working with Presidents to act within the law, even when the law does not seem to allow the President to do what he wants, and this involvement does not appear likely to end anytime soon. Fifth, there is no consistent position by any party or branch on where decision-making authority should reside. As President Truman noted, his power to act during the Korean War and the support for his actions depended on events in Korea, and once they turned south, so did his popularity and support from the Congress. Taken together, Barron's themes support his thesis that the fears of the Antifederalists in 1788 that a man on a big white horse would lead his army and overthrow the Republic have not been realized and, one can therefore argue, are not likely to come true even during a Trump presidency.

¶9 I strongly recommend this well-researched, well-written book not only for all academic and larger public law libraries, but for general academic and public libraries as well. The issues discussed are both timely (thanks to the 2016 presidential election) and timeless (because who has the final say over any issue under the U.S. Constitution is often unclear and effectively left to the clashing ambitions and interests of the two elected branches). Waging War is an outstanding guide to how that clash has played out in the past and offers guidance for how it will play out in the near future.


Reviewed by Alexandra Lee Delgado*

When we say to be mindful means to be without judgment, we are not suggesting you set aside your obligation to use your legal judgment, expertise, or experience in your law practice. What we are suggesting is you become aware of your mind's tendencies to constantly judge other people, their behaviors, as well as judge yourself. (p.64)

¶10 I was parented with contemplative practices. And although over the years there have been both crests and troughs in my commitment, contemplative practices have been a part of my daily routine since childhood. My experimentation with and exploration of various contemplative practices often make me the worst consultant for the beginner whose basic request for a book recommendation is answered with many questions. My intention is to try to match the beginner to a contemplative practice that may be immediately and individually meaningful. My anxiety is that if my recommendation is not a good match, the beginner will swear off all practices forever.

I may have found the reference I am comfortable recommending to beginners in the legal and legal information professions, without the questions some may feel are like cross-examination: *The Anxious Lawyer: An 8-Week Guide to a Joyful and Satisfying Law Practice Through Mindfulness and Meditation.*

Attorneys Jeena Cho and Karen Gifford organized this book as a guide to their meditation program by lawyers, for lawyers. They guide the reader through their personal stories and concrete examples from work life, such as client interviews, opposing counsel, and working with difficult people. A companion website includes free access (readers need only fill out a contact information form) to eight guided meditations that supplement the program. There are short exercises peppered throughout each chapter. Each chapter ends with a seated meditation, an “off-the-cushion” practice, and a meditation log to reflect on the week’s activities. The book begins with a summary of reasons to meditate, including data-driven ones, and how to prepare for the program. The book concludes with suggestions on how to take forward the practice of meditation beyond this eight-week program, tailored to the individual reader’s preferences.

To approach this review of *The Anxious Lawyer* with a beginner’s mind, I participated in a book club sponsored by the National Association of Women Lawyers. During an eight-week period in September and October 2016, I joined over a thousand registrants following a syllabus of reading one chapter each week, supplemented by the authors’ three live webinars and weekly e-mails with tips, audio podcasts, and additional resources. Registrants were invited to work through the program on their individual timeline. However, I found the reminders to “be present,” delivered weekly to my work e-mail inbox, very motivating to follow the recommended readings, listen to the podcasts, and attend the webinars.

While the authors have a gentle approach to guiding the anxious or the curious through their meditation program, they do not shy away from the difficult challenges of the legal profession. For example, while exploring the topic of compassion toward others, Cho shares a moment of toxic mentoring she experienced as a young attorney. She linked her practice experience back to thoughts of law school.

In torts class, students are taught only to analyze the facts, apply the applicable law, and come up with the conclusion. There is never a pause or consideration for the horrible tragedy the person in the case suffered. We gloss over the fact that the plaintiff in the case lost his arms, his wife, and his child because of the defendant’s negligence. We don’t consider how the defendant may feel for causing this horrible tragedy to occur.

What we fail to teach, and what we fail to learn in law school, is humanity. When a client comes into our office, often, it’s because they are facing an unbearable pain or suffering they cannot fix on their own. Of course, not all areas of law are so emotionally charged, but lawyers often fail to see and understand that humans are driven by emotions. (p.125)

I admit this made me wince more than once that particular week as I am an academic law librarian teaching legal research to 1Ls while they take torts.

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The time spent with the book club helped discipline my reading of the book for this review. And although my experience with Cho and Gifford’s program was deeply enhanced by the book club, I want to emphasize that neither participation in a book club nor strict adherence to the program is required. I admit that I did not do the majority of the exercises in the program; I have my own practice. Exercises can be used in different weeks. For example, I used the “off-the-cushion” practice from the third week (noticing transitional moments) before I met with a student while I was reading the final chapter on taking the practice forward.

The most valuable reminder from The Anxious Lawyer is to be in the present moment and reflect on this question: “Consider the past twenty-four hours: how many of the 86,400 seconds were you consciously aware of? Mindfulness also means ‘to remember.’ Remember what? To remember your priorities, your intentions, the people you love, and to remember to savor these precious moments” (p.64).


Reviewed by Brendan E. Starkey*

Now in its third edition, this title from Carolina Academic Press’s series on U.S. federal and state legal research remains the go-to resource on California law. Like previous editions, it eschews simple bibliographic listings in favor of a holistic approach that integrates process and materials. This makes it especially helpful in an instructional context, although seasoned researchers will also find it valuable.

Most of the book follows the classic approach of devoting a chapter each to the standard sources of legal information: cases, constitutions, statutes, legislative history, administrative law, citators, and secondary sources and practice materials. It distinguishes itself by highlighting anomalies in California’s system that might surprise readers accustomed to other jurisdictions. For example, the chapter on judicial opinions explains the unusual practice of “depublication” of court of appeal cases by the California Supreme Court, as well the prohibition on citation of court of appeal cases accepted for review. The chapter on constitutions cautions that more legal issues in California have a constitutional element than one might expect because of the state constitution’s unusual length and breadth. A chapter on legal citation compares the system used in the state’s own California Style Manual to that in the Bluebook. The chapter on administrative law touches on controversial “underground regulations” and how they are challenged.

The chapters on legislative history and administrative law are particularly helpful in describing the legislative and administrative processes of the state and where to find the resulting documents. While the California Public Records Act is

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admirably expansive, actually locating documents can be challenging without the kind of guidance offered by the authors here. Although the state is putting more and more material online, it is often necessary to track down information from less obvious sources, which are listed in the book.

¶22 The chapter on secondary sources is similarly valuable for newbies. A salutary effect of the state’s massive legal market is the number of quality treatises, practice guides, and encyclopedic resources available to researchers. That quantity, however, can make it difficult to choose. The book covers some of the best, including the Witkin series, Rutter Group practice guides, and materials from California Continuing Education of the Bar, a joint effort of the University of California and the state bar to provide materials to practitioners.

¶23 The book is rounded out by chapters on the research process, legal analysis, and legal research techniques, which pull everything together. This makes it a great primary text for an advanced legal research course at a California law school. Most graduates will practice in the state and its systems are analogous enough to other U.S. jurisdictions that those who do not will still be well served by the book’s approach. I used the second edition for this purpose, and it was well received. (The $29 list price did not hurt.)

¶24 Important updates include a focus on the newer LexisNexis and Westlaw interfaces due to the retirement of the “classic” platforms, along with more treatment of Bloomberg Law. Other online providers such as Fastcase and Loislaw are mentioned as well. Examples, tables, and charts are sprinkled judiciously throughout and are legible and straightforward.


Reviewed by Hugh J. Treacy*

¶25 A widely held view of our national government persists that only the U.S. Supreme Court and the President stand as bulwarks against an encroachment on individual rights. Noted scholar Louis Fisher presents an immensely readable account of congressional history offering as counterpoint numerous legislative efforts made by Congress to define, support, and defend individual liberties.

¶26 Evaluating the American presidency, Fisher notes that presidential historians did not begin to burnish the luster of their subjects as protectors of the nation until World War II. As for the Supreme Court, Fisher agrees with other authors that the period between 1789 and 1954 saw very few, if any, federal court decisions upholding individual rights.2

¶27 Fisher cites examples of congressional efforts to secure civil rights for black Americans that began with the Brown decisions of the mid-1950s. The author cites

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in particular the Civil Rights Act of 1964, the Voting Rights Act of 1965 and its reauthorizations, and the preclearance formula that was ruled unconstitutional by the Court in 2013. Fisher reminds readers that the Court determines the final outcome of issues only if Congress fails to act.

¶28 Fisher next examines the important role Congress has played in defense of women’s rights. In addition to the Equal Rights Amendment and abortion, Fisher addresses congressional efforts to legislate for equal pay and against workplace discrimination. Congress began this effort in the early 1960s with an equal pay statute and continued with the Lilly Ledbetter case in 2007. Congress also enacted Title VII of the Civil Rights Act of 1964, which prohibited gender-based employment discrimination with respect to compensation and other terms and conditions of employment. Later, pregnancy became a protected condition when the Pregnancy Discrimination Act of 1978 amended Title VII.

¶29 The Lilly Ledbetter case displays disparate viewpoints held by the Supreme Court and Congress on employment discrimination. Ledbetter was an employee of Goodyear Tire & Rubber Company from 1979 to 1998. After learning she had been paid less than her male counterparts, Ledbetter filed a charge of sex discrimination under Title VII and a claim under the Equal Pay Act of 1963. Her Title VII case went to trial, and Ledbetter won more than $3.8 million in back pay and damages. Goodyear appealed, and the Eleventh Circuit Court of Appeals ruled that Ledbetter could not prevail because of her failure to file timely charges with the Equal Employment Opportunity Commission.

¶30 The Supreme Court upheld the appellate court in a five-to-four decision, based on Ledbetter’s failure to file a timely claim. Ledbetter reasoned she could not file a claim until she had knowledge of the discriminatory acts by Goodyear. Congress acted to overturn the decision within days of President Barack Obama’s first inauguration, enacting the Lilly Ledbetter Fair Pay Act of 2009.

¶31 Shifting to children’s rights, Fisher examines congressional action against child labor. In 1900, almost two million children between ten and fifteen years old were employed on farms and in factories across the country, all working for lower wages than adults. States that permitted child labor therefore enjoyed a significant economic advantage over states with child labor laws. In response, Congress passed a bill outlawing child labor based on the Commerce Clause. Two years later, however, the Supreme Court overturned that law in *Hammer v. Dagenhart*, holding that the Congress lacked authority to prohibit the interstate transportation of manufactured goods produced by child labor.

¶32 Next, Congress enacted legislation that imposed an excise tax on net profits of businesses utilizing child labor within a prohibited age range. Three years later, the Supreme Court struck down the revenue law in *Bailey v. Drexel Furniture Co.*, 

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10. 247 U.S. 251 (1918).
citing congressional overreach that overpowered state sovereignty. After another unsuccessful attempt at a constitutional amendment, Congress enacted the Fair Labor Standards Act, which contained a child labor provision upheld in United States v. Darby.

¶33 With respect to religious liberty, Fisher provides the reader with an interesting example from congressional history. In 1984, a D.C. Circuit case upheld a Defense Department ban on the wearing of a yarmulke by an active duty U.S. Air Force officer. Congress responded with an amendment to a defense authorization bill permitting the wearing of religious headgear if it did not interfere with military duties. However, the Supreme Court later affirmed the lower court decision, ruling that a regulation requiring uniformity in military dress did not violate the First Amendment, even though Captain Goldman’s religion required him to wear a yarmulke. Congress settled the matter with a statute permitting members of the armed forces to wear neat, conservative religious apparel while in uniform.

¶34 Moving on to civil rights for Native Americans, Fisher notes that historically their treatment by the federal government had damaged their tribal and individual civil rights. He notes that only recently has there been an effort to protect Native American tribal culture and civil rights, most often by Congress and the President. In Employment Division v. Smith, the Court ruled that a state may prohibit use of peyote, even if part of a religious ceremony, if the state law is neutral and generally applicable to everyone. The decision generated significant opposition from religious groups.

¶35 Congress stepped into the controversy by enacting the Religious Freedom Restoration Act, intended to bolster the Free Exercise Clause by reestablishing the Sherbert test. A year later, Congress passed a statute permitting the use of peyote by Native Americans during their religious ceremonies.

¶36 Fisher offers a concluding chapter advocating five detailed suggestions to improve the institutional effectiveness of Congress as a defender of individual rights: Congress should (1) make adequate time for legislative work throughout each session; (2) refrain from abdicating congressional powers to the other branches of government; (3) improve and maintain adequate institutional resources like the Congressional Research Service; (4) eliminate the practice of gerrymandering congressional districts; and (5) limit campaign expenditures.

15. 312 U.S. 100 (1941).
21. Sherbert v. Verner, 374 U.S. 398, 403 (1963) (holding claimant must show the law imposes a “significant burden” on religious activity and the state must show the burden on the activity is the “least restrictive” means to preserve its “compelling” governmental interest).
¶37 In this slender volume, Fisher has written a fascinating and thoroughly researched analysis of Congress as a vital protector of individual rights. It should be found in every academic law library as well as in all college and university libraries.


Reviewed by Genevieve Blake Tung

¶38 The most fundamental aspects of our experiences are often hard to articulate or understand. When we are immersed in something as a matter of course, it becomes difficult to see the way it operates or imagine alternatives. Legal acts, defined in the broadest sense, can be immersive in this way. These can include formal laws, regulations, court decisions, and all other manifestations of the legal system. What we know (or do not know) about how the law operates will affect our collective and individual decision making, even in the most personal matters, and sometimes even unconsciously. For example, a split-second decision to jaywalk may be influenced by the jaywalker’s recognition that jaywalking may be illegal, whether other pedestrians are likely to follow suit, and the risks (if any) of being caught and punished.

¶39 In this engaging new book, Lawrence Friedman surveys impact, defined as the multitudinous ways that human behavior is causally connected to laws and legal institutions. The question of impact is fundamentally empirical. Friedman’s meta-analysis draws from hundreds of studies from many different disciplines, including many we might not consider “impact studies,” that examine a wide range of legal interventions. He also draws on his own scholarship on law and society, which has accumulated for more than forty years. Despite its reliance on “a volcanic eruption of research” (p.249), this book is remarkably readable, using extensive endnotes to create an accessible and colloquial tone in the main text. Friedman does not propose any grand theory of impact, nor does he make any claim on what types of legal causes are most likely to achieve their intended effects. Instead, he offers a way of thinking about the immersive nature of law.

¶40 This framework for analyzing impact begins with understanding legal information and how it is communicated. A message that is never communicated to a listener cannot have an impact. By the same token, legal information can only be as impactful as it is perceived to be by those who become aware of it. Among many vivid examples, Friedman cites the Tarasoff case, in which the California Supreme Court held that therapists had a duty to use reasonable care to protect people threatened by their patients.²³ Research has shown that physicians, social workers, and therapists who learned of the decision from their professional literature ultimately perceived it to stand for a different proposition: that they had an absolute duty to warn. The impact of the decision differed significantly from what the court might have intended or what a lawyer reading the case might anticipate.

¶41 After addressing communication, Friedman assesses the results of laws on behavior in terms of three “clusters” of motives: reward and punishment,


²³ Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334 (Cal. 1976).
peer-group influence, and individual conscience. These clusters can help frame our thinking on why people or organizations choose to comply, resist, or adjust to laws that would seek to regulate their behavior. This generalized grouping makes it easier to appreciate the commonalities between studies conducted in dissimilar fields that may support one another or undermine any general conclusion. For example, Friedman demonstrates that economists’ analyses of the deterrent effect of the death penalty differ, both in method and results, from those of sociologists. While both groups bring “heavy statistical artillery” (p.120), neither has succeeded in establishing consensus on the nature of the impact of capital punishment on crime and society.

¶42 It is challenging, if not impossible, to compare the magnitude of impacts between clusters. Fear of punishment will vary tremendously depending on the presumed severity and likelihood of being caught. Moral commitments will vary from person to person and will likely be more deeply rooted with respect to, say, homicide, than to jaywalking. Friedman also notes that some legal structures play an intermediary role: they have an impact on impact. For example, the availability of social safety nets, be they tools of public law (bankruptcy) or private law (insurance) can influence individuals’ choices to engage in behaviors, such as starting a new business, that policymakers might independently want to incentivize.

¶43 Readers who are seeking simple answers about how to make laws achieve a desired outcome will likely be disappointed. Friedman concludes with only one generalization, which is that no law can be totally effective. This is attributable to the endless variety of people as individuals with diverse social circumstances. As it is, “[w]e are used to a world of imperfect impact” (p.131). This lack of consistency may itself be immersive, in that it may leave some readers with the feeling that a comprehensive understanding of impact is unattainable. What this work does do, however, is provide a way of plotting an approach to law as a social force. As such, it is a valuable read for law students and scholars, and judges, lawmakers, and bureaucrats at every level. Without thoughtful consideration of how law impacts lived experience, we are more likely to make normative conclusions based on unfounded assumptions, and ultimately live under the law of unintended consequences.


Reviewed by Deborah L. Heller*

¶44 Edward B. Foley’s Ballot Battles: The History of Disputed Elections in the United States chronicles the history of such elections from the founding of the country through the 2008 U.S. Senate race in Minnesota. This journey looks at contested elections at all levels of government and through different periods in history. Some of the accounts will be familiar to readers, while others may provide new lessons on the intricacies of the U.S. electoral system.

¶45 The book begins with a prologue outlining one of the main problems that arises in contested elections—lack of impartiality—by detailing the disenfranchise-ment of a voter in Ohio during the 2012 election. For better or worse, the United States has developed a two-party system in which Democrats and Republicans control most of the power. Many countries have such a system and there is nothing intrinsically wrong with it; the problems arise, however, when someone must make a decision about a contested election. With a two-party system, unless there are specific measures in place, the tribunal that makes a decision is not necessarily impartial. The members will always have an allegiance to one candidate or the other.

¶46 The British incorporated the idea of George Grenville, British Prime Min-ister in 1765, that impartiality is the overall goal for the adjudication of disputed elections. Although the actual mechanisms of the Grenville Act did not work, the ideal remained. America, however, did not include any such measures in the found- ing of the country. As such, many contested elections do not have impartial tribu-nals, and the ultimate decision may be seen as unfair or unjust to one of the candidates.

¶47 An introductory chapter follows the prologue and outlines what the book covers. Important election law topics such as gerrymandering, campaign finance, and the rules and procedures for casting rather than counting ballots are not cov-ered in this book. Those elections that end in peaceful and accepted recounts are also not detailed. As its title suggests, this book looks only at disputed elections. The ideals of a fair count are looked at through the scope of eliminating dishonesty and inaccuracy. The book seeks to educate about the past, all the way back to the found-ing, in order to improve the procedures used to resolve vote-counting disputes in U.S. elections.

¶48 Ballot Battles examines disputed elections in the framework of historical time periods and specific aspects of contention. The eras discussed include the founding era, Civil War era, Gilded Age, Progressive Era, mid-twentieth century, 1960s, and 1980s and 1990s. The 1876 Hayes versus Tilden presidential election and the 2000 Bush versus Gore presidential election are discussed in great detail in separate chapters. Minnesota’s 2008 U.S. Senate election between Norm Coleman and Al Franken is the last disputed election covered.

¶49 Foley’s conclusion brings together the tales discussed in the rest of the book. It highlights the need for a fair count and a neutral arbiter of disputed elections. It also highlights possible changes that could help in the event of a disputed election. For instance, Foley suggests that Congress replace the Electoral Count Act of 1887 with simpler procedures to empower an impartial Electoral Count Tribunal to adju-dicate any dispute that arises when the joint session of Congress convenes under the Twelfth Amendment to receive the electoral votes from the states. Another sugges-tion is to amend the Twelfth Amendment to eliminate the joint session of Congress and make the impartial Electoral Count Tribunal the sole body in charge of tallying state electoral votes. Foley also proposes that the Electoral College should meet on January 1 rather than in mid-December to allow more time to adjudicate ballot-counting disputes.
¶50 In addition to an index, there are endnotes and an appendix of data on overtime elections (“elections for which the outcome remained unsettled for longer than the day immediately after Election Day” [p.363]). Although fairly common in publishing, I find endnotes cumbersome and harder to use than footnotes since they require turning back and forth between pages to find the information and have a tendency to interrupt the flow of reading. That being said, the endnotes in this text are well organized by chapter and tremendously thorough, consisting of ninety pages of information. This book should be included in the collection of any school that has a course on election law. Considering the contentious nature of current elections even if there are no disputed ballot counts, *Ballot Battles* makes for an informative and timely read for any election cycle.


Reviewed by Robert F. Brunn*

¶51 The two most significant inventors of legal research methods for United States law were not attorneys, but salesmen: one in Chicago and one in Minnesota. They had the business acumen to give attorneys what they needed and to drive out or acquire competing businesses.

¶52 Based in Minnesota, John West set up the National Reporter System, which eventually covered all the states through its regional reporters. West then added reporters that covered the federal courts. He also set up a Key Number Digest System that covered both the state and federal courts. Joseph L. Gerken’s example of West’s knack for identifying and meeting customer demands is West’s arranging “to have Minnesota’s rules of practice translated into Swedish, ‘an effort that was much appreciated by the region’s many Scandinavian-born lawyers and judges’” (p.37). The other salesman, Frank Shepard, organized a citation system that first covered Illinois cases and then gradually spread, state by state, to cover all the states; at the same time, Shepard was adding federal courts to his system. Today these innovations by West and Shepard are still the basis for legal research of U.S law: Thomson Reuters owns Westlaw and LexisNexis owns Shepard’s.

¶53 Gerken’s *The Invention of Legal Research* discusses the circumstances that prompted reporter Henry Wheaton to file a lawsuit against his successor, Richard Peters, and how this resulted in a landmark decision determining whether U.S. Supreme Court decisions can be copyrighted.24 Gerken points out that the middle decades of the nineteenth century saw a gradual transformation in the nature of case reports, including the fact that judges in many jurisdictions began issuing their decisions in writing. The upshot of this was that the reporter no longer needed to observe every session and take down counsels’ arguments, judges’ questions, and the rendering of oral opinions.

¶54 Gerken points out that because lawyers argue from precedent, the most common research task, particularly when preparing briefs, is to find cases in one’s favor. Thus digests came about because the increasing number of cases was more than any one attorney could read. Another reason for the development of digests is

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that cases are put in reporters roughly in chronological order. To help attorneys find relevant cases on a particular subject, digests are necessary. Digests do this by giving short descriptions of the key holdings, accompanied by a citation to these cases.

\(\S 55\) The brothers Benjamin Vaughan Abbott and Austin Abbott developed digests, and for a time they also practiced with their younger brother, Lyman Abbott. President Grant appointed Benjamin Abbott as one of the three commissioners charged with the codification of federal statutes. The resulting product of this commission was the *Revised Statutes of the United States*. The first venture of Benjamin and Austin Abbott was a digest of New York state court cases. Subsequently they made a topical study of treatises on every subject. In that study, the Abbotts “were less concerned with the texts of these treatises than with their topical structures, as reflected in the table of contents and subject headings in the books” (p.52). Based on this study, they composed an outline of American law. The Abbotts came up with “a two-tiered system consisting of few hundred topics, each broken down into sections. The number of sections for a given topic varied greatly, some having only a few and others more than a hundred” (id.). This was an attempt to fit case notes into a system accounting for every legal issue and was the predecessor of West’s Key Number System.

\(\S 56\) While case law is significant and must be considered, another component of U.S. law is that the great majority of cases concern the interpretation of a statute. In interpreting a statute, a court may look at the statute's language, legislative history, or even nonlaw sources. Gerken comments that in most situations, the court will look to the cases that have construed the statute. This was not always the situation. “In the early years of the Republic, the Common Law was by far the most important source of legal principles” (p.81). During the nineteenth century, many statutes were enacted, a process that accelerated during the New Deal and then again in the 1960s with social and civil rights legislation.

\(\S 57\) In the nineteenth century, two movements, both described as “codification,” occurred. One was the process by which all laws of a certain subject matter, such as banking, penal, or taxes, would be put in one place of the statutes. The other codification was a movement to put “all legal principles [into] a universal statutory code” (p.82). Proponents of this latter codification method included Jeremy Bentham and William Sampson.

\(\S 58\) Gerken describes the *Pennsylvania Law Journal* as an influential legal periodical in the mid-nineteenth century. It addressed many of the practical issues of that era and also “promoted the notion of the law as a science” (p.153). Virginia had a number of legal periodicals, one of which, the *Virginia Law Register*, stopped publishing when the University of Virginia School of Law started publishing the *Virginia Law Review*. The end of what Gerken calls “the heyday of professionally edited law journals” (p.159) resulted in the *University of Pennsylvania Law Review* and *Harvard Law Review*. Since its inception in 1887, the *Harvard Law Review* has been edited by law students. Student-edited since 1896, the *University of Pennsylvania Law Review* is the successor to the *American Law Register*, which, under various names, has run continuously since 1852.

\(\S 59\) *The Invention of Legal Research* is a well-written and well-researched book. It starts at the beginning of the Republic after the American Revolutionary War and shows us the origins of our current legal research methods. The book has a useful bibliography for each of its chapters and also a name index.

Reviewed by Leslie A. Street*

¶ 60 Justice Ruth Bader Ginsburg, affectionately known by her admirers as the Notorious RBG, has unambiguously left an indelible mark on women’s rights, the law, and popular culture, even as her work on the U.S. Supreme Court continues. In *My Own Words*, Ginsburg, Mary Hartnett and Wendy W. Williams pull together some of her most salient and perceptive words over her long career to produce a work entirely relevant to the ongoing challenges of twenty-first century America.

¶ 61 *My Own Words* is but a small collection of the voluminous written record of Ginsburg’s long and distinguished career. It predates completion of a more traditional biography, thought best to be deferred “until my Court years neared completion” (p.xiii) (which many of us hope may still be several years in the future). Because *My Own Words* is only a small selection of Ginsburg’s written work, it is a fascinating and useful study of which words she personally selected to be included in the book, which is meant to partially define her career. The selection offers a glimpse behind the steely, distinguished façade most observe of Ginsburg as Supreme Court Justice (even as popular media has reimagined her in more approachable terms), as one section of the book covers her earlier years and “lighter side.” Of course, Ginsburg also includes sections devoted to her work on gender equality and her views on judging and justice.

¶ 62 *My Own Words* brings together words written and spoken in a variety of venues and forums: from her eighth-grade school newspaper editorial championing the Charter of the United Nations, to her recent remarks at a memorial service recalling her friendship with her colleague Justice Antonin Scalia. Admirers of Ginsburg will savor this collection of her writings, in particular her remarkable ability to diagnose the ills of society while offering optimism and hope for overcoming them. Consider the words written by a thirteen-year-old Ruth in the Bulletin of the East Midwood Jewish Center:

> We are part of a world whose unity has been almost completely shattered. No one can feel free from danger and destruction until the many torn threads of civilization are bound together again. . . . There can be a happy world and there will be once again, when men create a strong bond towards one another, a bond unbreakable by a studied prejudice or a passing circumstance. (p.16)

These words were written in response to the aftermath of World War II and the unspeakable tragedy of the Holocaust, but they are also shockingly prescient for our own time.

¶ 63 Ginsburg, only the second woman to be confirmed to the Supreme Court, devotes many pages to her speeches on prominent women in U.S. and legal history, as well as an entire section of the book to some of her speeches and written words dealing with issues of gender equality. She includes excerpts from her work on litigating issues of gender equality prior to her time on the bench. Considering the multitude of issues raised in regard to gender equality in the most recent presi-

* © Leslie A. Street, 2017. Clinical Assistant Professor of Law and Assistant Director for Public Services, Kathrine R. Everett Law Library, University of North Carolina School of Law, Chapel Hill, North Carolina.
dential election, Ginsburg’s words written in a reply brief to the U.S. Supreme Court in 1970 still are worth pondering:

Women who seek to break out of the traditional pattern face all of the prejudice and hostility encountered by members of a minority group . . . . For women who want to exercise options that do not fit within stereotypical notions of what is proper for a female, women who do not want to be “protected” but do want to develop their individual potential without artificial constraints, classifications reinforcing traditional male-female roles are hardly “benign” (p.136).

¶64 It is unsurprising that many writings and excerpts are chosen that call out the trailblazing nature of Ginsburg’s work. Equally moving is Ginsburg’s choice to include so many of her words that paid tribute to other great women who paved the way for her, including Belva Lockwood, Sandra Day O’Connor, and Gloria Steinem. Particularly moving is a lecture that Ginsburg included discussing the contributions and work of the wives of prior Supreme Court Justices. Ginsburg’s lecture (and subsequent law review article) highlighted the work, wit, and intelligence of Supreme Court partners who were largely forgotten by others.

¶65 Lawyers, law students, law librarians, and others who enjoy discussions of judicial theory and reasoning will appreciate the section of the book devoted to Ginsburg’s views on judging. Ginsburg, known for reading her dissents from the bench in the Roberts Court’s years, includes a lecture about her views on the power and value of dissents, deemed particularly worthwhile in appealing to the wisdom of future audiences. She follows up her views on dissenting opinions with several of the bench dissents that she has written, highlighting her views on the value and power of dissents.

¶66 Although scholars and admirers of Ginsburg may already be familiar with the bulk of her individual writings included in My Own Words, the compilation and organization are an important addition to her distinguished career. The excerpts are preceded by biographical context and comments about each work, giving new context and information about how to view her work, contributions, and achievements. Not only is this a book that all law libraries will wish to have in their collections, it is a work that all students of legal history, all women who choose to make the law their career, and all people who celebrate the defense of civil rights and liberties will also wish to have for their home libraries.


Reviewed by Tara Mospan*

¶67 In 2015, there were nearly 1.3 million cases filed in the U.S. federal court system—in excess of 7000 filings in the Supreme Court, 411,000 cases filed in the ninety-four district courts and thirteen courts of appeal, and 860,000 petitions filed in the bankruptcy courts.25 These numbers clearly illustrate the important role that

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the federal courts currently play in the American legal system. The courts have not always occupied such a central position in that system, however. Rather, the federal judiciary functioned in fits and starts for decades amongst fierce political battles, struggles over state and federal jurisdiction, and debates on the role of the judiciary within our government’s system of checks and balances. In *The Federal Courts: An Essential History*, Peter Charles Hoffer, William James Hull Hoffer, and N.E.H. Hull take a close look at the development of the federal judiciary from its founding in 1787 through the reforms of the 1980s. Their well-researched and engaging book provides an enlightening examination of how the federal judiciary has both impacted, and been impacted by, the social, economic, and political systems of our country.

¶68 Part I of *The Federal Courts* chronicles the years 1776 to 1860 and opens with the American Revolution. It richly describes the deliberations and conciliations among the delegates of the Constitutional Convention that resulted in the establishment of the national judiciary in 1787. This section of the book goes on to recount the issues that plagued the newly formed federal courts and introduces three significant themes that run throughout the book: first, the connection between politics and the judiciary; second, the tension between states’ rights advocates and nationalists who support greater federal power; and third, the position of the judiciary within the three branches of government. Part I concludes with an examination of how slavery became a particularly difficult subject for the federal courts to adjudicate during the antebellum years, as the courts were pulled into the center of the conflict between free-state and slave-state laws.

¶69 The years 1861 to 1929, covered in part II, saw several exceptionally trying periods for the nation and thus also for the courts. In 1861, the southern states seceded to form the Confederate States of America and the Civil War erupted. Federal courts located in the Confederate states ceased functioning, and those in the Union states faced unique wartime conditions, including the suspension of the writ of habeas corpus. Reconstruction was not much easier for the federal judicial system, as the courts grappled with their role in rebuilding a nation torn apart by war. Furthermore, as demographics shifted from rural to urban and the national economy was transformed by technological advances during the Gilded Age and the Progressive Era, the courts themselves underwent a period of profound change. At the same time, the courts were challenged by the demands of an ever-increasing caseload.

¶70 The final section of the book, part III, tells the story of the federal courts during the period from 1929 to 1986. During this time, the country weathered the Great Depression, World War II, the Cold War, and the civil rights movement. There was dramatic growth in litigation in the 1970s and 1980s, which required an increasingly robust court administrative system. There was also a gradual change in the composition of the federal bench, with a growing diversity among the judges appointed. Overall, during this period the federal bench finally accepted the “idea of an integrated national judicial system” (p.277)\(^\text{26}\) and embraced its role in effecting social change.

An afterword to the book, written by John S. Cooke and Russell R. Wheeler, with Daniel S. Holt and Jake Kobrick of the Federal Judiciary Center History Office, describes the courts in the years from 1987 to 2015. The authors of this section detail how the changes put in motion in the preceding decades continued, with diversity increasing on the bench and substantial growth in the number of filed cases. This increase in cases necessitated expanding the number of court personnel and adopting technological tools to help with the increased workload. However, while the federal court system as a whole was deciding more cases, the number of petitions for certiorari granted by the Supreme Court fell by about half. Currently, the Court grants and hears oral argument in about eighty cases each term.27

In writing this book, the authors took on a seemingly impossible task, namely to chronicle “the history of the entire federal court system, its personnel, procedures, achievements, output, and failures, for both general audiences and legal professionals, in the space of a single volume” (p.xvii). Yet that is precisely what they have accomplished in a remarkably objective and accessible manner. By telling the story of the federal judiciary as a narrative and by framing that narrative within the social, political, and economic context of our national history, the authors have created both an entertaining and an informative historical account. This single-volume book will thus prove beneficial to both jurists and members of the general public interested in a concise analysis of the federal courts’ development.


Reviewed by Casey D. Duncan*

Chris Jay Hoofnagle is a noted privacy and information policy scholar. Visitors to his personal University of California, Berkeley webpage are greeted by a pop-up that reads “By entering this virtual property, you consent to any indignity that increases my utility.”28

This pop-up message is perhaps the pithiest and most appropriate summation of Hoofnagle’s recently published work, Federal Trade Commission Privacy Law and Policy. As an advocate for online privacy rights and consumer protections, Hoofnagle is not shy about stating his points and preferred policy solutions with razor sharp clarity, tempered by humor. In the book’s introduction, he states that “[n]ow, more than ever, the FTC needs a defense” as it is beset by attacks “calculated to blunt the inventiveness and efficacy of consumer protection law” (p.xvi). It is little surprise that the book casts Hoofnagle in the role of champion for the Federal Trade Commission (FTC) and its consumer protectionist mission and powers.

Federal Trade Commission Privacy Law and Policy is divided into three parts. The first part is comprised of five chapters devoted to a detailed discussion


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of the FTC’s history and regulatory powers and procedures. While not meant as a comprehensive history of the agency, it is nevertheless highly detailed and well sourced. This part provides ample detail about the economic and political climate that led to the creation of the FTC, as well as the events that would shape its legal development to the present day. The internal workings of the FTC, including its structure and the policy decisions made by various commissioners throughout the agency’s history, are also discussed at length, with a particular eye toward how these decisions ultimately shaped the agency’s current powers and procedures. Overall, this part of the book is an excellent example of how an overview of a federal agency should be written, as it places legally significant details within the context of key historic, economic, and political events.

¶76 Part two focuses specifically on the FTC’s regulation of privacy. Accounting for approximately half of the book, this part is divided into six chapters, each dealing with a specific aspect or sector of privacy regulation, including online privacy, the privacy of children, and information security. Each chapter division roughly corresponds with what Hoofnagle refers to as the “‘sectoral’ regulatory approach” (p.145) employed by Congress in recent decades. This is important because, in Hoofnagle’s assessment, the FTC is perfectly positioned to fill in the gaps created by this targeted, sectoral approach. He argues that the breadth of the FTC’s jurisdiction and regulatory powers not only imbue it with the flexibility to respond in a variety of constantly changing economic circumstances, but, equally important, help to insulate it from industry capture. Portions of part two read like a series of case studies, illustrating key matters and enforcement actions brought by the FTC as it established and expanded its influence and regulation of information privacy.

¶77 The third part is composed of a single chapter that serves both as conclusion and a section of prescriptive suggestions and solutions. In this chapter, Hoofnagle returns to the theme of defending the FTC that he first offered in the introduction. This time, however, he more directly names those he believes are attacking the FTC. Industry groups and online companies that seek or have achieved “platform” status are certainly singled out, but he most specifically targets a group he calls “Beltway libertarians,” characterized as commercial, as opposed to civil, libertarians. In Hoofnagle’s characterization, these Beltway libertarians are part of a larger effort to curtail and undermine the entire federal regulatory apparatus and consumer protections that developed over the past century. According to Hoofnagle, many Beltway libertarians disguise their lobbyist rhetoric in the trappings of professionally disinterested and unbiased academic discourse. To any extent there is a weakness in Hoofnagle’s book, it is here. While the author’s clearly stated advocacy is refreshing in that it makes bias and credibility analysis by the researcher simple, it also casts an unfortunate sheen of partiality on the entire work, the vast majority of which is not advocatory in nature.

¶78 This is not to say that part three is without merit to the researcher. Although comparatively brief, this chapter contains several suggestions that are genuinely thought provoking, such as the suggestion that the FTC seek to enforce the long-ignored rule proscribing the use of marketing data for nonmarketing purposes found in Article 32 of the Direct Marketing Association’s Guidelines for Ethical Business Practice. If adopted and effectively employed, this suggestion seemingly has the potential to strike at the heart of one of the greatest threats to privacy in the widespread compilation and aggregation of personal online data and metadata.
¶79 As a whole, *Federal Trade Commission Privacy Law and Policy* provides a wealth of information about the history, law, and policy respecting the FTC and regulatory protections of consumer privacy. Footnotes are placed liberally and conveniently throughout each chapter but are never overwhelming or obtrusive. A standard bibliography and index are also included, which make the work accessible for more targeted, in-depth research.

¶80 Overall, this is an important book that can serve several purposes in a legal collection. Not only is it an important addition to the consideration of online and information privacy protections, but the book is also an excellent example of a historical overview of an important federal agency.


Reviewed by Alexander J. Jakubow*

¶81 As its title suggests, *Empirical Legal Research: A Guidance Book for Lawyers, Legislators and Regulators* attempts to demystify the strange world of empirical legal research (ELR) for important stakeholders in the legal process who tend to toil outside of academia’s ivory towers. Judges, lawyers, and policymakers all shape the legal scaffolding of society, and authors Frans Leeuw and Hans Schmeets fundamentally believe that cultivating a deeper understanding of empirical research will improve the quality of the laws, judicial opinions, and regulations at the heart of our legislative and judicial process.

¶82 Introductory books on ELR are rare, so the arrival of *Empirical Legal Research* is a welcome addition to this small, yet growing, market.29 This ambitious project tackles the past, present, and future of ELR in an encompassing guide for doing empirical research. The book begins by introducing the concept of ELR and discussing its emergence as a distinct intellectual subdiscipline, although the bulk of the text follows the lifecycle of an empirical research project through its various phases: from the formulation of a research problem or question, through the development of a theory and set of hypotheses derived from a combination of logic and a thorough review of the extant literature, through the specification of a research design, to the collection, analysis, and interpretation of data.

¶83 The narrative occasionally sacrifices depth to maintain its impressive scope—a common tradeoff in many books. For example, the book attempts to cover a wide suite of inferential statistics—from basic bivariate comparisons through multiple regression and beyond—in a mere seven pages devoid of any useful visualizations. To place this in perspective, introductory texts found in basic statistics courses devote anywhere from 300 to 500 pages to the same material. Individuals with no prior experience with statistics may find many of these sections inaccessible.


More concerning is the fact that the topics underexplored or ignored are occasionally those that would prove most useful in helping individuals with little formal training in social scientific research methods or statistics become more critical consumers of empirical research. Consider the chapter on research design. The authors do a wonderful job reminding us that there are multiple ways to study the same phenomenon, but more should be said about the relative strengths and weaknesses of different research designs. If a lawyer or judge is presented with evidence from two different scientific studies that reach opposite conclusions about whether police officers are racially biased, which one is more authoritative and why? For a book that presents itself as a resource for nonacademic legal practitioners, guidelines for handling these common, real-world research conundrums are surprisingly absent.

The book also has a few fundamental mischaracterizations of the nature of social scientific research. For example, the authors’ five-part typology for mapping different research problems in ELR is a useful heuristic tool, but it ultimately includes too much. Despite the authors’ claim, normative research problems do not belong in any typology of ELR. As a form of social scientific inquiry, ELR focuses exclusively on answering empirical problems—issues broadly having to do with what was, what is, or what will be. This differs from normative concerns about what should have been, should be, or ought to be. Empirical evidence can and frequently does inform normative claims (and vice versa), but maintaining this analytical distinction is very important, particularly for individuals who are being introduced to ELR for the first time.

Despite these shortcomings, the book succeeds in introducing the audience to several key concepts, as well as the general workflow, at the heart of empirical research. Important terms such as theory, hypothesis, variable, and data are clearly defined and appropriately contextualized within the broader empirical research process. Operationalization, the crucial process of translating abstract concepts, such as democracy or economic development, into items that we can measure and compare empirically is another fundamental part of the research process, and the text succeeds in reminding readers that not all operationalizations are created equal. Even the notion of causation itself is discussed in relatively accessible language, and the authors use James Coleman’s famous boat diagram to distinguish between different sets of causal mechanisms.

The book ends strongly with a great set of chapters that address what the authors call the fact-value gap between empirical research and the doctrinal legal profession, as well as a candid discussion about what value, if any, ELR brings to the legal field. The authors clearly believe that knowledge of ELR will help legal practitioners and policymakers better understand all of the implications of the various forms of evidence presented to them on a daily basis. In turn, this will help them make better decisions for themselves, their colleagues, and society as a whole.

Empirical Legal Research is a welcome addition to the field, as long as readers approach it with a clear understanding of its limitations. Educators, as well as other individuals with a general interest in ELR, would be wise to triangulate the insights from this volume with other texts on the subject, such as Epstein and Martin’s Introduction to Empirical Legal Research or Empirical Methods in Law by Lawless, Robbennolt, and Ulen.


Reviewed by Anna Blaine*

North Dakota Legal Research is a concise but comprehensive guide to the sources of North Dakota law and the legal research process. It covers a variety of relevant materials across formats and price ranges and is accessible to a variety of research skill levels, making it an appropriate manual for any researcher interested in the legal landscape of this sparsely populated but rapidly growing state.

The first three chapters are devoted to the legal research process, research techniques, and receiving research assignments and gathering facts. Anne E. Mullins and Tammy R. Pettinato cover research logs and include an innovative and on-the-money research process flow chart that guides the researcher to continuously “pause, analyze, [and] log” (p.5) throughout the process. Their discussion of online resources covers free and lower-cost tools in addition to Westlaw, Lexis Advance, and other legal databases. The “Research Techniques” chapter covers terms and connectors searching, which is often given short shrift in beginning research classes. Very useful to a student, intern, clerk, or new associate are the highly practical suggestions regarding receiving and reporting on research assignments.

The chapter on secondary sources notes the dearth of North Dakota–specific titles before discussing general secondary sources (such as encyclopedias, treatises, and American Law Reports) with tips on how to use them to locate North Dakota law. I was pleased to see research guides included as I always cover them when I teach about secondary sources.

The authors provide a good summary of the differences between the federal constitution and state constitutions. They cover a variety of sources for the North Dakota state constitution and include tips on researching proposed constitutional amendments.

The chapter on researching statutes and legislative history covers important information about the North Dakota Legislative Assembly, such as how it meets only every other year but that much work is done between sessions by the body known as Legislative Management. Historical codes are discussed, and the titles of previous North Dakota statutory compilations are provided. The authors do not just list the types of legislative history documents and where to find them; they prioritize the document types as well. Also covered is the state’s free bill-tracking service.

* © Anna Blaine, 2017. Assistant Professor and Head of Public Services, University of Idaho Law Library, Moscow, Idaho.
¶94 The chapter on administrative law research opens with a brief description of the rulemaking process in North Dakota and an outline of the administrative research process. The authors stress the usefulness of agency websites and cover gubernatorial documents. The discussion of court rules includes a description of the state court system (including its lack of a standard intermediate appellate court) and a section on rule interpretation.

¶95 When addressing case law research, the authors provide a detailed discussion on how to read a case and encourage researchers to use digests in addition to full-text searching. They mention North Dakota’s medium-neutral citation rules, but (while not a crucial omission) they fail to mention the North Dakota Reports, where opinions were published until 1955 (when the state opted to rely on West’s North Western Reporter for publication).

¶96 While an altogether useful guide to researching North Dakota law, there are three areas in which this book really shines: (1) ballot measures, (2) oil and gas law, and (3) Indian law. The chapter on ballot measures includes a concise yet interesting background on this topic in North Dakota; it then provides specific instructions for using sources such as the North Dakota Secretary of State website. The authors also explain why and how to research past ballot measures. The latter two chapters, on oil and gas and Indian law, are included because they are “substantive area[s] of law important to many North Dakota lawyers” (p.169). The authors briefly cover the oil industry in North Dakota and stress the importance of regulation in that area. They list specific secondary sources, including websites that may be of use to researchers, before covering primary law and specialized tools for finding it. At the end of the oil and gas law chapter, they also include an appendix titled “Selected Secondary Sources on Oil and Gas Law.” Finally, the chapter on Indian law provides a brief background and explanation of relevance before listing materials for finding federal Indian law and the law of individual tribes.

¶97 The book concludes with a good and concise, but superfluous, summary of federal equivalents of the information sources covered in previous chapters. The federal law researcher has a variety of more detailed research guides to choose from and is unlikely to consult a book on state-specific legal research for assistance.

¶98 North Dakota Legal Research would be a valuable resource to anyone with a need for North Dakota legal information based solely on the fact that it is the only published book of its kind. But the authors went above and beyond a mere and much-needed survival guide by providing a concise yet thorough manual for conducting research in a state where comparatively little legal information is available.


Reviewed by Eve Ross*

¶99 Specific needs for law firm information security vary widely and change quickly, but the tendency to ignore best practices—until forced to pay attention—has long remained common. Sharon Nelson and David Ries, who practice tech-
nology law, and digital forensics technologist John Simek believe, based on attendance and responses at their seminars, that more lawyers now feel more urgency toward learning about cybersecurity, compared to four years ago. In both editions of their book, *Locked Down: Practical Information Security for Lawyers*, the authors address what lawyers need to know about information security in a format that is easily read, skimmed, and used as a reference.

¶100 The updates to the second edition reflect changes between 2012 and 2016 in the legal and ethical landscapes, and statistics, predictions, and recommended approaches regarding specific technological threats. The statistics and examples of law firm data breaches that are incorporated into chapters 1 and 2 range from 2008 to 2015. Appendix A consists of tables and charts from the American Bar Association (ABA) 2015 Legal Technology Survey Report, which shows lawyers where their technological readiness ranks compared to similarly sized firms, ranging from solo to 500+ lawyers. The latest breaking information, including 2015 year-end statistics, early 2016 predictions of likely threats, and a short summary of the final version of the Cybersecurity Information Sharing Act, passed in December 2015, is located in appendix P. For information updated beyond the book’s publication date, see the websites and blogs listed in chapter 27, “Additional Information Resources.”

¶101 One recent change driving lawyers to confront information security issues is the fact that some ethics rules and opinions now unmistakably clarify lawyers’ responsibility for client information held or transmitted electronically. As the book went to press in late 2015, twenty states had adopted the ABA’s changes to Model Rules of Professional Conduct 1.1 (Competence) and 1.6 (Confidentiality of Information), which expressly apply standards of competence and reasonable measures to protect confidentiality in the digital realm. The authors predict these changes will be adopted by more states in coming years. Chapter 3 describes ABA Model Rules 1.1, 1.6, 1.4 (Communications), and 5.3 (Nonlawyer Assistance); the application of these rules in comments and opinions; and statutory, regulatory, and common-law duties requiring protection of information. Appendixes B through G contain the full text of ABA, state, and federal rules regarding information safeguards.

¶102 Relevant laws and ethics rules, as well as statistics on security threats, should motivate lawyers to read, understand, and apply the book’s technological explanations and recommendations in chapters 4 through 26. However, busy practitioners probably will not read all these chapters from start to finish. More likely, the bulk of the book will serve as a reference for lawyers who need a primer on an unfamiliar topic (perhaps encryption) or an updated list of points to consider when contemplating a change in law firm policy or a new purchase, such as writing a business continuity plan or subscribing to a cloud computing solution. Accompanying appendixes that provide checklists, sample security policies for smaller firms, and a glossary of security terms are also useful references.

¶103 Because the book is designed for lawyers to scan the table of contents and delve into discrete topics as needed, librarians should consider whether patrons searching for specific topics will discover the book using available finding aids. For example, does a catalog search using terms such as “VPN,” “Dropbox,”...
“passwords,” “cyberinsurance,” or “social media policy” retrieve the bibliographic record? Will reference librarians know to recommend the book when asked about such topics?

¶104 Law firm librarians who collect the book might suggest it to their IT departments, as the book might help legal IT professionals translate their knowledge and recommendations into terms lawyers will understand and may find convincing. Law firm librarians tasked with locating additional practical security recommendations may also be interested in Beth Chiaiese’s *Confidentiality, Privacy, and Information Security: A Primer for Law Firm Records and Information Governance Professionals*.

¶105 *Locked Down* is recommended for law school libraries, especially where law practice technology is a focus, or where students are likely to move into solo and small firm practice soon after graduation. Court libraries may find the book relevant if changes to technology-related ethics rules are under consideration.


Reviewed by Caitlin Hunter*

¶106 In *Misreading Law, Misreading Democracy*, Victoria Nourse argues that lawyers fundamentally and sometimes willfully misunderstand legislative history in ways that are both unjustified and damaging. Professors who teach the complexities of administrative law and civil procedure protest that legislative history is too hard. Judges who would never confuse a dissent with a majority opinion interpret statutes based on opponents’ statements, while purporting to be Congress’s faithful agents. This is particularly troubling because Congress is increasingly unable to muster the votes to pass legislation correcting courts’ errors. Judges’ misinterpretations of statutes become the final word.

¶107 Nourse identifies key facts and principles lawyers must understand to properly interpret legislative history. First, legislators want to be reelected, and their primary audience is ultimately their constituents. Constituents like bold, passionate statements and do not know or care about judicial canons. As Nourse dryly notes, no voter has ever shown up at a rally holding a sign reading “Vote for X, she understands the latin canon ejusdem generis” (p.21). Second, bills need a supermajority to pass. Since the 1990s, senators have attempted to filibuster every major bill. Filibusters can only be stopped by mustering the sixty votes necessary to invoke cloture. As a practical matter, a bill must appeal to the constituencies of sixty senators. In this context, ambiguity may be both purposeful and rational. Third, statutes are elections. A bill that gets sixty votes in the Senate wins, no matter how vociferously the other forty senators oppose it. Accordingly, statements of a bill’s opponents, like dissenting opinions, should carry little weight.

¶108 Fourth, statutes follow a sequence. If the language the court is interpreting was added shortly before the bill was passed, early materials are unlikely to be relevant. Start with the final conference report and then work backwards. As Nourse

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notes, this also has the practical benefit of shaving hundreds of pages of material down to a few relevant pages. Fifth, do not apply simple typologies. Committee reports are often considered the gold standard of legislative history, but a report that was actually considered by Congress is not the same as a report released after the bill was passed. Sixth and seventh, recognize that Congress thinks differently from judges and apply Congress’s own interpretive rules. Legislators are generally unaware of judicial canons and have their own rules that conflict with the canons. For example, the judicial canon against surplusage presumes statutes do not have redundancies, but members of Congress will happily vote for redundant language that pleases their constituencies.

¶109 Ultimately, Misreading Law is as much a manifesto as a how-to, and Nourse spends most of the book critiquing alternative approaches to legislative history. Nourse most approves of contract theorists, who use game theory to explain how Congress negotiates compromise language that satisfies both sides. However, this misses the facts that lawmakers’ primary audiences are their constituencies and that passing a bill is an election, not a bargain. Members of Congress do not need to compromise if they can draft language that pleases a sufficient number of constituencies and then simply outvote the other side. Nourse levels similar criticisms against purposivists who try to identify a central congressional purpose for bills. Up to forty senators may not have wanted the bill at all, and the sixty senators who did want the bill may have had different purposes to please different constituencies. Instead, Nourse argues that Congress’s intent must be pragmatically inferred based on the materials that were actually seen and approved by the majority.

¶110 Nourse’s strongest criticism is reserved for those who reject legislative history entirely. In particular, she criticizes those she dubs petty textualists: judges who pull a few words of a statute out of context and scrutinize them for their plain meaning using judicial canons. Nourse reiterates that Congress is unaware of judicial canons and may quite rationally write ambiguous language to appeal to the constituencies of sixty different senators. Moreover, textualism is subject to judges’ political biases. Readers are more likely to consider a statute’s meaning plain if they agree with it, and almost every canon has a corresponding canon with the opposite effect, making it easy for judges to reach the outcome they want. Additionally, even if judges are perfectly politically neutral, textualism encourages the focusing illusion, a cognitive bias in which readers zero in on one element of the text and miss the surrounding context. For example, in a case on racial quotas, the Supreme Court carefully parsed a general antidiscrimination statute while neglecting a statute specifically about quotas. Finally, Nourse argues that textualists’ attacks on the constitutionality of legislative history ignore that the Constitution itself authorizes the keeping of legislative history materials.

¶111 No doubt textualists will find much to disagree with in Misreading Law, but it is hard to imagine that they will be bored. Even at the book’s densest, Nourse keeps it engaging with her lively language, vivid examples, and passion for the material. Early chapters identifying key facts and principles of legislative interpretation provide practical guidance for law students and attorneys alike. Later chapters parsing constitutional clauses and discussing the metaphysics of group intent are

likely to lose most law students but are perfect for theoretically minded professors and judges. *Misreading Law* is an engaging and thought-provoking entry into the debate over how courts should use legislative history.


Reviewed by Stacy Fowler*

¶112 Now in its third iteration, *Texas Legal Research*, by Spencer Simons, describes the primary sources of Texas law and how to conduct meaningful research using those sources. Unlike the 2012 revised printing in which only minor changes were made to the 2009 first edition, this edition has many changes and additions, and online references have been completely updated. The new edition also includes an expanded list of tables and figures, including relevant search examples and helpful searching hints.

¶113 Simons begins with the research process and legal analysis, giving the targeted first-year law student a concise overview of the seven-step research process, the same basic process referenced in other books in this series. Chapter 2, “Online Legal Research,” has been expanded from its previous iteration and renamed “Research Techniques.” In addition to giving an overview of the basic principles of legal research, this chapter now includes information on how to begin legal research, including a list of helpful tools and finding aids.

¶114 The remainder of the chapters have been rearranged into a more organized flow. The chapter covering secondary sources has been moved to stress its importance. Following that, primary law is discussed with chapters focusing on constitutional law, statutory law, and administrative law. Legislative history is also discussed, with great detail given to discussing the sources available as well as instruction on how to prepare a legislative history. Each of these chapters also includes sections for researching both federal statutes and statutes of other states, but, in keeping with a Texas focus, these sections are fairly brief.

¶115 New to this edition is a chapter on how to research local government law. Simons covers the best ways to find laws and ordinances for municipalities, counties, and special districts. Also included is a section on attorney general opinions as well as helpful tips for researching local law using secondary sources.

¶116 As with other books in this series, citators warrant their own chapter, and specific instructions are given for using both of the two major citators to make sure cited cases reference good law. In-depth examples are given, including a section on troubleshooting and editing. Simons specifically recommends using online over print for citators, which he asserts are “much more current and cover more types of authority than print versions” (p.182). For that reason, the rest of the chapter gives instruction specifically on online citators (a footnote recommends that if you absolutely must use the print, it could be helpful to consult a law librarian).

¶117 The book also includes several appendixes. The first covers the bane of every law student’s existence, legal citation. Numerous examples are given, both in Bluebook and ALWD styles, and the chapter also details the importance of adher-

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* © Stacy Fowler, 2017. Technical Services Librarian and Associate Professor, St. Mary’s University School of Law, San Antonio, Texas.
ing to the *Texas Rules of Form* (commonly known as the *Greenbook*) when writing about Texas law. There is also a selected bibliography section for further research, and the final appendix, a new addition to this edition, covers searching for cases online, discussing each of the three largest paid legal databases as well as Google Scholar. This augments the chapter on how to search for cases. How to find cases, and what to do with them once located, are discussed in great detail, giving the reader a better understanding of the entire legal research process.

¶118 Overall, the second edition of *Texas Legal Research* is well worth the money. The content has been completely updated from the 2012 revised edition, so online information is up to date and ready to use. At a minimum, all Texas law school libraries, as well as county law libraries, should have a copy of this important resource, but it will also prove valuable for law school libraries around the country. For law students and any members of the public who may need to navigate Texas’s intricate legal system, this book will be a worthwhile tool for learning how to conduct Texas legal research in an organized and thorough manner.


Reviewed by Eric W. Young*

¶119 Suja A. Thomas, in *The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries*, contends the jury should be viewed as a fourth branch of government equal to that of the executive, judicial, and legislative branches. Despite this contention, Thomas notes that today’s jury is marginalized because

the executive charges, convicts, and sentences, despite juries indicting, convicting, and sentencing in the past. The legislature can set damages, although only the jury historically had that power. The judiciary circumvents juries by dismissing cases via mechanisms such as the motion to dismiss, summary judgment, acquittal, and judgment as a matter of law, procedures nonexistent at our Constitution’s founding (p.3).

Thomas finds summary judgment the most lethal killer of today’s civil jury, and plea bargaining the deadliest foe of the criminal jury. By the end of *The Missing American Jury*, believing the jury trial dead and in need of resurrection is easy.

¶120 Thomas provides statistics that verify the marginalization of today’s jury. At our country’s founding, a jury decided the future of nearly every criminal defendant. By 1962, the number of criminal defendants whose fate a jury determined had shrunk to 8.2% (in federal court), and by 2013 that number had decreased to 3.6%. In the courts of the largest twenty-two states, juries decided 3.4% of 1976 criminal trials, and by 2002 that number had shrunk to 1.3%. In civil cases, the statistics are bleaker. In federal courts, civil juries decided only 5.5% of cases, and by 2013 that number was just 0.8%. The states’ numbers were 1.8% in 1976 and just 0.6% in 2002. If not for the reasons listed above, what has caused this marginalization?

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Thomas notes the widely accepted reasons, namely, that a jury is inefficient, irrational, and inaccurate in its decisions.

¶121 While serving as a federal law clerk to a federal district court judge, I heard these reasons repeated often. I clerked for a judge, however, who told me many times that he thought everyone should have their day in court, and he was known to be reluctant to grant summary judgment. Yet, in two years, no more than six criminal trials and three civil trials took place in his courtroom. Even fewer trials occurred in other courtrooms. Almost every defendant pleaded and every plaintiff settled, or the case was dismissed either predisclosure via a motion to dismiss or postdiscovery via a motion for summary judgment. So, despite my judge’s bent toward trial, very few occurred. There was pressure for the judge to decide motions quickly and not keep cases lingering. The “Biden Report” was a real factor. Although, intellectually speaking, most of us in the courthouse understood and respected the role of the jury, I never heard any real discussions about its marginalization.

¶122 The Missing American Jury leaves you certain that the jury must be restored to its original role as a powerful, necessary, and meaningful part of our government. Left to their own devices, Thomas makes it fairly clear that the executive, judicial, and legislative branches will continue their swallowing of the jury’s true constitutional function, leaving it not marginalized but, rather, eaten alive. She devotes a chapter to the jury trial in foreign jurisdictions and the importance that the American jury has played in these foreign jurisdictions. She makes the reader understand that our system of government, and pointedly our jury system, must thrive so that it can continue to serve as a model of one very important piece of democracy. A diminished or dead jury will leave our democracy in a severely weakened position. I doubt history and government teachers in elementary and secondary schools will begin to teach the jury as the fourth branch of government, but we should all hope they begin to teach the importance of it so that we understand and respect it enough to demand its resurgence.

33. Semiannual reports issued pursuant to the Civil Justice Reform Act of 1990 revealed which district court judges had motions that were pending for more than six months and cases pending for more than three years. Around the courthouse, we called this report the “Biden Report” because Senator Joseph R. Biden was the bill’s principal sponsor. Zero or close to zero motions and cases pending longer than the six-month or three-year periods, were always a good thing.
With the growth of the Internet, the typical patron base that reference librarians serve has increased to a much wider group of people who use various electronic means of communication to seek assistance. Ms. Whisner examines how technology has expanded these service borders and discusses the ramifications for the modern reference librarian.

1 Who are the people we serve? It varies. It can be the person in front of you, the collection of students in your school or attorneys in your firm, or even a much larger group. Time, money, resources, technology, conflicts of interest, and confidentiality can all play roles in defining the scope of service—or answering the question “Who's my patron?”

2 In my library (as is no doubt typical), our definitions of patron groups mesh with our mission. Our primary purpose is to serve the curricular and research needs of the law school we are a part of, so our primary patrons are the faculty, students, and staff of the school. We also serve our university and the public, so our secondary patrons are faculty, students, and staff of the university; legal professionals; students from neighboring schools; and anyone else who chooses to come in. We provide a higher level of service to our primary patrons, and within the primary patrons, we provide a higher level of service to faculty and staff than to law students. For example, reference librarians do research projects for faculty but teach law students how to conduct research themselves. We help public patrons find and use appropriate resources, but we do not offer them all the services we give law students. I imagine that most libraries have some service groupings like these. A court library probably will do much more for judges than it will for visiting attorneys. A law firm library might do more for the firm’s partners than its paralegals (and nothing at all for a member of the public).

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¶3 This framework was developed when most library services depended on researchers coming to the building. We did serve some people over the telephone, sometimes taking orders for copies to be delivered by mail or fax, but the physical library was central in our sense of service. Technology has shaken up the expectation that researchers come to the library, but service categories have largely persisted. Our law students do not have to come here to have access to the full range of premium databases that we subscribe to for their benefit. On the other hand, we explain to local attorneys and members of the public who ask whether they can use databases from home that our licenses will not permit that. (Maybe Checkpoint or Hein would negotiate licenses that would allow any of our secondary patrons to search from their homes and offices—but they would probably charge a lot more than we would choose to spend for these secondary patrons.)

¶4 It used to be rare to provide much service beyond the building. Back around 1989, one of our professors who was on sabbatical in Germany filled an aerogramme with reference questions and sent it to us. I photocopied a few pages from the *Statistical Abstract of the United States* and mailed him a response. The exchange—Germany to Seattle and back—probably took at least a week. That seems quaint now, as we routinely correspond via e-mail with our far-flung faculty (and sometimes students).

¶5 Because of technology, we now get some questions from very distant patrons. Maybe they have found our library’s website through a Google search and saw our “Ask Us!” link. Maybe they haven’t even thought about where we are (besides “on the web”). But because we don’t have all the time in the world, we’ve decided to give priority to questions from Washington State or about Washington State law. Sure, I could probably fish around and find something about Kentucky or California law, but I would rather refer them to a law library in their state. Years ago, those distant researchers would never have come to our library. They probably would not even have telephoned because long-distance calls were expensive.

¶6 We are seeing fewer members of the public than we used to, probably because they can find much more of what they need online. But some patrons who don’t come to us physically do ask questions on our web form, and so we give them leads to useful websites. This shift in access, from print to online, benefits patrons who are far away. The statutes and regulations are equally available to someone in a small town two hundred miles from here as they are to the person down the street. Yet there is still a big advantage to being close to a physical law library because the free sites on the web don’t provide everything researchers need. In some of our online answers, we explain the advantages of using an annotated code, a treatise, or practice materials, and encourage patrons to visit a law library. Our largest counties have county law libraries with good collections and services, but people in many rural areas do not have easy access, so geography does still matter.

¶7 So far, I have been talking about reference interactions that are initiated by the patron, someone coming in, calling, or writing with a question that we librarians respond to. Now let’s turn to services that are not sparked by individual questions from patrons: providing guides and resources and sending current awareness alerts.
Once, our research guides were typed and photocopied. Users needed to pick them up in the library—but that was not a big deal since the guides referred only to print material that would be used in the library. As we built our website, our guides became available not only to people in the library but also to anyone online. We could still create them with our primary patrons in mind, but we might also consider that others would use them.

Some of our projects have been aimed at a larger audience from the start. For example, our site with material on the history of the Washington State Constitution was inspired by a professor’s vision that a lawyer in Omak should be able to brief constitutional arguments even without visiting Seattle, Olympia, or Spokane. Our law students can use all the PDFs we’ve posted—but they could have read the books in the library too, so the site is especially useful to distant researchers.

After the 2016 election, two of our professors created a new course for winter 2017, Executive Power and Its Limits. It filled up and developed a waiting list almost as soon as it was announced. And there was strong interest from outside the law school. People from other university departments and the outside community asked whether they could sit in or get a copy of the readings. There was not room to accommodate auditors, but the professors asked the library to create a website that would give outsiders access to their readings and other materials. I threw myself into the project, creating a LibGuide on presidential power (http://guides.lib.uw.edu/law/prespower). Copying the reading assignments from their class website was straightforward, although once in a while I added a citation or used a free online source instead of the document the faculty posted. I also added content: links to research guides, a list of books on presidential power, links to relevant videos, and so on. When Washington v. Trump heated up, I uploaded copies of pleadings and briefs. I created a page with links to resources on topics that weren’t explicitly addressed in the class because readers might want to see something about the Emollients Clause or the Dakota Access Pipeline. It would be an overwhelming task to track everything, but I offered some basics.

This project serves many constituencies. It serves the two professors who requested it because it gives them an easy way to respond to e-mail messages asking them for their readings. It could serve the students in the class if they want to look at the supplemental resources. (Frankly, I expect that most of them have enough reading to do as it is.) It also serves the students who aren’t in the class but want to look beyond the headlines. It serves other faculty who are interested in these issues.

2. When our budget was especially tight, we laminated them so that patrons could copy the guides themselves, on their own dime. The people who once might have picked up one of every guide from the rack thought harder about which ones they really needed.


4. The city of Omak has a population of 4835. CITY OF OMAK, http://www.omakcity.com/ [https://perma.cc/V5E6-PCR8]. It is 141.4 miles from Seattle, 110.7 miles from Spokane, and 183 miles from Olympia. Distances found by searching Wolfram|Alpha (https://www.wolframalpha.com/).

5. See Washington v. Trump, 855 F.3d 984 (9th Cir. 2017) (declining to stay temporary restraining order); Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017) (TRO). There have been a dizzying number of amicus briefs and other filings. By the time this is published, I imagine there will be more—as well as more court orders and decisions.
(Some are more than merely “interested” and have assisted with briefs, commented to the press, or spoken to groups.) And it serves all the people outside the law school who want to learn more about the scope of executive power. I have enjoyed working on it, and it has given me a good reason to follow news that I would want to follow anyway.6

¶12 My library took the lead on current awareness service decades before I joined the staff. The Current Index to Legal Periodicals (CILP) began in the 1930s as a service for only the school’s own faculty, indexing articles from selected law journals before the Index to Legal Periodicals supplements were published. In the 1940s, it moved outside the school’s walls. Many law libraries wanted to tell their faculty about the same articles in the same journals, so it made sense for them to subscribe to our index rather than creating something similar from scratch. Over the years, CILP has responded to technological changes by adding online subscriptions, a tailored alert (SmartCILP), and access via Westlaw and HeinOnline. We still are serving our own faculty—but also many other researchers around the country (and some in other countries as well!).

¶13 Current awareness does not have to be as comprehensive as CILP (all the substantive articles in hundreds of journals). It can be general or specific, aimed at many people or one. Again, reminiscing about the pre-Internet period, I think about the articles we used to clip from the New York Times and the Wall Street Journal to post on a bulletin board near the reference office. We weren’t thinking about any particular person who would want to know about Michael Milken’s securities fraud case,7 the Iran-Contra scandal,8 or news related to law practice9—we just figured someone might be interested enough to pause at the bulletin board as they walked from the elevator to the computer room, the reference stacks, or the restrooms. This scattershot information sharing has been totally transformed by technology. When we want to share an interesting news item or resource, we can tweet out a link or write a blog post. The audience—potential and actual—has changed dramatically as well. Nobody has to visit the library to see an item, and those who do visit the library might not see an item unless they look at our homepage and see the most recent blog post. Someone who sees a blog post or tweet could as easily be around the world as a current member of our law school community.


8. If you were not following the news then, I can assure you there were a good many articles to choose from when we had our scissors and thumb tacks out. Searching the New York Times in Lexis Advance for Iran-Contra and length(>700) and date(<1994), I found 2461 articles (search performed Mar. 2, 2017).

¶14 At the other end of the spectrum, we often send notes to professors (or others) who we are pretty sure will be interested. For example, I sent a professor a link about immigrants and entrepreneurship a few weeks after she asked for information about immigrants getting business licenses.\(^{10}\) Someone else had already answered her question, and I didn’t know what project she was working on, but when I came across the site, it seemed likely that she’d be interested. (She was.)

¶15 In between the scattershot (“Hey, anybody, here’s something I thought was interesting.”) and the very specific (one item likely relevant to one person working on one project), I find occasion for sending notes to handfuls of people. Our criminal law faculty might be interested in this news item about the death penalty in Alabama,\(^{11}\) our IP faculty might be interested in this item about Trump trademarks in China,\(^{12}\) and so on. Several years ago, I created some group e-mail lists in my personal Outlook so I didn’t have to think so hard to remember who taught professional responsibility, who taught criminal law and criminal procedure, and so on. That made it easier for me, but it didn’t help my fellow reference librarians, who didn’t have my Outlook address book. It didn’t even help me when I was sending a message from my iPad or from the reference office e-mail account. So in the last year, I have set up a number of listservs. It’s a simple matter to send a story about Zika to GallagherFYI-HealthLaw or a resource about climate change initiatives to GallagherFYI-EnvirLaw. Having the “FYI” items come from listservs also helps recipients triage their e-mail: they can see right away that a message is just for their information and they can delete it, shove it in a folder, or read it, as they choose. The listservs also help expand the people served by these current-awareness messages. Students, staff, and even people outside the law school can subscribe to the lists, and it is no harder for us to send them alerts than to send to the few faculty members we might have thought to include. I am pleased that some local attorneys, especially from public interest organizations, subscribe to our social justice list. I like sharing information, of course, but it is also a good, easy way for us to serve the community.\(^{13}\)

¶16 As technology changes, researchers have changed how they use libraries, from physically coming in to remotely asking questions and using guides and databases. In an effort to match them, we have changed how we provide services. We could still photocopy guides and post newspaper articles with thumbtacks, but we don’t. The users’ habits and ours influence one another. Our showing classes our online guides encourages the students to use them, while students’ preference for online resources leads us to try to reach them online. The core activities on both sides remain the same: researchers need to find information and we librarians want to help them. During my career, though, I’ve seen both sides changing techniques. I’m not much of a seer, but I expect that the changes will continue. Yet I think that the core activities will remain the same, too: researchers will still need to find information and we librarians will continue to help them.

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MEMORIAL: WILLIAM J. (BILL) BEINTEMA (1944–2015)*

¶1 After many years as a law librarian, law library director, and humanitarian, Bill Beintema passed away on November 12, 2015, in Knoxville, Tennessee. Bill was born and grew up on Long Island, New York, in the town of Sayville. He earned both his undergraduate and Juris Doctor degrees from the University of Miami. He obtained his Master of Library Science degree at Florida State University. He is survived by his wife of forty-two years, Jane, who often accompanied Bill to regional and national professional meetings.

¶2 Bill started his career as the assistant director at the University of Miami School of Law Library. He accepted his first director position in 1978 at the Oklahoma City University Law Library, where he served for six years and cofounded the Central Oklahoma Law Librarians Association. In 1984, he became the director of the Law Library at the University of Tennessee College of Law in Knoxville. He served faithfully and effectively in that position for twenty-five years, retiring in 2009.

¶3 In addition to leading the Law Library at the University of Tennessee, Bill contributed broadly to the College of Law in various capacities, including chairing as well as serving as a member on a number of committees. In particular, he served on the College’s Building Committee in the 1990s during an important time during the expansion of the building, playing a significant role in planning and overseeing the growth and renovation of the facility, including the law library. In recognition of his service to the college, he was twice awarded one of the college’s highest honors, the Carden Faculty Award for Outstanding Service. While at the University of Tennessee, Bill published an annotated bibliography addressing legal issues involving clergy malpractice.

¶4 Bill also had a distinguished and meaningful record of professional service during the course of his career. He was intimately involved with the American Association of Law Libraries (AALL), chairing and serving on numerous committees and in various capacities, including the Placement Committee, Awards Committee, and Statistics Committee. He also chaired CONELL very early in his career. Bill served three years on the Law Library Journal editorial staff and also served for an extended period of time on the editorial board of the quarterly newsletter of the Audio Visual/Micrographics Special Interest Section. Bill took great pride in the fact that he had attended forty-five consecutive AALL Annual Conferences, often with his wife Jane by his side.

¶5 Additionally, Bill made notable contributions to the profession through the Southeastern Chapter of AALL (SEAALL), where again he served in numerous capacities. He was honored with the SEAALL Special Service to the Chapter Award in 2001, and he received a lifetime membership and appreciation award in 2011. He

was also the founding director of COSELL, the Consortium of Southeastern Law Libraries, and served a number of years as treasurer of the consortium.

¶6 Perhaps Bill’s greatest contributions to the profession, however, came through the many connections he made with other law librarians throughout the profession and across the country. He has been described as warm, friendly, entertaining if not hilarious, and a good soul. He befriended many of us and was often especially supportive of those early in their careers. He had a way of making others feel important and comfortable. Those who knew him best described him as a light spirit with a big heart, a jokester with few equals in the profession. In a world filled with problems and challenges, Bill’s humor and compassionate care for other people are greatly missed.—Scott Childs

¶7 Bill was my library director for more than ten years. He was a wonderful mentor and friend to me. He provided gentle guidance when I was unexpectedly promoted to acting head of public services when I was barely out of library school and had been at the Joel A. Katz Law Library for less than a year. He showed me the value of making connections and staying actively engaged in the profession, even though our library was tucked far away from major metropolitan areas and other law libraries. Most of all, Bill was one of the kindest people I have known. He loved to tease, but he never had a mean word for anyone, and I knew I could turn to him for a corny joke or a friendly chat whenever I needed a bit of warmth. Bill was a man of broad interests, from his church, to travel, to photography and all sorts of work with graphics, images, and publishing. He loved discovering new restaurants as well as cooking—his molasses icebox cookies were legendary and are sorely missed at our library gatherings! I consider myself fortunate to have worked with him as long as I did.—Sibyl Marshall

“When Pigs Fly”

¶8 That was one of Bill’s favorite responses when asked a question. Often teasing and ironic in his conversation, Bill used his wit to entertain, never to hurt someone. His love of good food, good friends, and interesting travel was of primary importance to him, second only to his devotion to his wife, Jane. He is missed by all who knew him.—Loretta Price

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