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District Court Opinions That Remain Hidden Despite a Long-standing Congressional Mandate of Transparency—The Result of Judicial Autonomy and Systemic Indifference* 

Peter W. Martin**

The E-Government Act of 2002 directed the federal district courts to provide online access to all written opinions. Over fifteen years later, the promise of that legislation remains unfulfilled. Using the large volume of district court Social Security litigation, this article examines the dimensions, consequences, and causes of that failure.

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Introduction

¶1 In the course of a year, nearly 300,000 civil actions\(^1\) and more than 75,000 criminal proceedings\(^2\) are begun in the U.S. district courts, the federal judicial system’s general-purpose courts of first instance. In resolving those matters, district judges and magistrate judges write and file many thousands of opinions. They range from rulings on preliminary motions to final judgments.\(^3\)

¶2 Throughout the era in which lawyers, judges, and others seeking relevant case law searched in and read from print law reports, the federal government assumed no direct responsibility for the selection, collection, or publication of these decisions. Those tasks were performed in the private sector, most comprehensively by a publisher that worked so closely with the courts and their judges that many thought of its books as “official.” In a functional, although not a legal, sense they were.

¶3 During that period, publication was highly selective. The volume of decisions and economics of publication made that a necessity. Moreover, unlike the decisions of the U.S. Supreme Court and courts of appeals, none of these constituted precedent in the strict sense. For any given district court opinion to be available as a reference for lawyers, judges, and others beyond the parties, the publisher had to view it as sufficiently important to warrant publication. Some district judges sought publication of their opinions. Others were indifferent.\(^4\) Publishers of loose-leaf services covering particular areas of law in depth—environmental, intellectual property, or labor, for example—routinely included district court decisions passed over by the editors of the general-purpose *Federal Supplement* reporter. Opinions disseminated in that fashion or even informally enjoyed no lesser authority.

¶4 Once the production and release of court documents shifted to electronic means, filtering became logistically and economically unnecessary. The publication of legacy print reports continued, furnishing a familiar means of citation for those decisions appearing in their pages, but lawyers and judges ceased using those reports directly and limiting their district court case law research to the 3000 or so decisions put out in print each year.\(^5\)

¶5 By the turn of the twenty-first century, the Internet had revealed itself to be a means of disseminating government-generated documents of unprecedented effectiveness. That led Congress, for the first time, to place responsibility for opinion publication directly on the district courts and all other federal courts. A provi-

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3. The FDsys database of “written opinions” includes 136,734 from U.S. district courts for the year 2016. As will be explained shortly, that database is seriously incomplete.
sion of the E-Government Act of 2002 required federal courts to begin furnishing online access “to the substance of all written opinions . . . , regardless of whether such opinions are to be published in the official court reporter.”6 It set a deadline of April 2005 and specified that these online opinions had to be in “text-searchable format.”7

¶6 At the time of the law’s enactment, many federal courts were already doing much if not all that it required. The Supreme Court had gone online in April 2000 with a site that provided access to its decisions as released in slip opinion form, together with electronic replicas of twenty-four volumes of the U.S. Reports.8 All the U.S. courts of appeals by then were placing their “published” or precedential opinions at a website.9 Although the district courts presented a more mixed picture, in late 2002 over half of them were providing online access to at least some decisions.10 The E-Government Act gave federal courts that lagged in these developments more than two years to catch up and set for all a standard of comprehensiveness and usefulness, not satisfied by the release of only selected or published or recent opinions or scanned images of paper documents.

¶7 Many, including some judges, imagined that act’s requirement would dramatically improve access to the full range of federal decisions—for litigants, lawyers, and others. While a judge on the U.S. Court of Appeals for the Third Circuit, Supreme Court Justice Samuel A. Alito chaired the Advisory Committee on the Federal Rules of Appellate Procedure. In that capacity, he led a lengthy study of the diverse circuit court rules governing the withholding of vast numbers of “routine” opinions from publication and limiting citation to such “unpublished” decisions. (Also sitting as a member of the same committee was a judge of the D.C. Circuit, now Chief Justice of the United States, John G. Roberts, Jr.) In the face of judicial resistance that ranged from mild to fierce, the committee recommended a new rule overturning all past circuit policies that forbade the citation of unpublished opinions. With some revision by the Judicial Conference of the United States and following a year’s delay, the committee’s recommendation was adopted as Rule 32.1 of the Federal Rules of Appellate Procedure. Responding to concerns about access to unpublished opinions, especially on the part of those unable or unwilling to pay the high prices of Lexis or Westlaw, Justice Alito’s committee pointed to the E-Government Act. Said the report: “The disparity between litigants who are wealthy and those who are not is an unfortunate reality.” But, it continued, “the

7. Id.
solution is found in measures such as the E-Government Act, which makes unpublished opinions widely available at little or no cost.”

¶8 Over a decade later, effective and comprehensive access to district court decisions remains an elusive goal. Large numbers remain hidden from lawyers, academics, and the general public. This article explores the scope, consequences, and underlying causes of that largely unacknowledged reality.

Consequences

¶9 What is at stake? What is the harm if a good number, even thousands, of district court opinions remain out of sight, failing to make it to the surface? There are, after all, so many of them. Few are momentous. During the print era, publication was the exception.

¶10 Unlike the U.S. courts of appeals, with the exception of a few mavericks, district court judges have never made a categorical distinction between their “published” and “unpublished” opinions. While no district court opinion constitutes “precedent” in the strict sense of being binding on either the deciding court or another court addressing the same question in a future case, all have the force of their persuasive power. That power is especially strong, it can be hoped, in similar cases coming before the same judge or court. In some fields, particularly those with few binding precedents flowing down from courts of appeals or the Supreme Court, individual district court decisions can exert great influence. In the current era, this can be so whether or not they were nominated by their author and selected by the publisher for inclusion in the print Federal Supplement series. Beyond their weight as authority, it is possible for district court opinions to hold significant value simply as tested templates for lines of legal argument.

¶11 Last and not least, opinions that resolve contested legal matters constitute data on judicial decision making and lawyer effectiveness. In June 2017, LexisNexis announced the acquisition of the San Francisco startup, Ravel Law. The transaction would strengthen LexisNexis, both parties declared, through the integration of Ravel’s judicial analytics. To state the obvious, judicial opinions that are, as a practical matter, hidden from view cannot be analyzed for purposes of prediction or


12. While this article focuses on federal district court opinions, there is no reason to suppose that bankruptcy court decisions present a different picture.


14. Judged by citation count, notable examples include Almonte v. New York State Division of Parole, No. 9:04-CV-484 (GLS) (N.D.N.Y. Jan. 18, 2006) (which Shepard’s counts as being cited 397 times, 34 of them warranting the label “followed”), and Marquez v. Colvin, No. 12 Civ. 6819 (PKC) (S.D.N.Y. Oct. 9, 2013) (cited 125 times according to Shepard’s, followed 14 times).

strategic decision making.\textsuperscript{16} They are equally unavailable to academics or public bodies conducting empirical studies.

Illustrating the Problem—One District Court, One Type of Case

\textsuperscript{\textsection12} Each year the U.S. District Court for the Middle District of Florida receives approximately 850 civil complaints challenging rulings on benefit eligibility or amount by the Social Security Administration (SSA). Nearly 150 of them are filed with the court’s Tampa Division. Each is handled by one of six magistrate judges. When both parties consent, the assigned magistrate judge handles the case straight through to final judgment. If consent is withheld, the magistrate judge prepares a report and recommendation for the assigned district judge. Either party can object to that proposed resolution, but more often than not, it is adopted in full. During 2016, over fifty Social Security appeals assigned to Magistrate Judge Anthony E. Porcelli were concluded. One concerned the denial of disability insurance benefits to James Thomas Ates. On August 1, 2016, Judge Porcelli issued an eight-page order in the \textit{Ates} case, reversing the agency’s decision.\textsuperscript{17} His order remanded the case to the SSA for further proceedings. Ted Taylor, the lawyer handling the appeal, was notified immediately by an e-mail message generated by the court’s electronic case management and filing system. He in turn notified Mr. Ates. It was good news for both. Ates could look forward, upon remand, to better than even odds of receiving benefits.\textsuperscript{18} For his attorney, the decision opened the prospect of immediate compensation. Taylor promptly moved for an award of fees under the Equal Access to Justice Act. In an opinion dated September 7, Judge Porcelli ruled that the act’s terms were met and awarded Ates and, by assignment, Taylor $4,365.90.\textsuperscript{19}


\textsuperscript{17} Ates v. Comm’r of Soc. Sec., No. 8:15-cv-1014-AEP (M.D. Fla. Aug. 1, 2016), \url{http://www.access-to-law.com/pacer/MDFla_15cv01014_08012016.pdf}[https://perma.cc/9VJB-ZY6J]. Writing on this subject requires citing numerous opinions unavailable from the standard online sources. Judge Porcelli’s opinion in \textit{Ates} and most of the others falling into this category can be retrieved by PACER subscribers at $0.10 a page from that system via a direct link, in this instance: \url{https://ecf.flmd.uscourts.gov/doc1/047116358216}. But having already located and retrieved the district court decisions cited in this article, frequently incurring the fee, I have decided to place all of them online at an open site. That site is the target of the prior link and those provided for other “hidden opinions” throughout the article.

\textsuperscript{18} In 2007, the Government Accountability Office (GAO) calculated the rate of success upon remand at sixty-six percent. \textit{U.S. Gov’t Accountability Off., Report to Congressional Requesters, Disability Programs: SSA Has Taken Steps to Address Conflicting Court Decisions, But Needs to Manage Data Better on the Increasing Number of Court Remands} 16 (Apr. 2007), \url{https://digital.library.unt.edu/ark:/67531/metadc299236/m1/1/}[https://perma.cc/RVN8-X8XR].

Although both Ates opinions clearly fall under the E-Government Act’s access mandate, neither is available via a written opinion retrieval from the court’s site. As a consequence, those researching Social Security cases on Lexis, Westlaw, Bloomberg Law, Casemaker, Fastcase, Google Scholar, and the rest remain ignorant of them. Such a database search, however, does retrieve a reversal and remand opinion in another Social Security denied-benefits appeal filed only days before by Magistrate Judge Carol Mirando of the same court. What explains the difference?

Concededly, the commercial databases, Bloomberg, Lexis, Westlaw, and the rest, operate with different collection policies and systems. They are not compelled to offer all district court rulings. Of the major three, Westlaw has historically loaded fewer U.S. district court opinions, a carryover from the high degree of selectivity required by the publisher’s legacy print reporter. In recent years, though, competitive pressures have eroded that difference. Today, all major services have comparably extensive and, as this article will explain, comparably incomplete collections of Social Security claims decisions from the Middle District of Florida, collections in which the decisions of Magistrate Judge Porcelli are seriously underrepresented. The lack of access to his decisions in Ates and similar cases is neither an anomaly nor the consequence of quality or brevity filters imposed by online publishers. Its source lies within the federal judiciary. The problem is widespread.

Indeed, the situation is worse than the example of the Ates case suggests. Having been informed of the Ates decisions or having discovered them through laborious docket searches, a researcher can retrieve both from the court’s case management system. Any similar attempt to obtain the judge’s report and recommendation in the case of Robinson-Rollins v. Commissioner of Social Security dated June 15, 2016, and adopted in full by District Judge Charlene Honeywell encounters the message “You do not have permission to view this document.” Federal law is clearly to the contrary, but because someone at the court failed to properly tag the computer file holding the document, remote public access to it remains blocked. Similar lapses lie at the heart of the pervasive, but little noticed, case law access issue explored here.

Prior to Ratliff v. Astrue, 560 U.S. 586 (2010), courts were divided over whether fees awarded under the Equal Access to Justice Act (EAJA) were payable to the attorney or the client. In Ratliff, the issue was whether the fee award was subject to a statutory offset to satisfy a client’s preexisting debt. The Supreme Court held that the EAJA’s plain language compelled a conclusion that the payment belonged to the client and was therefore subject to the offset. Nothing in that decision cast doubt on the standard practice of attorneys having their clients assign future rights to an EAJA fee award. However, the Anti-Assignment Act (AAA), 31 U.S.C. § 3727, poses a problem. Several lower court decisions, including one in 2017 by the Sixth Circuit, Kerr v. Comm’r of Soc. Sec., 874 F.3d 926 (6th Cir. 2017), have held that, unless the defense is waived by the Social Security Administration (SSA), the AAA renders such assignments invalid. In Kerr, and generally it seems, SSA will waive this defense allowing payment of the EAJA fee pursuant to an assignment to the extent that the claimant has no outstanding debts owed the U.S. government.


Screen print of PACER message on file with author.
A lawyer filing a Social Security appeal with the District Court for the Middle District of Florida cannot know in advance to which magistrate judge the case will be assigned. However, upon learning to whom it has gone, that lawyer must decide whether to consent to having him or her conduct all proceedings and render a final judgment. Practice before the SSA might lead to an expectation that data bearing on the decision should be available. That agency regularly posts outcome statistics for each member of its cadre of more than 1200 administrative law judges (ALJs). Their award percentages vary enormously. Those for the ALJs in the Tampa office range from a low of twenty-eight percent (ALJ Glen Watkins) to a high of eighty-nine percent (ALJ Paul Johnston).

According to the SSA’s internal data on judicial review of benefit denials, the district court remand rate for Fiscal Year 2016 was slightly higher than fifty percent nationwide. That number includes roughly fifteen percent remanded at the government’s request, the result of a determination by SSA’s Office of General Counsel that the administrative determination or process was indeed flawed. In a few cases, but only a few (perhaps two percent of the overall total), the district court remand is coupled with an outright reversal and simply directs the agency to calculate and pay benefits.

A recent study by Harold Krent and Scott Morris concludes that in their rulings on Social Security cases, U.S. district and magistrate judges exhibit even greater variability around average national figures than ALJs. Krent and Morris found that twenty-five percent of magistrate judges had remand rates lower than twenty-two percent; twenty-five percent, higher than fifty-six percent. The mean was forty percent; the median, fifty percent; the standard deviation, twenty-one percent.

Whatever the national figures, an attorney with a case assigned to Judge Porcelli should want to know where his rulings place him along the spectrum reported by Krent and Morris. As noted above, an early decision that attorney must make is whether to consent to having Porcelli conduct all proceedings and render a final judgment. Withholding consent will not remove the magistrate judge from the case, but it will limit his role to producing a “report and recommendation” to which either party can object, thereby putting the matter before an Article III U.S.

24. Id.
27. See Social Security Admin., supra note 25.
28. Harold J. Krent & Scott Morris, Inconsistency and Angst in District Court Resolution of Social Security Disability Appeals, 67 Hastings L.J. 367, 389 (2016). In light of the current inquiry, the data source for these findings is noteworthy. The study relies on a data set consisting of all Social Security decisions rendered from 2010 through 2012 by federal district courts held by Lexis. The authors acknowledge that the total falls far short of the number of Social Security cases resolved during that period, but write that they had “no reason to doubt that the 10,743 cases analyzed [were] representative.” Id. at 387–88. The research reported here throws a shadow over that premise.
29. Id. at 389.
district judge.\textsuperscript{30} To the extent that a full collection of a judge’s opinions is not available, strategic choices on questions like these cannot be based on meaningful analytics.

\begin{itemize}
\item In preparing the necessary memorandum arguing that the ALJ decision should not be affirmed, access to Porcelli’s opinions in the \textit{Ates} case and others would allow counsel to argue for consistent treatment. Did the ALJ’s decision in this later case fail to address the report of an examining psychologist that detailed the claimant’s borderline IQ, limited ability to acquire new skills, poor cognitive processing, and recurring depression? If so, its facts would permit an argument that the case is “on all fours” with \textit{Ates} and therefore should be remanded.
\end{itemize}

\begin{itemize}
\item Courts of appeals case law would, in all likelihood, frame that argument, but these are matters on which most U.S. courts of appeals provide only the most general guidance and little meaningful oversight. During the decade ending December 31, 2016, the Eleventh Circuit Court of Appeals (the appellate court that hears appeals from the Middle District of Florida) issued only eight precedential Social Security decisions; four of them affirmed the district court decision on appeal.\textsuperscript{31}
\end{itemize}

\begin{itemize}
\item There is an altogether different perspective on a magistrate judge’s performance in resolving Social Security appeals and the other components of a full case load. Magistrate judges serve for a term of eight years. A full portfolio of opinions would appear to be relevant to their potential reappointment to a follow-on term or any subsequent nomination to some other public office.
\end{itemize}

\begin{itemize}
\item Stepping back still further, academics and policymakers addressing such important and recurring questions as “Could the current approach to providing judicial review of Social Security disability determination be improved upon?”\textsuperscript{32} are severely handicapped so long as they lack access to comprehensive data on the status quo.
\end{itemize}

\begin{center}
\textbf{The Terms of the 2002 Transparency Mandate as Applied to the Courts}
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\begin{itemize}
\item The E-Government Act’s opinion-access requirement was one among a large and comprehensive set of measures aimed at improving federal government transparency and performance. The list of stated purposes included
\begin{itemize}
\item providing increased opportunities for citizen participation;
\item reducing costs and burdens for businesses and other government entities;
\item promoting better informed decision making by policymakers; and
\item making the federal government more transparent and accountable.\textsuperscript{33}
\end{itemize}
\end{itemize}


\textsuperscript{31} During the same period, the Eleventh Circuit decided another 400 or so Social Security disability cases, affirming the district court opinions in eighty-five percent of them. (Both tallies compiled by the author.)


The legislation led off with a finding that “[m]ost Internet-based services of the Federal Government are developed and presented separately, according to the jurisdictional boundaries of an individual department or agency, rather than being integrated cooperatively according to function or topic.” For this reason, it required creation of and authorized appropriations for an integrated online information system covering all federal administrative agencies.

For the Judiciary, a Court-by-Court Rather Than a Consolidated Approach

In sharp contrast, the act’s section dealing with the judiciary left the federal courts as it found them—each responsible for the design, content, and maintenance of its own website. The legislation addressed the courts individually rather than collectively, simply calling upon the chief judge of each and every one to bring the court’s site up to the statute’s minimum standards. These included the “[a]ccess to the substance of all written opinions” mandate. With one Supreme Court, twelve regional U.S. courts of appeals plus the Federal Circuit, ninety-four district courts, a similar number of bankruptcy courts, and the Court of Federal Claims, this directive invited a wide range of methods and degrees of compliance. For anyone conducting case research extending beyond a single circuit or district, the approach necessitated either (1) resort to multiple sites, one per court, with nothing ensuring consistent approaches to case retrieval and document format; or (2) reliance on a third-party service that had gathered and organized opinions from the many court sites. This inconvenience was not experienced by the judges themselves, their clerks, or many of the lawyers appearing before them. They were already accustomed to having their case law research needs met by Westlaw and Lexis. The legislation’s individual court site standards were for the benefit of an amorphous public.

The most obvious (although not most serious) gap between the act’s explicit opinion-access requirement and the federal judiciary’s indifferent performance is the absence of a well-marked link to opinions at many district court websites. Figure 1 shows the home page of the Northern District of Indiana site. Behind what door (tab or link) would a nonexpert expect to find its opinions?

This district court’s homepage is typical in not having an “Opinions” link. Only thirty-nine out of ninety-four do. Another eleven have a choice with that or a similar label on a drop-down menu under a home page tab, one that may be denominated “Judge’s Info” or “Case Info.” An additional handful offer links to “recent” or “newsworthy” opinions. The Northern District of Indiana site is far from alone in assuming that anyone seeking the court’s opinions will know that the system named “PACER” is a means to that end and will have a PACER account. PACER, which stands for Public Access to Court Electronic Records, is the public

34. Id. at § 2(a)(3), 116 Stat. at 2900.
35. See id. at § 204, 116 Stat. at 2913. The model had already been established. In 2000, a single-portal site for the federal government, FirstGov.gov, was opened by the General Services Administration. In 2007, it became USA.gov.
36. The survey of district court websites on which these counts rest was first conducted in June 2017 and repeated in late April 2018. The figures appearing here are as of the latter date.
access face of the federal electronic filing and case management software (CM/ECF) now installed in one version or another in all federal district courts. Its presence throughout the federal judicial system and accessibility from court websites is, apparently, the ground on which the Administrative Office of the U.S. Courts certified to Congress in 2009 that all federal courts had achieved full compliance with the E-Government Act.39

¶29 That was just around the time that the inconsistency in design, functionality, and content of federal court websites and, in particular, the difficulty in finding district court opinions through them led the Judicial Branch Committee of the Judicial Conference of the United States to commission the preparation of a website template. The resulting “District Court Website Toolbox” was distributed in early 2011.40 Use of the “toolbox” elements was totally elective. They were described as a set of tools “that courts may use when developing, enhancing, or updating their . . . websites.”41 The homepage template included a prominent “Opinions” link, and


41. Hornby memo, supra note 40.
distribution provided an occasion for reminding all district courts of the content required by the E-Government Act and Judicial Conference policy.\(^\text{42}\) As the data reported above reveal, the initiative’s impact was limited.

\(\text{¶30}\) A number of districts still maintain their own online opinion collections, apart from PACER. Some of these offer important functionality that PACER does not, such as the ability to search by year, judge, and words or phrases appearing in the text of an opinion (i.e., full-text search).\(^\text{43}\) Others provide more limited retrieval options.\(^\text{44}\)

\(\text{¶31}\) Well before enactment of the E-Government Act, the inefficiency of having each district court build and maintain its own opinion database had led the Administrative Office of the U.S. Courts to work with one of the nation’s busiest districts to establish a multicourt site it called CourtWeb. CourtWeb, begun with decisions from the Southern District of New York and running on its server, was designed to receive opinions from as many other district and bankruptcy courts as wished to participate. By the end of 1998, the Northern District of Illinois had joined. By the effective date of the E-Government Act in 2005, nine district courts and one bankruptcy court were using the system.\(^\text{45}\) Five years later the original host district withdrew from participation, and the database moved to the U.S. District Court for the Middle District of Pennsylvania.\(^\text{46}\) There it resides today, holding some decisions from seventeen district and eleven bankruptcy courts.\(^\text{47}\) For those ten of them that still actively use it, the site avoids the burden of maintaining a separate database. For the public, however, it offers neither a coherent collection of courts nor the assurance of completeness and currency as to those it includes. CourtWeb courts are scattered from Hawaii to Vermont, Alaska to Alabama. Sixteen appear to have ceased sending their opinions, although only one has indicated that fact at the site. Finally, reflecting the elective structure of the original design, its homepage warns users that “not all opinions and rulings, even by participating judges, are necessarily posted to this [site].” In its current form, CourtWeb is more likely to be a source of confusion than of assistance.

\(\text{¶32}\) A more recently established, and potentially more promising, public database of opinions from multiple district courts is now maintained by the Government Publishing Office (GPO). (See figure 2.) As part of its Federal Digital System (FDsys), the GPO currently offers opinions from fifty-three federal district courts, fifty bankruptcy courts, all twelve regional circuit courts of appeals, and the Court of International Trade.\(^\text{48}\) (The collection does not include decisions of either the

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42. See id.
48. These FDsys data were compiled on April 25, 2018.
Figure 2  

U.S. Supreme Court or the U.S. Court of Appeals for the Federal Circuit. Fifteen of the participating district and bankruptcy courts are or were users of CourtWeb.) Begun in 2011 as a small pilot project with only twelve participating courts, this joint venture was, a year later, approved for national implementation by the Judicial Conference of the United States. “National implementation” means only that all federal courts are invited to participate and have formally been “encouraged” by the Judicial Conference to do so. It does not mean that there is any process or set of incentives in place designed to obtain full participation. The decision as to whether to participate, like the responsibility for compliance with the E-Government Act’s requirements, lies with the chief judge of each court. As the prior numbers indicate, more than five years after “national implementation” forty-one district courts and forty-three bankruptcy courts have not seen fit to join.

¶33 As the GPO receives opinions, it authenticates them and loads the files into FDsys, along with their accompanying docket entries, exactly as they have come from each court. Unlike PACER, the system includes full-text search capability. However, the ability to retrieve opinions using full-text search depends on judicial compliance with another E-Government Act provision: the requirement that opinions be provided in “text-searchable format.” Astonishingly, twelve years after the


act’s effective date, some judges continue to have their decisions printed for review and signature and then scanned into CM/ECF as PDF image files.\textsuperscript{51} According to a recent tally, six percent of the judicial documents designated as “written opinions” in 2016 were, for this reason, not “text-searchable.”\textsuperscript{52} Placed in FDsys as image files, they remain utterly opaque to its search engine. As with other key aspects of E-Government Act observance, courts and judges vary enormously on this point. Over the past decade, the percentage of written opinions filed in non-text-searchable form has been more than cut in half, but during 2016 seven district courts had rates of nonsearchable opinions in excess of one in five.\textsuperscript{53} With some judges, the practice appears quite consistent. One of them is Senior Judge Edward J. McManus of the U.S. District Court for the Northern District of Iowa. During 2016, he filed at least twenty-five opinions on Social Security appeals, including one reversing and remanding a claim because of the SSA’s failure to evaluate evidence of mental impairment submitted after the ALJ’s determination of ineligibility but before a decision by the agency’s Appeals Council.\textsuperscript{54} While those decisions are held in FDsys, none can be retrieved using an appropriately narrow word search because all are scanned image files.\textsuperscript{55}

\(\S 34\) At present, the FDsys opinion database is troubled by one further flaw. The regular transfer from each participating court’s CM/ECF system is supposed to occur automatically. Nonetheless, interruptions can and do occur due to failure of the software designed to accomplish that, often the consequence of an upgrade. Such lapses can easily pass unnoticed at the court level as they have no direct effect on court functioning. Yet neither the Administrative Office nor the GPO have a system in place to monitor opinion flow. Both were unaware in May 2017 that the most recent opinion from the Eastern District of Michigan in FDsys carried a 2013 date and that data transfers from a number of other courts had also fallen behind, although less egregiously. Those specific deficits have since been addressed, but no measures are in place to detect future interruptions of this sort. Less than a year later, the most recent opinion in FDsys from the Northern District of Alabama was dated from 2016, and its opinions from three other districts included none filed in 2018. The FDsys holdings for prior years from several participating courts are substantially below the numbers shown on the courts’ own records for the same period,\textsuperscript{55}

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\textsuperscript{52} E-mail from Michael Lissner, Exec. Dir., Free Law Project (Aug. 11, 2017) (on file with author).


\textsuperscript{54} Sabljakovic v. Colvin, No. 16-cv-2010 (N.D. Iowa Aug. 5, 2016), http://www.access-to-law.com/pacer/NDIowa_16cv02010_08052016.pdf [https://perma.cc/P8KB-WQEL].

\textsuperscript{55} The full set of decisions can be retrieved by party name, which in this instance includes the phrase “Social Security” and McManus’s name because both are included in the docket entries associated with the opinions. While the opinions are not text-searchable, the docket entries and metadata are.
presumably the result of past transfer interruptions that were caught without the resulting gaps in coverage being filled in.\footnote{For instance, FDsys holds only 1991 opinions in civil cases for the District of Colorado filed during 2016, while the court’s PACER report for that year lists 4209. The court’s 2016 opinions on FDsys include only seventy-six involving Social Security Disability Insurance; the PACER total is 187.}


\¶35 In sum, because of the federal judiciary’s radically decentralized approach to E-Government Act compliance, a curious citizen, lawyer, journalist, or scholar seeking to gather and analyze (1) opinions on a particular issue, (2) opinions written by a specific judge, or (3) opinions written by a specific judge on a particular issue may or may not find a court-based database that makes that possible and may or may not find the GPO’s database a useful tool. Even where one of those options exists, the path to it may not be clearly indicated on the relevant court’s website.

**PACER’s Queries and Reports as Compliance**

\¶36 Over thirty district courts neither participate in the GPO database nor offer an alternative comprehensive and searchable database of their opinions. Are those courts in compliance with the E-Government Act? As already noted, the act does direct that each court’s opinions be made available in “text-searchable” format.\footnote{The phrase, however, has been interpreted by the Judicial Conference as requiring...}

\section*{Figure 3}

PACER (CM/ECF) Query form, U.S. District Court for the Middle District of Florida, \url{https://ecf.flmd.uscourts.gov/cgi-bin/iquery.pl} [\url{https://perma.cc/5P4D-X3Z8}]  
[This view is shown only after the user logs in.]
only that opinions be released as text rather than scanned image files, not that each court must ensure access to its decisions via full-text search.\footnote{58}

\¶\hspace{1em} 37 For federal courts that neither maintain nor cooperate with some other public database of their opinions, the PACER system furnishes the sole means of E-Government Act compliance. Yet PACER has serious deficiencies. Several are obvious. Any user of the Internet can go to the GPO’s FDsys collection of federal court decisions, perform a search, and download the documents that meet its terms. No login is required. No fee is levied. By contrast, PACER is a subscription service that runs on fees. Opinions may be exempt from them, but to gain access to free opinions one must subscribe.

\¶\hspace{1em} 38 A member of the public, of whatever stripe (lawyer, journalist, academic, curious citizen, data vendor), who has obtained a PACER account and logged in to the Middle District of Florida’s CM/ECF system is delivered to a query form (see figure 3) that presents a warning and several unexplained options.

\¶\hspace{1em} 39 The warning is a reminder that unless one has been granted an exemption from PACER fees, searches and downloads carry a cost (currently \$0.10 per page). If one is searching for the documents pertaining to a single case, docket number, party names, and date can serve well. Suppose instead one is searching for Social Security disability decisions by Judge Porcelli. Conspicuous by its absence from PACER is any capacity to search by “name of judge.” As recently as 2003, the Judicial Conference of the United States reaffirmed a long-standing policy prohibiting “the Administrative Office from releasing judge-identifying information from statistical databases.”\footnote{59} In 2012, the suggestion that the next generation of CM/ECF (NextGen) should enable PACER users to access information by judge was tabled by a Judicial Conference subcommittee “for further study.”\footnote{60}

\¶\hspace{1em} 40 Enticingly, the form does offer “Nature of Suit” and “Cause of Action” choices. The contents of those fields depend on categories selected by the party filing the complaint that initiated the action. The civil cover sheet contains a section in which the filer must mark off the single most appropriate “nature of suit” box. Those doing empirical work with federal case data have long commented on the imprecision of these designations, especially with types of litigation that plausibly fit in more than one of the available categories.\footnote{61} The filer’s indication of category is not effectively monitored by court staff and counts for nothing in the subsequent treatment of a case. Social Security appeals illustrate the difficulty. The “nature of suit” options include multiple Social Security categories. A complaint seeking review of a denial of disability insurance should be designated “863.” However, mistakenly coding it as “865” will have no adverse effect on the case. Claims for

\footnote{58. See Mecham memorandum, \textit{supra} note 51, at 3 n.1.}


Social Security Disability Insurance and Supplemental Security Income often overlap. Where they do, either “863” or “864” would be an appropriate choice. Both cannot be selected. PACER documentation treats these “Nature of Suit” and “Cause of Action” categories as self-explanatory. The form available to the filers, who must affix them, does only a slightly better job.\(^2\)

\(\S 41\) PACER predates the E-Government Act. Even in April 2005, at the point the act took effect for the judiciary, the CM/ECF to which PACER provides access had not been installed in all federal courts.\(^3\) Where installed, the system held and, through PACER, furnished public access to all documents filed in a case, including those written by the judge, however denominated. A highly configurable platform, CM/ECF allows courts to alter the names of events and document types to fit their distinctive terminology and procedures. As one judge, the chair of a committee charged with gathering the views of external users of this system, wrote in that committee’s final report:

In fact, we are currently running some two hundred distinct case management systems in the federal courts, with little consistency as to which release is employed, which features are activated, and what naming conventions are used. The differences are often not apparent and are ill-explained. Our current systems work remarkably well when looked at through the lens of our individual courts; they are maddening to those users who attempt to work in or retrieve information from multiple courts.\(^4\)

\(\S 42\) In response to the E-Government Act, the Administrative Office of the U.S. Courts, operating under Judicial Conference guidance, issued a new version of the CM/ECF software that, once installed by a court, incorporated two changes that applied to all documents in its system tagged as a “written opinion.” The first exempted all documents so designated from PACER fees. Then and now, access to the system still requires an account. Running a query that identifies a case or group of cases still gives rise to charges. Retrieval of a docket sheet listing and linking to all documents filed in a case does as well. But, by virtue of this 2005 software modification, downloading any of those documents tagged by the court as “written opinions” no longer does.

\(\S 43\) Since the docket sheet itself does not show the designation, a second and more important change to PACER was the addition of a “Written Opinions Report.”\(^5\) This operates only at the individual court level. To understand what that means, one must first understand that at bottom PACER is a set of queries and

\(\S 2\) U.S. Courts, Civil Cover Sheet (June 1, 2017), http://www.uscourts.gov/forms/civil-forms/civil-cover-sheet [https://perma.cc/6MHX-F7S5]. One unique feature of the incomplete FDsys database is that it preserves these “Nature of Suit” tags as metadata. Since FDsys also permits full-text search of opinions, it allows case retrieval based, in part, on these categories, without forcing complete reliance on the accuracy of the filer’s application of them. (None of the commercial research services retain this information.)

\(\S 3\) In November 2004, only fifty-six district courts were using CM/ECF. Mecham memorandum, supra note 51, at 3 n.2.

\(\S 4\) See Admin. Office of the U.S. Courts, supra note 60, at iii.


\(\S 6\) See PACER Serv. Ctr., supra note 65.
report options that can be used to access the docketed events and filings in cases held by any federal court's CM/ECF database. It is simply a feature of that court's distinctive CM/ECF installation.

¶44 The holder of a PACER account can go, one by one, to the CM/ECF systems of all ninety-four district courts and search for an individual case or for a set of cases filed between certain dates. The “Written Opinions Report” option added as district courts installed the version of CM/ECF released in 2005 allows retrieval of all documents designated as “written opinions” in cases meeting the researcher's criteria. Use of that retrieval option as well as the downloading of any of the documents listed on the resulting report is free.

¶45 PACER has a second access point that leads only to cases and not directly to opinions. The Administrative Office of the U.S. Courts maintains a national index kept up to date through regular take-offs from all individual court systems. Although this index permits searches across courts, it holds none of the docket listings or documents of the cases to which it points. Searches, other than those for a specific case identified by some combination of party name, docket number, and range of dates, are forced to rely on one or more of those elements, augmented by one or more “Nature of Suit” and “Cause of Action” codes. Using that national index, one can generate, for example, a linked list of all 107 actions filed from June 5 to June 8, 2017, naming Nancy Berryhill, the acting commissioner of the SSA, as defendant or all 176 actions with one of the three principal Social Security “nature of suit” codes terminated during the same period. In either case, the charge is ten cents a page of search results, and following a link to determine more about or search for documents filed in any of the listed cases takes the researcher to the PACER installation of the court in which the action was filed.

¶46 A few federal court sites that do not offer a full-text searchable database of the court's opinions explain these PACER options. Many more, including the site of the Middle District of Florida, do not. In any event, neither of PACER's entry points offers the individual researcher a useful set of tools for retrieving opinions addressing a specific issue or those written by a particular judge.

¶47 That reveals a fundamental truth about PACER. All spin aside, PACER is not and never has been designed for the ordinary citizen, scholar, or journalist wielding a web browser in pursuit of case information. The system's principal customers have long been “major commercial enterprises, large law firms, and financial institutions.” Its biggest single user is the U.S. Justice Department. Other heavy users fall into one of two main categories: experienced professionals involved in litigation with filings in the system and automated computer systems gathering documents and data,

67. Currently, all district court CM/ECF systems include this report option. A handful of bankruptcy courts still do not.
69. The quotation and the data appearing in this paragraph are drawn from a document entitled “Electronic Public Access Program” distributed at the February 14, 2017, hearing of the Subcommittee on Courts, Intellectual Property and the Internet of the House Judiciary Committee by committee staff (copy on file with the author).
71. Litigants receive one free copy of all documents filed in their case through a link in the notice of filing generated by CM/ECF, but lawyers who rely on CM/ECF as their own repository of events...
massive amounts of it, on a regular and recurring basis. Together, they are focused more on specific unfolding litigation or on what court filings reveal about individuals and business entities than on court opinions. Patently, the system was designed for such users and, for the most part, satisfies them. Thanks to these segments of the “public,” PACER generates large sums that have been used to support a range of court technology projects. In recent years, annual revenues have held steady at around $145 million. (See figure 4.) Close to ninety percent of the total comes from a tiny percentage of account holders (2.7%).


PACER as an Opinion-Collection Tool for Third-Party Database Proprietors and the Data Feed for FDsys

¶48 The impact of PACER’s manifest indifference to citizen access has been alleviated in recent years by developments that could not have been foreseen when the Written Opinions Report was added in 2005. The most significant of these was Google’s launch of a free and open, searchable case law database.74 Thanks to Google Scholar’s high-profile entry into the legal information field in November 2009, and a subsequent small swarm of startups pursuing a business strategy of opening their primary law data to the public while providing premium services to subscribers, the access environment has changed dramatically. The inadequate and poorly documented search capabilities offered by individual federal courts no longer pose a practical access barrier so long as the courts’ opinions can be easily and reliably collected by these new, open-to-the-public systems. Using Google Scholar or Casettext without charge or subscription, a citizen can retrieve Social Security decisions of the Middle District of Florida, including, for example, Judge Porcelli’s Report and Recommendation in Munger v. Colvin.75 How do these free services and their fee-based competitors gather decisions from the federal district courts? PACER’s Written Opinions Report is reasonably suited to their needs. Database proprietors have only to deploy software scripts that routinely and systematically run that report on each of the ninety-four district court systems to retrieve all tagged opinions filed since their last harvest.

¶49 For FDsys the process is functionally equivalent. The CM/ECF systems of participating courts automatically transmit all judicially prepared documents that have been tagged as “written opinions” to the GPO.

At the Root of PACER’s Failure—Courts and Judges That Do Not Take the Tagging of Written Opinions Seriously

¶50 By this point it should be clear that it is not the lack of a searchable database of opinions on the Middle District of Florida website or the court’s failure to participate in FDsys that explains the absence of the Ates opinions from Google Scholar and Lexis. Both services hold reports and recommendations their author has written in other Social Security appeals, including the Munger case noted directly above.

¶51 The Ates decisions and countless others remain hidden due to a lack of systematic attention to or oversight of how courts, individual judges, and court staff have implemented the E-Government Act’s “written opinion” requirement. A large number of opinions issued by Judge Porcelli and other Middle District of Florida judges are not retrieved by a PACER Written Opinions Report simply because they have not been tagged by the person filing and docketing them as “written opinions.”

¶52 The E-Government Act places responsibility for compliance with its “written opinion” and other court website mandates on each court’s chief judge. PAC-ER’s implementation disperses it further by leaving the ultimate decision as to whether a particular document qualifies with its author or the court staff member docketing it using the “event” categories set up in his or her court’s CM/ECF system.

¶53 Lurking behind that decision and the choice among available docketing categories is an obvious definitional question: which of the myriad rulings, orders, judgments, and reports written and filed by judges are covered by the E-Government Act mandate? A memorandum to chief judges from the director of the Administrative Office of the U.S. Courts, dated November 10, 2004,77 furnished guidance on that point, approved by the executive committee of the Judicial Conference:

For the purposes of the E-Government Act of 2002, . . . [a] “written opinion” is defined as, “any document issued by a judge or judges of the court, sitting in that capacity, that sets forth a reasoned explanation for a court’s decision.” This definition is clarified by the following points:

1. The responsibility for determining which documents meet this definition rests with the authoring judge, and the determination should be made at the time the document is filed;
2. The decision as to whether a document meets this definition is not the same as the decision about whether an opinion is to be published;
3. The definition is expressly intended to cover reports and recommendations issued by magistrate judges at such time as any action is taken by a district judge on a report and recommendations issued by a magistrate judge, and also includes a summary order adopting such report and recommendations;
4. The definition is not intended to include routine, non-substantive orders such as scheduling orders or rulings on motions for extension of time . . . .78

¶54 A subsequent memorandum to all district, bankruptcy, and magistrate judges, dated April 7, 2005, announced the release of a new version of the CM/ECF software, incorporating two features designed to facilitate compliance. The first allowed the automatic tagging of specified categories of judicially authored documents “such as Memorandum Opinions,” those categories to be set by each court. The second feature enabled a prompt querying the judge or “judicial assistant, law clerk, or courtroom deputy” filing a document of some other type whether it met the definition of a “written opinion.” Both documents tagged automatically and those tagged as a result of an affirmative answer to that prompt would then be listed on and retrievable at no charge by means of a Written Opinions Report.79

¶55 For these two new features to achieve the intended result, the software (or software update for those courts that already had CM/ECF installed) had to be configured by each court’s administrative staff to correspond to local nomenclature

77. Mecham memorandum, supra note 51, at 2.
78. Id. A fifth clause, not quoted, applied only to the courts of appeals.
and docketing procedures. Document titles and docketing terminology vary so widely from court to court that the standard settings in the software as released were and still are a poor fit for many. The category or categories resulting in automatic tagging have to be ones regularly used by the court for rulings that meet the “written opinion” definition. If not, the software’s “event dictionary” has to be adjusted to fit its practice. Other types of orders that may or may not qualify and therefore warrant a prompt asking whether the document being docketed constitutes a “written opinion” have to be identified and coded. Assuming appropriate adjustments to the docketing system, some form of communication between the authoring judge and members of court staff docketing a document that may be entitled “order,” “memorandum,” or “judgment” is necessary. The 2005 Administrative Office memorandum suggested several approaches, but all of them necessitated changes in court practice, practice that before 2005 had no compelling reason to single out this particular document category. Unless a court’s docketing practice already distinguished among different types of judicial writing in a way that could readily be mapped onto categories warranting automatic or possible tagging as “written opinions,” the new CM/ECF features provided no straightforward means of E-Government Act compliance. Reports and recommendations by magistrate judges posed a particular challenge. Read narrowly, the Judicial Conference guidance called for them to be tagged not when filed but only upon their adoption in whole or part. To achieve that result, orders adopting such recommendations had to be docketed as a separate category, with that event programmed to tag the corresponding magistrate judge’s opinion retroactively.

¶56 The act placed no responsibility at the national level, and none has been assumed. Among the many reports issued by the Administrative Office of the U.S. Courts, none measures or can even be used to infer degrees of compliance. In the training and guidance furnished to new judges and staff, there appears to be little or no attention devoted to this significant detail—how to file a distinct category of judicial writing, which may carry such diverse titles as “order,” “memorandum,” “judgment,” “ruling,” or “report and recommendation.”

**Probing the Problem Further**

**One District Court, One Type of Case**

¶57 District courts exhibit remarkably diverse interpretations and levels of internal compliance with the injunction to tag all written opinions. The range is suggested by their ratios of written opinions to closed civil cases. In 2016 for the ninety-four district courts those ratios ranged from a high of 4.21 (i.e., an average of over four opinions per civil case) for the Eastern District of California to a low


81. This study has looked only at civil cases. An investigation of the tagging of opinions in district court criminal proceedings would, in all likelihood, reveal a similar spread.
of 0.03 for the Southern District of Iowa (three opinions per one hundred cases), with a median of 0.69 (the Eastern District of Wisconsin). The Middle District of Florida fell below that mark with a ratio of 0.50.

¶58 Some of the variance may be the result of differences in civil docket composition. As a control against that, one can compare courts and judges in terms of a specific type of case, ideally one with significant volume, minimal procedural complexity, a relatively standard set of issues, and a predictable number of opinions per case. Social Security cases qualify on all counts. They are filed at a rate in excess of 18,000 a year. Each comes to the district court as an appeal from an agency adjudication. The proceedings are restricted to a review of the administrative record. The issues are limited to whether the SSA’s proceedings and determination involved legal error or were not supported by substantial evidence.

¶59 Social Security cases have one additional attractive feature. A single federal agency, the SSA, participates in every such suit. As a result, there is a public data source other than the courts that can be used to benchmark PACER opinion counts. A recent study of Social Security litigation, prepared for the Administrative Conference of the United States, has, in fact, drawn upon data furnished by the SSA rather than the federal courts, to calculate the remand rates for individual district courts over the years 2010 to 2013. It found a range spanning from a high of 76.6% in the Southern District of New York to a low of 20.8% in the Eastern District of Arkansas.82

¶60 Situated precisely at the median, 41.4%, is the Middle District of Florida.83 According to the authors, these differential rates persist over time.84 Applying the 41.4% rate to the Middle District of Florida’s Social Security case volume for 2016, together with national data on dismissals and voluntary remands sought by the government, produces an estimate of 348 remands (including 127 voluntary remands), 413 decisions upholding the agency decision, and eighty-five dismissals. Judges of the Middle District of Florida deal with voluntary remands and many dismissals without a level of explanation meeting the Judicial Conference definition of “written opinion.” Putting those cases to one side leaves a total of 637 Social Security cases in which one would expect there to be at least one written opinion. In many one would expect more. Cases where the parties have not consented to final disposition by the magistrate judge should have a minimum of two, a report and recommendation and separate adopting order. Successful appeals often bring a subsequent petition for attorneys’ fees under the Equal Access to Justice Act. When that occurs, the court must respond with another opinion (two if there is a magistrate’s report and recommendation). In fact, only 463 Middle District of Florida Social Security cases generated documents logged as “written opinions” in the court’s CM/ECF system during 2016. (The total number of those documents equaled 692.) In sixty-three of those cases, the only document appearing in the Written Opinions Report is a form signed by a deputy clerk noting the final judgment. All sixty-three are cases in which the judge’s opinion or report and recommendation supporting and directing the entry of that judgment was not tagged. The totals suggest that at an absolute minimum one-third of the written opinions in this district’s Social Security cases were not designated as such. As a consequence, they are effectively hidden from public view.

82. Gelbach & Marcus, supra note 26, at 83.
83. Id. at 84.
84. Id. at 85, 91, 94.
¶61 The district’s failures to tag do not distribute evenly across judges and divisions. Only six of the fifty-one closed cases that Judge Porcelli disposed of on the merits in 2016 appear in PACER’s Written Opinions Report. Those six dramatically underrepresent his propensity to affirm the agency decision (eighty-four percent). Only three opinions by Magistrate Judge Thomas G. Wilson of the Tampa Division show up on the Written Opinions Report, two of them reversing and remanding the administrative determination. Unreported are his additional twelve reversals and fifteen affirmances. Magistrate Judge Thomas B. McCoun III filed a total of twenty-nine opinions during 2016 that are not shown on the report. On the other hand, several magistrate judges from other divisions of the court appear to be meticulous in designating their opinions with that title and seeing that they are properly tagged. These include Judges Douglas Frazier, Carol Mirando, and Mac McCoy of the Fort Myers Division, and Judges James Klindt and Monte Richardson of the Jacksonville Division. Their practice remains consistent even when they are handling cases from another division.

Other Districts, Other Patterns

¶62 At least one district court has ensured the tagging of qualifying opinions by designating nearly all orders as opinions, even those that address routine procedural matters. That is the reason the U.S. District Court for the Eastern District of California has so high a ratio of opinions to closed civil cases. It designated 1985 documents as written opinions in the 435 Social Security cases it closed in 2016. These included orders granting and denying motions to proceed in forma pauperis, granting extensions of time to file briefs, and disposing of other seemingly routine matters in addition to those addressing the substance of the plaintiffs’ appeals. This approach leaves no substantive opinions hidden, but it does shift the burden of separating wheat from chaff to the individual researcher (all tagged documents are transmitted to FDsys) or a third-party database service. In light of constantly improving search and filtering software, this appears a relatively minor inconvenience, far to be preferred to missing opinions.

¶63 The bottom of the ninety-four–court opinion labeling curve is anchored by the U.S. District Court for the Southern District of Iowa. It closed 102 Social Security cases during 2016, of which only six had tagged written opinions. Those six opinions were all magistrate judge reports and recommendations, three written by one judge, two by another, and one by a third. The corresponding adopting orders were not tagged, nor were the vast majority of orders furnishing a “reasoned explanation” for the resolution of individual Social Security appeals during 2016. These include five opinions by a single senior judge published in the Thomson Reuters

85. Those reported in full on the Written Opinions Report include four that affirm and two that reverse and remand. Only eight out of the complete set of fifty-one reverse and remand.

86. Since Social Security appeals involve no hearings and usually no oral argument, it is not difficult for magistrate judges of one office to take on cases from another division of the same court.

Federal Supplement series, presumably having been transmitted directly by the judge’s chambers. These do not show up on the court’s Written Opinions Report. They are also missing from the small collection of opinions at the court’s website and from CourtWeb, to which the district seems to have ceased contributing in 2014.

¶64 Lying between these extremes are districts in which the judges and court staff manage to apply the “written opinion” definition carefully and consistently. The U.S. District Court for the Middle District of Alabama closed eighty-seven Social Security cases in 2016. All but six featured at least one tagged written opinion. Those six included three that were remanded upon the government’s unopposed motion for the cases’ return to the agency, one in which the plaintiff moved for a voluntary dismissal, one upon the case being transferred to another district, and the last a dismissal for the plaintiff’s failure to file a brief. All opinions by the district’s five magistrate judges that dealt with the merits of the district’s 2016 Social Security cases were properly tagged as “written opinions.” They can therefore be retrieved by PACER's Written Opinions Report and are readily available to the full range of case law database services, including the GPO’s FDsys in which the district participates. The U.S. District Court for the District of Kansas closed 151 Social Security cases in 2016, 141 of them disposed of by tagged written opinions. The remaining ten consisted of two dismissals and eight voluntary remands.

¶65 What the judges of these two districts have in common is an established practice of employing consistent terminology in the titling of opinions (“Opinion” in the case of the Middle District of Alabama, “Memorandum and Order” in the case of the District of Kansas). That facilitates docketing using CM/ECF events that have been programmed to result in automatic tagging.

¶66 Similarly, judges of the U.S. District Court for the Eastern District of Missouri use the label “Memorandum” to distinguish opinions that warrant tagging from routine orders. As a consequence, the practice recently adopted by one magistrate judge in the district has led to her opinions not being tagged. Her approach poses a novel question about the reach of the phrase “written opinion.” During 2016, Magistrate Judge Shirley P. Mensah disposed of ten Social Security appeals by means of oral opinions, delivered to counsel following oral argument. Transcriptions of her opinions were filed in CM/ECF. These oral opinions refer with care to the parties’ arguments and to the authorities they cite. Transcribed, they run to


90. See COURTWEB, supra note 47.

as many as eleven pages of “reasoned explanation.” However, while the transcriptions attached to final judgments are available through PACER, they are not docked as memoranda and thus not tagged as “written opinions.” A 2016 Written Opinions Report for the Eastern District of Missouri misses them and the judgments to which they are attached, the majority of this one judge’s Social Security decisions for the year. In all other respects, that report shows another court in substantial compliance with the “written opinion” requirement of the E-Government Act.

Are Social Security Cases Representative?

§67 Correspondence between Hyperlaw’s Alan Sugarman and the Administrative Office of the U.S. Courts dating back to 2008 documents a persistent opinion designation problem cutting across types of district court litigation.92 A recent article by Elizabeth McCuskey reports the hidden opinion phenomenon, which she terms “submerged precedent,” in federal-question removal decisions. In a sample drawn from two districts, she found that nearly thirty percent of the relevant “reasoned decisions” were invisible to anyone relying on the commercial databases. They were accessible through PACER, but only to those who knew of their existence or were prepared to dig through docket entries.93 In order of magnitude, her finding compares to this study’s estimate of the “submerged” Social Security opinions rendered by judges of the Middle District of Florida. Another source reports a significant and continuing failure to tag opinions in EEOC litigation.94

§68 The stakes are atypically high with Social Security cases due to Rule 5.2(c) of the Federal Rules of Civil Procedure. Privacy concerns prompted this provision, which limits remote electronic access (i.e., PACER access) to the docket entries and documents in all “actions for benefits under the Social Security Act.” It also applies to a variety of immigration cases. Exempt from the rule and therefore open to remote access is the court’s “opinion, order, judgment, or other disposition” in cases that it covers. Because of Rule 5.2(c), unless the report and recommendation in a Social Security case is tagged as a “written opinion,” it will remain unavailable through PACER even though adopted in full by a district judge order. When that occurs, the failure to tag properly results in online access being blocked completely, rather than the imposition of a per-page fee and omission from PACER’s Written Opinions Report. Thirteen instances of this extreme form of inaccessibility are found in the 2016 Social Security cases disposed of by the Middle District of Florida.

In Conclusion

This Is Not a Small Problem

§69 During 2016, twenty-nine district courts had ratios of tagged opinions to closed civil cases below that of the Middle District of Florida, a demonstrably low standard. Two-thirds of the districts had ratios lower than 1.0, a plausible rough
estimate of the average number of opinions across all types of civil cases. Applying that estimate to the courts falling below 1.0 yields an estimated annual total of hidden opinions in civil cases greater than 130,000. A more conservative ratio of 0.70 yields an estimate still in excess of 66,000, nearly half the projected number of opinions issued by the courts involved. Even for those who know about individual untagged opinions, the failure to comply carries a cost. Their retrieval from PACER would result in a charge of $0.10 per page.95

Hidden Opinions Pose a Serious Challenge to Those Carrying Out Empirical Studies or Attempting to Use Judicial Analytics

¶70 The widespread failure to tag opinions of the U.S. district courts thoroughly and consistently compromises empirical studies that focus on the work of these courts and emerging systems of data-informed prediction and planning. That is true whether the immediate data source is a public one (PACER, FDsys, an individual court database) or a commercial service. All depend ultimately on document designations applied by opinion authors and court staff. At minimum, empirical work on the federal district courts requires a careful look at the completeness of the data for the court and even the judge in question. As matters now stand, in a majority of districts that cannot be accomplished without a laborious review of docket information.96

Addressing the Problem Will Require More Than Infrequent Appeals to Individual Conscientiousness

¶71 Improving access to district court decisions will depend ultimately on the federal judiciary’s national bodies—the Judicial Conference, the Administrative Office, and the Federal Judicial Center—taking the matter seriously. Taking it seriously should include periodic audits of individual court compliance with the “written opinion” mandate and emphasis on this feature of the CM/ECF system in training materials for both judges and court staff. The CM/ECF software should be configured in all districts so that the filing of an order adopting the report and recommendation of a magistrate judge automatically tags both as written opinions. The software should also be configured to require a final review for opinions before a case is marked “closed” and to permit retrospective tagging when omissions come to light. Most effective would be a CM/ECF change reversing the default designation for all judicially authored documents that rule on party motions. Instead of requiring a special designation or some other affirmative step to indicate that a document is an opinion, tagging should be automatic unless the filer affirmatively...
indicates by choice of docketing event or response to a query that it contains a routine nonsubstantive order.

**Participation in FDsys Should No Longer Be Elective**

§72 Now that all lower federal courts have fully operational CM/ECF systems, inclusion in the GPO’s FDsys database ought to be system-wide. So long as the opinion database is run on an “opt in” basis and opinion transmissions are not monitored by the Administrative Office of the U.S. Courts, the FDsys database will remain incomplete. Court participation in the national PACER index is not optional. There is no sound reason for inclusion in FDsys to be. For the broad public, as distinguished from the legal professionals relying on PACER and large data brokers collecting and reselling data drawn from it, completing the GPO database of decisions is the only way to realize the full value of this public system. It is also the best way to ensure an enduring national archive. That, combined with consistent tagging of opinions, might finally fulfill the promise of the written opinion mandate of the E-Government Act of 2002.
Sources of Alaska Legal History: An Annotated Bibliography, Part I

W. Clinton “Buck” Sterling

The author provides an annotated bibliography of sources detailing the legal history of Alaska.

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** Public Services Librarian, Alaska State Court Law Library, Anchorage, Alaska. I offer my sincere appreciation to Professor Stacey Gordon Sterling, Director of the Jameson Law Library, University of Montana, Missoula, Montana; Dr. Joel Fishman, Duquesne University Center for Legal Information/Allegheny County Law Library, Pittsburgh, Pennsylvania; Justice Peter Maassen, Alaska Supreme Court, Anchorage, Alaska; and Michael T. Schwaiger for their advice and assistance in reviewing this work. I also thank my colleagues at the Alaska State Law Library for their forbearance, in particular Susan Falk, Alaska State Law Librarian, Anchorage, Alaska; and Therese Veker, Library Assistant III, Alaska State Court Law Library, Anchorage, Alaska.
Introduction

§1 Nearly two decades ago, it was reported that the demand for legal history research was growing.1 This bibliography helps meet that ongoing demand by contributing an annotated list of books, articles, occasional reports and papers, and selected unpublished materials that shed light on the rich, diverse, and vibrant legal history of Alaska, including both the territorial and statehood periods, as well as the period of Russian control, the period between U.S. acquisition in 1867 and the onset of territorial status in 1912, the Native Alaskan experience, and relevant federal law.

§2 The bibliography is intended to be as comprehensive as possible. While I took a broad view of what constitutes Alaska legal history, I used certain guidelines for inclusion. I have included accounts of historical events with legal consequences, stories of legislative and court actions, and the biographies or biographical sketches of prominent members of the Alaska bar. I have also included sources that offer some history of the development of a particular area of Alaska law or that embed the state’s legal history in a broader narrative. The bibliography also contains sections on crime and justice. In addition, since Alaska was under federal control for so long, and since federal rules and regulations still control much of the state, I include relevant federal legal history: for example, relations with Native Alaskans in areas such as education, subsistence, and land claims settlement. I also include materials on the “law ways” of the Alaska Natives, the distinctly Native and non-Western approaches to law and justice developed by the Alaska Natives prior to contact and beyond. Law from the period of Russian Alaska was a challenge. For one thing, I include only sources in English. For another, many of the rules used to govern were corporate rules from the Russian-American Company (RAC). Those are included, as are accounts of corporate history and the RAC’s relationship and subservience to the imperial government.

§3 To keep the size manageable, legal history sources found to be marginal or unhelpful are weeded out. Sources that merely present the state of an area of law at a given time or predict the effect of a court decision are excluded, as are most meeting proceedings, newspaper accounts, legislative journals, and anything that is not cataloged in the OCLC database. The purpose of the latter approach is to limit inclusion to those items that the reader can reasonably expect to obtain. General history items that are helpful for understanding Alaska’s legal history and context are included and identified as such in the annotations.

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1. Joel Fishman et al., Bibliography of Legal History Articles Appearing in Law Library Journal, Volumes 1–94 (1908–2002), 95 LAW LIBR. J. 217, 220–21, 2003 LAW LIBR. J. 13, ¶ 2 (citing two reasons for the increased demand: more courses in legal history, reflecting greater interest by both faculty and students; and an increase in the number of legal history articles in the periodical literature).
Beginning with the online catalog of the Alaska State Court Law Library, I developed a list of subject headings that I then searched in OCLC’s WorldShare database, as well as the catalogs of the Anchorage Public Library and the Alaska Resources Library and Information Services (ARLIS). I also searched some discrete subjects in JSTOR. As topics of interest emerged, I leveraged the new subject headings as well. I also searched the tables of contents of Alaska’s two law reviews, Alaska’s two bar journals, and several other relevant periodicals. Finally, I browsed shelves, here in the Anchorage Law Library and in the Loussac Library, the main branch of the Anchorage Public Library. Each identified item was then obtained and combed for references to additional items. When the well ran dry, my research was at an end.

The bibliography is organized with a modified list of the subject headings used by Dr. Joel Fishman in a compilation project he led of legal history articles in Law Library Journal. While some entries fall under multiple subject headings, they are listed only once under the subject heading that seemed the best fit. Where appropriate, I include an explanation of the subject heading, allowing me to truncate some annotations in the interest of avoiding repetition. Part I covers the subjects Alaska Bar, Practice and Education, through Education. Part II, which covers the subjects Environmental Law through the Wilderness, will appear in the Fall 2018 issue of volume 110 of Law Library Journal.

Bibliography

Alaska Bar, Practice and Education

This brief article gives an outline account of the onset of the Alaska Bar Association shortly after the arrival of a court system in Alaska.

This brief article looks at the author’s experience in carrying out his coroner duties as a U.S. commissioner in Nome during the territorial period.

This brief article looks at the author’s experience conducting weddings as a U.S. commissioner in Nome during the territorial period.

This brief article looks at the author’s experience as a U.S. commissioner in Nome during the territorial period, with some definition of what the duties of commissioners were and how they were paid.

5. Fishman et al., supra note 1, at 218–19.
This one-column thumbnail gives the history of the Alaska Bar.

This article, based on remarks made by Chief Justice Carpeneti at the Alaska Bar Association Conference in Juneau, 2009, focuses on three jurists who helped establish the court system of Alaska at statehood: Thomas B. Stewart, John H. Dimond, and James von der Heydt.

This article presents a year-by-year account of the *Bar Rag*, the official publication of the Alaska Bar Association.

The author’s purpose, gleaned from interviews in the 1980s, is to capture some of the character of Alaska’s territorial bar and the uniqueness of Alaska legal experience in those halcyon days. The book depicts lawyers and judges at work and at play as they established the rule of law in the territory and laid the groundwork for statehood.

There is often a sense among the practicing bar in Alaska that practice in the Last Frontier differs from practice anywhere else in the country. There was a time, before the Integrated Bar Act and before the Alaska Court-Bar Fight, when this was true. This book examines legal careers and the “Alaska Spirit” during the territorial period. It includes chapters on George Grigsby, Buell Nesbett, practice in Fairbanks, the Gold Rush, John Hellenthal, the U.S. Attorney’s Office, and the Court-Bar Fight.

Part I of this article looks at the growth of the Anchorage bar until Alaska statehood, starting from an inchoate collection of practicing attorneys, through the floating courts, the Grigsby Era, and the controversy of the appointment of J.L. McCarrey to the federal bench by President Eisenhower.

Part II builds on the first part by bringing the Anchorage bar into the 1960s and beyond. Issues addressed include lawyer discipline, an activist bar, and the Court-Bar Fight.

This article outlines the events and personalities regarding the Alaska Supreme Court’s 1964 attempt to control the Alaska Bar Association and resistance by Alaska lawyers. It starts with a look at *United States v. Stringer*, a 1954 decision that many perceived as emblematic of the territorial court’s inability to adequately regulate the legal profession.

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This publication contains an overview of Alaska legal history from the Treaty of Cession to the turn of the last century, as well as a sketch of the Alaska judiciary, the constitution and bylaws of the Alaska Bar Association, a roll of attorneys and roll of members of the association, and a section “In Memoriam” of departed members.


This article, by a former Alaska Supreme Court justice, reviews the practicing bar’s resistance to the Alaska Supreme Court’s attempt to control the Alaska Bar Association by placing it under the judicial branch of government and to seize its funds (known as the “Great Alaska Court-Bar Fight”).


This short article, by a former Alaska Supreme Court justice, looks briefly at the careers and impacts of four prominent Alaskan jurists: John H. Dimond, Jay Rabinowitz, Jim Fitzgerald, and James von der Heydt.


The author reminisces about the practice of law in Alaska when he was coming up through the ranks, immediately prior to and after statehood with some focus on personalities and admissions.


This article reviews four years of academic studies focused on the priorities for legal education in the state. It then reviews the results and classes established at the University of Alaska Anchorage and the Criminal Justice Center.


This report starts out as a study of the feasibility of support for a law school in Alaska. It then expands to inquire into broader issues of legal services in the state, including the demand for, and methods of, delivering legal and law-related services, supply of lawyers, and need for law-related education in the general public.


The author provides personal reminiscences of his time in Alaska, as both a former U.S. attorney in Valdez and a U.S. district judge in Nome.


This humorous article recounts the time nonlawyer Gus Boltz, a Nome character, managed to represent plaintiffs before the U.S. district court in Nome.


The author briefly recounts what it was like to practice in Anchorage shortly after World War II, with a look at the bar examination of the period and some of the judges.
This is a brief account of interviews with the living legal legends of Alaska’s territorial period, including Jack Asher, Kenneth Atkinson, and Russ Arnett.

The author reminisces about his law practice in Nome in the 1950s.

**Alaska Constitution and Constitutional Law**

This pamphlet outlines and highlights the proposed Alaska constitution for the citizens who will vote on ratification.

This is a brief narrative of the Alaska Constitutional Convention, held in Fairbanks in the winter of 1955–1956. It contains a list of the delegates and their professions.

This article recounts the contributions of the University of Alaska student body, prior to the constitutional convention and after, to push the cause of statehood onto the national level. Students also attempted to directly influence the drafting of the constitution by lobbying to set the voting age in the new state at eighteen years of age.

This article compares the century-old Indiana constitution with that of the emerging state of Alaska, showing where they approached issues similarly and demonstrating how the delegates to the Alaska constitutional convention benefited from the constitutional experiences of Indiana and other states in constitution making.

Based on proceedings, minutes, recollections of participants, and related documents, this is a historical account of the drafting and ratification of Alaska’s state constitution by a participant. Includes short biographies of convention delegates and consultants.

This article reviews Alaska court decisions regarding the free exercise and establishment of religion in Alaska, and is based on the Alaska Constitution, which provides greater protection of religion than the U.S. Constitution.

This note looks at how Alaska courts have worked to establish a unifying test for
interpreting the privacy amendment to the Alaska Constitution since the Ravin decision. It also focuses on developments in general personal and place privacy, informational privacy, and search and seizure.


This book, written for a nonexpert audience, covers the origin and evolution of Alaska’s constitution and includes judicial interpretation and political history.


This article, by the former executive director of the Alaska Redistricting Board, provides a history of redistricting in Alaska from drafting the original constitutional provision in 1955–1956, through the 1998 constitutional amendment and the adoption of the final plan in 2002.


While making his argument, the author reviews the Alaska Constitutional Convention and the subsequent history of the state’s constitution, including amendments.


This account of the drafting of the Alaska Constitution, written by one of the delegates to the constitutional convention, includes a look at many of the “modern” constitutional provisions.


This volume is part of a series of reference guides to U.S. state constitutions. It covers the history and development of the Alaska Constitution and then parses the document section by section, with accompanying commentary and interpretation by the courts and other governmental bodies.


With a focus on equal protection, privacy, religious freedom, and access to natural resources, this article examines Alaska’s independent interpretation of those rights, based on the Alaska Constitution and separate from the federal Constitution. This approach—looking to state constitutions to protect civil liberties over and above the protections guaranteed by the federal Constitution—is part of what has been called the New Judicial Federalism.


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10. Available at http://www.alaska.edu/creatingalaska/statehood-files/49th-state-sets-example/ [https://perma.cc/6QLV-ZMAC].
This article examines the individual rights jurisprudence of Chief Justice Jay Rabinowitz, who served on the Alaska Supreme Court for thirty-one years. Specifically, it looks at the background of the Alaska Supreme Court’s personal freedom protections, at case law, and at Rabinowitz’s impact.

Project Jukebox. *Judges of Alaska.* Digital Branch of the University of Alaska Fairbanks Oral History Program.11

This project provides online access to documentary, visual, and oral resources highlighting aspects of the history of Alaska’s courts. The collection includes interviews with former judges and justices, posted in recorded form and sometimes with transcription, and with some thematic access. There are also slideshows.


These three volumes contain the twelve staff papers prepared by the Public Administration Service for the delegates to the Alaska State Constitutional Convention to assist them in their deliberations on specific topics, some of which corresponded later to specific articles in the Constitution.

I. The State Constitution Within the American Political System12
II. Civil Rights and Liberties13
III. The Alaskan Constitution and the State Patrimony (The Constitution and Natural Resources)14
IV. Suffrage and Elections15
V. The Legislative Department16
VI. The Executive Department17
VII. The Judicial Department18
VIII. The Constitution and Local Government19
IX. State Finance20
X. Legislative Structure and Apportionment21

11. Available at http://jukebox.uaf.edu/site7/project/70 [https://perma.cc/9TGE-XF3F].
17. Available at http://archives2.legis.state.ak.us/PublicImageServer.cgi?lib/5500200VI.%20The%20Executive%20Department.pdf [https://perma.cc/F4KZ-HMED].
18. Available at http://archives2.legis.state.ak.us/PublicImageServer.cgi?lib/5500200VII.%20The%20Judicial%20Department.pdf [https://perma.cc/BNA4-DUC].
XI. Constitutional Amendment and Revision

XII. Initiative, Referendum, and Recall


The Alaska Supreme Court determined that the rights to privacy and liberty enshrined in the Alaska Constitution did not invalidate a state law prohibiting doctor-assisted suicide. Along the way, the court reviewed the development of the court’s interpretation of those sections.


In 1977, Justice William Brennan called on state judges to interpret their own constitutions before considering the federal Constitution as a way of enhancing individual rights in an approach that became known as the New Judicial Federalism. This article looks at the history of independent interpretation in Alaska and the historical context of the Alaska Constitutional Convention that helped make it possible.


This article looks at pertinent trends in home rule as it developed nationally prior to 1960. With that as background, the author examines the drafting and adoption of the home rule section of the Alaska Constitution, and then examines the treatment of the home rule section by the Alaska courts.


Among other things, this Note reviews Alaska’s right to privacy as written into its constitution and as interpreted by case law. It also analyzes the reasoning behind Alaska’s current approach to privacy law.


Among other things, the author “reviews the current status of the nascent doctrine of independent state constitutional law and explores areas in which the Alaska courts have succeeded in giving life to the state constitution” and “mirrors early court doctrine first enunciated in Baker v. City of Fairbanks.”


Article VIII of the Alaska Constitution concerns natural resources. The papers in this publication look at the history and application of section 4 (Sustained Yield) and section 17 (Uniform Application).

This article examines the development of an equal protection standard in Alaska under the Alaska Constitution and independent of the federal standard.

**Alaska Court Procedure**

This article reviews the development and content of Alaska’s summary judgment standard and compares it to the federal standard.

As part of a study of Alaska Civil Rule 82, this report briefly reviews the history of fee shifting in Alaska, discusses how it became the common rule, and examines the purpose of its adoption.

This article provides a brief history of the development of Evidence Rule 104(b) (Relevancy Conditioned on Fact), common applications of the rule, and a history of the Edwards case.

This article examines the development of Alaska’s standard for admission of expert testimony and its conflict with the federal approach.

As part of his analysis of Alaska Civil Rule 82, the author provides a brief historical development of the Alaska practice of awarding attorneys’ fees.

Alaska Civil Rule 82 was amended in 1992. Before examining the amended version of the rule, the author reviews the history of fee shifting in Alaska prior to the amendment.

This empirical study of Alaska’s Civil Rule 82 examines whether the rule actually reduces meritless claims as held by tort reformers, who want to use Rule 82 as a model for national reform. The results suggest that reformers will need a different model.


In 1973, the Alaska court started carving out a public interest exception to the English rule of making losing parties responsible for their opponents’ attorneys’ fees. This exception was adopted legislatively with HB 145.27 This article traces these developments and looks at how the court has responded to HB 145.

Alaska Legislature


This brief article covers the election of the legislature, appointment of officers, and consideration and passage of legislation for the first session of Alaska’s legislature.


The Organic Act of 1912 established the Territory of Alaska and provided for a locally elected legislature, which met for the first time in 1913 in Juneau. Two senators and four representatives from each of the four judicial districts of the territory comprised the new territory’s legislature. This article looks at the election, membership, and legislation of that first session.


This article looks at the composition, priorities, and historical impact of the first state legislature in Alaska.


This article reviews the ultimately unsuccessful efforts to create a one-house legislature in Alaska, from when Congress created Alaska’s bicameral legislature in 1912 until the 1970s.


This article surveys various factors surrounding Native electoral participation in Alaska and provides a summary of Native membership in Alaska’s legislatures.


This article reviews the creation of Alaska’s territorial legislature and the consideration of unicameralism by Alaska’s constitutional convention.


This brief article provides an account of the work of Alaska Territory’s Third Legislature. It is followed—through to the November issue—by brief biographies of the legislators.

Alaska National Interest Lands Conservation Act (ANILCA)


This booklet outlines the development and passage of the Alaska National Interest Land Conservation Act, from citizen activism to legislative action, over a period of more than a decade.

In this paper the author analyzes the legal history of ANILCA and concludes that the state must incorporate community-derived tribal law as the applicable minimum federal standard in formulating policies and regulation in state subsistence management.


The author provides an account of the legislative effort to pass what became ANILCA, with brief coverage of earlier nonlegislative efforts that helped set the stage for congressional action in 1980.


This article covers the legislative history of what became ANILCA the following year, with some focus on those who supported the lands act (Representatives Morris Udall and John Sieberling, and Interior Secretary Cecil Andrus, on the one side), and those opposed and more in favor of tapping Alaska’s mineral wealth (Senators Mike Gravel and Ted Stevens, and Congressman Don Young, all from Alaska).


This reworks the following article from the 1982 Congress, with a little more focus on the lessons learned from ANILCA.


This article provides some of the historical background to the passage of ANILCA, including historical perspective, growth of public and congressional support, and conflicting interests.


This article provides a brief legislative history to ANILCA and also reviews the relevant Ninth Circuit decisions that addressed the conflict between development and conservation inherent in the legislation.

**Alaska Native Land Claims and the Alaska Native Claims Settlement Act (ANCSA)**

Anders, Gary C. “A Critical Analysis of the Alaska Native Land Claims and Native Corporate Development.” In *Native Americans and Public Policy*, edited by...

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This article looks at the historical relevance of U.S. Indian policy to Alaska Natives, specifically with regard to Native profit-making corporations that were established to receive cash and title to land when aboriginal land title in Alaska was extinguished under ANCSA in 1971.


The author compares ANCSA with the General Allotment Act of 1887 (Dawes Act), looking at both as efforts to impose a capitalistic private property system on “collectively oriented subsistence practitioners.”


This article examines the historical background leading up to ANCSA’s passage, outlines some of the more important settlement terms, compares it with other federal policies toward American Indians, and then evaluates the effects of ANCSA with regard to Alaska Native development potential.


This article looks at the effect of ANCSA fifteen years since passage on three issues of concern to Alaska Natives: land protection, subsistence, and tribal self-government.


This article takes stock, from the perspective of Native Alaskans, of the achievements of ANCSA and where it fell short, particularly in the sense that Alaska Natives understood that corporations could not be substitutes for tribes and that the act failed to give meaning to the lives of Native Alaskans.


This illustrated book-length treatment of Alaska Native land claims contains chapters covering Alaska Natives and their lands and land claims struggles, as well as a review of ANCSA and issues such as settlement act organizations, money settlement, and land settlement.


This is a treatment of the law on Native land claims in Alaska prior to the Alaska Native Claims Settlement Act of 1971.31 While it does not claim to be an exhaustive legal treatment, it nonetheless reviews developments from prior to the purchase of Alaska from Russia to the 1960s. The booklet also includes an appendix with case law and legislation.


This article provides a historical and legal background to ANCSA, starting with Russian settlement, and then proceeds through a narrative legislative history to the act.


This book analyzes, in discrete chapters, colonial treatment of Natives’ rights to their own land around the Pacific Rim. One chapter reviews arguments on how to accommodate the Alaska Natives and how to balance those claims against demands by settlers.


This article discusses the historical relationship between the federal government and the Alaska Natives and the effect of ANCSA on that relationship.


This article provides a very brief history of ANCSA, including its incentives, and looks at ANCSA’s role in natural resources policy making and social engineering.


This article gives some background on ANCSA.


This article briefly reviews the history of ANCSA and some legal history of Native Alaskans, with an emphasis on assimilation. It also examines the Alaska Native Review Commission, which was established by the Inuit Circumpolar Conference as an independent entity to examine several issues, including ANCSA, Native corporations, and the social and economic status of Native Alaskans.


In 1983, Thomas R. Berger was appointed by the Inuit Circumpolar Conference to lead the Alaska Native Review Commission in a review of ANCSA (1971). That assignment took him to Native villages across Alaska in pursuit of evidence. This book is an account of that experience. He determined that the legislation had created new problems without fixing the old ones.


This article gives an overview of the history of Alaskan Native land claims, focusing on both legislative and judicial efforts.


Among other things, this article looks at the relevant case law and legislation that affect Native rights in Alaska, the applicability of the Indian Trade and
Intercourse Acts to Alaskan Natives, the existence and character of their property rights under the 1884 Organic Act, and the cases leading up to and including the Tee-Hit-Ton decision.\textsuperscript{32}


This article posits that the “land claim era” was formally ushered in by the passage of ANCSA in 1971. It then looks at different aspects of the act, including Native Regions, Native Corporations, and Land Selection.


The author presents an overview of Alaska Native land claims in Alaska, reviews the events leading up to the passage of ANCSA, with summary of some of its major provisions, and brings the reader up to date with a synopsis of developments since passage.


This article briefly looks at the lack of provision in ANCSA to settle the Alaska Native sovereignty issue and the subsequent judicial attempts to define tribal existence and jurisdiction in Alaska.


This essay looks at Russian legacy in resolving land claims of the Alaska Natives by briefly reviewing the Imperial charters for the Russian-American Company and the 1867 Treaty of Cession.


The authors maintain that Congress intended to treat the settlement package as akin to personal injury damages when it came to taxing the distributions of Native corporations, which as such would not be taxable. The article then reviews the history of how the IRS interpreted the settlement in order to tax the distributions.


This treatment studies the sophisticated lobbying effort of the Alaska Federation of Natives to secure their land claims, eventually resulting in the 1971 passage of ANCSA. The author looks at interest group formation and alliance, and particularly the attributes and strategies of their leadership.


Due to the erosion of land claims and subsistence rights, Native Alaskans faced a crisis. This treatment examines the history of how they developed mechanisms and political capacity to solidify their rights by settling the land claim issue, which came to fruition with the enactment of ANCSA in 1971.

\textsuperscript{32} Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

\textsuperscript{33} Available at \url{http://www.alaskool.org/projects/ancsa/ARTICLES/ervin1976/Ervin_MuskOx.htm} [https://perma.cc/3X67-26YM].

The Alaska Federation of Natives, founded in 1966, is the largest statewide Native organization in Alaska. After founding it pushed to settle land claims in a just and fair way, ultimately leading to the passage of ANCSA. This dissertation provides a history of Alaskan Native-White relations in Alaska, the process of organization, and land claims issues and settlement.


This article reviews the history of both ANCSA and its 1987 amendments.


This article provides a history of Alaska Native land claims and the passage of ANCSA.


This chapter compares the Native land claims experiences of Alaskan and Hawaiian Natives and includes a brief history of ANCSA and a review of its use in practice.


This is a republication of a 1946 study of Tlingit and Haida possessory rights. A lengthy introduction places it in context and an eleven-page chapter examines customary land use and rights of the two tribes. It also includes descriptions of various regions of Native territories. Anthropologist Goldschmidt and lawyer Haas went from village to village and conducted interviews to discover who owned and used the lands and waters and under what rules. Their report established strong historical evidence to support Native land claims.


This brief account describes the career of William Paul, the Alaska Native Brotherhood, the Tlingit-Haida Jurisdiction Act of 1935, and two pre-ANCSA court battles over Native land claims, *Tlingit & Haida Indians of Alaska v. United States*34 and *Tee-Hit-Ton Indians v. United States*.35


In *Tee-Hit-Ton Indians v. United States*,36 the U.S. Supreme Court ruled that while Indian title rights permitted Native Americans exclusive occupancy of aboriginal lands, they did not extend to property rights that required compensation under the Fifth Amendment to be extinguished. While this article is about the *Tee-Hit-
Ton decision, it also focuses on the efforts of the man who was most responsible for bringing the suit, William Paul, a former president of the Alaska Native Brotherhood.

Haynes, James B. “The Alaska Native Claims Settlement Act and Changing Patterns of Land Ownership in Alaska.” Professional Geographer 28, no. 1 (1976): 66–71. ANCSA required settlement of how the vast federal lands in Alaska would be administered, as private, federal, state, and Native. This brief article describes decisions immediately after enactment on how some parcels of land were to be allocated, with more to be determined later.

Under the terms of ANCSA, Native corporations were required to select about forty million acres of surface estate and mineral rights from ninety-nine million acres set aside from federal lands. This article looks at how, due to time constraints, one Native regional corporation, Doyon Limited, enlisted the assistance of the Geophysical Institute of University of Alaska to survey available land and resources.

This article reviews the foundation of the law as it applies to Alaska Natives, including the 1867 Treaty of Cession, 1884 Organic Act, and 1958 Alaska Statehood Act. It also looks at Alaska Natives and their relation to their land and tribal governance.

Written a year prior to the passage of ANCSA, this article reviews the background of Native Alaskan land claims in Alaska, including treaties and federal legislation, and then looks at the major settlement proposals before Congress.

Hensley, William L. What Rights to Land Have the Alaska Natives? The Primary Question. Paper for Constitutional Law Class, University of Alaska Anchorage, May 1966.37
This influential paper, written for a course taught by Judge Jay Rabinowitz, traces the legal rights of Alaska Natives to the property and resources on which they lived. The coverage starts from “time immemorial” and proceeds through Russia’s sale of Alaska to the United States, various governing regimes during U.S. control, and on through the Alaska Constitution, but it stops short of ANCSA (1971).

This report analyzes land claims and rights-of-way by utilities within Native allotments in the Copper Valley, but more broadly the legal principle of “relation back,” a doctrine that “grants priority to allottees if the date of the allottee’s claimed initial use and occupancy of available land predates other uses and rights-of-way, even if the allotment application was submitted after the right-of-way was issued.” By way of background, the report provides a brief history of lands involving Alaska Natives.

This report looks at land tenure issues in the context of Alaska and the implementation and impacts of ANCSA. It also looks at the pre-ANCSA history of the Ahtna Alaska Natives and their traditional territory.

This report reviews the treatment of Alaska Native land claims from the time of Russian rule up to and including a section-by-section analysis of ANCSA.

It was hoped that the passage of ANCSA in 1971 would lead to an improvement of the prosperity and quality of life for Alaska Natives. This paper examines the data for evidence that hope was starting to come to fruition ten years after passage. In the end, it was determined that while things were improving, other developments may have been of more immediate effect. Still, the author was hopeful and noted impacts that ANCSA had that could bear fruit later on.

This article is about the *Tee-Hit-Ton* case, in which the U.S. Supreme Court ruled that because aboriginal land claims by Alaska Natives had not been “recognized,” Native groups could not sue for property loss under the Fifth Amendment.

This paper reviews the history of aboriginal title in Alaska and the extinguishment of title under ANCSA, reviews portions of ANCSA, and notes how those sections have played out in the thirty-five years since passage.

This paper reviews the history of aboriginal title in Alaska and gives a section-by-section analysis of ANCSA noting twenty years of litigation and amendment.

This article contains a historical look at the legal and moral nature of Native title claims in Alaska and then looks at the development of a legislative solution.

The purpose of this study is to review Alaska Native self-government in the con-

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38. Available at https://minds.wisconsin.edu/handle/1793/21937 (click on the link to the PDF under “File(s)”) [https://perma.cc/WU53-5DZR].
41. Available at http://www.lbblawyers.com/ancsa/ANCSA%20Paper%20with%20Table%20of%20Contents%201992.pdf [https://perma.cc/Y6QW-WZGG].
text of U.S. politics. Subsidiary themes are development of Native leadership and development of Native land claims, the latter of which includes a brief legislative history of ANCSA and a look at its implementation. The authors also look at the formation and experiences of the North Slope Borough, which they see as an advanced form of self-government for Alaska Natives.


In addition to providing an accessible history of ANCSA and subsequent law, this book reviews the struggle of Alaska Natives prior to passage, particularly in the realm of civil rights.


This article examines the early congressional policy and legislation concerning Alaska Natives and looks at the evolution and definition of “Indian Country” and its application to Alaska, legislative history and intent of ANCSA, and the influence of the Alaska Native sovereignty movement.


Overall, this treatment is the first part of a history of the U.S. government’s relations with the Alaska Natives, from acquisition of Alaska from the Russians to statehood. Among other things, it includes an account of how non-Natives sought to monetize Alaska’s Native resources and the rise of new forms of Alaska Native political leadership.


This is the second part of Don Mitchell’s history of the U.S. government’s relations with the Alaska Natives. It focuses on “how and why Congress was persuaded that Alaska Natives should be compensated for the extinguishment of their legally cognizable possessory right . . . to use and occupy the land on which they and their ancestors had hunted and gathered”42 and concludes with the 1971 enactment of ANCSA.


This article traces the lack of consensus between Governor Gruening and elements of the Interior Department (including Felix Cohen) on how to assimilate, acculturate, accommodate, and compensate Alaska Natives as federal policy toward them evolved. In particular, disagreements arose over whether the Alaska Natives should be given reservations or compensated outright. The time frame is from the Alaska New Deal to the passage of ANCSA in 1971.


This Comment examines the original intent of Congress in passing ANCSA, the problems the 1991 amendments were intended to resolve, and various problems with the amendments.


The author reviews the history of Native Alaskan title claims to the seabed and ocean off Alaska.


This article looks at the history of Native Alaskan water rights prior and subsequent to the enactment and enforcement of ANCSA.


This article gives a brief legal history leading up to the enactment of ANCSA before analyzing the law.


This three-volume report was compiled to assess the impacts of ANCSA on the Alaska Natives in the interior regions of the state. Of particular note are volume 1, which includes a history of the issue, and volume 2, which includes individual issue papers on topics such as Native hunting and fishing rights, taxation under ANCSA, and the International Caribou Treaty.


This very brief article reviews some of the changes made to ANCSA by Congress in 1988.


This article reviews the events that led to passage of ANCSA, as well as the need for amendments made in 1976 and 1980. The author also looks at the overall effect of passage and amendments on specific issues, such as stock alienation, viability of village corporations, and subsistence.


This dissertation provides an overview of Haida cultural adaptation from the time of contact with the Russian fur traders to their later willingness to “Americanize.” Archival research is coordinated with oral accounts by people in and near Hydaburg. Included are political and commercial developments, as well as relevant federal legislation, including cooperative associations before ANCSA and Native corporations after ANCSA, such as Sealaska.

This paper reviews the application of federal laws to the different groups of Alaska Natives, 1867–1910, 1910–World War II, and 1941–1958.

This article examines the history and provisions of ANCSA and the history of the trust relationship between Alaska Natives and the federal government.

This chapter examines the experience of Alaska Natives from a Marxian standpoint, where “primitive accumulation” describes the separation of the direct producer from the means of production. An account of primitive accumulation in the United States is followed by a focus on Alaska, from the Russian colonial period through ANCSA.

Commencing with the Russian administration of Alaska, this report reviews the treatment of Native Alaskan land claims and how they were subsequently treated by congressional, executive, and judicial activity in American Alaska prior to the passage of ANCSA.

While this comment is primarily a look at how ANCSA fits into the history of overall U.S. Indian law, it contains a brief history of ANCSA itself.

Alaska Native Law Ways

This article includes brief sections on “Settling Trouble Cases,” “Territorial Rights,” and “Women.”

This article discusses how anthropology can contribute to public policy and focuses on three areas: the Alaska legal system, Native Alaskan subsistence issues, and commercial fishing permits. With regard to the former, the author gives some focus to the work of lawyer-anthropologist Stephen Conn.

This chapter reviews Yupiit leadership, law, and governance, focusing on the formation of the Yupiit Nation, traditional leadership, traditional laws, social control, and decision making.


This article, in two parts, examines Alaska Native culture broadly, but also focuses on Alaska Native law aspects of that culture. This part examines sense of justice and mercy, homicide, good faith, and cannibalism.


This second part looks at theft, inheritance, gambling, marriage, and divorce.


The author believes that a great deal of variant behavior exists among different Eskimo groups and that variety can be reduced to certain consistent themes in their lives, especially in the way they react to conflict.


This study reviews the two contexts of the Inuit institution of spouse-exchange from East Greenland to Kodiak Island. “Common spouse-exchange” is “mundane, secular, and unaccompanied by any form of ritual,” whereas “ritual spouse-exchange” is “attended by some considerable religious ceremony.”


This article reviews the elaborate rules involved with the institution of wife trading, as well as its social function.


Overall, this article is an anthropological study of how Native Alaskans developed legal mechanisms that suited their “cultural personality.” But it also looks at the development of the village council and magistrate systems.


In 1970, the Alaska Judicial Council sponsored a Bush Justice Conference to examine the problems of improving justice in rural areas. This paper analyzes northern Native attitudes toward conflict resolution where the cultural traditions conflict or harmonize with Western legal approaches.

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This analysis of Alaska Athabascan aboriginal law ways of dispute solving and conflict resolution discusses how they differ from contemporary Anglo-American legal processes.


This article looks at the law ways of the Alaska Natives as a whole, not focusing on national boundary. While it does not focus on any particular groupings, it does include Alaskan units. The author recognizes that this can lead to a blurring of the picture but gives an overall account of property notions, homicide, evidence, and other legal concepts.


While there was no formal social control structure in Native Alaskan society that could adjudicate disputes, mediate between parties, and dispense punishment, there nonetheless existed an informal council of elders that existed alongside clan structures to help settle controversies and keep the peace. This article looks at how the council functioned on St. Lawrence Island after the beginning of the U.S. presence in 1894.


This study of the Tlingit contains a chapter on “Native Jurisprudence” and also discusses treatment of slavery, miscegenation, education, and marriage.


This volume primarily compiles ethnohistory papers originally presented in 1967. In the second part of the book, a kind of reconstruction of Aleut social structure, are sections on “Administration of Justice” and “Property and Trade.”


This study examines the clash between Yup’ik and Western legal traditions, particularly how the two cultures dealt with crime, as well as the degree to which Western legal traditions have been absorbed.


This article summarizes some of the different types of Tlingit crimes—for example, murder, stealing, and adultery—and how the importance of clan sovereignty and individual status affected the types of punishment that were exacted. It also looks at the difference between a criminal act and a shameful act.


This paper shows that while the Tlingit in southeast Alaska governed their territory and had laws, their approach was different than the Euro-Americans who subsequently gained control.

While mostly a cultural analysis, this piece also looks briefly at the administrative and societal structure of law of the Nunamiut who, the author determines, have instituted legal structures and ways of adjudication.


This scholarly treatment of aboriginal culture and history is primarily anthropological. The article tries to correct early disregard of leadership, law, and political organization by giving a more informed and respectful look at such issues as well as territory and boundaries, alliances, and other elements of the twelve political units in the Bering Strait area.


This chapter reviews the purposes and obligations of the historical Alaska Native practice of wife lending and wife exchange.


This book contains chapters on family and kinship, customary law, economy and society, voluntary associations, and property, wealth, and status.


This report looks at the basic tenets of Tlingit property law, which exists in the context of society, culture, and ceremony, and also examines the conflicts between claims brought under traditional property law and claims under U.S. law. In addition, the study is intended to integrate the traditional property law as a basis for cultural perspective with regard to the Native American Graves Protection and Repatriation Act of 1990.

**Alaska Native Sovereignty**


This student Comment includes a brief history of ANCSA, its subsequent amendments, and other legislative enactments. It also examines the historical development of the “Indian Country” concept and its application to Alaska.


This article examines the Alaska Supreme Court decision in *John v. Baker*, in which the court refused to follow the interpretation of federal Indian law regarding tribal jurisdiction as put forth by the U.S. Supreme Court in *Alaska v. Native Village of Venetie Tribal Government*.

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This article is primarily a critique of the Venetie decision. Nonetheless, it provides a history of the events and law that led to the decision as well as the historical relationship between the federal government and Native Alaska tribes.


The purpose of this article is to analyze how ANCSA affected Indian Country and tribal authority in Alaska. Along the way, it presents a history of Native Alaskan land rights and then discusses the importance of Indian Country and tribal sovereignty to Alaska Natives. After looking at the Venetie II decision, it reviews the legislative history and judicial precedent “traditionally applied to determine the existence of Indian Country and inherent tribal sovereignty.”


Public Law 280, passed in 1953, was an attempt by Congress to find a happy medium between “abandoning the Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction.” It transferred criminal and civil jurisdiction over reservation Natives in five states from the federal government to the state governments, thus allowing state criminal prosecutions for crimes committed in Indian Country, with a secondary intent of opening state court jurisdiction to civil actions arising in Indian Country. Alaska was added to the list of states in 1958, applying the law to Alaska Natives. This article reviews the legislative history of Public Law 280 and later amendments, how Natives and states have sought to resolve troublesome issues, and the need for careful statutory interpretation.


The article focuses on the incorporation into U.S. law of the Tlingit people, who were sovereign when the United States acquired Alaska in 1867. It also looks at the development of a distinct legal status for Alaskan Natives and then considers the impact of that status on the sovereignty of the Tlingit.


This chapter looks at the legal structuring of Tlingit-White relations (Russian and American) in Alaska and specifically at Tlingit sovereignty and how Tlingit law was sometimes used by U.S. officials to maintain peace. In Crow Dog’s Case, the U.S. Supreme Court held that unless authorized by Congress, federal courts had no jurisdiction to try cases where the offense had already been tried by the tribe. Soon thereafter, Congress passed the Major Crimes Act, which extended federal jurisdiction to Indian Country for certain crimes. The holding of Crow Dog was

47. 944 F.2d 548, 559 (9th Cir. 1991).
49. Ex parte KAN-GI-SHUN-CA (otherwise known as Crow Dog), 109 U.S. 556 (1883).
effectively voided by decisions of Judge Matthew Deady, who refused to recognize Tlingit sovereignty in *Ex parte Sah Quah* and *Kie’s Case.*


By analyzing the two cited opinions, this Comment focuses on conflict between the Alaska constitutional denial of special privileges to any resource user group, on the one hand, and the recognition by the federal government of special hunting and fishing privileges for Native Alaskans, on the other. Includes a look at state attempts to comply with federal law.


This article looks at Native sovereignty issues with a particular focus on the *Venetie* case, which addressed two very important issues for Native Alaskans: “(1) do federally recognized tribes exist in Alaska; and if so, (2) do they possess jurisdiction over members and non-members?”


This article contains a history of Alaska Native sovereign immunity in the courts, examines the history of the federal-Alaska Native relationship from 1867–1934, and looks at the distinction between the tribe, reservation, and village.


In 1976, the Chilkat Tribe attempted to prevent the removal of artifacts from the Chilkat Village’s *Whale House*. This article, told through a semiotic process, tells the story of the *Chilkat III* case, focusing on the artifacts, players, procedural history, and litigation in tribal court to determine ownership and help define tribal sovereignty. The litigation, in both federal and tribal courts, lasted many years.


This Comment looks at the history of congressional intent with regard to Native sovereignty and to Alaskan Native Indian villages.


Before making a polemical argument, this Note gives a brief look at subsistence hunting and fishing in Alaska from statehood through ANILCA, as well as background to the *Katie John* litigation.

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51. 31 F. 327 (D. Alaska 1886).

The author traces the history of the erosion of tribal sovereign immunity in the Alaska Supreme Court, which he sees as a contradiction to the federal line of cases.


This lengthy memo from the solicitor of the Interior Department to the secretary outlines the legal history of Alaskan Native village status and jurisdiction from pre-Russian law ways through ANCSA.


A section of this article reviews the history of the termination of Alaska Native sovereignty, with reference to Public Law 280, ANCSA, and the *Venetie* decision. It also reviews some of the legal doctrines that supported the process.


A historical review of the treatment of Native villages by Congress and the Alaskan and federal courts is provided in part I.


This article reviews Alaska Native sovereignty as it was impacted by federal legislation such as the amended Indian Reorganization Act (1936), ANCSA, and the ANCSA amendments.

Alaska Natives


This fact-finding report includes a chapter on the “Administration of Justice” with regard to Native Alaskans in Alaska.


The author outlines the history of Alaska aboriginal rights through statehood (which clashed with Native claims) and ANCSA.


This article reviews the history of the Alaskan Native struggle for civil rights, land, and sovereignty but from the perspective that “citizenship,” “equal rights,” and “reverse discrimination” were used rhetorically to dispossess Alaska Natives of their land and sovereignty rights.

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This article looks at Native Alaska in terms of colonial status, as defined first by the League of Nations and then by the United Nations. In 1959, the UN resolved that Alaska had “exercised its right to self-determination and freely” chosen the status of statehood, which ended its colonial status.


In the 1930s, human remains were excavated from Larsen Bay on Kodiak Island and removed to the Smithsonian anthropological collection. Prior to and following the 1990 passage of the Native American Graves Protection and Repatriation Act (NAGPRA), the Larsen Bay Tribal Council demanded the repatriation of the remains. This article examines the legal issue of cultural affiliation in the successful effort to have the remains repatriated.


The author offers a case study of the Klukwan Artifacts dispute to help frame his argument that there are flaws in NAGPRA when it comes to recognizing and protecting communal property rights of Native Americans.


In this lengthy treatment, the author examines the Venetie opinion against the history of federal Indian law, ANCSA’s effect on Native sovereignty (Indian Country), and the history of the litigation, including a focus on an opinion issued by the solicitor of the Department of Interior.


This panoramic treatment recounts the laws historically applied to Alaskan Natives, but also how those laws have been, and are being, refashioned into tools by Native Alaskans for their own use.


While racial discrimination by Whites against Native Alaskans was taken for granted in prewar Alaska, in the 1940s resistance began to grow. This article addresses the fight against segregation by Territorial Governor Ernest Gruening, the Alaska Native Brotherhood, Roy and Elizabeth Peratrovich, and a young Native woman named Alberta Schenck who was arrested for sitting in a “Whites only” section of a Nome theater in 1944, eleven years before Rosa Parks refused to give up her seat on an Alabama bus.

58. Prior to the two previous editions of this work, in 1984 and 2002, the original incarnation was published as David S. Case, The Special Relationship of Alaska Natives to the Federal Government: An Historical and Legal Analysis (1978).

This report examines the relationship and obligations of the federal government, in both the legislative and executive branches, to the Alaska Natives, especially after the enactment of ANCSA and the termination of most land-related trust obligations. It includes an appendix by Stephen Haycox, “Historical Aspects of the Federal Obligation to Alaska Natives.”


This article reviews the import of ANCSA on, among other things, the legal status of Alaska Native groups, recognition of family/kinship structures, customary law and the impact on the criminal justice system, and local methods of dispute resolution.


The author reviews the working relationship between village and state legal processes in Alaska since 1970. While there was an initial response by state agencies, they eventually resisted what they perceived as power sharing between competing sovereign entities.


This paper examines how ANCSA affected tribal government as a fundamental unit of service delivery and its survival as a third order of government within the U.S. federal system.


The author looks primarily at cultural issues as they relate to the Natives of south-eastern Alaska—the Haida and Tlingit—but he also analyzes the effect of ANCSA on indigenous cultural and political processes.


Chapter 5 of this volume contains a brief review of laws and policy in Alaska from 1867 to statehood, and reviews the contemporaneous status of lands, statewide and regionally.


60. Available at [https://scholarworks.alaska.edu/bitstream/handle/11122/7350/conn.1988.smooth_the_dying_pillow.8815.01.pdf?sequence=1](https://perma.cc/4J7H-HMZS).

This article discusses, in part, the impact of ANCSA on Native Alaskans, with a focus on the Eyak Tribe. It also looks at the “conflicts that exist between the Eyak Corporation, an ANCSA corporation, and its minority Native American shareholders, the Eyaks.”


This article examines the laws that have been developed to protect archaeological sites on federal and Alaska Native land, both under current Native control, including by Native corporations, and after the property has lost its Native character. It also provides a brief history of ANCSA and other federal legislation enacted to specifically protect certain archaeological finds.


The primary intent when Public Law 83-280 was enacted was to allow state criminal prosecutions for crimes committed in Indian Country, with a secondary intent of opening state court jurisdiction to civil actions arising in Indian Country. This article looks at the historical and legal contexts of the 1970 “Metlakatla” amendment to Public Law 280 (PL 91-523) and whether it divested the Metlakatla Indian community of its own jurisdiction for trying crimes committed in Metlakatla territory.


This article is primarily about the forging of Native collective identity and political consciousness in Alaska and its manifestation by the publication of the *Tundra Times*. The legal aspect revolves around opposition to the Atomic Energy Commission’s “Project Chariot.” The proposal, to use “nuclear engineering” to harness an atomic blast to excavate a deep-water harbor near Otogoruk Creek on the Bering Sea, united the groups in opposition, sparked the spirit of cooperation, and gave visibility to Native voices statewide.


This book is a treatment of the Pribilof Aleut experience of servitude under federal and territorial jurisdictions, including as refugees during World War II relocation, and after their return.


This article reviews the issues and challenges faced by the federal government in relations with the peoples native to Alaska after acquisition from Russia. The author recognizes that relations appear different from those with other racial
groups on the U.S. mainland and therefore require a different approach. He also focuses on the issue of education for the Alaska Natives.


This article examines the effects of policies applied to the Alaska Natives in the mid-twentieth century.


The author traces the history of Alaskan Native status during the Russian and U.S. territorial periods and in the context of a U.S. Senate bill to define citizenship and qualification of voters in Alaska.


This article reviews the 1971 passage of ANCSA, comparing the cultural understanding of the need for the legislation and the legislative process itself between the members of Congress involved in legislating and the Native Alaskans who participated. Problem definition, legislative hearing structure, and issues of meaning and culture are analyzed.


The author examines the formation of the Alaska Federation of Natives and the history of the prior organizations that led to it, particularly in the context of Native Alaskan land claims. The author gives context to the “nativistic movement” and also examines the role of the *Tundra Times*.


This article focuses on the Gwinich’in people in Alaska and their relation to the Alaska National Wildlife Refuge. The author includes a history of their relation to ANCSA and their opposition to the drilling in the refuge, as well as the background of the *Venetie* decision, which limited sovereignty of the Native village.61


The author reviews the legal culture of Russian and American Alaska with regard to regulation of Native Alaskan labor and the legal status of Alutiiqs and Creoles before and after the 1867 Treaty of Cession.


For many years, starting during the Russian period of control, Aleuts were forced to harvest fur seals on the Pribilof Islands in the Bering Sea. During World War II, they were evacuated to the Alaska Southeast but still brought back to harvest the seals as a cash crop for the federal government. After the war, they were threatened with not being allowed to return unless they continued the harvest. This article reviews the history of Aleut seal harvests and government threats, and the Aleuts’ subsequent activism to gain civil rights.


This article examines and airs the living conditions of the Aleut sealers on the Pribilof Islands in the middle of the twentieth century. To make their lives better and integrate them into U.S. citizenship, the author recommends entrusting their cultural, educational, and social problems to the Office of Indian Affairs, which would treat them as wards, rather than to the Fish and Wildlife Service, which treats them as employees.


This note opines that traditional Indian sovereignty criteria do not apply well to Alaska Native sovereignty after ANCSA. It then proposes a new sovereignty analysis to use in deciding *Native Village of Tyonek v. Puckett.* The author gives the history of the village and the litigation, as well as a brief look at Alaska Native sovereignty.


This article reviews the history of tribal sovereignty and case law on Indian Country and determines that the only true Indian “reservation” in Alaska is in Metlakatla.


Alongside their brothers in the Alaska Native Brotherhood, the Alaska Native Sisterhood fought for civil rights and equal justice, among other things. In this book, women from the Sisterhood tell of how the organization impacted their lives and their activities.


This book gives an account of the activities of the Alaska Native Brotherhood and William Paul in their efforts to secure Native rights and protect their unsettled claims prior to statehood (and in anticipation of ANCSA). Some litigation is reviewed, including *Tee-Hit-Ton Indians v. United States* and *Tlingit & Haida Indians of Alaska v. United States.* The period covered is circa 1945 to 1958.


Unlike other Native American tribes, Alaskan Natives were not conquered and pushed off their ancestral lands. Yet, while they have generally been able to maintain their cultures and lifestyles, they have been denied a right recognized as basic by other Native tribes: the right of tribal self-government. This paper examines the historic context of this issue and also looks at relevant state and federal case law.

62. Decided after publication, 957 F.2d 631 (9th Cir. 1992).
64. 177 F. Supp. 452 (Ct. Cl. 1959).

This article gives a quick review of challenges faced by Alaska Natives in obtaining justice, particularly with regard to traditional land rights. It was written prior to the passages of ANCSA and ANILCA.


This article examines American Indian law, its “special relationship in Alaska” and with Alaskan Natives, and efforts to increase tribal and state authority.


While much has been written about the Indian New Deal and the Indian Reorganization Act of 1934, the author seeks to focus specifically on how they affected Alaska Natives, especially regarding the need for the addition of the Alaska Reorganization Act of 1936.


The Alaska Statehood Commission was convened to study the relationship of Alaska to the other states and make recommendations if any changes were desirable. The purpose of this report by the Department of Law was to provide the commission with legal information about Alaska Native interests.


This report provides a historical analysis of Indian Child Welfare Act implementation in Alaska. It includes a review of Alaska case law.


This study examines the 1915 meeting between a group of Alaska Native leaders and James Wickersham, representative of the U.S. government. It was the leaders’ first official opportunity to gauge the government’s intentions regarding Alaska Native rights under U.S. law. According to the author, by participating in the meeting, Judge Wickersham “publicly recognized [Natives’] concerns and legal status.” Appendices include the original transcript of the meeting.


In *In re McCord*,67 the U.S. district court ruled that petitioners could not be tried for statutory rape under territorial law because their village of Tyonek was part of Indian Country and therefore subject to Native law. This brief report explains that Congress acted to undo the decision because Alaskan Native villages did not have the means to enforce criminal or civil law within the territory. Alaska was there-


66. Available at https://scholarworks.alaska.edu/bitstream/handle/11122/4205/0012.01.icwa.pdf?sequence=1 [https://perma.cc/D5KD-CH2T].

fore added to the list of states and territories that have jurisdiction over offenses and civil causes in the Indian Country within their boundaries.68


Congress did not start imposing Indian policy on Alaska Natives until the twentieth century. This treatment reviews the history of the gradual imposition on Alaska Natives of the same policies that were applied to Natives in the lower forty-eight states.


The first section of this article describes the case law governing the tribal status of Alaska Natives, as well as relevant federal statutory law and administrative actions. It also reviews contemporaneous litigation.


This article looks at the legal restrictions on the treatment of human remains and draws some lessons from the successful effort to repatriate the Larsen Bay remains, which had been excavated in the 1930s and placed in the Smithsonian anthropological collection.


This article reviews the basis for Native self-government and jurisdiction in Alaska and explores the scope of nonterritorial tribal rights and jurisdiction in Alaska.


While this article is primarily about the political and cultural revitalization of the Tlingit tribe, it also looks at how federal legislation influenced that revitalization.


This book relates the history of the Aleuts on the Pribilof Islands. Included is coverage of the legal conditions under which they worked during the periods of Russian and U.S. control, the island sealing industry in which they were forced to labor, relocation during World War II, and their struggle for economic and political freedom.


This one-column article provides a personal recollection of the genesis of the Alaska Natives Sisterhood by one of its founders.


This brief article recounts the Brotherhood’s century of success, particularly in the area of civil rights.

Alaska Statehood


This book provides a narrative of the final stages of the push for Alaska statehood, primarily by reviewing debates in the constitutional convention on key issues, but it also looks at the end game.


Most accounts of lobbying for Alaska statehood in the late 1950s focus on the efforts of Democrats, such as Bob Bartlett, Ernest Groening, and William Egan. This brief article looks at efforts by Republicans.


This book looks at the roles of C.W. Snedden, publisher of the *Fairbanks Daily News-Miner*, and his protégé Ted Stevens in securing Alaska’s admittance to the Union. One issue treated here is the opposition of southern members of Congress who feared that the admittance of Alaska (and Hawai‘i) would tip the balance of power in Congress away from segregation.


This slim publication provides an overview of the efforts to bring representative government to Alaska and then statehood.


This personal account by the former territorial governor of Alaska and U.S. senator from Alaska describes the successful drive to statehood following World War II.


This comprehensive history of the movement for statehood in Alaska starts with “Seward’s vision,” through the Organic Acts, and other efforts in and out of the halls of Congress.


This treatment covers the movement for Alaska statehood from the first statehood campaign in 1915 through the 1955–1956 Constitutional Convention on to the final push and achievement of statehood in 1959.


This publication describes how the actors in the statehood movement understood the event and how they assessed it in 1981. Includes numerous interview summaries.


This article tells the history of the final push for statehood in the 1950s and the involvement of the average citizen in that effort and process.

Prior to statehood, most of Alaska’s territory was controlled by the federal government. Upon statehood, Alaska was entitled to select and acquire up to 103,350,000 acres in a land grant formula that departed from the formula used when other states entered the Union. This article tells how the formula came to be included in the Statehood Act of 1958.


This article, written immediately following Alaska statehood by the sitting Interior Department secretary, provides a history of the march to statehood from the purchase from Russia to admittance to the Union.


As publisher of the *Fairbanks Daily News-Miner* newspaper, C.W. Snedden promoted, supported, and participated in the Alaska statehood movement, including lobbying in Washington, D.C., after the adoption of the Alaska Constitution. Snedden’s letter, following the Introduction, describes his role in the statehood movement.


This in-depth treatment of the admissions process for Alaska and Hawai’i—they were admitted into the Union almost simultaneously—starts with their roles in World War II and then follows the process through the events of the day until 1959.


While the push for statehood was popular in Alaska in the 1950s, sizeable opposition to it existed as well, and for a variety of reasons. Jay Hammond opposed statehood because he feared overdevelopment. Later, as governor, he supported the establishment of a permanent fund to smooth economic growth and save some of the oil boom for later needs. This brief article examines Hammond’s career in light of his opposition to statehood.

**Alaska Statutes**


An account of the “bulk formal revision” of the 1949 Alaska Code and subsequent session laws, a five-year effort.


This history of the Alaska Statutes starts with the transference, in stages, of the Oregon Codes to Alaska. It is demonstrated that the early Oregon Code derived from postcolonial New York, with some “flirtation” with the early code of Iowa.


This article picks up the tale of the early Alaska Code from part I and includes a section on “Alaska Without Law, 1867–1884,” the period immediately after purchase from Imperial Russia during which there was no provision made for civil government.
Alcohol and Controlled Substances


This book attempts an encyclopedic look at the role of alcohol in early Alaska history, Russian, American, and tribal. Included in its universe are accounts of attempts to control alcohol, enforcement, violence, and punishment by all three stakeholders, miner's courts, and other groups.


In 1981, Alaska changed its alcohol laws to accommodate local option referenda,70 which would allow residents to regulate how alcohol comes into their communities. This article reads the evidence as suggesting that not only do the local option laws likely reduce adverse effects of alcohol in Alaska Native communities, but they also help restore limited self-government.


This brief article looks at the history and function of Alaska's local option laws. It includes a timeline and a map.


This review thoroughly recounts the nearly forty-year history of efforts to support or tear down the landmark *Ravin* opinion, which validated the possession and use of marijuana in the home on a right to privacy argument.


This paper examines the breakdown of the relationship between official law and village social control, which was tied to alcohol control. “It also assesses the role of town liquor policy, town police, and treatment resources on alcohol-related violence in the villages in the 1970’s.”71

Conn, Stephen. *Alcohol Control and Native Alaskans—From Russians to Statehood: The Early Years*. Paper delivered at the 1982 Meeting of the Academy of Criminal Justice Sciences, Louisville, Kentucky, March 26, 1982.72

This paper looks at the enforcement of alcohol control laws in Alaska and the dependence on law as a vehicle for social control, with the law enforced differently when applied to Natives as opposed to territorial Whites.

69. Available at http://www.iser.uaa.alaska.edu/Publications/Alcohol_Arctic.pdf [https://perma.cc/ZN9B-FTP8].
70. ALASKA STAT. § 4.11.491 (2018).

The first section of this publication is a treatment of the history of alcohol consumption control in Alaska from the Russian period through the first ten years of statehood. Patterns characterizing that history are noted and analyzed.


This article is an account of the challenge federal officials had in trying to limit the importation of liquor into Alaska, as well as enforcement of the regulations and tariffs in court and before juries.


This article endeavors to understand why two-thirds of the voters in a territory with a frontier ethos and a prevalence of libertarian anti-authoritarian attitudes would vote to “go dry.”


This article looks at legislation, municipal law, and case law regarding public intoxication in Alaska.


This article reviews how for moral and economic reasons the Russian-American Company limited alcohol access to fight drunkenness and alcoholism among Alaska Natives. The author concludes that alcohol “played an insignificant role during contacts with the aboriginal population” during Russian colonization.


This article reviews the claim that Native Alaskan villages lack authority to control alcohol in their jurisdictions beyond state enforcement of state and local option laws. It also reviews federal Indian liquor laws, their reformulation in 1953, and how the laws were brought to Alaska.


The author explores the history of alcohol use by Alaska Natives and looks at reasons for the failure of alcohol control.


This report includes a history of alcohol control in the Alaska Bush, a history of the Local Option Law in Alaska, and a history of village alcohol use and control.

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73. Available at [https://scholarworks.alaska.edu/bitstream/handle/11122/7353/conn%2026%20moras.1986.no_need_of_gold.8617.pdf?sequence=1](https://scholarworks.alaska.edu/bitstream/handle/11122/7353/conn%20%26%20moras.1986.no_need_of_gold.8617.pdf?sequence=1) [https://perma.cc/KJA9-4KKQ].

This article provides an account of the experience of the Tlingit Indians under Russian and U.S. rule until about 1880, with a focus on the role of alcohol in their interactions and the attempt to regulate alcohol. The Osprey was a British warship that in 1879 temporarily “protected” White settlers in Sitka until the arrival of U.S. patrol vessels.


Alaska had two periods of prohibition, the first of which accounted for forty-eight of the first sixty-six years under the U.S. flag. The second came after territorial status when voters adopted the “Alaska Bone Dry Law” by a two-to-one margin. This article is a history of how that happened, with a look at the initial prohibition as well.


This dissertation reviews the liquor policies and problems of enforcement in the Alaskan territory at the end of the nineteenth century.


The author of this piece demonstrates how the unresponsiveness of governmental actions, laws, and structures failed to meet community needs in Alaska regarding alcohol control and management. This historical context is reviewed, followed by focus on crime, village councils, the police, and magistrates.

**Aleut Relocation**

The 1942 invasion of the Aleutians—including Attu, Kiska, and Dutch Harbor—by the armed forces of Imperial Japan brought a U.S. military response and presence. A side effect of the U.S. military involvement was the evacuation of the natives of the Aleutian and Pribilof islands, ostensibly for their own protection. They were relocated to the Alaska Southeast where they were interned in abandoned canneries and mines and neglected despite squalid camp conditions. The result was a harsh existence that led to avoidable suffering and death. After the war they were allowed to return home—except to Attu and some other islands—only to find that their homes and churches had been looted by U.S. servicemen. Eventually, they were compensated by the same legislation that compensated the Japanese Americans who had also been interned during World War II, and funds were set aside to repair and restore their damaged churches.


This report examines the constitutional and civil rights issues of the relocation and internment of the Aleuts during World War II.

The Commission on Wartime Relocation was charged by Congress with reviewing the circumstances and orders behind the relocation of U.S. citizens and permanent resident aliens and recommending appropriate remedies. Part I reports on the treatment of the Nisei and Issei. Part II is about the Aleuts, including their evacuation during World War II.


This eight-volume collection of narratives and documents describes the military relocation of Aleuts during World War II, with coverage from the “military situation” through evacuation, camp conditions, repatriation, and resettlement. Includes four volumes of island-by-island depositions by persons evacuated.


Madden, Ryan. “The Forgotten People: The Relocation and Internment of Aleuts During World War II.” *American Indian Culture and Research Journal* 16 (1992): 55–76. This article looks at the tragic history of the evacuation and its effect on those evacuated, and who they were, where they went, how they were treated, and what they found when they returned.


Smith, Barbara Sweetland, and Patricia J. Petrivelli. *Making It Right: Restitution for Churches Damaged and Lost During the Aleut Relocation in World War II*. 3 vols. Anchorage: Aleutian/Pribilof Islands Association, 1993. Volume I lays out the background of the evacuation of the Aleuts during World War II and the condition of their property when they were allowed to return. It also summarizes the views of experts who evaluated the churches as well as a review of each church: background, impact of the war, architect’s report, art conservator’s report, and estimate for repair and restoration. The other two volumes provide documentation.

The Aleut Restoration Act of 1988 set aside funds to repair and restore Aleut churches damaged during U.S. military occupation from 1942 to 1945. The damage was aggravated by several cumulative factors, including vandalism by troops, a break in the normal maintenance cycle, the need to use green lumber after the war for immediate maintenance, adverse conditions when evacuating art works, and inexpert repairs, among others.

**Bibliography and Research**


This bibliography is divided into sixteen subject categories.


This is a nonannotated bibliography of academic theses on a variety of subjects regarding the Pacific Northwest and Alaska. There is no separate heading for law.


This article comes in two parts. First, a review of some major themes in the history of Alaska Native law, and second, a selective and annotated bibliography.


This treatise provides in-depth analysis of specific areas of federal Indian law, as well as general overviews, with treatment of specific legislation and specific tribes. Coverage of Alaska Natives includes history of Native land claims, ANCSA, ANILCA, hunting and fishing rights, and tribal self-government.75


This volume contains more than 300 pages of annotations on a wide variety of Alaska historical subjects, both Russian and American. There is no separate heading for Alaska law.


This brief bibliography outlines some of the major resources regarding ANCSA.


This lengthy bibliography is topically comprehensive. It contains listings for some sources of Alaska legal history.

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74. Available at http://www.ajc.state.ak.us/reports/biblio.pdf [https://perma.cc/JL7P-SLUD].
75. See § 407[3][a]–[d].

While this article is not directly on point, it does provide information on how to approach historical research on issues in territorial Alaska and therefore may assist those who are looking to drill down deeper than this bibliography does.


This volume contains a twenty-page overview by Antonia Moras, broken into a variety of areas which include courts, corrections, and juvenile justice. It also contains a twenty-page list of annotated citations to relevant Alaska Native legal cases and some justice system maps.


This collection of legislation, case law, reports, and other materials starts with the 1867 Treaty of Cession with Russia.


This lengthy bibliography contains references to resources on all aspects of the industry and culture of reindeer herding, both annotated and non-annotated, as well as a list of relevant library and archival resources.


This book is a guide to and description of the Alaska-related holdings of the National Archives, particularly major records groups, series, and subseries of records.


This article provides a brief legal history of Alaska during its prestatehood period, as well as a brief list of primary and secondary sources of prestatehood Alaska law, including books, manuscripts, papers, theses, speeches, and articles.

**Biography**


This article gives an account of the long legal career of George Grigsby, who served in various capacities around the territory and in Washington, D.C., as delegate to Congress.


This obituary recounts a long legal career that began on Kodiak Island in 1947.


This memorial piece reviews the career of Robert Wagstaff, a legendary Alaska trial lawyer and appellate advocate, whose work ranged far and wide but who also
focused on constitutional rights and civil liberties and who also argued the *Ravin* right to privacy case. Following the article are reflections by contemporaries.


This article gives a contemporaneous account of the role of Magistrate Nora Guinn in the community of Bethel, as well as some of Guinn's background.


This is a brief appreciation of a prominent practitioner with basic biographical facts and several anecdotes.


Part I. This is a brief appreciation of a prominent practitioner with basic biographical facts and several anecdotes.


Part II. This is a brief appreciation of a prominent practitioner with basic biographical facts and several anecdotes.


This is the standard biography of Judge Wickersham, the preeminent figure of early twentieth century Alaska history, who served as the lone federal judge from 1900 to 1908 and delegate to Congress off and on between 1909 and 1933.


This article contains part of an interview with Ashley Dickerson, a prominent Anchorage lawyer, whose practice started before statehood. She was also the first African American lawyer in Alaska.


The author reviews the life and public service of Sadie Brower Neokok, who was Barrow’s first Bureau of Indian Affairs schoolteacher and then served for twenty years as Barrow’s magistrate. She also helped introduce the U.S. legal system in the Alaska bush and won the right to use Native language in court when the defendant could not speak English.


Part I of a two-part series about a prominent early woman lawyer in Alaska. This part reviews her practice in Juneau.


Part II of a two-part series about a prominent early woman lawyer in Alaska. This part reviews her involvement in the push for statehood and Alaska’s Constitutional Convention.


Prior to his time as president of the University of Alaska, Charles Bunnell ran for delegate to Congress against James Wickersham and also served as an Alaska judge on the Fourth Judicial Circuit. This book covers Bunnell’s academic career, his campaign against Wickersham, Wickersham’s charges of corruption while
Bunnell was on the bench, and one notorious case, that of William Dempsey. Dempsey was found guilty of murder, had his death sentence commuted, corresponded with Bunnell seeking release from prison, and then escaped, never to be seen again.

Central Council of Tlingit and Haida Indian Tribes of Alaska. *A Recollection of Civil Rights Leader Elizabeth Peratrovich, 1911–1958.* Juneau: Central Council of Tlingit and Haida Indian Tribes of Alaska, 1991.76 Elizabeth Peratrovich was a civil rights activist who worked on behalf of Alaska Natives. Her advocacy helped secure the passage of Alaska’s Anti-Discrimination Act of 1945, the first antidiscrimination law in the United States.

Connor, Roger C. “Dimond Holds Place in History: Tribute to Judicial Leader.” *Alaska Bar Rag* 9, no. 3 (1985): 4, 23. John Dimond was a judicial and political leader during Alaska’s territorial period. This brief biographical account covers his life until the end of World War II.

Conrad, David E. “Emmons of Alaska.” *Pacific Northwest Quarterly* 69, no. 2 (1978): 49–60. George Thornton Emmons had a long association with Alaska, starting in 1882. Among other things, he was a consultant to the State Department on the boundary dispute with Canada, conceived and promoted what became the Tongass National Forest, and advised President Theodore Roosevelt on determining federal policy toward Alaskan Natives. This article provides an account of his activities.

DeArment, Robert K. *Alias Frank Canton.* Norman: University of Oklahoma Press, 1996. This biography recounts the career of legendary “lawman” Frank Canton, whose real name was Joe Horner and whose career included a period of law enforcement but also a period of criminal activity. A chapter is devoted to his law enforcement career in Alaska.

DeArmond, Robert N. “Saginaw Jake: Navy Hostage, Indian Policeman, Celebrity.” *Alaska History* 5, no. 1 (1990): 23–33. This article follows the life of Kitchnatti, an Alaska Native, who was taken as prisoner/hostage aboard the USS *Saginaw* in 1868 as the result of some trouble on shore. He was released months later. In 1882, he gained further notoriety for his involvement after the destruction of Angoon by the Navy. Eventually he was commissioned as a policeman.

Dickerson, M. Ashley. *Delayed Justice for Sale: An Autobiography.* Anchorage: AlAcres, 1998. This is an autobiography of the first female African American attorney in Alabama, Indiana, and Alaska, where she homesteaded and had a lengthy and eventful career. She was also the first African American president of the National Association of Women Lawyers.

Fischer, Victor. *To Russia with Love: An Alaskan’s Journey.* Fairbanks: University of Alaska Press, 2012. In this autobiography, Vic Fischer reviews his long engagement with Alaska public affairs and gives insights into the Alaska Constitutional Convention (to which he was a delegate) and his time serving in the Alaska Senate.

This memoriam reviews the career of James M. Fitzgerald, who served as an Alaska superior court judge, state supreme court justice, and federal district court judge.

Apart from his adversarial prowess regarding bears, Judge George W. Folta was a well-regarded jurist in his time. A reader of this volume will learn that Judge Folta had no formal law school education but started as a territorial court clerk, passed the bar, and worked his way up to solicitor, prosecutor, and appointment to the territorial U.S. district court in Juneau in 1947. This volume was written by his son and contains an introduction by Judge Robert Boochever.

This article reviews the career of Wendell Kay, who the author esteemed as a “brilliant trial lawyer [and] probably the best criminal defense attorney who has ever practiced in the State of Alaska.” Also noted are some of the cases Kay tried and his service in the state legislature.

Charles Edwardsen, Jr.,—aka, Etok—was an Alaska Native activist who fought to protect Native land rights. This book gives an account of how Alaska Natives fought to bring about ANCSA.

This article presents a brief look at the impact of the legal and public career of the first attorney general of Alaska.

This memorial, by one of the subject’s children, examines the life and legal career of Clifford Groh, including some time he spent in the state legislature.

This autobiography by Alaska’s most prominent territorial governor relates some of the author’s perceptions and understanding of the Alaskan legal and statehood battles in which he participated.

Jay Hammond was governor of Alaska from 1974 to 1982. In this autobiography, he recounts his experiences as governor as well as in the state legislature and gives his views on some of the legal challenges of his time, including the initiation of the Permanent Fund and the Alaska lands fights of his second term.

This brief account describes the life and postwar legal career of Judge Roy Madsen of Kodiak.
This brief piece focuses on the integrity of Judge James Wickersham, in particular with regard to his effort to expose and unravel the manipulations of the judicial system by the “Spoilers” who tried to wrest gold claims from rightful claim holders in Nome. The author’s view is that “[w]e should love him for the enemies he has made.”

This brief article is an appreciation of Mildred B. Herman of Juneau.

This is the memoir of Willie Hensley, long an active voice for Alaska Native issues and interests, as well as a state representative and senator, businessman, founder of the Nana Regional Corporation, and author of an influential constitutional law course paper at the University of Alaska. Written in 1966, What Rights to Land Have the Alaska Natives: The Primary Issue explored the background of Alaska Native land claims issues. Not long after that class he was a lobbyist for the settlement of those issues and the eventual passage of ANCSA in 1971.

This volume contains references to the early Alaskan judiciary and looks at John Brady’s role in Alaska, including his service as a judge and as district governor, appointed by both Presidents William McKinley and Theodore Roosevelt.

This article briefly tells the story of Frank Canton, who served as deputy U.S. marshal in the Alaska interior from 1898 to 1899. It also touches on the strain between civilian and military roles in Alaska law enforcement.

This article reviews the background and exploits of William B. Ballou, a prospector from Vermont who settled in Rampart, Alaska, before the turn of the last century. He served briefly as a U.S. commissioner in Rampart.

This is the autobiography of the plaintiff in the “Molly Hootch Case,” Tobeluk v. Lind, which resulted in a consent decree requiring the state of Alaska to provide high schools in Native villages. The author reviews her life and provides an account of her participation in the Tobeluk case.

This article provides a brief account of the career of Anthony Dimond, prominent lawyer and delegate to the U.S. House of Representatives.
This book contains thumbnail biographical sketches of prominent Alaskan women, including politicians, jurists and court personnel, and governors' wives. This volume also contains several thumbnail biographies of actors in the law.

This book contains thumbnail biographical sketches of prominent Alaskan women, including politicians, jurists and court personnel, and governors' wives. This volume continues the listing of lawyer biographies.

This biography of the Rev. Jackson reviews the background of law and order, as well as his efforts to establish education as general agent of education, his efforts to bring reindeer to Alaska to establish a herding industry, and his interaction with Alaskan leaders.

This article provides an account of the career of George Grigsby, who started his legal career in Alaska as assistant U.S. attorney in Nome, where he was involved in resisting the machinations of U.S. District Judge Arthur E. Noyes and the “Spoilers” when they tried to jump legitimate mining claims.

This article is an appreciation of the career of Judge Erskine May Ross, a federal appeals court judge in California, who oversaw the appellate proceedings regarding the “Spoilers” (the conspiracy to jump mining claims in Nome). This article gives an account of his role in those proceedings.

The author reviews the role of Anthony Dimond as a reform senator in the Alaska territorial legislature. Issues examined here include regulation of the salmon industry, jury reform, and literacy requirement for voting.

Anthony Dimond was a prominent member of the Alaska bar who also served as a nonvoting delegate to Congress (1933–1945) and federal district judge when Alaska was still a territory. This article recounts his early experiences in Alaska.

In this short interview by the author, Justice Allen Compton surveys his career and experiences in the law.

This brief account describes the career and legacy of Aline Chenot Baskerville Bradley Beegler (1867–1943), physician, lawyer, and political activist.

Among the five Fairbanks foundresses focused on here are brief biographies of Aline Chenot Baskerville Bradley Beegler, the first female lawyer in Fairbanks, and Sarah Margaret Keenan Harrais, a prominent local participant in the Women’s Christian temperance movement, later a U.S. commissioner during the territorial period, and then a deputy magistrate in Valdez after statehood.


Margaret Kennan Harrais served as a U.S. commissioner in territorial Alaska and as a deputy magistrate in Valdez after statehood.


Bob Bartlett was a giant of Alaska politics in his day. This full account of his life includes chapters on the effort for statehood, the effort to pass the Alaska Mental Health Enabling Act, and some reference to prestatehood judiciary.


Alaska Judge Charles Bunnell, later president of the University of Alaska, sentenced William Dempsey to hang for a 1919 murder conviction, after which Dempsey threatened to kill all court officials connected with the case. After Dempsey’s sentence was commuted to a life sentence, he began writing to Bunnell seeking his recommendation for release. Bunnell feared for his life in 1940 when Dempsey escaped the McNeil Island penitentiary road camp and was not recaptured.


This is a brief appreciation of a former chief justice with basic biographical facts and a few anecdotes.


This book is part autobiography, part family biography, and part behind-the-scenes look at the Native land claims movement in Alaska and the creation of the North Slope Borough.


This tribute reviews the career of Chief Justice Rabinowitz and his significance to the legal history of Alaska and beyond.


This reflection on Jay Rabinowitz by his brother Robert was delivered at a memorial service shortly after the chief justice’s death. Also included in this issue are other memorials and remarks touching on his life and career.


Richard Geoghegan was an English Esperantist who relocated to Alaska shortly after the Klondike gold rush. While this book reviews Geoghegan's many activities in Alaska, it is of use for the legal historian because it gives an account of his relationship with Judge James Wickersham and his time as a court reporter in Fairbanks in the early twentieth century.


In recounting his life experiences in the Last Frontier, the author reviews his legal career in Alaska, which included government service and private practice, and provides observations about his encounters with judges, practitioners, and clients.


Chris Shea, a bar owner, was elected as a reform mayor of Skagway in 1907 and served until appointed as game warden in 1909, serving in that position until 1912. He helped change the city's tax structure to more equitably rely on taxing corporations, such as railroads, and also advanced the cause of publicly owned utilities.


Prior to statehood, Judge James von der Heydt served as U.S. marshal, U.S. commissioner, and U.S. attorney in Nome. In addition, he helped to plan and create the new constitution and served a term in the last territorial legislature. After statehood, he helped initiate the judiciary of the new state as the first superior court judge assigned to Juneau and then was appointed to the federal bench, where he served for three decades. This article treats the career and the person.


This one-page article gives a brief account of the life of Jim Delaney, a prominent Anchorage lawyer, and his family.


Tony Dimond was an Alaska politician, delegate to Congress, and federal judge. He was also, while in Congress, an early promoter of adding Alaska as the forty-ninth star to the U.S. flag. This article reviews his career, with a focus on his efforts and strategy to secure statehood.


This article looks at the career and tragic end of David H. Jarvis, customs collector for Alaska, as well as friend and advisor of Judge James Wickersham, the preeminent Alaska politician and jurist of the early twentieth century in Alaska. Their friendship founded on differences in developing Alaska, including the Alaska Syndicate, an effort by the House of Morgan and the Guggenheim Brothers to develop the Bonanza copper mines.

Justice Allen Compton spent eighteen years on Alaska’s Supreme Court, from 1980 to 1998, and four years before that on the superior court. This appreciation is a brief account of his time on the high court.


Judge Wickersham is the giant of early twentieth century Alaska history, serving as the lone federal judge from 1900 to 1908 and delegate to Congress off and on between 1909 and 1933. This abridged and annotated edition of the judge’s memoirs provides a lively account of his legal exploits on the Alaskan frontier.

**Boundary Dispute and Border Issues**

Alaska’s boundary with Canada was ambiguously defined in the 1825 Anglo-Russian Treaty, which was inherited by the United States when it purchased Alaska in 1867. It was not a matter of strong concern until gold was discovered in the Klondike in 1896. At that point, both Canada and the United States needed to define deep water routes from the Alaskan panhandle to the mines. The following treatments are about the treaty negotiations and the later dispute and its resolution. This section also examines the history of the maritime jurisdiction since the 1825 treaty with Russia. Some books and articles are listed without annotations; these listings tended to be on subjects that had already been explored in full by other annotations.


This article is an account of the dispute as revealed in the papers of Theodore Roosevelt.


Kurtz, Rick S. “Disputing Wilderness on the Canadian-American Frontier: The Case of Glacier Bay National Park.” Journal of the West 43, no. 1 (2004): 67–73. This article reviews the effect the 1903 boundary settlement has had on Glacier Bay National Park, with a focus on the Windy Craggy mining controversy in the early 1990s.

Mason, Arthur. “Neglected Structures of Governance in U.S.-Canadian Cross-Border Relationships.” American Review of Canadian Studies 38, no. 2 (2008): 212–22. This article looks at cross-border concerns in policy planning, using a proposed natural gas pipeline in Alaska as an example. In particular, the author looks at the Alaska Natural Gas Transportation Act of 1976 and the contemporaneous Northern Pipeline Act of Canada to allow a pipeline to straddle the border. The pipeline was never built, and when the issue came up again the relevance and utility of the 1976 law was open to question.

Munro, John A. The Alaska Boundary Dispute. Toronto: Copp Clark, 1970. This collection of primary and secondary materials includes treaties, papers, and letters.

Murray, Keith A. “The Peter Martin Case.” Alaska Journal 2, no. 1 (1972): 48–58. The boundary between British territory and Russian territory in Alaska had not been resolved in what is now the Alaska panhandle (Southeast Alaska) at the time of sale by Russia to the United States. Peter Martin was a miner who was arrested by British authorities for brawling. Subsequent legal action from this otherwise obscure case put the spotlight on jurisdiction and hence on the border issues.


Thonger, Charles. Canada’s Alaskan Dismemberment: An Analytical Examination of the Fallacies Underlying the Tribunal Award. Niagara-on-the-Lake, ON: Charles Thonger, 1904.79


Business Law


While this short article is primarily concerned with the formation of the Alaska Commercial Company, it also covers how the company was able to secure an exclusive but controversial U.S. government lease on the Pribilof seal fishery.


This Note examines the legislative history of Alaska’s 1997 Trust Act and looks at ensuing amendments.


This Note reviews the history of the Alaska Supreme Court’s development of veil-piercing doctrine within the state in which it toggles between two competing tests: a “disjunctive” test (must show either excessive control or other corporate misconduct to pierce the veil) and a “conjunctive” test (must show both excessive control and other corporate misconduct to pierce the veil).


This report examines the effects on costs of transportation in Alaska trade of the federal Jones Act,80 which generally requires that domestic cargoes be transported in U.S.-built, U.S.-flagged, U.S.-owned, and U.S.-crewed ships. It also summarizes the act’s provisos and other related laws.

Children and Minors


This article looks at relevant Alaska law in the 1970s and the 1976 legislative changes, analyzes distinctions between the requirements of the federal Indian Child Welfare Act (“active efforts”) and Alaska’s Child in Need of Aid statutes (“reasonable efforts”), and analyzes decisions of the Alaska Supreme Court, which moved the state closer to the “active” requirement.


This article is about the issues that can result from the disruption of traditional community child welfare practices. It also traces the history of agency structures and practices.

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This Comment reviews and analyzes the case law and statutes pertaining to Alaska Native child custody cases, starting with *Native Village of Nenana v. Department of Health & Social Services*, through the *Venetie* cases, *John v. Baker*, and beyond.


This brief article reviews five years of “systems improvement” and program development at the Division of Juvenile Justice.

**Courts**


This online brochure marks the fiftieth anniversary of the Alaska state court system with text and photos covering highlights from that period.


This report provides some history, background, and descriptions of the Alaska therapeutic courts, as well as an evaluation of three of them.


Therapeutic courts, also known as “problem-solving” courts, take a more holistic approach to offenders and the underlying issues that bring them into court. This article reviews the development of the different therapeutic courts in Alaska.


The author briefly recounts his nine-month stint as a U.S. commissioner in Nome in 1952.


Following a brief outline of Alaska's territorial court system, this article briefly reviews the formation of Alaska's court system, with a focus on the pressure brought to bear by the Alaska bar to get trial courts up and running sooner rather than later.


The Organic Act of 1884 provided Alaska with its first civil government, which included a single federal judge appointed by the president. That judge was assisted by commissioners, also appointed by the president, fulfilling certain judicial and quasi-judicial duties. This article looks at the commissioner system, how it functioned, and how effectively.

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83. 982 P.2d 738 (Alaska 1999).
84. Available at https://jukebox.uaf.edu/site7/sites/default/files/documents/50yrs-exhibit.pdf [https://perma.cc/2YA7-MS6J].
85. Available at http://www.ajc.state.ak.us/reports/TherCt2004.pdf [https://perma.cc/8LR9-U7S3].

This brief article reviews the development of Alaska’s judicial system from the Organic Act of 1884, when it essentially began, through the 1909 congressional alteration of the Alaska judicial system. Prior to 1884, Alaska had no state judicial system.


This article reviews the history of the U.S. district court in Alaska from its inception in 1884. Sections include “Early Judges,” “The Floating Court,” “The Integrated Bar Act,” “Statehood,” “The Establishment of the Alaska Court System,” and appreciations of several noteworthy judges.


The author reviews the third report by the Alaska Judicial Council on the judicial selection and retention process. Among other things, the author reviews how the judicial selection process works in Alaska, and then looks comparatively at how the demographics of the applicant pool and those selected (and appointed) have changed over the years.


The purpose of therapeutic jurisprudence is to emphasize rehabilitation over retribution as a goal of the legal process—in other words, to leverage laws and legal process for therapeutic purposes. This article, after defining and exploring the concept, traces the history, development, and contemporary structures of therapeutic courts in Alaska.


Prior to expounding about para-professionalism in a larger context, the authors review the history and use of paralegals in the Alaskan bush.


Written by the presiding district court judge, this article examines the historical origins of the magistrate in Alaska and follows the position into statehood.


This publication includes brief histories of the Sitka and Minto tribal courts and of PACT, a conciliation organization in Barrow. (PACT is an acronym for the Tagalog (Filipino), Inupiat (Eskimo), and English words for “come together.”) It also includes a brief history of federal-Native relations in Alaska.


This brief report to Congress supports a bill to provide a federal district court in Alaska.

86. Available at https://jukebox.uaf.edu/site7/sites/default/files/documents/magistrates_connelly.pdf [https://perma.cc/J7Q3-YBJN].

This paper looks at the legal system in Alaska in the nineteenth century, a system imposed from outside and responsive to certain special interests but not at first to Alaskans as a whole.


This Note briefly reviews the history of the grand jury, with a focus on Alaska, and then “analyzes the pertinent constitutional history of [Alaska Constitution] article I, section 8 in order to define the scope of the grand jury’s power.”


This brief article gives a history of the Alaska Court of Appeals and reviews and lauds the work of the few Alaska lawyers who specialized in appeals during the first twenty years of statehood.


This brief article provides a summary of the duties of U.S. commissioners in Alaska during the territorial period, accompanied by some anecdotes from the field.


The author provides a brief history of the state court law libraries in Alaska, and also offers a brief review of pre-statehood history of Alaska’s laws and constitution for background and perspective.


This essay celebrates the fiftieth anniversary of the U.S. District Court for the District of Alaska, which was commissioned in February 1960. It briefly examines some of the significant state and federal cases that have shaped Alaska law and policy.


This is a brief account of the founding and organization of KAROL, under the umbrella of the nonprofit Russian-American Rule of Law Consortium, organized to promote dialogue between legal professionals and the courts to improve justice in the represented communities and create and maintain fair, predictable, and accessible courts.


This article provides a look at the construction of an effective Department of Law and state judiciary in the earliest days of Alaska statehood, significant challenges because the Territory of Alaska left problems that were unaddressed by the territorial legal system and courts. The problems are outlined, challenges defined, and personalities revealed of those responsible in both the new legislature and court system for creating a new effective and constitutional system.


This is an account of how the first Alaska judiciary was put together after statehood. The author observes that the Alaska judiciary was widely recognized as the best of the fifty states’ systems and opines that it could have been because Alaska had no judiciary prior to statehood to undo, with no need to reconcile old and new practices.
This report presents a panoramic view of Alaska tribal courts, including a brief history of the Alaska tribal courts and some case law.

This article describes the territory of Alaska—its people, the land, industries—and then gives a brief account and history of its courts and judges.

The author reminisces about his experiences riding circuit, from Anchorage to Ketchikan to Nome, as a federal judge in Alaska in the early 1960s.

This article remembers some of the commissioners, judges, magistrates, and court procedures in Kodiak, starting in 1895, much of it from the personal recollection of the author, a retired superior court judge.

This study was prepared pursuant to an agreement between the Alaska Court System and the Geophysical Institute at the University of Alaska, Fairbanks. Each chapter represents a discrete topic in the history of the Alaska courts, including the Nome scandals (the “Spoilers”), poaching of pelagic seals in the Bering Sea, taking care of Alaska’s mentally ill, the Floating Court, and creation of the state court system.

This history of the Alaska judicial system covers the period from the promulgation of the first Organic Act of 1884 through the scandal of the “Spoilers,” the Nome gold “conspiracy” in the early twentieth century. Along the way, the author focuses on the first officers and officials of the new district court and their challenges, Judge James Wickersham, and the murder trial of Fred Hardy.

After Congress passed the Organic Act of 1884, Alaska was given one federal district court with one judge and four commissioners. The number of districts, judges, and commissioners was later expanded. This article looks at the role, duties, payment, and vital work of U.S. commissioners in Alaska during the territorial period.

Commissioners played a vital role in Alaska courts because they were needed to punish minor crimes, record mining claims and vital statistics, and handle minor civil cases, including probate. This history starts in 1884 but also focuses on the

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87. Available at http://thorpe.ou.edu/AKtribalct/index_2.html [https://perma.cc/7E46-AT38].
role of Joseph W. Kehoe as territorial representative of the U.S. attorney general from 1943 to 1944 with a portfolio to study the judicial system in Alaska and recommend changes.


Matthew Deady was the federal district court judge in Portland, Oregon, who wrote every Alaska Indian Country decision from 1868 to 1886. This article examines those decisions and their ultimate relevance to interpreting ANCSA. The author also examines *United States v. Tom* and its influence on Judge Deady’s opinions.


The author, a former federal judge in the territory and its delegate to Congress, provides an overview of the judicial systems in Alaska from the beginning of the Russian period through U.S. occupancy after cession, including miners’ meetings, the Organic Act of 1884, provision of penal and civil codes, and the creation of the territorial legislature. He also provides a list of all governors and judges in Alaska until the time of publication.


This is a one-page treatment of the early years of the federal territorial court in Alaska.

**Crime and Vice**


This booklet gives a short history of prostitution in Ketchikan but then focuses on the career of Dolly Arthur, a successful Ketchikan madam.


This publication reviews the panorama of prostitution in Seward from demographics, to economics, to public health. It also provides biographical sketches of selected Seward prostitutes and madams.


This article briefly reviews the career in crime of Thomas “Blueberry Kid” Johnson, and then focuses on the effort by Alaskan authorities to apprehend Johnson after the disappearance of three passengers from his ship, the *Seal Pup*.


This book is a collection of thirteen criminal investigations in Alaska taken from police files.


This is a collection of stories about ten notorious murder cases in Alaska. One of the standout is the story of Robert Stroud, who gained later notoriety as the “Birdman of Alcatraz.”

88. 1 Or. 27 (1853).

This book tells the story of the efforts of the law enforcement agency of the U.S. Postal Service to solve postal crimes committed in territorial Alaska.


This book tells the story of a con man, who happened to be the founder of Fairbanks, and its mayor, E.T. Burnette, as well as the culture of that city near its founding.


This is a brief account of the murder of Jacob Jaconi on a slough near Fairbanks in 1904, which led to the first death sentence in Alaska the following year. The accused was Vuko Perovich, who was never executed.


This is an early and colorful criminal history of Soapy Smith and his gang.


This slim volume outlines the life of the most famous confidence man of the Klondike Gold Rush who, for a year, dominated Skagway with phony businesses, rigged card games, and murder.


By looking at a gallery of colorful characters, this work tells the story of how the early territorial government of Alaska tried to bring law and order to Juneau.


This book recounts the tales of notorious criminals in the Last Frontier, from Soapy Smith to the Blueberry Kid to the Blue Parka Bandit.


In 1882, a Hoochinoo shaman was accidentally killed by an exploding harpoon. These two articles set the scene and tell the story of the fallout. At the time, the Navy was in charge of administering Alaska and enforcing the peace.


This work is heavier on the history of mission work in Alaska than on the murder of the Rev. H.R. Thornton, but the author focuses on other areas of interest as well, such as policy toward Native Alaskans before and after the Organic Act of 1884 and planning for Arctic schools.


Harrison Thornton was a missionary who came to Alaska to bring Christianity to the Alaska Natives and educate them. In 1891, he was murdered in his home by Natives, who were then judged and executed by their fellow villagers. This article is an account of the crime and the clash of cultures.

During a gold rush, there are two ways of making a fortune: mining for gold and mining the miners. This book gives a history of one approach to the latter.


This article tells the story of the 1905 trial of Vuco Perovich, who was convicted of the 1904 murder of Jacob Jaconi, the operator of a fish wheel near Fairbanks. What sets this tale of murder apart is that in 1909 Perovich’s lawyer secured a presidential commutation of sentence from death to life imprisonment, against the wishes of his client. In 1927, the U.S. Supreme Court upheld the commutation, ruling that it did not require the consent of the convict.


According to the author, finding information about prostitution on the mining frontier is difficult because of the lack of reliable sources. In this instance, he came across the report by Kazis Kraucecunas, an officer of the Immigration Service, about his arrest of sixteen men and women in the Alaskan interior (he would have arrested more but could get no cooperation). The report is reproduced.


This article looks at the life of Russian Orthodox priest Hieromonk Juvenaly and his missionary work among the Chugach Sugpiag and Athabaskan Natives in Kodiak and the Alaska mainland. Juvenaly disappeared while evangelizing among the Yup’ik in 1796. No material evidence of his death has come to light, but there are oral traditions and other accounts. Oleksa weighs the scant evidence. Juvenaly is considered a martyr and a saint in the Russian Orthodox Church.


This article weighs the oral history among Native Alaskans regarding the murder of Fr. Juvenaly and finds agreement among the Athabaskans and Yup’iks regarding the circumstances and location. The author also suggests that further information or corroboration should be sought from the Quinhagak.


In 1923, William Duffy was transporting a payroll of $30,000 when he was robbed in Flat, Alaska. Nellie Beatty, known as Black Bear, was accused of the crime and prosecuted twice, resulting in a hung jury and acquittal. This is an account of the crime and trials.


Gold rushes attracted fortune seekers, adventurers, and those who would take advantage of the latter. Crime was rampant in gold rush towns, and occasionally a criminal became legendary. One such legend was Jefferson Randolph “Soapy” Smith, who operated as a con man, crook, and violent gangster in Skagway during the Klondike Gold Rush. This book tells his story.


This book provides an inside look at undercover wildlife investigation by providing an account of an elaborate sting operation in the Alaska wilderness.
As a victim of a gold mining scam in Aurora, on Kachemak Bay, Henry Derr Reynolds appropriated the scam himself and reorganized it in 1903 as the Reynolds-Alaska Development Company for which he lured in Governor John G. Brady as a director. The prospectus listed gold and copper mining, smelting, colonizing, agriculture, and lumber as its activities. It was a pyramid scheme that expanded as far as Valdez, much of which Reynolds acquired. This article is an account of the scam and its off-shoots.


This account of the life and times of the famous frontier scoundrel was written by a great-grandson of the subject and is informed not only by primary sources but also from unpublished family records.


The author explores the rise and fall of prostitution, gambling, and saloons in Skagway between the time of the gold rush in 1898 and the onset of prohibition in 1918, with a focus on money and politics.


Missionary Charles Seghers was bishop of Vancouver Island. His diocese included Alaska, which he visited five times for missionary work. In 1886, his goal was to establish a mission in the upper Yukon, at Nulato, hoping to preempt Anglican efforts. One of his companions on the journey was Frank Fuller, a layman, who killed the bishop near their goal. This article explores the crime.


H.R. Thornton was a minister posted in 1890 to the Prince of Wales Mission, on the tip of the Seward Peninsula, by the Congregational Church's American Missionary Association. This article reviews his life and career and reports on his murder by three Kinugumiut Native Alaskans.


A contemporaneous account of the 1893 murder of Harrison Thornton at the Congregational Mission at Cape Prince of Wales, Alaska.

Criminal Law


This article provides a history of clemency from ancient times to the present with a look at its development in the United States and the Alaska Territory. It then focuses on its use during the period of Alaska statehood up to the administration of Sarah Palin.

This article reviews the decisions of the Alaska Supreme Court as it developed and protected individual rights in the area of criminal procedure. The period covers the court's jurisprudence with regard to the new Alaska Constitution as well as the period when the Burger Court made significant changes to Warren Court decisions.


This article examines the legal developments that led to the decision in *State v. Clifton*.\(^9^9\) In particular, it reviews the affirmative defense of insanity, the use of evidence of diminished capacity for undercutting proof of intent, the guilty but mentally ill defense, and civil commitment. It also examines the history of the case and the subsequent development of relevant state statutes.


At the time this article was published, the Mallot Rule,\(^9^0\) which requires that police electronically record custodial questioning of suspects, had been adopted by only Alaska and Minnesota. The author provides a history of its adoption in both states.


This paper, given at the Criminal Correction Conference in Anchorage (July 10, 1968), includes sections on the history of criminal correction and sentencing before and after statehood.

### Criminal Procedure and Justice


Alaska banned plea bargaining in 1975, which dramatically shifted responsibility for sentencing convicted defendants. This report reviews and reevaluates the ban, looks at the long-term effects, and then makes recommendations.


The trial of Senator Ted Stevens on federal corruption charges was controversial from the beginning. This account of the government’s case, the trial, and the senator’s defense is given by one of his attorneys.


This article traces the development of Alaska’s appellate sentencing law, starting in 1966, and its relationship to presumptive sentencing and the ban on plea bargaining.


The Alaska legislature enacted a sentence review statute in 1969 giving the Alaska Supreme Court jurisdiction to review sentences in serious criminal cases. Subsequently, the courts gave definition to the statute. This article reviews the first five years of that case law.

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Feldman, Jeffrey M. “Search and Seizure Law in Alaska: A Comprehensive Review.” 

After reviewing search and seizure law from several perspectives, the author “categorizes and analyzes Alaska search and seizure cases according to object or area searched.” He then “breaks down Alaska’s search and seizure cases by author, isolating individual philosophies and styles among the [then] present members of the Alaska Supreme Court.”

Groh, Cliff. “Bill Allen Takes the Witness Stand in the Stevens Corruption Trial.”

Bill Allen was the longtime CEO of the VECO Corporation, an oil field services company. He was also a personal friend of U.S. Senator Ted Stevens and the key witness in the 2008 corruption trial. This is the first in a series of articles on the Stevens trial.


This study, which spans 100 years, looks at efforts of the territorial government to establish law and order in Juneau, as well as some of the characters who tried to make it happen.


This article recounts the unsuccessful effort to place a penal colony in Alaska in the late nineteenth century.


In tracing the evolution of criminal justice in Alaska from 1935 to 1965, the author analyzes Alaska as a unique area that did not evolve along the same lines as other U.S. frontiers. His method includes analysis of major crimes—homicide, burglary, robbery, theft—as well as social mechanisms used for control.


This chapter reviews the history of policing in Alaska as well as the Village Public Safety Officer Program.


This thesis examines the interim criminal justice “system” in Alaska prior to Alaska’s receiving its first complete judicial system in 1902. Starting with acquisition from Russia in 1867, the territory was governed first by the army, then the navy, then by civilian governments. The author also distinguishes administration in three areas: Bering Sea, Interior, and Cape Nome.


This dissertation examines the accelerated evolution of Alaska’s correctional system after a period of relative stasis between 1884 and 1953. The coming of statehood sped up the process, where the state took over from federal control.

After reviewing the limitations of the prison system in New York, the author proposes Alaska as a suitable penal colony, which would be run by the military.


In July 1975, the Alaska attorney general officially ended plea bargaining, allowing few exceptions. This report evaluates the new policy and also looks back at the Alaskan practice prior to the ban.

*Sources of Alaska Legal History: An Annotated Bibliography, Part I*.

**Searches and Seizures Under Prohibition Laws in Force in the Territory of Alaska.** Juneau: Department of Justice, Office of United States Attorney, First Division, District of Alaska, 1922.

This publication includes an opinion by T.M. Reed, judge for the District Court, District of Alaska, for guidance in issuing and serving search warrants in the district, followed by a treatise by N.H. Castle on the laws relating to search warrants under the National Prohibition Law and the Alaska Bone Dry Law.


This article reviews the legislative and judicial developments in presumptive sentencing since the revision of the criminal code in 1978, with focus on two components: use of prior convictions to establish repeat felony offender status, and aggravating and mitigating factors.


This article, written before the criminal code revision was enacted, provides a history of the revision, discusses the need for the revision, and then compares the first two parts of the tentative draft with the then existing code.

**Death Penalty**


Chapter 7, “The History of Death Penalty Abolition in Alaska,” relates the history of capital punishment in Alaska from the Russian period through abolition in 1957 and on through attempts to reestablish it legislatively from the 1970s through the 1990s.


There has been no death penalty in Alaska under statehood. This article reviews the death penalty in Alaska during the years prior to that, including under the “miner’s laws” in the late nineteenth century.


The Alaska death penalty was abolished by the territorial legislature in 1957. This article tells the stories of the last three executions, of Nelson Charles, Austin Nelson, and Eugene LaMoore.

This article gives an account of the murder of Cecelia Johnson in 1938, followed by the trial, postconviction actions, and hanging of Nelson Charles. It also contains a brief overview of the death penalty in territorial Alaska.


This short volume provides accounts of all fourteen people who were executed in Alaska between 1869 and 1950 when the death penalty was in force.

**Domestic Violence**


While making its argument, this article analyzes the legislative history of Alaska's Domestic Violence Prevention and Victim Protection Act and its interpretation by the courts since passage.


This article summarizes some general legal history, with case law, of Native Alaskan jurisdiction in Alaska, as well as remedies available to Native Alaskan victims of domestic violence and ways to strengthen Native Alaskan jurisprudence to combat domestic violence.


As part of trying to identify a definition of the term “sexual relationship,” the author of this Comment reviews the legislative history of AS 18.66.990, the definition section of the Alaska Statutes’ chapter on domestic violence.

**Earthquake 1964**


This report reviews the patterns of changes instilled in the functions of organizations in Anchorage following the Good Friday earthquake. Predisaster and post-disaster structures are compared for several organizations, including the police and fire departments.


While this book primarily describes the effect and damage of the earthquake, and the immediate recovery efforts by the military in Operation Helping Hand, the final chapter describes legislative efforts to assist recovery, both federal and state, by the establishment of the Federal Reconstruction and Development Planning Commission for Alaska and the State of Alaska Reconstruction and Development Planning Commission.


This report was produced by the special planning commission called into existence to chart a path forward for Alaska after the devastating Good Friday earthquake. After reviewing the situation, the commission makes recommendations for special legislation.


This article recounts the federal legislative effort to fund reconstruction in Alaska after the devastating 1964 earthquake. Included in those efforts was the establishment of a Reconstruction Commission.

### Education


This article provides an overview of the Alaska context, reviews federal policies that directly affected Alaska Native education, and analyzes the evolution of education for Alaska Natives with attention to the dual federal-Alaska system of schools as well as state and federal reform efforts.


This publication provides a brief historical summary of major educational systems in Alaska.


This treatment primarily analyzes the role of education in the transition for Native Alaskans from traditional mobile villages to the more settled approach of “persistent” villages and the challenge of providing adequate sanitation for them. Along the way, the author reviews the mission and activities of the Bureau of Education, both in bringing education to the Alaska Natives and for promoting education as a “civilizing” force.


This paper focuses on the life and the efforts of Dr. Jackson to establish schools in Alaska but also to encourage people to send their children to them.


This report reviews the history of land grants for higher education in Alaska from the Tanana Valley Agricultural College Reserve in 1915 through statehood, with some prior coverage of the Morrill Act of 1862.

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Prior to the 1976 settlement in the *Tobeluk v. Lind* case, children in Native villages throughout Alaska who wanted education above the elementary school level had to enter a boarding program. The *Tobeluk* consent decree committed the state of Alaska to providing high schools in Native villages. This article reviews the history of education in the villages and of the case itself.

The author provides a lengthy survey of education policy and legislation in Alaska from the Russian period until 1968.

This essay provides an introduction to the Russian approach to education in its North American colony.

In the nineteenth century, the federal government determined that Alaska Natives were largely self-sufficient and did not need comprehensive paternalism provided by the Bureau of Indian Affairs. Therefore, the federal role was limited to educating Alaska Natives, which was the responsibility of the Bureau of Education. This article analyzes the effort to provide education as an end in itself and to establish remote schools to induce Alaska Natives to relocate away from the corrupting influence of White civilization in mining towns such as Nome.

This thirty-nine-page paper reviews the laws that shaped Alaska’s educational system, focusing on Native education (but excluding military ‘on-base’ schools). Sections include “History: Evolution of Alaska’s Parallel System of Education,” “Federal Programs of Financial Assistance,” and “Localizing Education and Its Controls.”

This article reviews the frustrated efforts to persuade the U.S. government to make firm provisions for the Natives living in the newly purchased Alaska, including provisions for their education. Organic legislation was finally adopted in 1884, with education provisions for “children of school age” “without reference to race.” In 1885, Sheldon Jackson was appointed the first general agent of education for Alaska.


This paper is about the legitimacy of using church groups and religious individuals to develop and administer education and federal Indian policy in Alaska.


This article shows how and why Sheldon Jackson broke ranks with the common federal policy of educating Native American children away from their tribes and villages. Instead, Jackson believed that Alaskan Natives could be better educated and acculturated in their own villages.


This thesis provides a history of the origins and development of federal education programs in Alaska from 1877 to circa 1920, with a focus on how education was used as a means to assimilate Alaska Natives.


This paper is about the efforts by Dr. Jackson and others to bring education to Alaska in the late nineteenth century.


As part of its introduction to the study of boarding schools, this publication provides a brief history of schooling for Native Alaskans, from the Bureau of Indian Affairs boarding school system in the nineteenth century through the changes required by the *Molly Hootch* case and other changes. It also looks at the issue of whether boarding school assignment was mandatory or by choice.


This article provides a brief history of education in Alaska with a focus on the efforts of Sheldon Jackson and the ensuing years.


The Rev. Jackson reviews the history of education in Alaska, primarily for Alaska Natives, from the period of Russian control into U.S. control. He references government policy, or lack thereof, as well as particular schools.

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97. Available at [http://www.iser.uaa.alaska.edu/Publications/boardingschoolfinal.pdf](http://www.iser.uaa.alaska.edu/Publications/boardingschoolfinal.pdf) [https://perma.cc/5PHT-JDSG].

In this report, the Rev. Jackson builds on his 1882 report with reference to his experience as general agent for education in Alaska, under the supervision of the federal Bureau of Education, and looks at education in geographic areas and discrete groups.


This article reviews the experiences, voices, and actions of the Tlingit, Haida, and Tsimshian peoples in their interaction with the Native education system in Alaska. Two overall periods are encompassed: 1878 to 1912, which saw litigious actions by the Tlingit community, and 1912 to 1945, in which the Alaska Native Brotherhood was involved. The primary focus overall is on the Tlingit.


This work examines the history of education in Alaska with a focus on integration from the Russian period, through the development of local government, territorial status, post–World War II, and briefly into statehood.


This is a detailed study of education in Alaska from the Russian period into the territorial period.


This report highlights Alaska's educational programs from 1785 to 1917 and educational legislation from 1913 to 1967. It also examines the changing structure of the Department of Education.


The subtitle says it all.


This paper is a survey of the Russian approach to education in Alaska prior to the 1867 Treaty of Cession.


This dissertation covers Alaskan educational history from 1741, under Russian control, until 1948, when Alaska was a U.S. territory, and divides the period into six parts.\(^98\) Approaches, challenges, and legislation are examined.

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This dissertation provides background on the history of education in Alaska from the Russian period until the mid-twentieth century, and focuses more deeply thereafter on the period after statehood. The author's primary interest is the development and evolution of the educational systems in Bush (rural) Alaska. He identifies case law and legislation where possible.


This article reviews the efforts of the U.S. Bureau of Education through different directors and approaches. Because of the vast distances involved and difficult tasks, some directors sought to rid the bureau of its Alaska responsibilities.


Relying on Russian language sources, the author reviews the functioning of the mission schools in Russian Alaska from 1759 to 1867, as well as both secular education and religious seminaries in Sitka. He also provides appendices that include the tsar's 1836 ukase decreeing compulsory education for children of settlers in Russian Alaska and a review of the regulations, statistics, and curriculum of the Colonial Institute at Sitka, which opened in 1860.


This thesis reviews the history of education in Alaska, including legislation, from the Russian period to World War I America.
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 2017 and 2018. If you would like to review books for “Keeping Up with New Legal Titles,” please send an e-mail to bkeele@iu.edu and nsexton@email.unc.edu.

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*** Reference Librarian, Clinical Assistant Professor of Law, and Head of Access Services, Katherine R. Everett Law Library, University of North Carolina School of Law, Chapel Hill, North Carolina.
There is a paradox in Gilbert and Sullivan’s *The Pirates of Penzance*, and not just the one sung about early in Act II. Monica F. Cohen notes that for a work designed to denounce the piratical unauthorized productions of *HMS Pinafore*, which robbed Gilbert and Sullivan of both royalty checks and artistic control of their work, the pirates on stage are uniquely charming. She expected that authors who suffered from literary pirates would depict their fictional nautical pirates in the worst possible light. However, as she surveyed Victorian literature, Cohen found nautical pirates celebrated as “collaborative storytellers and comedic entertainers, figures whose affective energies make a case against Romantic originality that emphasized individual intellectual ownership by endorsing a creativity that is appropriative, recombinative, collective, and pointedly theatrical” (p.2). In *Pirating Fictions: Ownership and Creativity in Nineteenth-Century Popular Culture*, Cohen explores the tension between an emerging legal order that provided greater protections for intellectual property and a culture that was collaborative and derivative.

Before Cohen presents her introduction, she provides the reader an invaluable aid. Just as Jim’s map in *Treasure Island* provides a preview of the journey ahead, Cohen’s chronology places in context the key literary and legal waypoints from the 1557 Royal Charter to the Worshipful Company of Stationers and Newspapers, all the way through to the United States joining the Berne Convention in 1989. Each of the book’s eight chapters features a principal author: Daniel Defoe, Lord Byron, Walter Scott, James Fenimore Cooper, Charles Dickens, W.S. Gilbert and Arthur Sullivan, Robert Louis Stevenson, and J.M. Barrie.

Cohen shows how pirates change from historical villains ripped from newspaper headlines in Defoe’s day, undergoing a series of iterative changes through Byron, Scott, Cooper, and Stevenson, into stylized figures celebrated for a collectivist attitude and their theatricality. By the time Cohen gets to Barrie, the pirate has been transformed into a stock character that is at home in a world populated by mermaids and fairies.

¶4 The general state of copyright law is discussed to create context for each author. The Statute of Anne, which created a property right in intellectual property, is examined in the context of Defoe’s writing. Byron, Scott, and Cooper are reviewed together with the British Copyright Act 1814 and the American Copyright Act of 1790, both of which expand on the Statute of Anne by putting the author at the center of intellectual property rights.

¶5 However, neither law provided meaningful protection for foreign authors. The Dickens chapter highlights some of the holes in copyright law. The 1833 Dramatic Literary Property Act expanded copyright protection to works written for the stage, but it provided no protection for authors like Dickens, who continued to lack control of stage adaptations of their novels. The International Copyright Acts of 1838, 1844, and 1852 were adopted as part of an effort to bring British copyright law into conformity with European standards to allow bilateral agreements on copyright protection. However, the United States’ unwillingness to respect foreign copyrights became a source of frustration for authors like Dickens, and inspired Gilbert and Sullivan to attempt to address American theatrical piracy by producing The Pirates of Penzance.

¶6 In the second half of the nineteenth century, the focus shifted in Great Britain from the protection of individual property rights to facilitating free trade among nations. In the literary world, Stevenson boasted about the elements of his tales borrowed from other sources, and Barrie stressed the collaborative authorship of his work. Cohen argues that by Barrie’s time, with the adoption of the Berne Convention in Europe and the passage of the Chace Act in the United States creating a baseline, if patchwork, level of international copyright protection, a discussion of collaborative authorship was “an aesthetic statement about creativity independent of law and order” (p.219).

¶7 Pirating Fictions is a lively read that deftly weaves the development of intellectual property law into a discussion of the intellectual, commercial, and cultural lives of the Victorian era publishing and theatrical communities. Most readers familiar with the stock forms of the pirate will gain an appreciation for how the archetype developed over the nineteenth century. The more familiar the reader is with the featured authors and literary works discussed in the book, the richer the experience will be.

¶8 While copyright law plays an important role in this book, Cohen is an English and comparative literature professor counting herself among the Victorianists. She does not present herself as a legal scholar. Accordingly, this is not a book about the intricacies of intellectual property law, which is not to the book’s detriment. The focus is instead on how the literature of this era responded to the developing state of copyright law by using nautical pirates to explore the tension between a collaborative creative culture and a respect for individual property. Any library looking

5. 8 Ann. c. 19 (1710).
6. Copyright Act 1814, 54 Geo. 3 c. 156.
8. 3 & 4 Will. 4 c. 15 (1833).
9. 1 & 2 Vict. c. 59 (1838).
10. 7 & 8 Vict. c. 12 (1844).
11. 15 & 16 Vict. c. 12 (1852).
for titles to support a law and literature class or enrichment materials for those interested in intellectual property will be well served to consider this book for their collection. It would also be an excellent gift for anyone interested in intellectual property, pirates, Victorian literature, or theater.


Reviewed by Frederick W. Dingledy*

¶9 Joshua A.T. Fairfield did not bury the lede with this book. The title alone, Owned: Property, Privacy, and the New Digital Serfdom, tells the reader that this is no dispassionate legal analysis. Fairfield contends that today’s era of digital video and music, e-books, and the Internet of Things (IoT) is quickly becoming a time when a small group of companies dictates what everyone is allowed to do with the books, videos, music, and even everyday objects consumers own.

¶10 Fairfield passionately argues that intellectual property law has usurped a role more properly delegated to property law when it comes to governing digital property and smart devices. He says that giving property law its proper role in protecting those items will allow consumers to truly own them while still protecting creators’ interests. Fairfield’s book is a thoughtful, well-argued call to action that does an excellent job of explaining the basic principles of property law. It begins with the author’s history of property law and how digital property ended up being governed by intellectual property law instead; it then explains the consequences of that recent development and why people should care. The final part of the book presents possible technological and legal solutions to the problem that will protect manufacturers’ and content creators’ rights while allowing consumers to truly exercise ownership over digital property and smart devices.

¶11 Fairfield describes how Anglo-American property law long ago moved away from a feudal system, in which everyone managed property subject to the ruler’s will, toward a system in which a sale severed all ties to the previous owner. With digital property such as e-books and smart devices, however, we are returning to this feudal era as “owners” of this property can do with it only what a small group of manufacturers and content owners allow.

¶12 This regression to feudal property rules runs counter to what Fairfield believes is the most important purpose of property law: increasing people’s abilities to do things. He argues that courts made a mistake in early decisions involving digital property by focusing on its intangibility and thus resorting to intellectual property law instead of property law to govern it. Copyright’s severe financial penalties for infringement, combined with strict anticircumvention provisions in the Digital Millennium Copyright Act and companies’ ability to require customers to agree to lengthy boilerplate contracts before using digital services, enable companies to exercise extensive control over digital property even after it has “sold” that property to a customer. “Owning” digital property, Fairfield argues, is nothing of the sort. Companies have extended postsale control over property to physical items as more and more devices become smart and include copyrightable software. Fair-
field contends that by restoring property law to its proper role, consumers will truly own and control their digital items and smart devices. He says intangibility is no barrier because property law is really about information—information on who can use property and what they can do with it.

¶13 Where this book shines is in Fairfield’s explanations of legal and technological subjects. He makes excellent use of examples throughout the book to illustrate points, such as comparing a car made of Lego bricks with a model car to illustrate modularity, or a factory with smart equipment installed to explain the tragedy of the anticommons. He does a good job of using current events to illustrate his point, such as farmers’ right-to-repair fight with John Deere and a class-action trespass lawsuit against Pokémon GO’s maker. Occasionally, his use of present-day examples backfires, such as citing the now-defunct Yik Yak as a “viral (and virulent)” technology (p.71). Fairfield’s description of concepts such as rivalrousness and the conflict between contract and property law are clear, and the chapter on blockchain made this reviewer feel as though he truly understood for the first time how that technology works.

¶14 Fairfield’s interesting proposal is well worth the (relatively short) read for anyone interested in the issue of who truly owns digital property, Internet-connected devices, and smart devices (a field encompassing more and more objects every day). It also serves as an excellent primer for people who would like to know about the basic issues and technology involved in this high-profile area of the law. Recommended for academic libraries and for libraries in courts, firms, and other organizations that deal with the intersection of digital property and the law.


Reviewed by Nathan Preuss*

¶15 To use the cliché that Paul Finkelman’s Supreme Injustice: Slavery in the Nation’s Highest Court is timely would suggest that a time has ever existed in America when slavery and its aftermath were not impacting the daily lives of millions. However, there are strong arguments that liberties for many Americans have been sliding backward, particularly in recent years. So, I would say this book is timely(ish).

¶16 Finkelman takes a bright light to the lives of three important antebellum Justices: John Marshall, Joseph Story, and Roger B. Taney. I always find it refreshing when an analysis of the life and work of a jurist is not sprinkled with the fairy dust that takes out personal bias and political leanings from the people who write appellate opinions. Until justice is doled out by artificial intelligence (and perhaps even then), human failings will contribute to our laws and their enforcement. These Justices did not create the institution of slavery, but they helped to enshrine it more securely than the Founding Fathers did. The Justices also certainly did more to politicize slavery and thereby helped set the stage for slavery as a crucial cause of the American Civil War.

* © Nathan Preuss, 2018. Associate Professor and Reference Librarian, University of Tennessee College of Law Library, Knoxville, Tennessee.
History is subjective and often based on inadequate information to definitively support one interpretation against any other. “Revisionist” is the popularly dismissive description of contemporary historical analysis that differs from earlier historical interpretations. While that is a subjective judgment of a subjective analysis, Finkelman directly addresses various historians whose analyses differ from his in anticipation of such claims, providing specific examples based on historic primary sources (primary in the historians’ sense, that is, documents written by the Justices).

Finkelman powerfully illustrates how these influential Justices could have undermined slavery and the sorrows their failure to do so has brought upon our nation, not by magically imposing our modern views of slavery in their minds, but through different contemporary views and a more consistent application of the Justices’ own philosophies of legal interpretation. Finkelman shows two ways in which these Justices protected property rights and other interests at the cost of liberty for slaves and free African Americans. First, they ignored well-established precedent from the state courts of slave states—for example, they disregarded a ruling that a child born to a free woman cannot be enslaved. Second, the Justices frequently used strict constructionist analysis on various issues, but then broadly interpreted statutes in a manner that strengthened the institution of slavery or otherwise restricted liberty for black people. With Finkelman’s evidence, one must seriously consider the veracity of his claims that the Justices’ own interests, such as property interests in their slaves, real property, or political leanings like nationalism or states’ rights, were put ahead of the attainment of liberty for all.

I highly recommend this book to all academic law libraries and to any other library or reader interested in constitutional history, the history of slavery, or the history of our highest court. At times, I found the author’s reasoning overly repetitive, but upon reflection, I decided that any repetition enhances the ability of each chapter to stand on its own. Given that some researchers might use the book to learn more about one of these Justices rather than read the entire book, I feel that this is an enhancement in that regard.


*Reviewed by Whitney A. Curtis*

Neil W. Hamilton’s *Roadmap: The Law Student’s Guide to Meaningful Employment* is an amazing resource that sets young lawyers on a successful career path. The path begins in law school from the first day and continues through graduation. The book is divided into four sections: Buying into the Roadmap, Your Timeline for the Roadmap Progress and Your Roadmap Template, Developing Your Strongest Competencies, and Available Resources to Navigate Your Roadmap. If students buy into the Roadmap paradigm (a guide to sharpen your awareness of the characteristics most valued in the workplace), it allows them to become responsible professionals through law school and into practice and to take charge of their own future professional lives.
¶21 In section 1, Hamilton explains how law students can differentiate themselves from other students. He outlines how students will instinctively know which skills legal employers and clients need and be able to articulate how their strongest skills will help them succeed. They will then seamlessly weave their best stories to demonstrate those skills in the interview process. Section 1 further explains how to use the Roadmap for three distinct types of students: those with modest work experience who do not yet have postgraduate employment; those with substantial work experience who do not yet have postgraduate employment; and those who already have postgraduate employment. In the rest of section 1, Hamilton discusses the realities, concepts, and other advice every law student needs to understand, including professional competencies for new law school graduates and how they tie into what potential employers expect.

¶22 Following his explanation of realities and concepts, Hamilton then delves into the importance of professional competencies such as trustworthiness, relationship skills, and a strong work ethic and diligence. He further divides those three broad categories into specific skills such as maintaining confidentiality, honoring commitments, paying attention to detail, treating others with respect, and exhibiting tact and diplomacy, all necessary soft skills that are becoming too uncommon. The discussion of competencies here serves as a preview of section 3, where he goes into much deeper detail on each of them.

¶23 In section 2, Hamilton introduces the timeline of what to do every semester, sometimes even breaking tasks down into individual months within each semester. There are self-assessments for the Roadmap with questions for readers to ask themselves, which is good because not enough people truly take the time to self-evaluate. In addition to the assessments are detailed instructions on how to access the electronic Roadmap template.

¶24 Then Hamilton recommends which classes would be most useful for 2Ls and 3Ls based on the self-assessment results. One thing he makes clear is that the Roadmap is an ongoing tool for discernment and will constantly change as students gain more experience. He also makes clear that this is an individualized product and the time for completing each step will vary from student to student. This section provides suggested and approximate times for completing each section, but Hamilton cautions these suggestions exist merely to set the parameters for a minimum good-faith effort.

¶25 In his detailed section 3, Hamilton discusses how students can distinguish themselves by developing their strongest competencies that go beyond the basics taught in the required curriculum. In addition, students will learn the vocabulary legal employers use to describe the competencies they want, so students can show their value in a language employers will understand. This section also contains self-assessment and a 360-degree assessment to provide students with feedback to help them develop a particular competency.

¶26 While the first three sections of the book teach students to take proactive ownership of their professional development, the last section identifies resources potentially available at their law school. The Roadmap advises them to seek feedback and input from mentors. It also encourages students to strategically develop professional relationships with their professors, lawyers, and judges, all of whom can provide proof of their strongest competencies.
27 Roadmap is a book that belongs not only in every academic law library collection but also in every law school career services office collection. This book is an effective tool to help law students create proactive strategies to find gainful and meaningful employment.


Reviewed by Kaylan Ellis

28 In The Dysfunctional Library: Challenges and Solutions to Workplace Relationships, Jo Henry, Joe Eshleman, and Richard Moniz provide a comprehensive overview of the numerous destructive traits, behaviors, and attitudes that can plague even the most prestigious libraries. This collaboration represents a continuation of the authors’ focus on leadership, management, and healthy work environments. This title could be seen as a complement to the authors’ recent book (with Howard Slutzky and Lisa Moniz), The Mindful Librarian: Connecting the Practice of Mindfulness to Librarianship (2016). While The Mindful Librarian takes a deep look at the application of one technique to address the challenges faced by librarians, The Dysfunctional Library tackles challenges from all sides and offers a variety of solutions that could be applied in most library environments.

29 Libraries are workplaces like any other, in many respects, and they are subject to the same issues found in any environment in which people must work closely together. Many of the concepts presented are drawn from psychology, communication theory, and leadership principles. The authors provide numerous examples, both imagined and culled from their robust survey of more than 4000 library workers, grounding theory with the reality of the changing library environment in the twenty-first century.

30 Some of the points made might seem obvious at first glance, but both the causes of and solutions to these issues are complex, ongoing, and often surprisingly difficult to address. For instance, incivility is identified as the underlying issue compelling many lesser deviations. Determining what constitutes uncivil behavior is complicated because context is a major factor, but intent is irrelevant. Codes of ethics call for civility, but in nonspecific terms, reflecting the challenge of confronting this relatively ambiguous problem.

31 The first chapter emphasizes the importance of emotional intelligence in library workers at all levels. The authors stress the need for individuals to take ownership of their own behaviors and their impact on the larger work environment. The second chapter takes a top-down perspective, focusing on organizational culture as the source of dysfunction, addressing the issues of silos, overbearing bureaucracies, and poor leadership. The following chapters analyze both minor and major individual negative behaviors based on interpersonal relationships, as well as the impact of these behaviors on the organization. An entire chapter is devoted to challenges in communication, which is perhaps the crux of the majority of the dysfunctional interactions presented. Subsequent chapters cover conflict

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management, collaboration, team building, and workplace design. Finally, the impact of (non)functional leadership is discussed.

¶32 The authors are passionate on this topic and well versed in the multitude of workplace dysfunctions in libraries. The book takes care to examine these issues from a variety of perspectives—top-down, bottom-up, cross-functional—both within the library itself and its larger institutional or community context. The perspectives of library workers at all levels, including staff, tenured academic librarians, and library administrators are considered, as well as the personal challenges, opportunities, and responsibilities associated with each role. There is truly something here for everyone, no matter the reader’s position or library setting.

¶33 The book achieves breadth of coverage at the slight expense of depth. Entire titles could be (and have been) devoted to issues of communication, conflict management, leadership, and the like. While the authors provide numerous suggestions for approaching the challenges listed, some issues could benefit from a more in-depth treatment. However, this is a wonderful tool for library workers who are interested in identifying problems within their organization and receiving tips for moving forward, or who are in need of a springboard for future research into a particular behavioral or organizational challenge. Library workers at all levels of experience, rank, and ability would benefit from the reminders drilled in by the authors, including the importance of self-awareness and ownership of behavior, the crucial and often delicate nature of interpersonal communication and, above all, the need to emphasize civility in all interactions.


Reviewed by Lucie Olejnikova*

¶34 The much-anticipated *International Legal Research in a Global Community*, by Heidi Frostestad Kuehl and Megan A. O’Brien, focuses on public international law research, which is apparent from the table of contents. It follows the sources of international law named in Article 38 of the Statute of the International Court of Justice (ICJ). This arrangement aligns with the IALL Public International Law Research Instruction Guidelines,13 for those incorporating either the publication or Guidelines in their teaching. The book opens with a foundational chapter on public international law research, in which the authors draw attention to similarities and differences in methodologies between international and U.S. legal research, listing sources of law, value and weight of authority, and structures of legal systems as examples.

¶35 Chapters 2 through 7 address the sources of law: treaties, their implementation, and travaux préparatoires; customary international law; general principles of law; teachings of highly qualified publicists; and international judicial decisions. Chapter 2 on treaty research begins with an explanation of what international agreements are and the forms they may take (such as written and unwritten agree-


ments, those consisting of multiple documents, or agreements made by an exchange of letters). The chapter lays out basic treaty collections, including general, historical, national, regional, subject, and combination collections, before offering a step-by-step method to treaty research. A thoughtful addition is part 4, on U.S. treaty interpretation and implementation. The authors use three examples—the Chemical Weapons Convention,\textsuperscript{14} the Paris Act Relating to the Berne Convention for the Protection of Literary and Artistic Property,\textsuperscript{15} and the Kyoto Protocol to the U.N. Framework Convention on Climate Change\textsuperscript{16}—to illustrate the approaches to treaty research. Chapter 3 discusses the research and use of travaux préparatoires, with an emphasis on U.S. treaty interpretation at the federal level.

\textsuperscript{¶36} The customary international law (CIL) chapter starts by defining CIL and then laying out strategies on how and where to find it. The second half of this chapter outlines the approaches to finding evidence of CIL, recommending judicial decisions, works of most highly qualified publicists, and treaty codification as the main sources. CIL is often one of the harder concepts for students to grasp, so having a solid foundational introduction followed by concrete research examples is very useful. General principles of law earned their own chapter, chapter 5, which is refreshing considering they are often overlooked. The authors demonstrate what general principles of law are, how to find them (despite the difficulty doing so), and when and how courts rely on them. To show the research complexities, the authors use an example of the principle of res judicata as applied in the United States, Germany, and the United Arab Emirates.

\textsuperscript{¶37} Teachings of highly qualified publicists as subsidiary means of interpretation are in chapter 6. Researchers are advised to ensure reliability, authority, objectivity, and accuracy of these sources because they vary over time and across jurisdictions. The authors mention basic sources, including Restatements of Law, International Law Association materials, International Law Commission materials, law reviews, and other materials. Chapter 7 on international judicial decisions discusses the continuous rise of international jurisprudence, the weight of authority of court decisions, and the various court structures one may encounter. An appendix to the chapter contains a table listing where to find decisions of various courts.\textsuperscript{17}

Chapters 8 and 9 examine secondary sources and finding tools, without which no research is possible. The chapters cover the usual suspects, including dictionaries, legal encyclopedias, \textit{American Law Reports}, practice materials, newspapers, commentaries, yearbooks, and legal blogs.

\textsuperscript{¶38} Chapters 10 and 11 contribute something different: approaches, techniques, strategies, and practical realities of conducting public international law research. Chapter 10 concentrates on staying organized, a common challenge given the overwhelming array of sources. The authors suggest a plan for complex


\textsuperscript{15} Berne Convention, \textit{supra} note 4.


\textsuperscript{17} The table includes listings for the International Court of Justice (ICJ), the International Criminal Court (ICC), the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).
research questions. This includes not only administrative considerations such as time, format, and deadline, but also tips on how to unpack a research question into manageable pieces. The authors cover dealing with different legal traditions, reliability of sources, translation tools, and abbreviations, and they describe how to keep a research log.

¶39 In the last chapter, the authors tackle an unspoken, yet embedded, issue in every international law research task, cultural competency. Most international law research questions contain some assumptions based on the researcher’s experience. The authors encourage researchers to detach themselves from these biases and assumptions to be more effective and comprehensive.

¶40 This chapter reminded me of Justice Breyer’s The Court and the World: American Law and the New Global Realities,18 in which he discusses the evolution of the U.S. Supreme Court’s jurisprudence as it relates to the global community. Throughout the book, he emphasizes the importance of mastering the ability to understand foreign and international law research because U.S. jurisprudence no longer can be considered in a vacuum. Kuehl and O’Brien draw attention to the differences among jurisdictions in codes of conduct, ethical rules, structures of legal systems, and sources of law. The chapter concludes with a human rights law research example to demonstrate how research might vary across jurisdictions, using Argentina, Brazil, China, and Japan as examples.

¶41 This book focuses on international law research with a U.S.-centric approach. Yet, it is a good reference book for all researchers, regardless of location. The book has a thoughtful balance of theory and practical advice. Chapter 11 is what sets this publication apart because it calls on researchers to be intellectually mindful of cultural differences, understandings, and approaches to law and legal research.

¶42 Given the many citations to online and electronic resources throughout the book, it is reassuring to see that the authors employed Perma links to preemptively deal with the ever-growing problem of linkrot. The extensive footnotes, featuring a broad array of sources, make this title a valuable reference tool. The book consists of substantive foundations, methodology, sources, and strategies rather than a compilation of resources. While it does not address topics of private international law, foreign law, or comparative law research, it is a welcome addition to foreign and international law research scholarship.


Reviewed by Christine A. George*

¶43 Lip . . . Dip . . . Paint. It’s a constant refrain throughout Kate Moore’s bittersweet telling of the Radium Girls—the women dial-painters whose exposure to radium caused them to have a heavenly glow that later led to horrific deaths. There are many different ways to tell the story of the fight to get radiation sickness recognized, workplace safety regulations in place, and compensation from the companies


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responsible. Moore’s take is apparent as soon as you open the cover and look at the faces of the dial-painters. The first section in the book is the List of Key Characters, and the book is dedicated to the dial-painters and those who loved them. This story, above all else, is a human story.

¶44 Part 1 of Moore’s narrative begins in 1917, just as the demand for luminous watches exploded. It was a point of pride to work in a factory painting watch faces. Many of the women who first got jobs reached out to relatives and friends to join them. As she introduces Katherine Schaub, Grace Fryer, Inez Vallat, Catherine Donohue, and so many others, Moore conveys the excitement that the women felt working in a place that could make its employees glow. By weaving biographies around each of the names, the feeling of community comes across the page. These are daughters, sisters, and mothers. They and their families have no idea what is causing their bodies to actually break. However, the reader knows because Moore has carefully interwoven the narratives of the company owners and doctors and lawyers with those of the women. Moore lays out the timeline of who knew what and when they knew it.

¶45 Part 2 covers the 1920s when the women learned that they were suffering from radium poisoning and the fight to amend the law. That sets the stage for part 3, which covers Catherine Donohue’s case against Radium Dial that was finally won in 1939. Moore lays out each setback and challenge Donohue, who had the lead case, and the other women faced: the statute of limitations that did not allow enough time for the symptoms to manifest; the fact that poisoning was not included in the Occupational Diseases Act; the seemingly vast conspiracy to avoid acknowledging that the women were radioactive; the ever-increasing medical bills that sent families deep into debt; and the difficulty in finding pro bono legal representation.

¶46 While legislatures reacted to the dial-painters’ plight by updating the laws to include poisoning, those laws only helped workers moving forward. Leonard Grossman was the attorney who ultimately carried Donohue’s case through to the end, winning not just before the Illinois Industrial Commission but also in the court of public opinion. However, when Donohue and her fellow plaintiffs are described as “The Suicide Club” (p.308) and “Walking Ghosts” (p.316), it is a reminder that a legal victory does not always mean a happy ending. Moore carries the history beyond Donohue’s case to portray the dial-painters as “Cassandra-like in their powers” (p.380) with regard to safety standards in factories. There was now an expectation that employers needed to care about the well-being of their workers, a standard that was important as the country moved into the nuclear age.

¶47 The Radium Girls is meticulously researched and immensely readable. It highlights a particular incident in history that carries through to today. Progress that came at a terrible cost. If Moore’s goal was to make sure you learned the names that carried that cost, she succeeded.

Reviewed by Mark W. Podvia*

§48 The writings of Justice Oliver Wendell Holmes, Jr. (considered a leading figure—if not the leading figure—in American judicial thought) guide and inspire lawyers and judges more than eighty years after his death. *Justice Holmes: The Measure of His Thought* by Anthony Murray and Edwin G. Quattlebaum III tells the story of the life and judicial outlook of this amazing man.

§49 The book begins with a description of Holmes’s early years and the effect that his childhood and experiences as a young man had on his later career. He was born in Boston in 1841 to Oliver Wendell Holmes, Sr. (a well-known writer, poet, and physician) and Amelia Lee Jackson, both from prominent Boston families. Holmes grew up surrounded by books; leading writers regularly visited his family home. This had a major effect on Holmes: while he would ultimately write a single book—*The Common Law*,19 published in 1881—his love of the written word would remain with him for life. That love of writing can certainly be seen in his brilliantly written opinions and dissents.

§50 Like his father, Holmes attended Harvard College. However, he felt duty-bound to leave school in 1861 to join the Union Army. Thrice wounded, Holmes saw numerous friends perish during the conflict. The authors write that “[i]f Holmes ever had religious beliefs, he certainly abandoned them after experiencing the slaughter of war” (p.40). In his writings, Holmes rejected the concept of natural law, refusing to defer to a higher power when making his judicial decisions.

§51 Following the Civil War, Holmes enrolled in Harvard Law School. After several years in practice—a period not adequately discussed in this book—Holmes was appointed to the Massachusetts Supreme Judicial Court in 1883. He served there until 1902, when President Theodore Roosevelt appointed him to the U.S. Supreme Court. Holmes remained on the Court until his retirement in 1932.

§52 The authors spend considerable time examining several of Holmes’s opinions and dissents. His dissent in *Lochner v. New York*20—one of the most influential dissents in the Court’s history—is discussed in great detail. In his dissent, Holmes espoused the principle of judicial restraint, recognizing that courts should defer to legislative judgments.

§53 The authors give particular attention to Holmes’s opinions in several World War I espionage cases—*Schenck v. United States*,21 *Frohwerk v. United States*,22 and *Debs v. United States*.23 Unlike many judges, Holmes was not bound by his personal feelings when making a judicial determination. Finding against Debs, he later wrote that he “greatly regretted” having to make that decision; he privately hoped that the

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* © Mark W. Podvia, 2018. Interim Co-Director, Head of Faculty Services, Special Collections Librarian, and Archivist, George R. Farmer Law Library, West Virginia University College of Law, Morgantown, West Virginia.

20. 198 U.S. 45 (1905).
22. 249 U.S. 204 (1919).
23. 249 U.S. 211 (1919).
The authors also address other free speech cases, including Holmes’s famed dissent in *Abrams v. United States.*

Noting that Holmes “was always gentlemanly in expressing his views” (p.83), the authors compare the polite language contained in his opinions with the “goading, provocative language” (p.85) found in many of the opinions of the late Justice Antonin Scalia. Holmes, the authors write, “understood that polite language was more convincing than words of denunciation” (pp.85–86). Unlike Scalia, Holmes was a legal pragmatist who believed that the Constitution evolves over time; he did not believe that judges were bound by the original intent of the Founding Fathers.

One quotation often attributed to Holmes is not mentioned in the book. On July 12, 1864, President Abraham Lincoln visited Fort Stevens, located just outside of Washington. At the time, the fort was under attack by Confederate forces commanded by General Jubal Early. Despite the bullets whizzing by, Lincoln insisted on peering over the fort’s parapet. It has been claimed that a young Captain Holmes told his commander-in-chief “get down you damn fool!” Considered by many to be apocryphal, the story has been repeated as fact in a number of highly reputable sources. While it has no direct bearing on Holmes’s judicial thought, it would have been welcome if the authors would have either confirmed the story or ended a long-standing rumor.

Illustrated with thirty-eight black-and-white photographs, this book is eminently readable. The flow of the book is logical and the writing never dull. The index is user friendly, and an extensive bibliography will aid researchers in search of additional information. This book belongs in every law library and in the hands of all who have an interest in American legal history and in the life and judicial thought of this great American.


 Reviewed by Nicole P. Dyszlewski

While many lawyers might approach a book titled *Beyond Smart: Lawyering with Emotional Intelligence* with skepticism, a skepticism that author Ronda Muir describes as a typical lawyer attribute (along with low emotional perception, low emotional empathy, low emotional regulation, low sociability, high pessimism, high autonomy, and limited conflict resolution strategies), that skepticism is misplaced.

The book’s first 250 pages offer a well-reasoned and easy-to-read argument for why emotional intelligence matters, especially in the legal field. Muir knits together emotional intelligence studies and statistics from a variety of professions to define the concept and emphasize its importance. Beyond just explaining why

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24. President Warren G. Harding later commuted Debs’s sentence.

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soft skills are important, the book discusses how nonlawyers evaluate the emotional intelligence of lawyers, and it makes a strong business case for developing emotional intelligence. The business case laid out for emotionally intelligent lawyers is comprehensive and compelling. Muir argues that increased emotional intelligence plays an important role in lawyers getting more clients, keeping more clients, communicating more effectively, and generating more revenue. Each of these points is discussed with case studies from nonlegal fields. For readers who already understand that emotional intelligence is important and thus do not need to read hundreds of pages validating a held belief, the only real criticism of the first half of the book is that while convincing, it seems overly long.

The second half of the book contains chapters on how to achieve an emotionally intelligent workplace, how to increase your own emotional intelligence, and what role law schools can play in building emotional intelligence. Chapter 7 discusses several ways to raise emotional intelligence such as embracing mindfulness; improving listening; and participating in professional development trainings on topics such as business development, client service, leadership, and communication. Finally, Muir’s book ends with a lengthy appendix of resources on assessment and development for those interested in learning more about emotional intelligence.

An interesting topic discussed in the latter half of the book is the relationship between emotional intelligence and gender in leadership. One of Muir’s suggestions for building a more emotionally intelligent law practice is to embrace women leaders. She writes that “evidence points to our women lawyers as an untapped pool of emotionally intelligent leaders. . . . Simply including women on teams seems to raise team effectiveness because of the higher incidence of women having [emotional intelligence] strengths” (p.258). Placing women in leadership and management roles is particularly important because while one-third of attorneys are women, only about one-fifth are law firm partners, general counsels of Fortune 500 corporations, and law school deans.²⁷

Beyond Smart is recommended for lawyers, law students, firm managers, and law school administrators. Muir’s section on recalibrating hiring practices in the law field is a must-read for anyone in career development, law firm hiring, and legal recruiting. This book is also recommended as an updated companion to Lawyer, Know Thyself."²⁸
My Year of Citation Studies, Part 3

Mary Whisner

In this third installment examining citation studies, Ms. Whisner looks at five articles from each of a sample of twenty-three journals published in 1982, and discovers some surprising results.

¶ 1 This year I have been dabbling in citation studies, trying to discover some things about how law journal articles are used. In the first two installments, I looked at samples from 2012. This time, I’m reaching back to 1982, a year I remember well but some readers might not have experienced.

¶ 2 Let’s set the scene for our trip back to 1982. Lexis and Westlaw existed but were not as ubiquitous as they are now, and they weren’t the first place researchers would go for journal articles. There was no HeinOnline. No SSRN. No Google Scholar. Researchers found articles by using print indexes or by leafing through issues that were routed to them or displayed on library shelves.

** Research Services Librarian, Marian Gould Gallagher Law Library, University of Washington School of Law, Seattle, Washington.

1. Mary Whisner, My Year of Citation Studies, Part 1, 110 LAW LIBR. J. 167, 2018 LAW LIBR. J. 7, and Mary Whisner, My Year of Citation Studies, Part 2, 110 LAW LIBR. J. 283, 2018 LAW LIBR. J. 12.

2. Westlaw began with “selected” articles from the journals it covered and later moved to full coverage. See Database Additions, WESTLAW UPDATE, June 1984, at 2 (“Selected articles from university law reviews and bar association journals are available in this expansive new database [Texts and Periodicals]. Selected full text articles from over 100 publications are available.”) Ten years later, Westlaw listed fifty journals with full coverage (“all articles, comments and case notes for which authors provide copyright releases”) with coverage beginning between 1981 and 1990. WESTLAW DATABASE LIST, Summer/Fall 1994, at 169–70. In the list of all journals, coverage was selective unless marked with a star. Id. at 172–91. Some journals had selective coverage for a period of time, followed by full coverage.


6. Let me tip my hat to all the people who undertook citations studies without the databases I use all the time now. See, e.g., Wes Daniels, “Far Beyond the Law Reports”: Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940, and 1978, 76 LAW LIBR. J. 1 (1983).
How did articles published in 1982 fare in the citations game? Did people find them and cite them? Did they get most of their citations in the early years? Does anyone still use these vintage articles? Those are the questions I’m exploring here. I set out to compare across the decades. I thought I could look at patterns for articles published in the same set of journals in 1982, 1992, and 2002. Alas, that was too ambitious for the time I had. You will see that comparison in the next installment.

Methodology

I started with the list of journals indexed in the Current Index to Legal Periodicals. I was overwhelmed by the hundreds of specialty journals, and I saw that a random sample would likely be dominated by them. I decided to focus on “flagship reviews,” the main law journal from a law school. That gave me a list of 192.

I used an old-school technique for producing a random sample: I rolled dice. If a journal got a ten, eleven, or twelve, it was in my sample. Thirty journals got that score. The dice gave me a diverse sample, including private and state schools, with varied reputations. If the sample had not had this diversity—for example, if none of the journals was a prestigious journal—I think I would have looked at another set of numbers. This sample’s elite journals were the Harvard Law Review and the Michigan Law Review.

Seven of the journals in the sample had not begun publication in 1982. That is, the 1982 sample is over a fifth smaller than today’s. This reflects the growth in the number of law schools over that period. So the sample for this study was twenty-three.

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There’s a one in six chance of rolling a ten, eleven, or twelve. Here, 30 out of 192 shows practice matching up nicely with theory. A sample of 32 would have been exactly one sixth, but that’s not the way randomness works.

9. Different samples also would have given me what I needed. If I had chosen to look at journals with a two, three, or four, then the sample’s high-ranked journals would have been the California Law Review, the Duke Law Journal, and the Stanford Law Review. If I had chosen journals that got a seven, then the elite journals would have been Northwestern University Law Review and the Texas Law Review. Each of these samples would have had many less prestigious journals as well. As in the first sample, there’s a one in six chance of rolling a two, three, or four; likewise, there’s a one in six chance of rolling a seven.


Five journals had different names in 1982:

- **Dickinson Law Review** became **Penn State Law Review** in 2003 (volume 108);
- **Journal of Family Law** changed its title three times before becoming **University of Louisville Law Review** in 2007 (volume 46);
- **Southwestern University Law Review** became **Southwestern Law Review** in 2008 (volume 38);
- **Tulsa Law Journal** became **Tulsa Law Review** in 2002 (volume 38);
- **University of Arkansas at Little Rock Law Journal** became **University of Arkansas at Little Rock Law Review** in 1998 (volume 21).

Within each journal, I looked at the first five articles published in 1982. I omitted introductions, memorials, book reviews, and commentary. (One article in the **University of Pittsburgh Law Review** was written by a third-year student at Pitt. I decided to skip that one too.) Two journals had fewer than five articles in 1982, so I looked at what they had.

For each article, I used HeinOnline’s ScholarCheck to find citations to it, year by year. When a citing reference’s date had hyphenated years (e.g., 1985–1986), I clicked through to see whether a header would tell me the exact year of that issue. I learned that some journals’s headers do specify a year and others’ just give the two-year range. (For example, **Northwestern University Law Review** gives a year; **Gonzaga Law Review** gives a range.) If I couldn’t get a precise date, I chose the later of the two.

In a few instances, a 1981 journal cited one of the 1982 articles in the sample. The citing journals must have been far enough behind in their publication schedule that authors could read and cite a 1982 article before the 1981 journal issue was in press. I put those 1981 citations in the column for citations in 1982. I didn’t count citations in 2018 because we’re in the middle of the year.

I plugged it all into a spreadsheet. I checked to make sure that my spreadsheet tallies (adding up the citations for each of the thirty-five years since 1992) balanced with HeinOnline’s ScholarCheck figures. Checking and cross-checking was tedious, but I value accuracy, and I decided it was important. As this was going to press, I discovered that I had omitted data for one of the journals in the sample, so I had to recalculate everything.

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12. It’s an interesting coincidence that the editors at Tulsa and UALR both decided that “Law Review” sounded better than “Law Journal.” The editors of the **Yale Law Journal** appear to be sticking with “Law Journal.”

13. The **Journal of Family Law** provided only “1981–1982” as the date for each issue. I assumed that the first issue was fall 1981 and that the second and third issues were 1982.

14. **Cardozo Law Review** had three; **Southwestern University Law Review** had four.


16. A few articles were cited by cases reported in the **Supreme Court Bulletin**. I omitted those citations from my count: I’m looking at citations by journals. I also eliminated one duplicate citing reference from HeinOnline.

17. Did I kick myself? You bet I did.
Findings

Citations over Time

¶11 I expected that there would be more citations in the first five or ten years after an article was published than in later years. I think most researchers generally look for recent coverage of a topic. Newer articles should discuss recent statutes and cases, as well as whatever is still important from decades ago. And some of the hot topics from 1982 must be resolved by now, so there would be less interest in the articles trying to sort out resolutions.

¶12 And indeed, a large share of citations do come early on. (There are fewer citations in the year of publication because of the slow publication cycles of print journals.) Figures 1 and 2 show you the citations to all the articles in the sample, by total numbers and by averages.

¶13 What surprised me was that the drop-off wasn’t greater. Some articles from 1982 are still being cited. This is true for heavily cited articles that might be considered part of the canon by now, but it’s also true of the less famous. For instance, the most-cited article in the sample, 18 which has been cited 724 times, was cited 10 times in 2017. Maybe it’s not surprising that it’s still popular—but an article that has been cited only three times in its life 19 was also cited in 2017.

¶14 To look at the pattern more broadly, I calculated the consolidated citations to all the articles in three twelve-year chunks: 1982–1993, 1994–2005, and 2006–2017. The first twelve years saw over half the citations. But the citations in the last

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dozen years were nontrivial: they were almost a fifth of the total (nineteen percent).

**Differences Among Articles**

¶15 In the sample, the average was 31.1 citations over the 16 years covered. But that average (the mean) tells only part of the story. The high was 724; the low was one. The median article (number 57) had 7 citations. The most common number of citations per article (the mode) was 2; 13 articles (tied for 91st place) had 2 citations each. Figure 3 shows this graphically. It’s an even more extreme long tail than the examples in my last column. Table 1 lists the 20 most-cited articles. (It’s actually 21, because of a tie.)

¶16 Not all articles naturally have a broad national and international appeal. An article about welfare in South Dakota or the South Carolina Business Corporation Act might be intensely interesting to practitioners in its state, but less so to the rest of the world. And indeed, each of those has been cited only twice. Twenty-three articles had a state’s name in the title. Nineteen of those were below the

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20. The numbers:
   1982–1993: 1900 citations, 57% of the total (3324).
   2006–2017: 624 citations, 19% of the total.


22. HeinOnline’s ScholarCheck includes citations in some foreign journals.


median in citation count; nine were cited only once or twice. So being focused on one state correlated with low citations.

Author Names

¶17 As I was looking through the articles, I noticed authors’ names. A couple of uncommon names appeared more than once: two people named Rex, two named Erwin. Two authors were named Frank, and one of them (Frank Easterbrook) had two articles in the sample. For the heck of it, I tallied the names. The most common was Robert (11 out of 136 authors). Other popular names in the sample were William (6), James (5), John (5), Michael (4), and Richard (4).

¶18 You might have noticed that these are common men’s names. In 1982, women were underrepresented on law school faculties and did not publish as often as men.26 So the prevalence of men’s names was to be expected. But note that names aren’t a perfect test: one of the authors in the sample was a woman named Stewart.27

Number of Authors

¶19 Twenty-two articles were coauthored. Twenty had two authors, and two had three. I didn’t notice any patterns worth commenting on. When I sample

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26. In fall 1982, women were 14.7% of full-time law teachers. Elyce H. Zenoff & Kathryn V. Lorio, What We Know, What We Think We Know and What We Don’t Know about Women Law Professors, 25 Ariz. L. Rev. 869, 870 (1984) (citing ABA, A Review of Legal Education in the United States, Fall 1982, at 40). In a sample of male and female tenure-track faculty who began at the same time in the mid-1970s, the women published less than the men. Zenoff & Lorio, supra, at 882–83.

## Table 1

### Most-Cited Articles from 1982

<table>
<thead>
<tr>
<th>Rank</th>
<th>Article</th>
<th>Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>Victor Brudney, <em>The Independent Director—Heavenly City or Potemkin Village?</em>, 95 Harv. L. Rev. 597 (1982)</td>
<td>286</td>
</tr>
<tr>
<td>11</td>
<td>Michael Gruson, <em>Forum-Selection Clauses in International and Interstate Commercial Agreements</em>, 1982 U. Ill. L. Rev. 133</td>
<td>70</td>
</tr>
</tbody>
</table>
articles from, say, 2002, will I find more collaboration, less, or about the same? A data point to watch.

Words in Title

¶20 I was curious about titles’ length, so I counted. Any group of characters with a space on either side counted as a word—including a date, a Roman numeral, or “v.” Following this logic, I counted hyphenated words (e.g., “post-conviction” and “forum-selection”) as one word.

¶21 Titles ranged in length from three words to thirty-two words. The median length was ten words. Figure 4 shows the articles ranked by their length. It’s obvious that that thirty-two-word title was an outlier. Most articles had titles of between six and twelve words. I think that it will be interesting to compare this factor when I look at articles published in 2002.

Hot Journals

¶22 As in my last small study, some journals in this sample were cited more often than others. It probably won’t surprise you—it didn’t surprise me—that the Harvard Law Review and the Michigan Law Review had articles in the top 20. But less highly ranked law reviews also had some stand-out articles. The top 20 most-cited articles in this sample of 107 appeared in Harvard Law Review (5, in fact, the

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30. It’s not a perfect bell curve, but it’s suggestive. I bet that a larger sample would show a smoother curve.
Table 2

Journals with the Most and Least-Cited Articles

<table>
<thead>
<tr>
<th>Journal</th>
<th>Number of Articles in Top 20* Most-Cited</th>
<th>Rank of Articles in Top 20*</th>
<th>Number of Articles in 20* Least-Cited Articles</th>
<th>Rank of Articles in Bottom 20*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buffalo Law Review</td>
<td>1</td>
<td>16</td>
<td>1</td>
<td>91</td>
</tr>
<tr>
<td>California Western Law Review</td>
<td>1</td>
<td>20</td>
<td>2</td>
<td>91, 91</td>
</tr>
<tr>
<td>Cardozo Law Review</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>91, 91</td>
</tr>
<tr>
<td>Florida State University Law Review</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>91</td>
</tr>
<tr>
<td>Harvard Law Review</td>
<td>5</td>
<td>1, 2, 3, 4, 5</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Idaho Law Review</td>
<td>0</td>
<td>3</td>
<td>91, 91, 104</td>
<td></td>
</tr>
<tr>
<td>Journal of Family Law</td>
<td>2</td>
<td>12, 14</td>
<td>1</td>
<td>104</td>
</tr>
<tr>
<td>Michigan Law Review</td>
<td>5</td>
<td>6, 8, 10, 13, 15</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>North Carolina Law Review</td>
<td>2</td>
<td>17, 18</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Saint Louis University Law Journal</td>
<td>1</td>
<td>18</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>South Carolina Law Review</td>
<td>0</td>
<td>1</td>
<td>104</td>
<td></td>
</tr>
<tr>
<td>South Dakota Law Review</td>
<td>0</td>
<td>2</td>
<td>91, 104</td>
<td></td>
</tr>
<tr>
<td>Southwestern University Law Review</td>
<td>1</td>
<td>7</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Stetson Law Review</td>
<td>0</td>
<td>1</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>Tulsa Law Journal</td>
<td>0</td>
<td>2</td>
<td>91, 104</td>
<td></td>
</tr>
<tr>
<td>University of Arkansas at Little Rock Law Journal</td>
<td>0</td>
<td>3</td>
<td>104, 104, 104</td>
<td></td>
</tr>
<tr>
<td>University of Illinois Law Review</td>
<td>2</td>
<td>11, 20</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>University of Pittsburgh Law Review</td>
<td>1</td>
<td>9</td>
<td>2</td>
<td>91, 104</td>
</tr>
<tr>
<td>West Virginia Law Review</td>
<td>0</td>
<td>1</td>
<td>91</td>
<td></td>
</tr>
</tbody>
</table>

*Because of ties, there are 21 in the top 20 and 22 in the bottom 20.


¶23 Harvard and Michigan were consistent: all 5 of the articles sampled from each journal was in the top 20. But 4 journals had articles in both the top 20 and the bottom 20. (The bottom 20 is actually the bottom 22 because of a tie.) See Table 2. Six journals stayed in the middle somewhere: their articles ranked between 21st and 87th. One lesson to draw from that is that placement in a lower-ranked journal does not doom an article to oblivion. Articles published anywhere can attract readers and be used in future scholarship.
Conclusion

¶24 In this column, I explored five articles from each of a sample of twenty-three journals published in 1982. Some articles have been cited much more than others, but each article has been cited at least once. Articles from some journals consistently are cited often. But other journals also publish articles that are widely cited.

¶25 I plan to continue this project in the next issue of Law Library Journal. Watch this space.
Introduction

The ideal work environment provides a sense of purpose and validation. Inevitably, however, unconscious or implicit biases permeate the workplace because we all have them. These biases can be based on race, age, gender, religion, socioeconomic status, physical disability, and other characteristics. Implicit bias in the workplace can “stymie diversity, recruiting and retention efforts, and unknowingly shape an organization’s culture.” People of color, in particular, experience challenges as a result of racial microaggressions in the workplace.

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3. Id.
Racial Microaggressions

Racial microaggressions are “brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward people of color.” Racial microaggressions may not raise an eyebrow right away, but they are harmful to the work environment. Due to their subtle nature, racial microaggressions can be “difficult to identify, quantify, and rectify.” For this reason, Derald Wing Sue and colleagues identified three forms of racial microaggressions: microassaults, microinsults, and microinvalidations.

Microassaults are “explicit racial derogation[s] characterized primarily by a verbal or nonverbal attack meant to hurt the intended victim through name-calling, avoidant behavior, or purposeful discriminatory actions.” Microassaults are what one would consider “old-fashioned” racism. Microinsults, more subtle and frequently unknown to the perpetrator, are “communications that convey rudeness and insensitivity and demean a person’s racial heritage or identity.”

For example, when a [W]hite person says to a person of color, “Wow! You’re so articulate,” he may intend this to be a compliment. However, the person of color this statement is directed toward may interpret it as a back-handed compliment . . . [that] people of my race are stereotyped as unintelligent or inarticulate.

Microinvalidations are “communications that exclude, negate, or nullify the psychological thoughts, feelings, or experiential reality of a person of color.” Colorblindness, or “accusing a Black person of being racially hypersensitive instead of acknowledging” that racial biases exist, “denies the experiential reality of people of color who are treated differently because of their race.”

Racial microaggressions are not limited to human interactions; they can also be environmental. “[O]ne’s racial identity can be minimized or made insignificant through the sheer exclusion of decorations or literature that represents various racial groups.” It can also be evident in the small representation of people of color in middle- and upper-level management positions in law librarianship. While these numbers have improved recently, the shortage of people of color in leadership positions remains, and for those in entry-level positions with aspirations to move up in the profession, this can be discouraging. It is important that we recognize all forms of racial microaggressions that exist in our organizations and in our profession.

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6. Sue, supra note 4, at 274.
7. Id.
8. Id.
9. Id.
10. Alabi, supra note 5, at 48.
11. Sue, supra note 4, at 274.
14. Sue, supra note 4, at 274.
**Effects of Racial Microaggressions**

¶5 Individuals who are confronted with their microaggressive acts often try to explain away their actions or accuse the victim of being overly sensitive.\(^{16}\) Victims may be told to “let it go,” “get over it,” or not waste their time addressing the acts. Because these acts are done unintentionally, people believe that the harm is minimal. However, overwhelming evidence supports that racial microaggressions have major consequences for people of color.\(^{17}\) Due to their cumulative nature, microaggressions have been found to (1) contribute to a hostile and invalidating campus and work climate, (2) devalue social group identities, (3) lower work productivity, (4) create physical health problems, and (5) assail mental health issues due to stress, low self-esteem, and emotional turmoil.\(^{18}\)

For women of color, these effects are amplified as they have to endure both racial and gender microaggressions in the workplace.\(^{19}\)

**Racial Microaggressions in Higher Education and Law Librarianship**

¶6 Most colleges and universities strive to increase and promote racial diversity on their campuses. Despite these institutional efforts, faculty of color experience disturbing occurrences of racial microaggressions on campuses nationwide.\(^{20}\) Faculty of color, at predominately White institutions, are more likely to (1) experience being “the only one,” which leads to feelings of isolation; (2) lack mentors of color; (3) have their scholarship devalued or considered illegitimate; (4) experience elevated levels of stress; and (5) face a biased tenure and promotion process.\(^{21}\) The challenges and struggles of faculty of color are well documented in quantitative and qualitative research and personal narratives.\(^{22}\)

¶7 An increasing number of librarians of color are sharing their personal experiences dealing with racial microaggressions in the workplace. Ronald Wheeler was the first law librarian to introduce the concept to law librarianship.\(^{23}\) We want to “pick up the baton” and share our experiences, feelings, thoughts, and reactions to racial microaggressions as Black female law librarians. We tell our stories vicariously through a fictitious character named Monique Stevenson. While the accounts are based on actual events and interactions, we have altered the details to avoid identifying our colleagues and students. Our goal is not to humiliate or condemn anyone, but to give a glimpse into our unique challenges and provoke change in our profession’s culture.

\[^{16}\] Sue, *supra* note 4, at 278–79.


\[^{18}\] Id. at 14–15.


\[^{21}\] Derald Wing Sue et al., *Racial Dialogues: Challenges Faculty of Color Face in the Classroom*, 86 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 331, 331 (2011).

\[^{22}\] Id.

Monday

¶8 It was 9:00 a.m., and I had the first reference shift of the week. As I was filtering through the usual Monday morning e-mails, a White man in a blue shirt walked up to the desk. He said, “I have a really tough research question. Is there a man available who can help me?” I was not sure I had heard him correctly, but my hesitation prompted him to repeat the question, this time with a smile. He continued, “I have a legal issue,” putting emphasis on the word legal. “Is there a man available who can help with my question? I need to speak with someone who went to law school.” A nearby circulation technician had overheard the patron’s question and was staring at me aghast.

¶9 I paused. In this all-too-familiar moment, I began an internal dialogue that people of color often have when encountering microaggressions.24 Should I tell him that his question was rude? Should I say something? I did not want to escalate the situation. Why should I be responsible for managing the escalation of a scenario that I did not create? I had experienced the same internal dialogue during a recent library staff meeting when a colleague made a condescending remark about where a professor attended law school, a school that happened to be a historically black college (HBCU).

¶10 The blue-shirted man casually shuffled his papers and leaned against the reference desk, looking to me for a response to his question. He seemed to be oblivious to both my nonverbal cues and the sign prominently displayed on the reference desk that listed my name and job title. I had chosen to speak up in the staff meeting in response to the HBCU law school comment, but today I did not have the energy to engage. I have learned that when confronting these kinds of comments, you have to be ready for any response, and I did not want to open myself up to the uncertainty of his reply.25

¶11 “I’ll find someone who can help you,” I said. I called Jon, an older White male colleague. Jon agreed to assist the patron, so I walked over to reorganize a book display and put some distance between myself and the patron. A few minutes later, Jon approached me with the man in the blue shirt following shortly behind. “Here’s the person who can help you. She’s a legislative history expert,” Jon said, referring to me. The man looked a bit surprised and asked, “You went to law school?” “I did,” I replied. I sat with the patron and showed him a few databases. He seemed to appreciate my assistance. On the way back to my office, I ran into the circulation technician who witnessed the encounter earlier. “Can you believe he said that?!” she exclaimed. I was thinking to myself, “Yes, I can believe it,” because it was not the first time I had heard a comment like that.

Tuesday

¶12 It was late afternoon, and I had just left my fourth meeting of the day after being up late the night before talking with a dear friend. She had heard the news

about a White supremacist organization being granted permission to speak on our
campus, and she wanted to check in with me to see how I was feeling. I told her I
was extremely uncomfortable that the KKK would be protesting so close to my
office, but the rally appeared to be generating very little conversation among my
library colleagues.

¶13 I returned to my desk to read e-mails and write out the next day’s to-do list.
At the top of my inbox, I saw a message from one of our library vendors and shud-
dered. She was always helpful with answering database questions in a timely man-
ner, but I was still a bit annoyed that she touched my hair without permission at the
recent American Association of Law Libraries (AALL) annual conference. People
are often curious about my dreadlocks, and I have gotten really good at dodging
when I see hands extending toward my head. But in this instance, the vendor came
up behind me and plunged both of her hands in my hair before I could stop her.
One of my law school classmates used to joke that if Black women received a dollar
every time someone touched their hair without permission, we would be able to
close the wage gap.26

¶14 The next e-mail was from the university’s Public Relations and Communica-
tions Office regarding the upcoming KKK rally. The e-mail contained a recom-
mended script for employees on how to answer questions about the rally. The
e-mail emphasized the importance of protecting freedom of speech even when we
disagree with what is being said. I shut down my computer and decided to go home.
Not only would this rally affect my work environment, but later that evening I
planned to discuss the topic with my son at home.

Wednesday

¶15 As I get dressed for work on this “hump day,” my heart is heavy. Last night,
I had to have a very difficult conversation with my nine-year-old son after receiving
this e-mail from his school:

You may be aware that Richard Spencer of the National Policy Institute is scheduled to give
a talk at [event location] . . . . We have been consulting with law enforcement about the
visit, and while we are not anticipating any problems at our schools . . . [t]he district will be
rerouting school buses . . . The delays may not be limited to just those buses traveling close
to the [event location], but may also affect other buses. We ask for your patience as we work
to get students home from school safely that day.

¶16 My son goes to a predominantly White (seventy percent White and thirty
percent Black, Asian, Hispanic/Latino, American Indian, and Native Hawaiian/
Pacific Islander collectively) elementary school, and I wanted to discuss this e-mail
with him before he heard about it from his classmates. This reminded me of the
first conversation I had had with my son about race, a year ago after attending open
house at his new school—the highest-performing school in the county. We were so
excited about meeting my son’s first grade teacher. As soon as we walked into the

-growing-black-white-wage-gap.htm [https://perma.cc/DU6C-Q2RN]. From 1979 to 2016, wages for
Black women fell from roughly ninety-five percent of what White women earned ($11 an hour versus
$12 an hour) to about eighty-two percent ($16 versus $20).
front of the school, we saw a bulletin board with a picture of a large tree with lots of branches. On the upper left side of the tree were five pictures of the janitorial staff, all of whom were Black. On the upper right side were five pictures of the kitchen staff, four of whom were Black. At the center were at least twenty-five pictures of teachers, only two of whom were Black. At the trunk were five pictures of the administration, including the resources officer, all of whom were White.

¶ 17 It was disappointing to think that every day students of color walk through the front doors of their school and see this type of imagery at such an impressionable age. I had a conversation with my son about the display as soon as we got home. I reiterated to him that he was not limited to what he sees around him. He may not see many teachers of color at his school, but I reminded him that his mother is a teacher and he can be one too if he so chooses. My son is fortunate because my research interests are race and implicit bias. Imagine all of the parents of color who are not aware of how to recognize environmental microaggressions and are not having these conversations with their kids.

¶ 18 After dropping my son off at school, I arrived at work and checked my e-mail. I noticed one from a colleague with the subject line, “Cookies in the Lounge.” My eyes lit up. Who does not want to have a cookie at 9:00 a.m.? So I opened the e-mail, which read, “Good morning all, I visited Charleston, South Carolina, for the first time last weekend. I brought back some delicious Plantation Cookies. Please enjoy.” I was shocked. I blinked my eyes a few times to make sure I was reading the e-mail correctly, and indeed I was. I immediately forwarded the e-mail to my supervisor to let her know I was offended by it. This e-mail is an example of a microinvalidation. I do not believe that my colleague sent the e-mail with malicious intent, but that fact does not negate how I felt or that the word choice may have offended our Black staff.

¶ 19 At 11:00 a.m., I went to the reference desk to start my final reference shift of the week. Twenty minutes into my shift, I received an e-mail through our library chat reference reporting a loud noise on the second floor. I e-mailed the student, told him that I had forwarded his concerns to our facilities manager, and signed my first name, Monique, to the e-mail. The student responded almost immediately: “Can I please have the library manager’s e-mail address?” I paused before answering. Why would the student think that I am not the manager? Was it my name? Does he not think I am capable of following through with his concerns? I informed the student that I was a library administrator. The student replied, “Oh, ok. Can I expect to hear back from you when you find out what is going on?” He was unaware that he had even offended me, which is why microaggressions are so hard to rectify.

Thursday

¶ 20 I arrived at work just in time for a 9:00 a.m. librarians’ meeting. Included on the agenda was an update from the search committee for our reference librarian opening. During the conversation, a colleague said, “Sharon, I mean, Monique, you will be happy to hear that two of the candidates are racially diverse.” I replied, “Oh, that’s great news,” but inside I was thinking, why are you singling me out? Is it because you think the library is doing “my people” a favor by interviewing racially diverse candidates? Because you believe that I am more concerned than non-Black colleagues that the school interview qualified candidates of color? Because you think
that my only professional interest is workplace diversity? Any of these assumptions represents a microinsult. Needless to say, it is also frustrating that I am frequently called by the name of a Black librarian who left the institution over a year ago.

¶21 Librarians of color commonly feel as though they are the only ones who care about diversity issues, which can be taxing and discouraging. Everyone at an institution or a firm must value diversity. The mission to promote diversity and inclusion cannot fall on the shoulders of a few. It takes the efforts of every employee to ensure that the workplace is diverse and inclusive. Similarly, AALL’s Diversity and Inclusion Committee and minority caucuses cannot be the only entities charged with advocating for diversity in law librarianship. Every member of AALL has to make it a priority to effectuate lasting change.

¶22 One of the challenges for our profession has been recruiting and hiring law librarians of color. Some factors that contribute to this challenge are outside of our control, such as the decreasing number of people of color attending law school. But one way to ensure we are doing our best is to minimize the role implicit racial bias plays in our hiring practices. It is not enough to include the standard Equal Employment Opportunity Commission language at the bottom of a job posting. We have to take an active role to reduce biases in our hiring practices. Here are some suggestions:

- Recruit outside your comfort zone. Most libraries post their job listings on the various minority caucus websites, but we have to take it a step further. Call veteran law librarians of color and request recommendations. Reach out to law librarians of color personally and encourage them to apply.
- Make sure that everyone on the search committee has taken implicit bias training. Most institutions offer free implicit bias trainings or tutorials.
- Diversify your search committee. It can be very discouraging for a candidate of color to interview with an all-White search committee. Whenever possible, there should be a person of color on every search committee.
- Develop a rubric to score résumés before you review them. A study found that Whites receive fifty percent more calls for interviews than Black job candidates with the exact same résumés. The only difference is the candidate’s name. Some companies delete any identifiers (e.g., names) from résumés before reviewing them. After the in-person interviews, you should also use a standard rubric to evaluate job candidates to ensure that hiring decisions are based on nondiscriminatory metrics.
- Stick to the script during interviews. “Interviewers naturally create a warmer or more casual climate for candidates they perceive as ‘in-group’ members—say, those who went to the same university or were in the same fraternity. This natural instinct to reach for common ground can advantage certain groups by making them feel at home.” To avoid this, set predetermined interview questions and pay attention to the setting to ensure a level playing field for all candidates.

27. Job applications usually include language such as “The University is an Equal Opportunity/Affirmative Action employer, and is committed to building a culturally diverse workplace. We strongly encourage applications from female and minority candidates.”

¶23 Once I returned to my office, I began to reflect on my experiences serving on search committees. I have served on committees where I have witnessed committee members speak negatively about the law school a candidate graduated from, choose not to interview a candidate because the law school ranking of his or her current place of employment was not as prestigious as ours, and advocate for a candidate who lacked experience but graduated from a top-tier law school. These are the types of biases that put people of color at a disadvantage. If we are going to evaluate candidates by the institutions they graduated from or worked at, then we need to be bold enough to include those criteria in the job description.

Friday

¶24 For some librarians, Friday may be a slow, relaxing workday—for me, it is a class day. Don’t get me wrong, I love teaching, but it is definitely a labor of love. This week was going to be particularly intense because I was covering legislative history, a difficult topic for most students. Because my class is only fifty minutes, I ask that students hold their questions until the end of the lecture. On this Friday, a student raised her hand during the lecture. I relented and answered her question. Ten minutes before the end of class, the same student raised her hand again. I told her to hold her question and I would answer it after class. I had a few more important concepts to review before the end of class.

¶25 The student shouted, “I can't wait until after class because I have somewhere to go.” She abruptly gathered her belongings, got up from her seat, and walked out of the class. I was startled, but I kept my composure and continued the lecture. A few students came to me following the class to apologize for their classmate's behavior. Once everyone left the classroom, I began replaying the interaction in my head thinking, “Could I have said or done something different to prevent that situation?” Later when I spoke to my supervisor about it, she assured me that there was no way to excuse the student's inappropriate behavior. While some may be shocked by this behavior, Black female faculty have frequently reported challenges to their competence and control over the classroom.29 This student's behavior was an example of such a challenge.

¶26 This incident made me reflect on a similar incident that occurred on the first day of class. I was standing by the class podium with my teaching assistant (TA). One of the White students walked toward us, turned to my TA, who is a White male, addressed him as “Professor,” and proceeded to introduce herself. My TA immediately told the student that I was the professor of the class. The student did not appear to be embarrassed or apologetic as she proceeded to talk to me about her expected upcoming absence from a future class meeting.

¶27 It is common for women of color in academia to feel “compelled to conceal or mute aspects of their identities . . . [and] sidestep controversial topics in the classroom and in faculty gatherings, shun ethnic hairstyles or attire, and behave in an exaggeratedly lady-like manner to avoid triggering stereotypes, such as the ‘angry

black woman.”30 Students assume that a female faculty member of color is not “as accomplished or credentialed as her [W]hite male colleagues. They question the professor’s competence, challenge everything she says, and become enraged if they receive a low grade in her course.”31 To combat the scrutiny, female faculty of color may overprepare for classes and be hypersensitive about their speech patterns.32

¶28 Like many other female faculty of color, Monique has experienced other incidents of microinvalidations and microinsults from students, such as having to consistently remind students to call her Professor Stevenson rather than using her first name; receiving an aggressive e-mail from a White student challenging her classroom policies; and having a White student barge into her office, while she was helping another student, to complain about two points that he missed on an assignment, arguing that the assignment was not clear enough. It is important for managers to learn how to support teaching librarians who are members of marginalized groups, as many of them may be facing these obstacles in silence.

¶29 Faculty course evaluations are the central method for evaluating teaching in legal education. While there are many benefits to faculty course evaluations, extensive research reveals “that conscious and unconscious racial and gender biases may depress the evaluations of women and people of color.”33 Women “who defy race and gender stereotypes, who are tough and demanding rather than warm and nurturing, and who introduce topics related to social justice (such as race, gender, and class) are often punished with negative student evaluations.”34 Over the years, Monique has received microaggressive comments, such as “I don’t like the way she talks,” or “Her hair is distracting,” or “She walks too close to people and it makes me nervous,” on her course evaluations. It is important for managers and law school administrators to understand the role implicit bias plays in course evaluations, especially when these measures are used to award salary raises, tenure, and promotion.

¶30 After some time to reflect, I returned to the library from class and stopped by the circulation desk to speak with a library colleague. I mentioned I was feeling a little tired and was headed to my office. My colleague suggested that I instead go home and get some much deserved rest. A man wearing a hardhat, who was working on a construction project in the library, happened to be walking by at that moment and told me in a jovial manner, “You better do what your boss says.” He assumed that my White colleague had to be my supervisor and I the supervisee. Before I could say anything, my colleague quickly informed him that I was the supervisor in charge of the library. He said, “Oh, I am sorry,” and walked off hastily.

¶31 As I prepared to leave work after a long week, I received an e-mail from a former student, who now works at a firm in Miami. She wrote to share that she was recently asked to conduct some legislative history research and she was able to use the skills she learned from my class to complete the challenging assignment. Even in the face of obstacles, e-mails like this remind me of the role I play in the world of legal education, and how important it is for students from all backgrounds to see and hear from me.

31. Id. at 50–51.
32. Id. at 51.
33. Id. at 53.
34. Id.
Changing the Culture

¶32 To reduce the occurrence of microaggressions in the workplace, we must intentionally minimize implicit bias and learn cultural competence. Mandating antidiscrimination training for all faculty and staff is one way to accomplish this. These trainings need to be structured and facilitated in a manner that promotes inquiry and allows trainees to experience discomfort and vulnerability. Trainees need to be challenged to explore their own racial identities and their feelings about other racial groups. The prerequisite for cultural competence has always been racial self-awareness. This level of self-awareness brings to the surface possible prejudices and biases that inform racial microaggressions.

¶33 On a macro level, changes to the work culture must come from the top down. Management must consistently ask the question, “To what extent is our organizational culture being affected by bias?” Directors and associate directors (or the like) must actively uncover and minimize bias in the workplace by reviewing every aspect of the employment life cycle: onboarding, assignment processes, mentoring programs, performance evaluations, identification of high performers, promotions, and terminations. Howard Ross, a lifelong social justice advocate, and other experts provided the following suggestions to create structures to eliminate bias: (1) conduct employee surveys to understand what specific issues of hidden bias and unfairness might exist at the organization; (2) talk with current employees, particularly women and minorities, to ask them what unconscious biases they have witnessed in the organization and the effects these have had on their own careers; (3) conduct salary surveys to identify inequities and make adjustments; and (4) conduct exit interviews when faculty of color depart to assess the instructional climate.

Conclusion

¶34 We hope that sharing Monique’s story will give you some insight into the challenges librarians of color encounter, inspire others to share their stories, offer validation for librarians of color who have had similar experiences, and start a dialogue about minimizing implicit bias in your institution. Awareness is an important first step in effectuating change, but it is even more important to move beyond awareness into actions that are specifically aimed at promoting inclusivity. Creating an inclusive work environment requires intentionality, and efforts to promote diversity should not be treated as one-time initiatives. If our law libraries aim to align with AALL’s core values, which include a commitment to diversity, then our library culture, practices, and policies must include the strategic and ongoing evaluation of how they support workplace inclusion.

35. Id. at 55.
36. Sue, supra note 4, at 283.
40. Id.
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