ARTICLES

The Library of Robert Morris, Antebellum Civil Rights Lawyer and Activist [2019-17]

Laurel Davis and Mary Sarah Bilder 461


James S. Heller and Simon F. Zagata 509


Kincaid C. Brown 551

Revisiting the Open Access Citation Advantage for Legal Scholarship [2019-20]

John R. Beatty 573
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Table of Contents

General Articles

The Library of Robert Morris, Antebellum Civil Rights Lawyer and Activist [2019-17]  
Laurel Davis  
Mary Sarah Bilder  
461

James S. Heller  
Simon F. Zagata  
509

Kincaid C. Brown  
551

Revisiting the Open Access Citation Advantage for Legal Scholarship [2019-20]  
John R. Beatty  
573

Review Article

Keeping Up with New Legal Titles [2019-21]  
Susan Azyndar  
Susan David deMaine  
591

Regular Features

Practicing Reference . . .  
Mary Whisner  
613

Looking for Waldo [2019-22]

Volume 111: Author and Title Index [2019-23]  
619
The Library of Robert Morris, Antebellum Civil Rights Lawyer and Activist

Laurel Davis** and Mary Sarah Bilder***

The Robert Morris library, the only known extant, antebellum African American–owned library, reveals its owner’s intellectual commitment to full citizenship and equality for people of color. Although studies of lawyers’ libraries have focused on large collections, this article provides a model for interpreting small libraries, particularly where few personal papers remain extant.
Introduction

¶1 In a striking portrait, Robert Morris (1823/5–1882) looks out at the viewer, formally dressed in a long coat and vest, his arm resting comfortably on a Greek pedestal, a watch fob secured to his vest button, with what looks like a Maltese cross. He appears to be about to emerge from the portrait and begin his legal argument. Morris long has been known as the second African American lawyer in the United States, and scholarship has focused on his role in early 19th century efforts in Boston to desegregate the schools and represent fugitive slaves.¹ Because of the apparent absence of extensive personal papers, however, Morris’s intellectual and emotional commitments have remained in the shadows.² His personal library offers a lens to reconstruct the mind of this remarkable man.

¶2 Morris’s personal library appears unremarkable at first glance. The books are not in prime condition. Some covers are detached. The bindings often are ordinary. A number of the editions are not notable. The quantity of books does not begin to rival the libraries of lawyer-collectors such as Thomas Jefferson or John Adams. But Robert Morris’s library represents the only currently known, extant library of an early African American activist. His books emphasize that his participation in the civil rights and antislavery movements arose from a deep intellectual commitment to American equality and to full citizenship rights and participation


2. Some of Morris’s papers do survive. Two collections are known to us. First, the Papers of Robert Morris at the Boston Athenaeum provide an invaluable glimpse into Morris’s activism and legal practice, as the collection includes petitions to the legislature, miscellaneous legal documents from Morris’s cases, and letters from clients and friends. These gave us great insight into Morris and helped us connect some dots, including establishing his connection to Boston College. However, the collection does not contain much in the way of Morris’s own writing. Second, we learned that the Canton Historical Society holds several items related to Morris, including a scrapbook and account book. Despite repeated efforts, we were unable to obtain access to this collection, which may hold additional information about Morris’s book collection.
in American life for people of color. The library restores Morris to his rightful place as a leader in the antebellum civil rights movement.

§3 As book and cultural histories have garnered more scholarly attention, lawyers’ libraries have proved a fertile source of scholarship. The famous libraries of founding-era lawyers such as Jefferson and Adams long have interested scholars. Recreating working libraries of more ordinary lawyers has offered insight into legal practices. Lawyer libraries also have been mined for insights into the law book trade and transatlantic exchanges of legal information. To date, however, these libraries represent only white lawyer-collectors.

§4 Although Morris was one of few pre–Civil War African American lawyers, he was not alone among founding and antebellum-era African Americans in building a personal library. The only other collection known to us, however, is the small library of Phillis Wheatley (c. 1753–1784). Although the collectors lived a half-century apart, their libraries share three significant similarities. First, both libraries contain the poetical works of Alexander Pope. Second, both collections include antislavery works. Third, both contain works about Africa.

David Waldstreicher points out that Wheatley posed a threat to men such as Jefferson by being...
deeply informed about the “ancients, moderns, Africans, and Americans.”

Morris's library offered a similar threat to white political thinkers through his deep engagement with the Western cultural tradition that embraced authors such as Pope even as it expanded the enslavement of Africans and African Americans. For both collectors, the act of owning books became a way to impose African American ownership on a European intellectual tradition. Wheatley had little opportunity to patronize other African American writers, but a generation later, Morris's purchase of Wheatley’s poetry represented an insistence on African American inclusion in this larger intellectual tradition. Morris indeed may mark one of the first self-conscious African American collectors of the African American experience, placing him in the company of later collector Arturo Alfonso Schomburg, who sought to collect and understand the “global black experience.”

Morris and Wheatley could not have been alone as collectors. Far more work needs to be done on recovering the private libraries of African Americans. Universities, libraries, and historical societies can undertake investigations of their provenance files to find African American donations. Catalogers of rare books can create local collections that pull together books containing ownership indicia of early African American readers and collectors. Historians and biographers who discover the history of book purchases and ownership through documentation such as auction catalogs and estate inventories can place such information in a source note. Such endeavors will contribute to the growing history on African American access to libraries and literary societies. Of particular importance, the libraries of early African American lawyers will likely reveal the porous boundaries between private legal practice and more public legal advocacy for civil rights.

The uncertain boundaries of the Morris library make it difficult to analyze in terms of conventional library and book collecting categories, such as size, cost, category, and comprehensiveness. Even so, the small, somewhat ragged library holds valuable insights into the owner’s mind. Morris's library reflects the transformative nature of books, so eloquently described by his contemporary, Frederick Douglass. In a famous chapter in his autobiography, Douglass recalled the importance of books as a young enslaved man and how he was often “suspected of having a book.” Books were keys. As a 12-year-old, he “got hold of a book entitled ‘The Columbian Orator’” and read a “bold denunciation of slavery, and a powerful vindication of human rights” in the printed speeches on behalf of Catholic emancipation. Douglass recalled that the “reading of these documents enabled me to utter

my thoughts.”

Morris’s library was a key to developing his arguments for the full and equal rights of people of color. His library allows us to hear Morris’s thoughts.

7 Even in the absence of related correspondence or personal journals, the mere list of books selected by Morris makes apparent the themes that motivated his life. The library reveals a man whose entire career was driven by a commitment to the most robust understanding of equal citizenship. These books show the synergies between Morris and the African American civil rights community, as well as with the white antislavery and transcendentalist literary community.

8 Our primary goal is to show the power of the library as a historical source. This article is not a literary biography of Morris or an analysis of antebellum civil rights activism, although we hope the article makes contributions in both respects. Rather than exhaustively analyze each book in the library, we have chosen a select few to demonstrate how the library reveals the rich intellectual life of its owner. For scholars of early 19th century American history, particularly of civil rights and antislavery, we include the entire library in appendix 1. In particular, we hope this article will encourage others to recover, reconstruct, and interpret other libraries of 19th century people of color.

9 Each section in this article is prefaced by the title and publication information of several Morris books. We show how one can “read” the mere presence of those books, along with small clues like acquisition dates, inscriptions, brief notations, and bindings. After a brief overview of the library and provenance, the article proceeds largely chronologically and thematically. Morris’s early life and legal apprenticeship paralleled the stories of other self-made men of New England. Yet he always understood that the African American story was unique. He identified with notable African Americans, as well as with the antebellum antislavery movement. For Morris, antislavery activism was part of a larger struggle for full and equal citizenship and an expansive understanding of civil rights. His library allows for the reinterpretation of Morris’s involvement in crucial legal cases and appreciation for his centrality to those events. The library also emphasizes the importance of the broader antebellum civil rights movement beyond abolitionism. The article concludes with a section on Morris’s relatively late conversion to Catholicism and friendship with the founders of Boston College, for it was because of this relationship that Morris’s library survives.

The Library

10 Robert Morris’s library lives on at Boston College because of decisions made by his wife, Catharine Morris. Books were integral to their relationship. Both before and after their 1846 marriage, they exchanged books. At Robert’s death in 1882, his will bequeathed his law books to his son, Robert, and the residue to Catharine. Robert, Jr., the couple’s only surviving child, unfortunately died two weeks after his father. When Catharine died in 1895, her will bequeathed the residue of her estate to the Church of the Immaculate Conception in downtown Boston; this Jesuit church and Boston College were essentially one and the same at that

16. Frederick Douglass, Narrative of Frederick Douglass, an American Slave 38–40 (1845).
time.\footnote{17} We have been unable to ascertain whether the books made their way to Boston College after Robert’s death or after Catharine’s death via her residual bequest to the Church of the Immaculate Conception. After the books became part of Boston College’s early library collection, most of the Morris volumes received a Boston College library bookplate, noting “Ex Dono Roberti Morris.” All but a few contain a Boston College High School stamp. At some point, after the university portion of Boston College moved from the South End of Boston to nearby Chestnut Hill (the high school remained downtown), the Morris books made their way into the collection of the John J. Burns Library, home of the University’s special collections and archives.

\footnote{11} The precise number and identity of the books in Morris’s library at the time of donation is unknown. No inventory accompanied his will, and he does not appear to have kept a separate list. As shown in appendix 1, the Morris collection today at the Burns Library is comprised of 75 titles. The numerous Boston College High School and Boston College library stamps indicate that the books once were part of working collections. For example, the \textit{Federalist} is stamped “Lower Library History,” and the \textit{Narrative of Frederick Douglass} bears two different Boston College stamps including “Lower Library Biography.” Prior to the move into special collections, some of Morris’s books may have been discarded, or they may remain intermingled with Boston College’s other library collections. For example, Harriet Beecher Stowe is represented by four works in Morris’s collection, and as the author of the introduction to William Cooper Nell’s \textit{Colored Patriots of the American Revolution}. Nonetheless, her most famous book, \textit{Uncle Tom’s Cabin}, does not appear in the list. Although Morris might have begun buying her work only in the wake of its 1853 publication, it is also possible that he owned the book and his copy has disappeared over the years. Thus, the list reproduced in appendix 1 represents the extant section of a larger original library.

\footnote{12} Indeed, although Morris’s will bequeathed his “Law Books” to Robert Morris, Jr., the surviving collection does not include any books for a legal practice.\footnote{18} It is possible that they went to another practitioner when Robert, Jr., died so suddenly after his father. If Morris followed his usual habit, his law books likely were signed on the front paste-down or fly-leaf and perhaps dated. We reproduce Morris’s signature in appendix 2 to aid librarians, dealers, and book collectors in identifying any such extant books.

\begin{thebibliography}{99}
\footnote{18} Morris’s will states, “I give devise and bequeath to Robert Morris Jr., my Law Books, my office desks, the pictures and engravings in my office.” He named Catharine Morris executrix and residuary beneficiary. Robert Morris, will dated Dec. 2, 1881, proved Jan. 22, 1883, Suffolk County Registry of Probate, Boston, MA, ANCESTRY.COM, https://search.ancestrylibrary.com/cgi-bin/sse.dll?_phsrc=kJH27&_phstart=successSource&usePUBJs=true&qu=kuVFJ21C46vQw2T0Q3zhb0%3D%3D&gsang-g&gsnew=1&gsfn=catharine&gsfn_x=0&gsln=morris&gsln_x=0&msbdy=1827&msddy=1895&msdpn__ftp=Suffolk%20County,%20Massachusetts,%20USA&msdpn=2812&msgn=robert&msgn_x=morris&MSAV=1&uidh=2in&pcat=ROOT\_CATEGORY&h=360173&dbid=9069&indiv=1&ml_rpos=1 (last visited Oct. 1, 2019).
\end{thebibliography}
Morris's practice of signing and often dating his books provides critical information about his acquisition history. All but nine of the titles either have a signature or other clear Morris ownership indicia beyond an “Ex Dono Roberti Morris” bookplate. Of these 66 titles, at least two were gifts from Morris to his wife, Catharine, and two were gifts from Catharine to Robert. Two titles were gifts from others to Morris, and one title a gift to Robert and Catharine jointly. The nine titles that do not have such clear marks of ownership are included in the Boston College Libraries catalog as part of the Morris collection—all nine have Morris gift bookplates, and five have visible writing under the bookplate, illegible to us, that likely includes Morris’s signature.

The collection reflects Morris's engagement with a northern intellectual and political cohort during the three decades between the 1830s and the 1860s. The dates accompanying Morris's signature show that he usually acquired them the same year or within a year of publication. Boston publishers produced 32 of the books, with New York and Philadelphia following close behind. Of the Boston publishers, the various incarnations of Ticknor & Fields, Phillips Sampson, and James Munroe & Company repeatedly appear. In New York, Harper & Brothers dominated. Moreover, the books indicate Morris's support for authors and publishers at the vanguard of the civil rights and antislavery efforts. He owned the Anti-Slavery Committee's publication of Frederick Douglass's autobiography. He bought books published by African American printers Benjamin Roberts and David Walker. Morris also acquired books printed by J.P. Jewett, the printer who first published Uncle Tom's Cabin.

Leading authors of color (Douglass, Lewis, Nell, Walker, and Wheatley) found a home in the library. Transcendentalists and liberals (Channing, Emerson, Martineau) were represented. Multiple books by antislavery belles-lettres authors (Lowell, Stowe, Whittier) were present. Political critiques of American slavery and records of efforts to end slavery and ensure civil rights for people of color were acquired (Copley, Garrison, Goodell, Griffiths). Histories of African slavery and revolts were purchased. Accounts of great leaders and political principles appeared. Books written by the most famous female authors of Morris's time were acquired (Martineau and Stowe), along with accounts of famous men by their wives (Hugo and Mann). And, repeatedly, Morris added books of poetry.

Unfortunately, the likely incomplete nature of the library renders any thoughts about changes in Morris's purchasing habits necessarily speculative. The earliest book with a definitive acquisition date is an 1840 gift to Morris when he was around 15 years old. Earlier copyright dates appear on three works of poetry, including Wheatley's poems and John Stedman's Narrative of a Five Years Expedition Against the Revolted Negroes of Surinam; however, we do not know when Morris acquired these titles.

19. Unfortunately, many of the Morris books have a gift bookplate pasted over his signature. In the 26 instances where we could read his name through the bookplate, we counted those titles as having clear evidence of his ownership.


21. [Henry Ingersoll Bowditch], Memoir of Nathaniel Bowditch (1841) (the inscription is curiously dated before the publication date).
Beginning in 1840, the collection includes books published almost every year with a few noticeable gaps. The only two-year gaps in the collection occur from 1842–1843 and 1862–1863 (the latter a likely byproduct of the Civil War). The bulk of Morris's collection dates from after his admission to the bar in 1847. An independent income and deepening political activism likely explain the rise in purchases.

The last book clearly signed by Morris was James Pike's *The Prostrate State*. Pike's dismissive, racist, and critical discussion of South Carolina's post-Reconstruction government likely saddened and angered Morris. Two books, not clearly signed by Morris, postdate Pike's. One, *Old Naumkeag*, was an account of the history of Salem, his birthplace. The other, *Indian History*, recounted the life of one of Morris's heroes, “the good sachem Massasoit.” The preface, by publisher and Massasoit descendant Zerviah Gould Mitchell, summarized Morris's lifelong belief in the power of books to promote justice: “Before going to my grave I have thought it proper to be heard in behalf of my oppressed countrymen; and I now, through the medium of the printing press, and in book form, speak to the understanding and sense of justice of the reading public.” Morris's library embodied this belief that books represented deliverance through the medium of the printing press.

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**Massachusetts Self-Made Man**


Robert Morris was born in Salem, Massachusetts, likely on June 8, 1825. His grandfather, Cumono (sometimes spelled Quommono or Quammono), was born in Africa and “was carried to Ipswich when he was quite young.” Whether Cumono was initially enslaved is unknown, but Ipswich, Massachusetts, town records indicate that he was free at least by 1778. In the 1783 *Quock Walker* case, a justice of the Massachusetts Supreme Judicial Court declared that slavery was

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25. Edwin G. Walker, *Eulogy of Hon. Edwin G. Walker, in In Memoriam: Robert Morris, Sr., Born June 8, 1823, Died December 12, 1882, at 28 (c. 1883). Most sources use 1823 as Morris’s birth year, but the age indicated in his death record and most census records on Ancestry.com indicate that he was born in 1825. The city of Salem does not have his birth record.*

26. *Id.* at 27.

effectively abolished by the 1780 Massachusetts Constitution. Robert’s father, York Morris, was born in 1786 and became a well-regarded waiter in the homes of Salem’s elite. Little information exists about Robert’s mother, Mercy (Thomas) Morris, but she was born around 1792 in Marblehead and married York in 1813. The couple eventually had 11 children, including Robert.

¶20 A nondescript book in Morris’s library suggests Morris’s compelling personal character even as a young man. His copy of Henry I. Bowditch’s Memoir of Nathaniel Bowditch is inscribed to “Robert Morris from his friend J.G.K. Jan. 1. 1840.” It almost certainly was given to Morris by John G. King, a Salem lawyer and abolitionist. After York Morris’s untimely death in 1834, Morris began working at King’s home as a waiter. At the time of the gift, Morris was around 15 and had known King for five or six years. King emphasized the personal relationship with the inscription, “his friend.”

¶21 King’s gift of the Memoir carried a statement about Morris’s capacity and future path. Nathaniel Bowditch was “America’s foremost astronomer and mathematician.” Henry Ingersoll Bowditch, his son and also author of the book, was an active abolitionist. Like Morris, Bowditch had been born in Salem. He was apprenticed at a young age and self-educated. According to historian Tamara Plaskin Thornton, Bowditch’s life became the model of the self-made man. She notes that in 1838, the Colored American published a story hoping “to inspire its readers with a ‘sketch of the early struggles of the boy BOWDITCH with the disadvantages of fortune.’” In gifting the book to his friend, a young African American man, King prophesied that Morris, too, would become a self-made man.

¶22 This book and inscription also reflect Morris’s strong relationships with white abolitionists and activists like King. His connections would later include Boston mayor Josiah Quincy, Jr., and U.S. senator Charles Sumner. Morris had a particular ability to move between different communities—African American and Brahmin, African American and Irish, Protestant and Catholic, wealthy and poor—and it appears that this fluidity was present early in his life with his relationship with King. In fact, Morris would later encounter Nathaniel’s biographer and son, Henry Ingersoll Bowditch, as they worked to integrate Boston’s public schools.

¶23 It bears noting that King dated his inscription on the Bowditch book January 1. The practice of gifting books on New Year’s Day remained common throughout the late 18th and early 19th centuries. Books were released in December for these sales. The tradition of giving a book for the New Year followed Morris

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29. Kendrick & Kendrick, supra note 1, at 10.
30. [Bowditch], supra note 21.
33. Id. at 237–38.
34. Id. at 245.
throughout his life. Perhaps the Salem lawyer introduced him to the custom, as it is the earliest such book in Morris's library.

¶24 Four years later, Morris received another gift book from a young woman. Catharine H. Mason inscribed *The History of Lynn* to "Robert Morris Jr. from C.H.M. - Jan. 1, 1845." Although New Year's holiday, Morris gave her one of the loveliest volumes in the collection, a gift book of poetry by the English Romantic poet Felicia Hemans. He included a more daring inscription on the front fly-leaf: "Miss Catharine H. Mason with the love of Robert Morris, Jr. Jan[u]ry 1, 1845." The book features a beautiful, ornate binding of green cloth with gilt lettering and pictorial decorations, for which Robert would have paid dearly. This New Year's Day exchange occurred a little over a year before Morris married Catharine, "daughter of Mr. Joseph Mason, a highly respected citizen of Boston." Another book, from 1860, bears the inscription, "Catharine Morris, with the love and New Years' wishes of Robert Morris. Jan. 1, 1860," suggesting that they continued these exchanges, a custom that suggests an affectionate, companionate marriage and a shared intellectual appreciation of books.

¶25 Catharine's choice of Lewis's *The History of Lynn* also signifies Morris's interest in local history and local writers, particularly in relationship to abolitionist commitments. Like King, she chose a book for Morris authored by a noted abolitionist, Alonzo Lewis. Lewis was an early vice president of William Lloyd Garrison's New England Anti-Slavery Society and the editor of several newspapers in Lynn, Massachusetts, including the abolitionist *Freedom's Amulet*. In the 1840s, Lynn had become a center of abolitionism and antislavery activism.

¶26 Frederick Douglass had moved to Lynn, where he would write his first and most famous autobiography. Lewis's book addressed the great promise of the nation's political system while recognizing the damage inflicted on indigenous people and the curse of slavery: "On its own principles, our government has no right to enslave any portion of its subjects; and I am constrained, in the name of God and truth to say, that they must be free. Christianity and political expediency both demand their emancipation, nor will they always remain unheard." Although not yet 20, Morris's commitment to abolitionism and justice was obvious to Catharine, just as his ambition and innate potential had been obvious to King.
Legal Apprenticeship


¶27 Without Morris’s law books, the library offers few clues about his legal education. He appears to have learned law as a copyist and apprentice for Ellis Gray Loring. As a 10- or 11-year old, Morris met Loring, another white Boston attorney and abolitionist with whom he had a close and long-lasting relationship. In 1836, Loring attended a Thanksgiving dinner at the King home, and young Morris served the meal.

¶28 Morris apparently impressed Loring, who hired him on the spot to help with errands and chores. Morris rode atop Loring’s carriage in the cold November weather back to Boston that very night. After some time, Morris became a copyist for Loring, who ultimately encouraged the young man to study law. It was upon Loring’s motion that Morris became a member of the Massachusetts bar with his admission to the Court of Common Pleas on February 2, 1847.

¶29 Despite the support Morris received from progressive white lawyers such as Loring and King, he faced racism, and he faced it largely alone. The only other African American lawyer in the country was Macon Bolling Allen, who had been admitted to the practice of law in Maine in 1844 and Massachusetts in 1845. After Morris’s death, his friend and mentee Edwin G. Walker noted that people often mistakenly referred to Morris as the first African American lawyer in the country; Walker said that Morris himself would have corrected them and given Allen credit as first. It seems likely that the two men would have crossed paths, but we found no direct evidence that they knew each other.

¶30 At Morris’s memorial service, Walker shared a story about Morris’s first case, emphasizing the moments of isolation, frustration, and resilience that Morris must have experienced throughout his career. Morris was representing a client who alleged nonpayment for services rendered. The day before the trial, Morris met with opposing counsel. The man berated Morris for bringing the case to trial, shaking his first in Morris’s face and shouting, “Then I will give you the devil!” Upset and shocked by this treatment from a fellow lawyer, Morris returned to his office and cried. He then vowed to prove himself as a lawyer. The next day, in a courtroom filled with members of Boston’s African American community, Morris won the case for his client; this achievement made him the first African American lawyer in the

48. Allen was born in Indiana and made his way to Maine in the 1840s, where he obtained a license to practice. He soon moved to Boston and was admitted to practice in Massachusetts in May 1845. Allen then passed an examination to become a justice of the peace in Middlesex County, home of Cambridge. He practice for years in the Boston area before moving to Charleston, South Carolina, after the Civil War. Clarence G. Contee, *Macon B. Allen: “First” Black in the Legal Profession*, *Crisis*, Feb. 1976, at 67–68.
country to argue—not to mention win—a case before a jury.\textsuperscript{50} Morris went on to have a long and important legal career, most famously representing the young Sarah Roberts in \textit{Roberts v. Boston} and alleged fugitive slave Shadrach Minkins. He also had a thriving criminal defense practice, often representing Irish immigrants.\textsuperscript{51}

\textsuperscript{31} Perhaps Morris’s law books will be found one day; however, even without them, Morris’s interest in the Constitution and American government is evident in two classic texts in his library. In \textit{The Federalist}, Hamilton, Madison, and Jay collaborated in defending the new federal Constitution.\textsuperscript{52} By 1793, Hamilton and Madison had become opponents, authoring opposite sides of the great debate over the president’s executive power: Hamilton (Pacificus) defending George Washington’s stance of American neutrality; Madison (Helvidius) criticizing it.\textsuperscript{53} Morris dated his copy of \textit{The Federalist} 1849, when he still was a newly minted lawyer; a bookplate obscures the acquisition date of his copy of \textit{Letters of Pacificus and Helvidius}. In antislavery circles in the 1850s, the fundamental nature of the union and the Constitution’s stance on slavery was being debated.\textsuperscript{54} \textit{Federalist} No. 54 (Madison) attempted to explain the Convention’s apparent agreement over the three-fifths compromise.\textsuperscript{55} These books provided Morris with the classic defense of the Constitution, as well as an example of the legitimacy of constitutional debate.

\textsuperscript{32} In 1846 and 1847, Morris may have been focusing on his legal education and his new family life. During these two years, the library appears to have grown by only one title—a set of volumes given to the Morrises as a gift shortly after their wedding. In March 1846, almost a year before Robert’s admission to the bar, Robert and Catharine married at the home of Morris’s mentor, Ellis Gray Loring. Boston mayor Josiah Quincy, Jr., was present for the occasion, as were the Kings, Morris’s old employers from Salem. The ceremony was performed by Reverend James Freeman Clarke, a Unitarian minister, abolitionist, and advocate for women’s rights.\textsuperscript{56} In June, Clarke gave the couple \textit{The Works of William E. Channing, D.D.}, a six-volume set of writings from a prominent Unitarian minister. He inscribed the books to “Mr. & Mrs. Robert Morris—with the kind regards of their friend James Freeman Clark.”\textsuperscript{57}

\begin{thebibliography}{99}
\bibitem{50} Id. at 32–33; \textit{Robert Morris}, \textsc{Liberator}, Jan. 28, 1848, at 15.
\bibitem{51} \textit{Walker}, \textsc{supra} note 25, at 34–35. He also once defended his brother Joseph against charges of selling liquor without a license. Morris argued mistaken identity. In an amusing move to make his point, he quietly substituted Joseph with another brother, Charles, who then was (wrongly) identified by a witness. Since all three brothers greatly resembled each other, Morris joked with the undoubtedly baffled witness, asking if perhaps Robert himself had sold the liquor. Joseph was acquitted. \textit{An Old Incident Revived}, \textsc{Bos. Daily Globe}, Apr. 18, 1880, at 9.
\bibitem{52} \textit{Alexander Hamilton, James Madison & John Jay, The Federalist, on the New Constitution, Written in the Year 1788} (6th ed. 1845).
\bibitem{53} \textit{Alexander Hamilton & James Madison, Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793} (1845).
\bibitem{55} \textit{Mary Sarah Bilder, Madison’s Hand: Revising the Constitutional Convention} 163–64 (2015).
\bibitem{56} \textit{Married}, \textsc{Liberator}, May 1, 1846, at 71.
\end{thebibliography}
Soon, the Morrises would welcome their first child, daughter Catharine. The young lawyer was now an established family man.

African American Identity and the Politics of Poetry


Frederick Douglass. *Narrative of the Life of Frederick Douglass, an American Slave.* Boston: Anti-Slavery Office, 1845.


In addition to attorney, husband, and father, Morris strongly self-identified as African American. He owned books by the two most significant African American literary figures of the time, Phillis Wheatley and Frederick Douglass. Moreover, the library indicates Morris's early commitment to the larger African American community in Boston and beyond.

The extensive number of poetry volumes in his library directly relates to Morris's life as an African American in Boston. By 1842, Morris was serving as secretary for the Young Men's Literary Society, which William Cooper Nell had formed in the 1830s to cultivate knowledge of literature and history in Boston's African American community. In 1843, Morris served as a teacher in that organization, helping younger students select and prepare pieces for public recitation. This work corresponded to the significant number of volumes of poetry in Morris's library, about 15 percent of the total 75 titles.

Poetry was linked to politics. Morris's volume of works by Alexander Pope—who, as noted earlier, was read by Wheatley—could be the earliest book

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58. We could not locate daughter Catharine's birth record but her 1856 death record indicates that she was 10 years old when she died. "Massachusetts Death Records, 1841–1915," Register of Deaths in the Town of Chelsea for the Year 1856, entry for Catharine D. Morris, 1856, no. 165, ANCESTRY.COM, https://search.ancestrylibrary.com/cgi-bin/ssedll?indiv=1&dbid=2101&h=6143011&ssrc=p&tid=75748328&pid=82003813211&usePUB=true (last visited Oct. 1, 2019).


60. *Communications: Lectures Before the Colored Citizens of Boston, Liberator, Apt. 21, 1843,* at 62.

61. Three of the earliest published books in the library are works of poetry. *Memoirs and Poems of Phillis Wheatley* (1838) and *The Poetical Works of Coleridge, Shelley and Keats* (1839) were printed before Morris turned 15. Unfortunately, any dates have been obscured by later bookplates, so we do not know whether he bought these volumes as a boy or acquired them later. Another poetry book by Thomas Campbell, printed in 1839, bears a date of 1841 and the signature of young Morris as "Robert Morris Jr.,” so he at least was acquiring books of poetry by around age 16. Indeed, we wondered if Morris might not have written poetry himself. He owned at least one posthumously published work of poems, Joseph Drake's *The Culprit Fay*. Drake's volume was apparently published by his daughter after his wife kept unpublished poems that he had requested be destroyed. *Joseph Rodman Drake, Encyclopædia Britannica,* https://www.britannica.com/biography/Joseph-Rodman-Drake [https://perma.cc/83U4-MVCL]. On the number of antebellum lawyers who wrote poetry, see *Anthology of Nineteenth Century American Legal Poetry* (M.H. Hoeflich ed., 2017); M.H. Hoeflich & Lawrence Jenab, *Three Lawyer-Poets of the Nineteenth Century,* 8 GREEN BAG 2d 249 (2005).
acquired for his library, with its probable 1836 publication date. Michael Hoeflich and Lawrence Jenab note that Pope's satire was particularly popular as “the political weapon of choice.”

Morris’s love of Pope and poetry crept into his correspondence as well. Pope’s “Essay on Man,” Epistle IV, included in Morris’s volume, contains the famous line, “An honest man’s the noblest work of God.” Morris quoted this language in an 1860 letter to Charles Sumner before thanking the senator for his mindfulness of the hardships faced by African Americans, his antislavery work, and his work on integrating Boston’s schools.

Morris seemed to have been particularly drawn to Romantics such as Scottish poet Robert Burns and English poets Samuel Taylor Coleridge, Percy Bysshe Shelley, and John Keats. Although no volume of William Wordsworth appears in the library, Morris knew the poet’s work, as he copied one of Wordsworth’s sonnets into his two books on Toussaint L’Ouverture. Indeed, the poem may have expressed Morris’s aspiration to live his life as his great hero. His transcriptions of the Toussaint L’Ouverture poem represent the only extensive Morris writing in the library.

Morris’s acquisition of the 1838 Wheatley volume combined his love of poetry with his interests in African American authors and the abolitionist press. Wheatley symbolized “black intellectual and literary achievement, even amidst bondage.” She had been kidnapped from her West African home as a child in the mid-18th century and sold into slavery in Boston, just one close-to-home example of the kidnappings that Morris knew all too well from his books and his antislavery activism. Wheaton was emancipated around 1773; she died around age 31 in 1784, soon after the abolition of slavery in Massachusetts and decades before Robert Morris was born.

The 1838 edition owned by Morris included a biographical account of Wheatley by Margaretta Matilda Odell. Morris may have focused on the introduction’s antislavery message and its recognition of prejudice against African Americans: “But even were the thrall of bondage broken, the hapless victim of slavery would find himself, in but too many cases, we fear, fettered by prejudice— despised by the proud—insulted by the scornful.” Although the writer claimed

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62. Alexander Pope, The Poetical Works of Alexander Pope (new ed. 1836?) (Morris’s signature is visible under the bookplate, but his date notation—possibly 1836—is unclear).
63. Hoeflich & Jenab, supra note 61, at 252.
64. Letter from Robert Morris to Charles Sumner (June 11, 1860), Charles Sumner Correspondence, 1829–1874 (MS Am 1), Houghton Library, Harvard University, The Papers of Charles Sumner (Beaver Wilson Palmer ed., 1988).
67. Phillis Wheatley, Margaretta Matilda Odell & George Moses Horton, Memoir and Poems of Phillis Wheatley, a Native African and a Slave. Also, Poems by a Slave (3d ed. 1838).
70. Id. at 140–41, 189.
71. It also included poetry by 19th century African American poet George Moses Horton.
72. Margaretta Matilda Odell, Introduction to Memoir and Poems of Phillis Wheatley, supra
that “the stain of slavery has long been erased from the annals of New-England,” Morris may have read these lines with recognition that “the poisonous operations of slavery on public sentiment” applied also to Massachusetts.\textsuperscript{73}

\textsuperscript{¶}41 Like the Wheatley work, Morris’s copy of \textit{Narrative of the Life of Frederick Douglass} was published in Boston at 25 Cornhill, then home of the Massachusetts Anti-Slavery Office, and mere blocks from Morris’s longtime law office at 27 State Street.\textsuperscript{74} Morris moved around the center of this hotbed of abolitionism, contributing to it with his own activism and by purchasing books written by people who had experienced the horrors of slavery firsthand. After escaping from slavery in Maryland, the young Douglass had settled for some time in Massachusetts. His \textit{Narrative}, the first of three autobiographies, made him an international figure in the abolitionist movement.\textsuperscript{75}

\textsuperscript{¶}42 Morris and Douglass knew each other, though perhaps not before Morris bought Douglass’s first work; he dated his copy May 19, 1845, on the front fly-leaf. In 1853, William Cooper Nell publicly discouraged people from subscribing to \textit{Frederick Douglass’ Paper}, the newspaper that Douglass had established in Rochester, New York, as a competitor to the \textit{Liberator}. Nell felt that Douglass had treated William Lloyd Garrison poorly with his accusations that Garrison engaged in racial tokenism in his staffing of the paper. Morris, however, publicly sided with Douglass.\textsuperscript{76} That same year, Douglass defended Morris against the slanderous rumors that he would send a fugitive back to a slaveholder.\textsuperscript{77}

\textsuperscript{¶}43 Morris also repeatedly bought books by other writers who were committed to African American civil rights and the abolition of slavery. Three of the most represented authors in the library were New England writers with abolitionist sentiments: Ralph Waldo Emerson (five titles); Harriet Beecher Stowe (four titles); and John G. Whittier (four titles).\textsuperscript{78}

\textsuperscript{¶}44 Whittier was a Quaker poet and abolitionist who helped establish the Liberty and Free Soil political parties.\textsuperscript{79} One of Morris’s four Whittier titles is a book of poetry called \textit{Tent on a Beach}, which includes a poem entitled “To the Thirty-Ninth Congress.” It included the following lines:

\begin{quote}
Make all men peers before the law,
Take hands off the negro’s throat,
Give black and white an equal vote.\textsuperscript{80}
\end{quote}

\footnotesize{\textsuperscript{note 67, at 9. The Odell introduction has been criticized by scholars for “unintentional mythmaking [that] romanticized the poet’s past and minimized her condition in bondage.” Jennifer Rene Young, \textit{Marketing a Sable Muse: Phillis Wheatley and the Antebellum Press}, in NEW ESSAYS ON PHILLIS WHEATLEY 219 (John C. Shields & Eric Lamore eds., 2011).}

\textsuperscript{73} Odell, supra note 72, at 7–9.

\textsuperscript{74} DOUGLASS, supra note 16.

\textsuperscript{75} FROM BONDAGE TO LIBERATION: WRITINGS BY AND ABOUT AFRO-AMERICANS FROM 1700 TO 1918, at 155–56 (Faith Berry ed., 2001).

\textsuperscript{76} Kantrowitz, supra note 1, at 151–55.

\textsuperscript{77} Our Eastern Tour, Frederick Douglass’ Paper, Aug. 26, 1853, at 2.

\textsuperscript{78} Morris clearly admired the work of Emerson, with whom he crossed paths at least once. They both gave powerful antislavery speeches during the annual West India Emancipation Day event in Worcester in 1849. Kendrick & Kendrick, supra note 1, at 131.


\textsuperscript{80} John Greenleaf Whittier, The Tent on the Beach, and Other Poems 133 (1867).}
A more succinct statement of Morris's philosophy would be hard to find. ¶45 Even the novels in Morris's library tended toward African American social justice themes. Harriet Beecher Stowe’s *Dred* and *The Minister’s Wooing* were anti-slavery novels. Harriet Martineau’s *The Hour and the Man* was the fictionalized account of Toussaint L’Ouverture and the rebellion against French control in Saint-Domingue, which became the independent nation of Haiti in 1804. Morris also owned a copy of James Fenimore Cooper’s *The Ways of the Hour*, which revolves around a murder trial. As Morris primarily made his living as a criminal defense attorney, Cooper’s object of drawing “the attention of the reader to some of the social evils that beset us; more particularly in connection with the administration of criminal justice” must have been of particular interest to him. In Morris’s library, life as an African American was inextricably intertwined with the need for lawyers to work—and poets and novelists to write—for justice.

**Early Civil Rights: Roberts v. City of Boston**

Lewis, R.B. *Light and Truth; Collected from the Bible and Ancient and Modern History, Containing the Universal History of the Colored and the Indian Race, from the Creation of the World to the Present Time*. Boston: Committee of Colored Gentlemen, printed by Benjamin F. Roberts, 1844.


¶46 As a lawyer, Morris’s work for justice began soon after his 1847 admission to the bar. The client who handed him his first major case appears in his library. In 1844, Boston-based printer and activist Benjamin Roberts printed *Light and Truth*, with the explicit statement that the book was published “by a committee of colored gentlemen.” The book’s author, Robert Benjamin Lewis, a self-described “colored man,” traced the shared history of oppression between Native Americans and African Americans and argued against white superiority. The introduction aspired to a country where “colored men enjoy every inherent attainment, free from human interference.” Morris dated his copy of the book 1850, the same year that, in a devastating decision, the Massachusetts Supreme Judicial Court rejected Morris and Roberts’s legal efforts to integrate the Boston public schools.

¶47 Benjamin Roberts’s printing business focused on works commissioned by African American institutions and works by and about members of the African American community. In addition to books, Roberts printed broadsides for the Boston Vigilance Committee and other antislavery and civil rights groups. This shared spirit of activism made Morris and Roberts natural partners to take on the City of Boston and its Primary School Committee. In addition to pursuing the

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82. Martineau, *supra* note 66.
lawsuit, the two men spearheaded a boycott of the school into which Roberts’s
daughter Sarah was being pushed by the segregated school system.87

¶48 In the 1840s, Boston’s African American community was relatively small,
about 2000 people, or 2 percent of the city’s population.88 African American com-

mentary leaders had begun lobbying for their children to attend any public school—

not just the handful of public schools that had been established for African Ameri-
can children. The integration efforts soon culminated in a legal battle. In 1847,
school officials denied four-year-old Sarah Roberts admission to the Boston public
school closest to her house; she then was forcibly removed from another school by
a Boston police officer at the behest of the School Committee due to her race.89 The
young child’s closest segregated option, known as the Belknap Street School or the
Abiel Smith School, was “twenty one hundred feet distant from the residence of the
plaintiff”; she had to pass five white primary schools to reach it.90 Morris was in his
early 20s and fresh off the win in his first jury trial when Benjamin Roberts hired

him to sue Boston for denyng Sarah entry to the Boston public school system.91

¶49 Morris filed a writ of trespass on the case for Sarah and Benjamin Roberts
against Boston in early 1848, alleging that Sarah had been excluded unlawfully from
the public school closest to her home. The writ gave Morris’s name and business
address at 27 State Street and was endorsed by Benjamin Roberts.92 During the
October Term of 1848, the trial court ruled for Boston. Morris promptly filed a
notice of the plaintiff’s intention to appeal.93 He then visited the law office of
Charles Sumner and hired Sumner to argue the case on appeal; Sumner agreed to
come onboard free of charge.94

¶50 On the day of oral arguments before the Supreme Judicial Court of Mas-

sachusetts, Morris stood first and laid out the facts of the case.95 Sumner followed
with a powerful argument about how discrimination in public education violated
the Massachusetts Constitution by denying African American citizens equality
before the law.96 In constructing this argument, Sumner was “building on the argu-

ments made by black citizens in the form of petitions and Liberator articles over the
previous decade.”97

¶51 In March 1850, the Supreme Judicial Court, led by Chief Justice Lemuel
Shaw, decided against Sarah and upheld the Boston School Committee’s ability to
segregate schools.98 It was a crushing loss. The Court conceded that “in the fullest
manner, that colored persons, the descendants of Africans, are entitled by law, in

87. Id. at 132–40.
88. HORTON & HORTON, supra note 85, at 2, tbl. 1.
89. KENDRICK & KENDRICK, supra note 1, at 98–99.
91. KENDRICK & KENDRICK, supra note 1, at 109.
chives, Boston.
94. KENDRICK & KENDRICK, supra note 1, at 141.
95. Id. at 157–58.
96. Id. at 161–68.
97. Id. at 159.
this commonwealth, to equal rights, constitutional and political, civil and social.” Shaw rejected the argument that separate schools “deepen[ed] and perpetuate[d] the odious distinction of caste, founded in a deep-rooted prejudice in public opinion.” Shaw wrote that “this prejudice, if it exists, is not created by law, and probably cannot be changed by law.” For Morris as a young lawyer, the words must have been profoundly discouraging.

¶ 52 Nonetheless, Morris persevered, continuing the battle for school integration that he had been fighting since at least 1844. He remained part of a group of indefatigable activists who exerted political pressure on the legislature to reverse the damage done by the courts. This persistence ultimately resulted in an 1855 state law requiring integrated schools that effectively rendered Roberts void.

¶ 53 Forty-six years after the decision in Roberts v. City of Boston, in a move that undoubtedly would have horrified Morris and Sumner, the U.S. Supreme Court cited to Roberts in Plessy v. Ferguson as authority for the doctrine of separate but equal. In doing so, the Court narrowly construed the Equal Protection Clause of the Fourteenth Amendment and ignored the Massachusetts legislature’s effective overruling of Roberts. Later, in its decision in Brown v. Board of Education, the Supreme Court belatedly began to embrace the arguments made on behalf of Sarah Roberts.

¶ 54 Morris’s place in the story of this historic case largely has been ignored and minimized. The library helps us see Morris as an intellectual equal to Sumner. Morris—not Sumner—likely made the early strategic decision to focus on the broad legal principle of equality, as opposed to the inferior facilities and resources of the African American schools. Extant records from the Roberts case are sparse, but they establish Morris’s critical early involvement and leadership. The original writ from April 1848 features Morris’s name and address, and the statement of facts and the notice of intention to appeal are solely in Morris’s handwriting, signed by him alone for the plaintiff. The reported decision from the Supreme Judicial Court contains Morris’s name. Sumner’s name is on the printed version of the appellate brief (printed by none other than Benjamin Roberts), and he made the substantive constitutional arguments before the Supreme Judicial Court. But

99. Id. at 206.
100. Id. at 209.
101. Id.
102. The Smith School, Liberator, June 28, 1844, at 103.
103. 1855 Mass. Acts 674 (ch. 256); see Introduction to Unconstitutionality of Separate Colored Schools in Massachusetts, in 2 CHARLES SUMNER, THE WORKS OF CHARLES SUMNER 327–28 (1870) (noting that the “error of the Court was repaired” by this legislation and that Robert Morris, “a colored lawyer,” was “associated” with Sumner in the case).
105. See Gerald Gillerman, Sarah Roberts, Charles Sumner, and the Idea of Equality, Bos. B.J., Sept./Oct. 1987, at 45–46. Stephen Kantrowitz notes that the argument made in the Roberts case was even broader than the one ultimately embraced by the Court in Brown v. Board of Education. In the appellate brief, Sumner, unlike Chief Justice Warren, also addressed the damage that segregation inflict on white students. See Kantrowitz, supra note 1, at 431.
107. Id. at 114–15.
108. Roberts v. City of Boston, supra note 98, at 201.
109. Argument of Charles Sumner, Esq. Against the Constitutionality of Separate Colored Schools, in the Case of Sarah C. Roberts vs. The City of Boston, Before the Supreme Court of Mass., Dec 4, 1849 (1849).
the decision to help Sarah Roberts pursue full and equal treatment under the law began with Morris. And, even on appeal, Morris was sitting next to Sumner, having addressed the court first to lay out the facts and procedural history of the case that had consumed him for more than two years.

¶55 The relationship between Morris and Sumner did not end with the Roberts case. Sumner presented the motion for Morris’s admission to the federal bar; Morris’s old mentor, Ellis Gray Loring, supported the motion. Sumner used his power and influence to support Morris’s later efforts to integrate the Massachusetts militia. And years later, it would be Senator Sumner who helped Morris secure a passport for his son, Robert, Jr., as he went abroad to study in France; Secretary of State William Seward had been holding up approval of the passport “on account of his color.”

¶56 Not surprisingly, Sumner occupies a place in Morris’s library. In 1856, Morris acquired the compilation of Sumner’s speeches and addresses. The compilation ends with Sumner’s vociferously antislavery Crimes Against Kansas speech, which he had given earlier that year on the Senate floor. Later on the day of the speech, Representative Preston Brooks of South Carolina brutally attacked Sumner while he was writing at his desk in the Senate chamber, beating him to the point of unconsciousness. It would be 1859 before Sumner returned to the Senate. In an 1860 letter to Sumner, Morris referenced the attack. He thanked the senator for a recent speech “in exposition of the barbarism of slavery.” He then expressed appreciation for Sumner’s efforts in the school integration effort in Boston, and wrote that after the assault in the Senate four years prior, “no persons felt more keenly and sympathised with you more deeply and sincerely, than your colored constituents in Boston.” The two men continued to cross paths, and when his former colleague died in March 1874, Morris received a formal invitation to the funeral.

Full and Equal Citizenship


111. KENDRICK & KENDRICK, supra note 1, at 216.

112. Letter from Robert Morris to Charles Sumner, March 7, 1866, Charles Sumner Correspondence, 1829–1874 (MS Am 1), Houghton Library, Harvard University, The Papers of Charles Sumner (1988). Morris enclosed a photo of Robert, Jr., with this letter, which is brimming with pride over his son’s accomplishments.

113. CHARLES SUMNER, RECENT SPEECHES AND ADDRESSES (1856). Morris signed and dated his copy 1856, the year of publication.


Carnes, J.A. *Journal of a Voyage from Boston to the West Coast of Africa: With a Full Description of the Manner of Trading with the Natives on the Coast.* Boston: John P. Jewett, 1852.

¶57 Morris’s library underscores his fight to guarantee people of color full American citizenship with equal rights to participate in civic life. Historians have shown that for many white activists, a passionate commitment to antislavery and abolitionism did not necessarily lead to or require a belief in full and equal African American citizenship.117 For Morris, abolition was part of the larger civil rights battle. Running through so many of his books was the repeated declaration that people of color were equal to whites, not just in Massachusetts or the United States, but across the world. Morris’s fight was not on behalf of African Americans alone; title after title referred to “colored” citizens, encompassing those of African and Native American heritage.

¶58 In 1855, Morris acquired a copy of William Cooper Nell’s *Colored Patriots of the American Revolution.*118 Nell, who also had been a leader in the school desegregation effort, began working in the early 1840s on this history of soldiers of color. In 1851, Nell petitioned the Massachusetts legislature to appropriate funds “for a monument to be erected to the memory of Crispus Attucks, the first martyr of the American Revolution.”119 When the legislature refused to recognize Attucks (while appropriating funds during the same session for a monument to Isaac Davis, a white soldier and patriot), Nell shifted his focus to completing his book as a way to help those lobbying against exclusion from military service.120 Morris contributed to Nell’s effort to obtain facts and testimonies from his contemporaries.121 Just as there had been “Colored Patriots of the American Revolution,” Nell and Morris insisted there had been “Colored” citizens.

119. Id. at 14.
120. Id. at 18; Kantrowitz, *supra* note 1, at 201.
In Massachusetts, Morris was at the forefront of the militia integration effort and regularly petitioned the legislature to remove the word “white” from the Massachusetts militia laws. The federal Militia Act of 1792 had restricted service in state militias to white male citizens. Pursuant to this federal act, Massachusetts law made its militia white only. Although the state militias were no longer critical for national defense, their segregated status remained a symbol that African Americans in the North were still not treated as equal citizens.

The Robert Morris Papers at the Boston Athenaeum include six petitions in Morris’s hand urging for the integration of the militia. Along with his own signature, these various petitions include signatures from an impressive array of Boston’s African American activists. The signers include Robert’s brothers Charles, George, and Joseph, indicating a family tradition of involvement and activism; Lewis Hayden, who escaped from slavery in Kentucky and became a lecturer and activist in Boston, owning a home with his wife that served as a station on the Underground Railroad; Benjamin Roberts, who, like Morris, remained active in fighting for equal rights for African American citizens during and after the struggle to integrate Boston’s schools; George L. Ruffin, the first African American graduate of Harvard Law School (or, in fact, any university law school), as well as a future state legislator and judge; William Pindell, father of another child whom Morris represented in an attempt to obtain admission to a white school in Boston; and John S. Rock, an impressively credentialed physician, dentist, and lawyer.

Even as Nell was writing the book, Morris was drawing on the history of African American military service. During an 1853 speech before the legislature’s Committee on the Militia, Morris referred to the “colored soldiers” who fought “during the entire revolutionary struggle” and in the War of 1812 (“the last war with Great Britain when Louisiana was in danger of being overwhelmed with a powerful British force”) to buttress his arguments. In 1855, with the book finally complete, Morris signed and dated his new copy. Purchasing Nell’s book was itself a statement of African American patriotism, as Nell painstakingly documented the accomplishments of African Americans in many aspects of American life, including Morris and his achievements at the bar.

In tandem with the fight to integrate the militia, Morris also lobbied the legislature for a charter to form an independent military company of volunteers of color excluded from the white militia. In addition to the petitions to strike the word “white” from the militia laws, Morris’s papers include two petitions to form a mili-

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122. Kantrowitz, supra note 1, at 200.
123. Militia Law of 1792, ch. 33, § 1, 1 Stat. 271 (1792).
tary company called the “Massasoit Guards.” 129 Similar companies already had been formed in Rhode Island, New York, and Ohio. 130 Unfortunately, despite the tirelessness of Morris and other activists, the legislature refused to grant a charter to the Massasoit Guards. 131

¶ 63 With the Civil War, Morris’s decade-long battle in Massachusetts would be preempted by federal law. By 1860, the Massachusetts legislature had accepted Morris’s arguments to eliminate the word “white” from the state militia statute. An amendment passed the legislature on two different occasions; however, Governor Nathaniel Banks vetoed it both times. 132 In 1862, the federal Militia Act finally amended the old, racially discriminatory federal militia law and allowed for the enrollment of “all able-bodied male citizens” of appropriate age in state militias. 133

¶ 64 In 1863, the War Department began recruiting African American soldiers in earnest after Lincoln signed the Emancipation Proclamation, and enlistment began for the newly sanctioned 54th and 55th Massachusetts volunteer infantry regiments. Morris and other activists immediately began lobbying to ensure that African American officers were commissioned to lead these regiments. 134 After the governor failed to secure approval from the secretary of war to commission black officers, Morris “left the Executive chamber, determined not to lift a finger for that Regiment, and he had never asked and never would ask any man to enlist in it.” 135 During the 1863 New England Anti-Slavery Convention, Morris said, “We ought not to have sent off the 54th [regiment], without a single black officer.” 136

¶ 65 The issue continued to be an important object of Morris’s focus. Morris rarely annotated his books, but his copy of the account of General Benjamin Butler’s service in New Orleans during the Civil War includes notations and page references in his handwriting on the rear paste-down endpaper. 137 One note refers to the pages discussing Butler’s policy of protecting fugitives as contraband of the war. Another provides a page reference to the discussion of Butler’s commissioning of black officers before the capture of New Orleans.

¶ 66 The belief that abolition was a part—but only a part—of a larger antebellum civil rights struggle is apparent in the two unique pamphlet collections that Morris himself apparently compiled and had bound. For each compilation, Morris created his own table of contents in his distinctive handwriting, bound in at the front of the volume. He signed and dated both compilations 1851 on the front

129. Petitions to Form the Massasoit Guards, n.d., folder 9, Robert Morris Papers, Boston Athenaeum. Like the petitions to remove the word “white” from the militia law, these petitions were signed by well-known figures in Boston like Hayden, Pindell, and Rock; the signatures also include two more Morris siblings: William R. and York, Jr.
130. KANTROWITZ, supra note 1, at 199; NELL, supra note 110, at 11.
131. An unchartered African American militia company called the Liberty Guard would later march, much to Morris’s displeasure. KANTROWITZ, supra note 1, at 216–17.
133. Act of July 17, 1862, ch. 201, 12 Stat. 597.
136. Id.
paste-downs. Almost all of the pamphlets in these two bound volumes relate to civil
civil rights or antislavery and abolitionism.

 §67 The compilation that we have designated as Morris Pamphlet Compilation
No. 1 (1851) includes 18 pamphlets, all listed under that compilation’s heading in
appendix 1. The table of contents and the volume itself opens with Walker’s Appeal,
the influential tract written in 1829 (when Morris was around four years old) by
activist David Walker.138 The preamble was dedicated to “the Coloured Citizens of
the World, but in Particular, and very expressly to those of the United States of
America,” an expansive address that would have appealed to Morris. Walker pas-
sonately appealed for enslaved people to rise up against their oppressors. His words
were so powerful and incendiary that the governor of Georgia unsuccessfully pled
for the mayor of Boston to suppress the work.139

 §68 If Walker’s tract represents Morris’s vigorous opposition to the institution
of slavery, then the next pamphlet, William Yat es’s Rights of Colored Men to Suffrage,
Citizenship, and Trial by Jury, reflects Morris’s view that the battle against slavery
was one vitally and urgently important front in a larger war.140 Martha S. Jones
describes Yates’s influential work as “the very first legal treatise on the rights of free
black Americans” and explains that “the oppression of free people of color was a
companion to slavery, in Yates’s view, with antislavery work necessarily extending
into questions of free people’s status.”141 To support his arguments that men of color
were entitled to the full spectrum of rights, Yates cited to legal authority and to the
historical contributions of black people to the founding of the country.142 That
combination of citing to precedent in law and history, along with Yates’s insistence
that the fight for abolition should not ignore the rights of men of color to the privi-
leges and burdens of citizenship, must have been powerful to Morris as a young civil
rights lawyer and (future) contributor to William Cooper Nell’s Colored Patriots.

 §69 Although antislavery and abolition pamphlets comprise the bulk of the
remainder of the compilation, Morris’s broader commitment to racial equality is
reflected in the last pamphlet. In this final slot, he placed the account of the 1847
National Convention of Colored People. Morris’s name does not appear on the list
of delegates—he was young and had just been admitted to the bar. But William Nell
and Frederick Douglass both attended as delegates. One of the many resolutions
passed created a committee to report “on the propriety of establishing a Printing
Establishment and Press for the colored people of the United States.”143 Another
stated: “That the Declaration of American Independence is not a lie, and, if the
fathers of the Revolution were not base and shameless hypocrites, it is evident that

138. Morris Pamphlet Compilation No. 1 (1851): David Walker, Walker’s Appeal, in Four
Articles; Together with a Preamble, to the Coloured Citizens of the World, but in Particular,
and Very Expressly, to Those of the United States of America, Written in Boston, State of
Massachusetts, September 28, 1829 (3d ed. 1830).
139. Nell, supra note 110, at 231–32.
to Suffrage, Citizenship, and Trial by Jury (1838).
142. Id. at 3–5.
143. Morris Pamphlet Compilation No. 1 (1851): Proceedings of the National
Convention of Colored People, and Their Friends, Held in Troy, N.Y., on the 6th, 7th, 8th and
9th October, 1847, at 16 (1847).
all men are created equal, and endowed by their Creator with certain inalienable
rights, among which are life, liberty, and the pursuit of happiness.” 144 The final por-
tion of the pamphlet is a report from a committee charged with reporting on “the
best means of abolishing Slavery and destroying Caste.” 145 For Morris, the Conven-
tion’s proceedings hinted at his understanding of the intertwined nature of racism
and slavery.

¶70 Morris Pamphlet Compilation No. 2 (1851) contains 33 pamphlets relating
to slavery and “distinctions of color,” which similarly point to Morris’s dual com-
mitment to abolition and full equality. The front endpapers contain a two-page
table of contents in Morris’s handwriting. Some of the documents mark congres-
sional debates over the expansion of slavery in the 1840s. 146 Four documents are
speeches and essays by Joshua Giddings, the U.S. congressman from Ohio who was
censured in 1842 for violating the House “gag rule” that forbade consideration of
antislavery petitions. 147 Multiple speeches and reports record debate surrounding
enactment of the Fugitive Slave Act of 1850. Morris included Daniel Webster’s
infamous Seventh of March speech, in which he advocated for enactment of the law
as the United States senator from Massachusetts; bound in right next to it are the
impassioned responses of white abolitionists Wendell Phillips and Theodore
Parker. 148

¶71 Other pamphlets in this compilation addressed struggles against racial dis-
crimination outside the context of slavery. For example, a document that Morris
labeled Report Respecting Distinctions of Color in his table of contents related to the
1839 petitions of 1400 Massachusetts women in Lynn and other towns asking for
repeal of laws that made distinctions among inhabitants on account of color. 149 The
petitions asked for the abolition of the laws barring interracial marriage and limiting
service in the militia to whites only. 150 Morris’s entry adds the word “Lincoln” to the
petition, emphasizing that William Lincoln of Worcester, Massachusetts, had
authored the report’s dismissive condemnation of the ladies’ petitions. Morris simi-
larly included a speech from John Quincy Adams on the right of men and women to

144. Id.
145. Id. at 31.
146. Morris Pamphlet Compilation No. 2 (1851), including Speech of Mr. Palfrey, of
Massachusetts, on the Bill Creating a Territorial Government for Upper California (1849),
and Joshua R. Giddings, Pacificus: The Rights and Privileges of the Several States in Regard
to Slavery: Being a Series of Essays, Published in the Western Reserve Chronicle, (Ohio,) after
the Election of 1842 (1842?).
147. Many thanks to John D. Gordan III for emphasizing to us the importance of Giddings,
who resigned after his censure in March 1842; he then wrote an essay in his own defense before
mounting a wildly successful bid to reclaim his vacated seat in that same year. For more on Giddings,
see James Brewer Stewart, Joshua R. Giddings and the Tactics of Radical Politics (1970).
148. Morris Pamphlet Compilation No. 2 (1851), including Daniel Webster, Speech of the
Hon. Daniel Webster upon the Subject of Slavery: Delivered in the United States Senate
on Thursday, March 7, 1850 (1850); Wendell Phillips, Review of Daniel Webster’s Speech
(1850); Wendell Phillips, Review of Webster’s Speech on Slavery (1850) (a second publication
of the same Phillips speech); Theodore Parker, Theodore Parker’s Review of Webster: Speech of
Theodore Parker, Delivered in the Old Cradle of Liberty, March 25, 1850 (1850).
149. Morris Pamphlet Compilation No. 2 (1851): Massachusetts House Committee on
the Judiciary, Report on Sunday Petitions Respecting Distinctions of Color (1839).
150. On the petitions, see Amber D. Moulton, The Fight for Interracial Marriage
Rights in Antebellum Massachusetts 86–123 (2015); Andrew Kull, The Color-Blind
petition the government, an impassioned address on antislavery petitions that Con-
gress repeatedly gagged.\textsuperscript{151} As with Morris's library, the compilation reflected his
belief that ending distinctions of color and abolishing slavery were inseparable goals.

\textsuperscript{\textsection 72} Morris's interest in the rights and dignity of people of color extended not
only beyond abolition but also beyond the bounds of the United States. Several of
his books explore the African continent. These titles suggest Morris's self-identity
as part of a larger African community and foreshadow the pan-African movement
of later writers such as W.E.B. DuBois. The American journalist and travel writer
William Cowper Prime relayed stories of his travels on the Nile in \textit{Boat Life in Egypt
and Nubia}.\textsuperscript{152} Paul Du Chaillu, in his \textit{Explorations and Adventures in Equatorial
Africa}, included a foldout map of equatorial Africa and discussed the domestic and
foreign slave trade.\textsuperscript{153} Joshua A. Carnes's \textit{Journal of a Voyage from Boston to the West
Coast of Africa} was a travel journal and antislavery work.\textsuperscript{154} In the margins near
several discussions of the kidnapping and enslavement of African people—include-
ing Carnes's account of seeing an American-built brig with 350 enslaved people
onboard—there are distinctive pencil markings likely added by Morris.\textsuperscript{155} Morris's
activism in Boston was only part of his story—he saw himself in sympathy with all
“Coloured Citizens of the World,” just as David Walker did when titling the pam-
phlet that opened Morris's first compilation.

\textbf{Resistance}

Morris Pamphlet Compilation No. 1 (1851). \textit{Address of the Committee Appointed by
a Public Meeting, Held at Faneuil Hall, September 24, 1846, for the Purpose of
Considering the Recent Case of Kidnapping from Our Soil, and of Taking Mea-
sures to Prevent the Recurrence of Similar Outrages}. Boston: White & Potter,
1846.

\textit{Selections from the Writings and Speeches of William Lloyd Garrison}. Boston: R.F.
Wallcut, 1852.


Sampson, 1856.

Martineau, Harriet. \textit{The Hour and the Man: A Historical Romance}. New York:
Harper & Brothers, 1841.

Beard, John R. \textit{The Life of Toussaint L'Ouverture: The Negro Patriot of Hayti}. Lon-
don: Ingram, Cooke, 1853.

\textsuperscript{151} Morris Pamphlet Compilation No. 2 (1851): \textit{J/q/sc/h.sc/n.sc Q/u.sc/i.sc/n.sc/c.sc/y.sc A/d.sc/a.sc/m.sc/s.sc, S/p.sc/e.sc/e.sc/c.sc/h.sc /o.sc/f.sc J/q/sc/h.sc/n.sc Q/u.sc/i.sc/n.sc/c.sc/y.sc A/d.sc/a.sc/m.sc/s.sc, /o.sc/f.sc ... M/e.sc/n.sc /a.sc/n.sc/d.sc W/o.sc/m.sc/e.sc/n.sc, /t.sc/o.sc P/e.sc/t.sc/i.sc/t.sc/i.sc/o.sc/n.sc; O/n.sc /t.sc/h.sc/e.sc F/r.sc/e.sc/e.sc/d.sc/o.sc/m.sc /o.sc/f.sc S/p.sc/e.sc/e.sc/c.sc/h.sc /a.sc/n.sc/d.sc /o.sc/f.sc ... H/o.sc/u.sc/s.sc/e.sc /o.sc/f.sc R/e.sc/p.sc/r.sc/e.sc/s.sc/e.sc/n.sc/t.sc/a.sc/t.sc/i.sc/v.sc/e.sc/s.sc} (1838).

\textsuperscript{152} \textit{W/i.sc/l.sc/l.sc/i.sc/a.sc/m.sc C. P/r.sc/i.sc/m.sc/e.sc, B/o.sc/a.sc/t.sc L/i.sc/f.sc/e.sc /i.sc/n.sc E/g.sc/y.sc/p.sc/t.sc /a.sc/n.sc/d.sc N/u.sc/b.sc/i.sc/a.sc} (1857).

\textsuperscript{153} Chaillu, \textit{supra} note 10.

\textsuperscript{154} Carnes, \textit{supra} note 10.

\textsuperscript{155} Multiple books in Morris's collection have passages marked by a vertical, wavy line and
a short pair of lines that resembles a slightly offset equal sign; another common mark looks similar to
a checkmark or crooked “v”. Since his books later became library books, it is possible that subsequent
readers made the marks. However, we have worked under the assumption that they came from Morris,
as they are relatively distinct and appear in a number of his books, as noted in appendix 1, \textit{infra} pp.
498–506.
¶73 David Walker’s son, Edwin Walker, described Morris as being “as bold as a lion and as severe as justice” when the rights of his race were called into question.156 This boldness, apparent in Morris’s struggle for equal rights in education and military service, comes across most strikingly in his abolition work. He understood that “slavery [was] not to be abolished by peaceable means.”157 Morris’s library reflects this spirit of fierce resistance and his identification with Toussaint L’Ouverture and other leaders of resistance.

¶74 Morris owned two books about Toussaint L’Ouverture, the once enslaved leader of the Haitian independence movement. The first book, signed and dated 1850 by Morris, is a novel by British activist and writer Harriet Martineau. Her work, *The Hour and the Man*, is historical fiction featuring Toussaint as the hero.158 The second book is a biography, John R. Beard’s *The Life of Toussaint L’Ouverture*. Beard, an English Unitarian minister, depicted Toussaint as an unparalleled general—more powerful than George Washington and a better man than Napoleon.159 Morris’s copy features his distinctive markings in multiple places, most notably around a discussion about how Toussaint could and did read and, in doing so, “became the vindicator of negro freedom.”160 It makes sense that Morris, who valued books and read widely, would have been interested in a passage about Toussaint’s literacy and his readings on the concept of liberty. In addition to these markings, Morris copied William Wordsworth’s sonnet *To Toussaint L’Ouverture* in both the Martineau and Beard books. In these works on Toussaint, Morris may have found his hero of resistance.

¶75 Resistance leaders resonated with Morris. He also owned Harriet Beecher Stowe’s *Dred: A Tale of the Great Dismal Swamp*, which appeared four years after *Uncle Tom’s Cabin*.161 Stowe wrote the fictional hero, Dred, as the son of Denmark Vesey, the formerly enslaved man who was hanged for planning a slave revolt in Charleston, South Carolina, in the 1820s.162 Stowe included an appendix with excerpts from Nat Turner’s confession of his involvement in the 1831 rebellion in Virginia; she meant these excerpts to serve “as an illustration of the character and views ascribed to Dred.”163 It is fitting that sitting on Morris’s bookshelf was an antislavery novel featuring a title character who is an amalgamation of two of the most famous leaders of slave revolts in American history. Indeed, during a speech at the Prince Hall Grand Lodge of Boston, Morris once described Vesey and Turner as “intrepid heroes . . . whose very names were a terror to oppressors.”164

156. Walker, *supra* note 25, at 40. Morris served as a mentor to Edwin (also known as Edward), who was the first African American member of the Massachusetts legislature and a lawyer. In fact, Morris made the motion for Edwin’s admission to the bar and, after the administration of the oath, told him squarely to never “run away from our people.” *Id.* at 36.


160. *Id.* at 30.


162. 2 *id.* at 274; *From Bondage to Liberation: Writings by and about Afro-Americans from 1700 to 1918*, at 102 (Faith Berry ed., 2001).

163. 2 *Stowe*, *supra* note 81, at 338.

Even as a Boston lawyer, Morris looked for opportunities to be an intrepid hero. By 1846, before his admission to the bar, Morris was an active member of Boston's Vigilance Committee, a relief organization dedicated to supporting, protecting, and advocating for fugitives from slavery. After a fugitive reached the shores of Boston only to be forced back on a ship to New Orleans, community leaders convened a meeting at Faneuil Hall on September 24, 1846. An address signed by Morris and others asked their fellow citizens “to give comfort and help to any fugitive slaves who may be thrown upon our hospitality, and to strive to secure for them all the rights and privileges which we claim for ourselves.”

The committee appointed that evening included Morris and William Cooper Nell, on a list dominated by white abolitionists, including Ellis Gray Loring, Charles Sumner, Samuel E. Sewall, John G. King, Theodore Parker, Wendell Phillips, Henry I. Bowditch, and James Freeman Clarke.

Morris's two pamphlet compilations include many documents addressing the political conflict over fugitives from slavery. One example is a letter from educator and progressive Massachusetts legislator Horace Mann to his constituents. In this May 1850 letter, Mann turned to a particular bill pending before the U.S. Senate that dealt with “the business of seeing that fugitives are delivered up.” Describing the proposed legislation as a “hideous bill,” Mann criticized Senator Daniel Webster of Massachusetts for supporting it. Mann expressed grave concerns about the constitutionality of the legislation, which would empower an expanded number of federal officials to serve “as tribunals, without appeal, for the delivery of any body, who is sworn by anybody, anywhere, to be a fugitive slave” and send the alleged fugitive back to enslavement without the right to a trial by jury.

In September 1850, despite the opposition of legislators like Mann, this proslavery Fugitive Slave Act was enacted into law. It created defiant resistance in Boston. The newly reconstituted Vigilance Committee, with Morris serving on the Finance Committee, quickly established an office and appointed an agent to whom fugitives could apply for assistance in obtaining employment, clothing, and money.

Accounting records indicate much activity: payments for clothing and boarding for fugitives; arranging and financing passage into Canada; printing and posting bills warning of slave hunters; monitoring the whereabouts of slave hunters; and payments to Morris, Ellis Gray Loring, John G. King, and Samuel E. Sewall for legal services rendered to alleged fugitives. An entry from November 1852

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165. Morris Pamphlet Compilation No. 1 (1851): Address of the Committee Appointed by a Public Meeting, Held at Faneuil Hall, September 24, 1846, for the Purpose of Considering the Recent Case of Kidnapping from Our Soil, and of Taking Measures to Prevent the Recurrence of Similar Outrages 8 (1846).
166. Id. at 39.
167. Morris Pamphlet Compilation No. 1 (1851): Horace Mann, New Dangers to Freedom, and New Duties for Its Defenders: A Letter by the Hon. Horace Mann to His Constituents, May 3, 1850 (1850). Mann appears five times in Morris's library; once as the subject of a biography by his wife and four times as the author of speeches in Morris's unique compilations.
168. Mann, supra note 167, at 25 (quoting Daniel Webster).
169. Id. at 27.
involves legal expenses for “the case of the rescue of Shadrach,” a matter that would bring Morris, in a very personal way, to the forefront of the battle against the Fugitive Slave Act.174

¶80 On February 15, 1851, a man named Shadrach Minkins was working as a waiter at the Cornhill Coffee House in Boston, in an area of the city known today as Government Center. He served coffee to a group of men who in turn served him with an arrest warrant alleging that he was a fugitive from slavery in Virginia. His customers, deputy U.S. marshals, arrested him and transported him to the nearby federal courthouse for a hearing.

¶81 Morris, along with King, Loring, and Richard Henry Dana, Jr., was immediately on hand to represent Minkins. The lawyers managed to secure a three-day adjournment.175 After the judge granted the adjournment, the marshals attempted to clear out the courtroom. Before they could complete this task, a group of people pushed through the door into the federal courtroom and grabbed Minkins from the custody of the marshals. Minkins literally was carried out of the courthouse by his rescuers and soon taken across the river to Cambridge.176 After several days of travel, he made it across the border to Montreal.177

¶82 President Fillmore and many others, including federal officials operating in Boston, responded with outrage. The federal prosecutor in Boston began arresting and indicting suspected participants in the rescue.178 Morris was among those charged. He was arraigned on April 1, 1851, on charges of aiding Minkins’s escape in violation of section 7 of the Fugitive Slave Act.179 Lewis Hayden, the longtime Boston resident who had escaped from slavery in Kentucky, also was charged. Hayden’s trial ended with a hung jury on the same day that Morris’s first trial began in the federal district court in Boston; Morris’s ended in a mistrial due to one juror’s indication of an unwillingness to enforce the Fugitive Slave Act.180

¶83 Morris was represented at his second trial, like the first, by Dana and John Parker Hale. Dana and Hale had to contend with several eyewitnesses who testified to Morris’s involvement. This included testimony that, just before the rescue, Morris indicated to a group gathered outside of the courtroom that there was a good opportunity to act since the courtroom largely had emptied; that Morris was in a carriage into which Minkins was ushered before it became necessary to proceed on foot, due to the crowd of people in the street; and that Morris was walking down the street with his arm on Minkins’s back.181

¶84 Dana opened for the defense and, in addition to arguing that the Fugitive Slave Act was unconstitutional and inapplicable, made the case that Morris merely had been a bystander to the whole incident and simply was heading back to his office when the chaos unfolded on the street. Thirteen character witnesses testified on Morris’s behalf, including Loring and Josiah Quincy, Jr., the former Boston mayor. Further witnesses offered testimony that cast doubt on the evidence put

174. *Id.* at 22.
176. *Collision, supra* note 1, at 124–33.
177. *Id.* at 174.
179. *Id.* at 33 and n.13.
180. *Id.* at 35–36.
181. *Id.* at 55–56.
forth by the prosecution. Lawyer and legal historian John Gordon has recently shown that Supreme Court Justice Benjamin Robbins Curtis (who presided as the trial judge in Morris’s second trial) “in his legal rulings and jury instructions repeatedly put his thumb hard on the scale against Morris, distorting existing law to do it.” Despite Curtis’s attempt to obtain Morris’s conviction, the jury returned a verdict of not guilty on the morning of November 12, 1851.

¶85 Discussions about Morris’s actual guilt or innocence continued after the verdict. It seems clear that reasonable doubt existed as to his actual guilt and that the verdict was not necessarily a case of jury nullification. Soon after his acquittal, Morris wrote a letter to the editor of the Boston Bee, reprinted in the Liberator, expressing frustration about continued assumptions of his guilt. In the letter, he did not deny his involvement outright but referenced the testimony on his behalf, the integrity of the jury, and the final verdict. He wrote,

I think I have now a right to stand clear in the judgment of this community, and cannot but think it ungenerous in the conductors of an influential paper still to hold up to public odium a young man whose good name and honest toil are the only reliance of himself and his family.

¶86 The Liberator, in turn, with William Lloyd Garrison at the helm, printed Morris’s letter and a brief response expressing disappointment that Morris “should seem to shrink from the glorious imputation of having assisted in the rescue of Shadrach, as though the deed were one that ought to tarnish the character of any one who participated in it.” There were other whispers from his contemporaries, likely influenced by Morris’s letter, that Morris was too concerned with white opinion. These rumblings persisted to the point that Frederick Douglass had to defend the young lawyer against “the absurd story that [Morris] had said he would send a fugitive slave back to his master.”

¶87 These exchanges raise a number of questions. Was Morris not involved in the rescue and genuinely resentful of the assumption of guilt, as his letter suggests? Was he involved but resistant to the lawbreaker label? Morris grappled with many contradictions as an activist and a lawyer. He tirelessly pushed for the integration of schools and militias and for resistance to the Fugitive Slave Act. However, he “was also an officer of the court, and aspired to be accepted as a gentleman.” Admitting to violating the law—even one he deeply felt to be unjust—could have jeopardized Morris’s good standing at the bar. Perhaps he felt compelled to deny involvement in the rescue to preserve his reputation and business.

182. Id. at 56–59.
183. Id. at xviii.
184. One other defendant in the Rescue cases, Elizur Wright, was acquitted like Morris (the other cases were dismissed). Gordon offers a fascinating account of so-called faithful jurors in the Rescue trials. Francis Bigelow, who served as a juror in Wright’s trial, admitted years later that he actually had sheltered Shadrach Minkins at his Concord home after Minkins’s escape from the Boston courthouse. Gordon notes that one of the jurors in Morris’s case, Stephen Kendall, shared a name with a man listed on the rolls of the Boston Vigilance Committee. Id. at 72, 75–77.
185. Id. at 59.
186. Rescue of Shadrach, Liberator, Nov. 21, 1851, at 186.
187. Id.
188. Kantrowitz, supra note 1, at 215–16.
189. Our Eastern Tour, supra note 77, at 2.
191. Id. at 215.
¶88 Morris also understood that future arrests of alleged fugitives were inevitable; he could have wanted to deflect as much suspicion as possible away from himself. We may never know his reasons for writing the letter or the extent of his involvement in Minkins's rescue. However, it bears noting that after the death of Lewis Hayden, long suspected to be the leader of the rescue, a friend shared Hayden's account of that February day in 1851. According to the friend, Hayden had described how he and Morris escorted Minkins to the nearby home of Mrs. Elizabeth Riley, who hid Minkins in her attic until he could be transported out of Boston.192

¶89 In the aftermath of the trial, Morris again turned to books. On behalf of "several colored citizens of Boston," Morris gave Dana a beautifully bound set of English historian Henry Hallam's complete works in thanks for his representation of Morris and other alleged rescuers. In an accompanying note dated January 1, 1852, Morris wrote,

> in [Hallam's] writings we seem to discern a spirit kindred to your own, since they are everywhere animated by that strong sentiment of liberty protected by Law which lives in your own breast, and which has in all later times so honorably distinguished the truly great constitutional lawyers, the Erskines and Broughams of England.193

¶90 After the Shadrach Minkins rescue and Morris’s own acquittal, Morris continued to be deeply involved in the work of abolitionism and the protection of fugitives, taking actions that cast further doubt on charges of his complacency. In 1854, he represented Anthony Burns, another fugitive. A rescue was attempted, but it failed, and Burns was returned to slavery in Virginia.194 Morris also represented the “alleged rioters” who attempted to rescue Burns.195 During the 1858 Convention of the Colored Citizens of Massachusetts, Morris urged attendees to trample on the Fugitive Slave Act, declaring,

> Let us be bold, if any man flies from slavery, and comes among us. When he's reached us, we'll say, he's gone far enough. If any man comes here to New Bedford, and they try to take him away, you telegraph to us in Boston, and we'll come down three hundred strong, and stay with you; and we won't go until he's safe.196

¶91 Morris continued to purchase antislavery titles, and his collection suggests that the books were used beyond private study. One volume in particular, *Autographs for Freedom*, was bound specifically to be exhibited.197 The book is a compilation of essays by abolitionists such as William Wells Brown, Horace Greeley, Ralph Waldo Emerson, and Harriet Beecher Stowe. The editor, Julia Griffiths, was a founding member of the Rochester Ladies' Anti-Slavery Society and an associate of Frederick Douglass. She arranged for the publication of this book to raise money for Douglass's floundering Rochester-based newspaper, *The North Star*.198 Morris's copy of *Autographs* is one of the loveliest books in his collection. Barbara Adams

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193. 1 Charles Francis Adams, Richard Henry Dana: A Biography 211 (1890).
194. Gordan, supra note 1, at 82–84.
195. Another Sims Case in Boston, Liberator, June 2, 1854, at 86.
196. Anniversary of British West India Emancipation, supra note 157, at 132.
Hebard, Burns Library conservator, explains that this book “was meant to be displayed, not kept on a bookshelf. The bright red colored book with the charming gilt-stamped image of an autographed manuscript and plumed pen in inkwell gracing the cover would have looked elegant lying on a parlor table.”

Perhaps visitors to the Morris home on Williams Street in Chelsea, Massachusetts, would have seen this antislavery work on proud display.

§92 His speeches and library make it apparent that Morris had few qualms about the level of resistance eventually required to abolish slavery. Morris wanted “the plantations at the South made uninhabitable through fear of the uprising of the slaves.”

His annotations in a compilation of William Lloyd Garrison’s writings—acquired in 1852 despite the disappointed note in the Liberator about the Shadrach Minkins rescue—suggest his understanding that a violent conflict was inevitable. The rear fly-leaf of the Garrison compilation contains the following note in Morris’s hand: “and, if Slavery continues, the sooner that day comes the better.” Morris keyed his annotation to a proslavery statement that the union would break if northern abolitionists got their way. That outcome did not seem to worry Morris.

### Family and Faith


§93 Throughout Morris’s life, family intertwined with political and professional commitments. In February 1853, he noted the family’s address at 28 Williams Street in Chelsea on his copy of abolitionist William Goodell’s *Slavery and Anti-Slavery*. Morris marked several passages in this book, most notably the discussion of Lord Mansfield’s 1772 decision in the *Somerset* case. That decision, which held that enslaved people were free as soon as they set foot on English soil, would have been of particular interest to the young lawyer. Morris also obtained a copy of Esther Copley’s *A History of Slavery*. Copley was an English writer known for her...
instructive books for children, including this indictment of slavery. Morris signed the book and noted the year 1853 on the front paste-down. At the time, his daughter, Catharine, and son, Robert, Jr., would have been about seven and five, respectively. It seems plausible that he purchased the book to guide conversation with his children.

¶94 In that same year, 1853, Catharine Morris gave her husband his copy of J.R. Beard’s biography of Toussaint L’Ouverture. The inscription reads “Robert Morris from C.H.M. June 8, 1853,” Robert’s birthday. His copy is the first edition of Beard’s work, so it was newly published when Catharine purchased the gift. Another edition was printed in Boston 10 years later, in the midst of the Civil War. Robert copied Wordsworth’s sonnet “To Toussaint L’Ouverture” onto the front fly-leaf, just as he had done with his copy of Harriet Martineau’s *The Hour and the Man.*

¶95 It is unclear to what extent Catharine Morris was involved in abolitionism beyond her support of Morris and her contributions to his library. Little about her has survived. One clue indicating potential direct involvement is the existence of a letter to Catharine from Ellen Craft. Craft and her husband William escaped from slavery in Georgia in 1848 and found refuge in Boston at the home of Lewis and Harriet Hayden. While Ellen Craft’s 1870 letter to Catharine mentions nothing of the escape or of her time in antebellum Boston, it indicates a warm relationship that likely originated when the Crafts were fugitives in Catharine’s hometown. Ellen expresses happiness about her and her husband’s recent relocation to Savannah, Georgia; her disappointment at not seeing the Morrises during a visit to Boston; and her delight at the achievements of Robert and Catharine’s son, Robert, Jr. Perhaps the affection in the letter stemmed from Catharine’s support when the couple was in hiding.

¶96 At some point in the early to mid-1850s, a challenge confronted the Morris family when Catharine converted to Catholicism. African Americans in Boston during the antebellum years tended toward Baptist and Methodist denominations; Catholicism was an unusual affiliation in the black community. Morris himself had been Methodist. At Morris’s funeral in 1882, Reverend Father Alphonse Charlier reflected on Morris’s response to his wife’s decision, noting that Morris initially was “decidedly opposed to the observance of Catholic practices in his family; he would not hear of it.” Morris’s strong resistance presumably stemmed from the generally anti-abolitionist stance of Boston’s Irish Catholic community.

204. *See supra* nn.158–160 and accompanying text.

205. *Kantrowitz, supra* note 1, at 184–86.


207. *Kantrowitz, supra* note 1, at 365.

208. *Horton & Horton, supra* note 85, at 47, 61.


211. In the 1840s, Irish Catholic activist Daniel O’Connell desperately tried to recruit Irish immigrants to the abolitionist cause in the United States. In 1843, O’Connell issued his “Great Irish Address,” signed by over 60,000 Irish Protestants and Catholics, urging Irish Catholic immigrants to oppose slavery. William Lloyd Garrison, Wendell Phillips, and Charles Lenox Remond tried to sell O’Connell’s message in Boston, citing also to Pope Gregory XVI’s 1839 apostolic letter condemning the slave trade, but their efforts to combine forces largely failed. *Max Longley, For the Union and the Catholic Church: Four Converts in the Civil War 54–56 (2015); Thomas H. O’Connor, supra* note 134, at 16–18.
This stance is reflected in articles published in the local Irish Catholic newspaper, *The Pilot*, which supported enactment of the Fugitive Slave Act of 1850 and regularly lambasted William Lloyd Garrison and other leading abolitionists.212

¶97 When this crisis of faith and conscience emerged, the Morrises lived in Chelsea, across the Mystic River from Boston. Catharine apparently started attending their local Chelsea parish, and despite his personal and spiritual struggle with his wife’s decision, Morris attended services there by around 1856, although it would be years before he officially converted.213 The lack of records makes it difficult to piece together his thought process. Undoubtedly, his love for Catharine played a huge role. Father Charlier noted in his remarks at Morris’s funeral that Catharine’s example “gradually modified his religious views and softened his unfriendly feelings.” After much investigation and prayer, Morris came to “a firm conviction that if he would save his soul he must make his submission to the Church.”214 It is also possible that the Catholic Church, which had abandoned segregated seating during services, appealed to Morris’s interest in integration.215

¶98 In 1856, when the Morrises were living in Chelsea and worshipping at the local Catholic parish, tragedy struck the couple when their daughter, Catharine, died at 10 years old.216 During the same year as this devastating loss, Morris initiated what would be a long-lasting relationship with a young Irish immigrant in his parish church. Patrick Collins had arrived in Boston from Ireland with his family when he was four years old. In 1854, around age 10, he suffered a broken arm and bruises during an attack on the parish church and the homes of Chelsea Catholics.217 At 12 years old, he became an altar boy in the Chelsea parish and impressed his fellow congregant, Morris, who hired him as an office boy.218 Morris likely felt a kinship with the boy, who was facing discrimination at roughly the same age Morris had been when he moved from Salem to Boston to work for Ellis Gray Loring. Collins later became a lawyer himself and, in 1901, he was elected mayor of Boston.219 He served as a pallbearer at Morris’s funeral and subsequently offered a reflection during a meeting of the Suffolk Bar, convened to honor the late Morris,


213. *Boston Mourns the Loss of Her Chief Executive*, Bos. Daily Globe, Sept. 15, 1905, at 1 (discussing Morris’s attendance at the same Chelsea parish attended by Boston Mayor Patrick Collins as a boy).

214. Charlier, supra note 210, at 8.

215. Leonard, supra note 1, at 81.

216. “Massachusetts Death Records, 1841–1915,” supra note 58. This was the couple’s second time suffering the loss of a child. In February 1848, Robert, Jr., arrived, followed in March 1849 by another son, Mason (Catharine’s maiden name). In April 1850, a mere month after the crushing loss in the Roberts school integration case, the Morrises were dealt another blow when Mason died from pneumonia. “Massachusetts Death Records, 1841–1915,” Register of Deaths in the Town of Chelsea for the Year 1850, entry for Mason Morris, 1850, no. 41, ANCESTRY.COM, https://search.ancestrylibrary.com/cgi-bin/sse.dll?dbid=2101&h=6798625&indiv=try&vc=Record:OtherRecord&RhSource=2495 (last visited Oct. 1, 2019).


219. *Id.* at 6.
whom he described as “modest, courageous, faithful and honest, a conscientious lawyer and a Christian gentleman.”

¶99 Morris’s relationship with Collins is emblematic of his larger connection with the Irish community. It “defied the conventional paradigm of Irish-black relations.” 221 Morris regularly represented Irish clients, mainly criminal defendants and women seeking child support. 222 Indeed, Morris’s friend Edwin Walker estimated that 75 percent of Morris’s clients were from Boston’s Irish community. 223 He even received at least one client referral from Patrick Donahoe, fiery editor of the Pilot, the Irish Catholic newspaper that often published pieces against abolition. In a note on Pilot stationery, Donahoe asked whether Morris could do anything to secure the release of one Barbara Fitzgerald, the mother of a dying child. 224

¶100 In addition to his relationship with Collins, the Catholic Church, and his work on behalf of Irish clients, Morris also supported the creation of an Irish militia company. Some members of the African American community expressed dismay that a charter had been granted to this nonnative group, particularly since a similar charter had been denied to petitioners like Morris, who had been seeking approval for the Massasoit Guards. 225 In a speech before a legislative committee, Morris expressed approval of the Irish charter, saying that the denial would have been a “great act of injustice.” He continued, saying, “Now, having granted a charter, to our Irish fellow citizens not native born, we confidently expect you will grant a charter to us who are native born citizens.” 226

¶101 Morris’s struggle with his faith continued, even as his ties to Boston’s Irish community strengthened. His library includes evidence of this struggle. In 1865, years after he began attending services in the Chelsea parish, Morris received a gift copy of Jaime Luciano Balmes’s European Civilization: Protestantism and Catholicity Compared. 227 Balmes, a Spanish Catholic priest, “denounced slavery as contrary to Holy Scripture and the Church’s tradition.” 228 Balmes delved into this in several chapters of the book. One subtitle reads, “The Catholic Church not only employs her doctrines, her maxims, and her spirit of charity, but also makes use of practical means in the abolition of slavery.” 229 The book is inscribed to Morris “with respects of Wm T. Connolly,” who likely thought that the antislavery content of the book would help Morris embrace the Catholic Church more fully.

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221. Kendrick & Kendrick, supra note 1, at 207–08.
222. Docket Book, Bos. Mun. Ct., 1860–1874, Mass. Sup. Jud. Ct. Archives, Boston. Case entries typically do not include attorney information until 1869, but after that, “R. Morris” is noted next to nonsupport cases with plaintiff names such as Mary E. Keogh, Margaret J. Murphy, and Bridget L. Granahan.
223. Walker, supra note 25, at 34–35.
224. Letter from Patrick Donahoe to Robert Morris, June 22, 1871, folder 21, Robert Morris Papers, Boston Athenaeum.
225. Kantrowitz, supra note 1, at 203.
226. Speech of Robert Morris, Esq. before the Committee on the Militia, Mar. 3 1853, folder 9, Robert Morris Papers, Boston Athenaeum.
228. Max Longley, For the Union and the Catholic Church: Four Converts in the Civil War 54 (2015).
229. Balmes, supra note 227, at xiv.
When Morris eventually converted in 1870, he “was accompanied to the font by his brother lawyer Connolly as sponsor.” In September 1870, just before he officially converted, Morris received a charming thank-you letter for a gift of grapes from a William T. Connolly. The stationery indicates that Connolly was clerk of the civil business session at the Boston Municipal Court, a court in which Morris regularly appeared. The signature on the letter matches the inscription in the book. Additionally, Morris worked on a committee with a William T. Connolly in 1873 to form a Catholic Union in Boston. It seems likely that the giver of the book, the sponsor, and the court clerk were the same person and that there was a significant relationship between Connolly and Morris based in large part on the latter’s spiritual struggle.

Robert and Catharine Morris’s relationship with the Catholic Church factored into the education of their sole surviving child, Robert, Jr. When the boy was 13, his parents enrolled him in the Imperial College in Montpelier, France, a Catholic boarding school; they had to seek Charles Sumner’s help to secure their son a passport, with a supporting letter of recommendation from Bishop John B. Fitzpatrick, another Morris family friend. The decision to send their only child abroad may have arisen from concerns about his health and the belief that he would face less racial prejudice in France. Abroad, young Robert thrived, graduating in 1868 with “the two highest prizes.”

Following his father’s legal career path, Robert, Jr., continued his studies at Stonyhurst College, a Jesuit school in England, before gaining admission to Middle Temple in London in 1870. He returned to the United States by 1871 and spent a year at Harvard Law School before reading law in the office of a practitioner, presumably his father. Thereafter, the father and son practiced law together. The Boston Athenaeum’s collection includes a business card for “Robert Morris & Son, Attorneys and Counsellors at Law.” The Massachusetts Reports includes a decision from at least one case with “R. Morris & R. Morris, Jr.” listed as attorneys for the defendants. The Supreme Judicial Court decided in favor of their clients in the matter, a tort action for

234. Letter from T. Baldy to Robert Morris ("Cher Monsieur"), July 19, 1862, folder 13, Robert Morris Papers, Boston Athenaeum; Leonard, supra note 1, at 80. This was around 1861, so either the country was on the cusp of war or the Civil War had already begun.
236. Letter from E.I. Purbrick, S.J., to Robert Morris, May 9, 1870, folder 21, Robert Morris Papers, Boston Athenaeum (telling Morris, Sr., that he could secure housing for his son with "an excellent Catholic family" for his tenure at Middle Temple); 2 REGISTER OF ADMISIIONS TO THE HONOURABLE SOCIETY OF THE MIDDLE TEMPLE: FROM THE FIFTEENTH CENTURY TO THE YEAR 1944, at 570 (1949).
238. 1 WILLIAM T. DAVIS, BENCH AND BAR OF THE COMMONWEALTH OF MASSACHUSETTS IN TWO VOLUMES 527 (1895).
239. Business Card, folder 1, Robert Morris Papers, Boston Athenaeum. The card states “French Spoken,” highlighting language skills that Robert, Jr., presumably obtained while studying in France.
wrongful conversion. The father and son partnership ended with the deaths of Morris and Robert Jr. within two weeks of each other in December 1882.

¶105 Robert Morris, Sr., died at home on December 12, 1882, after a long struggle with heart disease. His funeral was held at the Jesuit Church of the Immaculate Conception, where he had converted in 1870 and "found a home in the Catholic church free from the prejudice of caste, and where all, to its credit be it said, are recognized as equal before God." Through this church, the Morrises had forged connections with a very young Boston College, which was physically adjacent and administratively intertwined. Morris corresponded with Reverend Robert Fulton, S.J., first dean and early president of Boston College. Fulton also granted Morris a life membership to the Boston College Young Men's Catholic Association. Robert, Jr., had been involved as well, serving—in a fitting nod to the family's appreciation of books—as the librarian. At Morris's funeral, the president of Boston College, Reverend Jeremiah O'Connor, S.J., Patrick Collins, and William T. Connolly stood alongside Edwin G. Walker, George Ruffin, and Lewis Hayden, perfectly illustrating Morris's position at the crossroads of Boston's Irish Catholic and African American communities.

243. In Memoriam: Robert Morris, Sr., supra note 25, at 5; Brief Notes, supra note 230, at 2. The Morrises had moved to this congregation from their Chelsea parish at some point after March 1861, when their friend Bishop John B. Fitzpatrick presided over the dedication. Catholic Church Dedication in Boston, N.Y. TIMES, Mar. 11, 1861, at 8. When they moved from Chelsea to Boston in the late 1860s or early 1870s, their new home at 78 West Newton Street was mere blocks from the Immaculate Conception Church.
244. Donovan, Dunigan & FitzGerald, supra note 17, at 20–21.
245. Id. at 25, 43. Two letters in Morris's papers at the Boston Athenaeum indicate a cordial relationship. Undated letters from Robert Fulton to Robert Morris, folder 24, Robert Morris Papers, Boston Athenaeum.
246. "Boston College YMCA Life Member," folder 1, Robert Morris Papers, Boston Athenaeum.
248. In Memoriam: Robert Morris, Sr., supra note 25, at 5. When Catharine Morris died in 1895, her service was held in the same church where her husband's death had brought these individuals together 13 years prior. Deaths, Bos. DAILY GLOBE, Nov. 21, 1895, at 10.
Conclusion

¶106 Robert Morris’s unwavering commitment to securing full and equal rights for people of color has been obscured by the passage of time. If Robert Morris, Jr., had lived longer, he might have followed the tradition of so many sons of famous antebellum lawyers and created an edited volume of his father’s speeches and writings.249 If Morris had left extensive personal papers, historians would have written pages on his legal and political career. Instead, the condescending comments from some white members of the Boston Bar at Morris’s memorial service—a source often relied on by historians—minimized his intellectual achievements and led to him often being cast merely as Charles Sumner’s sidekick.250 Even when Morris was noted, it was largely for his status as a “first” (technically second) African American lawyer. The remnants of the racial caste system that Morris devoted his life to destroying diminished his accomplishments.

¶107 The library restores Robert Morris. We see his deep intellectual and political commitment to equality under the law for people of color, his self-identification as a leader of resistance by legal and literary means, and his lifelong work as an activist on behalf of specific political goals. At Morris’s memorial service, Edwin Walker explained:

In spite of his identity with a neglected and injured people in this boasted republic, in spite of all the obstacles that were placed across his path for over thirty-five years that he was in actual business life, he was a living, walking, uncompromising declaration of the intellectual strength and capacity of the American black man.251

¶108 Through books—acquiring, reading, gifting, and patronizing—Morris pursued justice. Morris lived to embody the words that twice he copied into his books:

[. . . ] Yet die not, do thou
Wear rather in thy bonds a cheerful brow.
Though fallen thyself, never to rise again,
Live and take comfort. Thou hast left behind
Powers that will work for thee; air, earth and skies;
There’s not a breathing of the common wind,
That will forget thee; thou hast great allies;
Thy friends are exultations, agonies,
And love and man’s unconquerable mind.252

Books and the written word were Morris’s weapons in the great struggle for full equality for African Americans and people of color. Like his great hero, Toussaint L’Ouverture, Morris was not forgotten. And his books, worn and well used, bear witness to Morris’s unconquerable mind.

249. See, e.g., Life and Letters of Joseph Story: Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University (William Wetmore Story ed., 1851); Richard Henry Dana, Jr.: Speeches in Stirring Times, and Letters to a Son (Richard H. Dana III ed., 1910).

250. In one particularly bewildering address, lawyer George Searle rambled about the lack of prejudice against Morris and claimed that his success likely was attributable to his race. After saying Morris “certainly was not a great jurist, nor even a learned lawyer,” Searle went on to state that though Morris had a fair law library [hopefully to be recovered one day], “he was not a bookish man.” In Memoriam: Robert Morris, Sr., supra note 25, at 17–18.

251. Walker, supra note 25, at 43.

252. Excerpt from William Wordsworth’s “To Toussaint L’Ouverture,” as reproduced by Robert Morris in his copies of J.R. Beard’s Life of Toussaint L’Ouverture and Harriet Martineau’s The Hour and the Man. For an image, see appendix 2, infra p. 507.
Appendix 1: The Robert Morris Collection

Introductory Note

¶109 The Robert Morris collection at the John J. Burns Library, Boston College, currently consists of 75 titles, two of which are pamphlet collections likely compiled by Morris. The Morris books can be retrieved by searching Morris as a local collection name in the Boston College Libraries catalog. Since his books were intermingled at various points with the Boston College and Boston College High School general collections, other books belonging to Morris may be discovered in the future.

¶110 For each title listed below, we have transcribed visible signatures and inscriptions. Other ownership information is indicated where applicable, usually with the following abbreviations:

- **SUB** – Morris signature legible underneath Morris gift bookplate
- **SNV** – Writing under Morris gift bookplate is not visible or illegible
- **A** – Annotations in what we believe to be Morris’s hand
- **DM** – Markings in the margins that we believe to be Morris’s based on distinctiveness and appearance throughout multiple books
- **EE** – Early edition of the title (first or in same publication year as first), according to WorldCat title search

The Robert Morris Collection, John J. Burns Library, Boston College


Bowles, Samuel. *Our New West. Records of Travel between the Mississippi River and the Pacific Ocean [. . .]*. Hartford, CT: Hartford, 1869. [SUB; EE]


Jameson, Mrs. [Anna]. *A Commonplace Book of Thoughts, Memories, and Fancies, Original and Selected*. New York: D. Appleton, 1855. [SNV]


Lewis, R.B. *Light and Truth; Collected from the Bible and Ancient and Modern History, Containing the Universal History of the Colored and the Indian Race, from the Creation of the World to the Present Time*. Boston: Committee of Colored Gentlemen, printed by Benjamin F. Roberts, 1844. [EE. Front fly-leaf: “Robert Morris 1850 –“]


———. *Household Education*. Philadelphia: Lea & Blanchard, 1849. [SUB, possibly by Catharine Morris; EE]

Morris Pamphlet Compilation No. 1 (1851). [Front paste-down: “Robert Morris –1851 –“] This bound volume is a collection of the following 18 pamphlets, compiled by Morris and listed in the order in which they appear on Morris’s handwritten table of contents:


3. *Address of the Committee Appointed by a Public Meeting, Held at Faneuil Hall, September 24, 1846, for the Purpose of Considering the Recent Case of Kidnapping from Our Soil and of Taking Measures to Prevent the Recurrence of Similar Outrages*. Boston: White & Potter, 1846.


11. [Lundy, Benjamin]. The War in Texas; A Review of Facts and Circumstances, Showing That This Contest Is a Crusade against Mexico Set on Foot and Supported by Slaveholders, Land-Speculators, &c. in Order to Re-Establish, Extend, and Perpetuate the System of Slavery and the Slave Trade. Philadelphia: Merrihew & Gunn, 1837.


Morris Pamphlet Compilation No. 2 (1851). [Front paste-down: “Robert Morris – 1851.”] This bound volume is a collection of the following 33 pamphlets, compiled by Morris, and listed in the order in which they appear in the volume (his handwritten table of contents is slightly out of order):

first page, partially illegible, but includes “Robert Morris Esq. of Boston.”


4. Giddings, Joshua R. *Speech of Mr. Giddings, of Ohio, on His Motion to Reconsider the Vote Taken upon the Final Passage of the “Bill for the Relief of Owners of Slaves Lost from on Board the Comet and Encomium”: House of Representatives, February 13, 1843.* [Washington, 1843?].


7. [Giddings, Joshua R.]. *Pacificus: The Rights and Privileges of the Several States in Regard to Slavery; Being a Series of Essays, Published in the Western Reserve Chronicle, (Ohio,) after the Election of 1842.* [Warren, OH, 1842?].


13. [Slade, William]. *Speech of Mr. Slade, of Vermont, on the Abolition of Slavery and the Slave Trade in the District of Columbia: Delivered in the House of Representatives of the U.S., December 20, 1837; To Which Is Added the


15. Winthrop, Robert C. *Speech of the Hon. Robert C. Winthrop, of Massachusetts: Delivered in the U.S. House of Representatives Feb. 21st, in Committee of the Whole on the President’s Message*. Boston, 1850. [In the form of a folded newspaper clipping from the *Atlas*, Boston, February 28, 1850.]


21. Massachusetts Joint Special Committee [Joseph T. Buckingham, Chair]. *The Joint Special Committee, to Which Was Referred so Much of the Governor’s Address as Relates to the Subject of Slavery*. Senate No. 51. [Boston, n.d., c. 1851].


27. Massachusetts Joint Special Committee [Charles Francis Adams, Chair]. *Report from the Joint Special Committee on Fugitives from Slavery and the Petition of George Latimer*. House No. 41. [Boston, n.d., c. 1843].
28. Massachusetts Joint Special Committee. *The Special Joint Committee to Whom Was Referred so Much of the Annual Message of His Excellency the Governor, as Relates to the Annexation of Texas.* House No. 12. [Boston, n.d., c. 1845].


Rogers, Nathaniel Peabody. *A Collection from the Newspaper Writings of Nathaniel Peabody Rogers*. Concord, NH: J.R. French, 1847. [SNV; EE]


———. *The Mayflower, and Miscellaneous Writings*. Boston: Phillips, Sampson, 1855. [SUB; EE]

———. *The Minister’s Wooing*. New York: Derby & Jackson, 1859. [SUB; EE]


Sumner, Charles. *Recent Speeches and Addresses*. Boston: Higgins & Bradley, 1856. [SUB; A; EE]


Whittier, John Greenleaf. *Leaves from Margaret Smith’s Journal in the Province of Massachusetts Bay, 1678–9*. Boston: Ticknor, Reed & Fields, 1849. [SUB; EE; newspaper clipping with review of book glued to extra front leaf]

———. *Literary Recreations and Miscellanies*. Boston: Ticknor & Fields, 1854. [SUB; EE]

———. *Old Portraits and Modern Sketches*. Boston: Ticknor, Reed & Fields, 1850. [SUB; EE]

———. *The Tent on the Beach, and Other Poems*. Boston: Ticknor & Fields, 1867. [SUB; EE]


Appendix 2: Morris Ownership Indicia (Images)

Typical Morris signature (from Goodell)

Inscription and transcription of Wordsworth poem (from Beard)
Handwritten table of contents for Morris Pamphlet Compilation No. 1 (1851)
Back to the Future: ABA Law School Accreditation in the 21st Century and America’s First Law School’s Battle to Survive in the 1970s*

James S. Heller** and Simon F. Zagata***

In the mid-1970s, the ABA threatened to pull accreditation from the College of William & Mary’s law school. The ABA’s motives were questioned as it had never taken this step before. Would a more aggressive 21st century ABA have stripped accreditation from well-established schools like William & Mary? The reader can be the judge.

Introduction ......................................................... 509
The William & Mary Law School Accreditation Crisis ..................... 518
The Question ........................................................ 549
Conclusion .......................................................... 550

Introduction

¶1 The American Bar Association, which determines whether graduating law students can sit for bar exams in most states, began accrediting U.S. law schools in 1923. In all the years that the ABA has been in the law school accreditation business, it had never revoked accreditation from a fully accredited school—until the spring of 2018.1 At the May 10–12, 2018, meeting of the Council of the Section of Legal Education and Admissions to the Bar—the ABA’s accreditation arm—approval was withdrawn from Arizona Summit Law School, which had been

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1. Email from Barry Currier, Managing Dir., ABA Section of Legal Educ. & Admissions to the Bar, to author (Nov. 16, 2017 9:12 EST); email from Mary McNulty, Senior Pub., Mktg. & Tech. Specialist, ABA Section of Legal Educ. & Admissions to the Bar, to author (Nov. 20, 2017 5:28 EST); email from James P. White, former ABA Consultant on Legal Edu., to author (Nov. 27, 2017 2:19 EST).
accredited since 2007. On a roll, one year later the ABA pulled its accreditation of San Diego’s Thomas Jefferson School of Law.

¶2 In the mid-1970s, the future of a far more established law school—America’s oldest actually—was in jeopardy when the ABA threatened to pull accreditation from the College of William & Mary’s Marshall-Wythe School of Law. Was the threat genuine, or was it, as some suspected, a tool for the school to get additional faculty and staff, funding, and a new building? We will never know because the Commonwealth of Virginia, the college, and the law school eventually acceded to the ABA’s demands.

¶3 The ABA seems to be getting serious about law school accreditation, but what role does it actually play? Does the ABA help maintain a quality legal education for law students and competent representation for those who hire lawyers? Or is it just a hammer used by law schools to get additional resources? What, if anything, can William & Mary’s accreditation crisis four decades ago teach us about how law school accreditation works today?

¶4 In 2011, the New York Times wrote,

This has been a difficult year for the A.B.A. It has been peppered with insistent letters by members of Congress . . . over a number of accusations of failings. Among the contentions is that the organization has not done enough to prevent law schools from overstating the current job prospects of graduates. The A.B.A. has lobbed back lengthy and detailed letters to Capitol Hill, which have done little to lower the temperature. Threats of Congressional hearings have surfaced in the news media. In this volley of correspondence, the A.B.A. has noted that it would be an antitrust violation to cap or limit the number of law schools.

But the ABA’s problems were minor compared with what was happening in U.S. law schools, many of which suffered from recent graduates’ low state bar passage rates, low employment, and high debt. These problems, along with plummeting applications, have been well documented. And in some respects, they have gotten worse over the last half-dozen years.

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%5 J.D. enrollment, which peaked in 2010–2011 at 147,525 students, is down 25 percent; 111,561 students were enrolled in the 203 ABA-accredited, J.D.-conferring law schools in academic year 2018–2019.6 Law school applications are down more than 40 percent, from a high of 100,600 in 2004 to 60,678 in 2018.7 The numbers are so bad that National Jurist began an article on the 2017 entering J.D. class with these words: “Flat is the new up. At least when it comes to law school enrollment.”8 Although the recent news is a bit better—the majority of U.S. law schools increased their 1L class sizes in 2018—enrollment is still a far cry from a decade ago.9

%6 Since August 2017, Arizona Summit (lost its ABA accreditation), Whittier Law School (fully accredited), Charlotte Law School (on probation), Indiana Tech ( provisionally accredited), and Valparaiso have closed.10 John Marshall (Atlanta) is on probation, and UNT Dallas is provisionally accredited.11 (Chicago’s John Marshall Law School was not on the ABA’s radar, but it will become part of the University of Illinois at Chicago.)12 That still leaves 194 fully accredited, J.D.- conferring


11. ABA, ABA Approved Law Schools, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html [https://perma.cc/ZV1L6-NFN7].

law schools—with enrollment numbers at the same level as 1975–1976 when there were only 163 ABA-accredited schools.¹³

¶7 A consistent and considerable increase occurred in the number of law students from 1963–1964 to 2010–2011, after which enrollment began to decline.¹⁴ With fewer applicants, acceptance rates soared from 56 percent in 2004 to 75 percent in 2017.¹⁵ A 7 percent increase in applicants the following year—and probably also because a few schools that accepted nearly all of their applicants were no longer accepting new students—resulted in a slightly lower acceptance rate (72 percent) in 2018.¹⁶

¶8 Not surprisingly, the decrease in total J.D. enrollment coincides with the beginning of the Great Recession of 2008; students who matriculated in 2008 graduated in 2011. Simple math shows that law schools averaged about 680 J.D. students 40 years ago, and 540 students today.¹⁷ That’s a lot of lost tuition revenue. This financial pressure is compounded by an increase in scholarships and grants¹⁸ and decisions by many schools to freeze or even reduce tuition.¹⁹ Formerly cash cows for their universities, many law schools are going hat-in-hand to their central administration seeking money to operate.²⁰

¶9 Below is data from the ABA of student enrollment in accredited law schools from 1963–1964 through 2018–2019.²¹


¹⁷. See Enrollment and Degrees Awarded 1963–2012 Academic Years, supra note 13; Statistics, supra note 13; Statistics Archive, supra note 13.


²¹. See Enrollment and Degrees Awarded 1963–2012 Academic Years, supra note 13; Statistics, supra note 13; Statistics Archive, supra note 13.
Twenty-six law schools have been fully or provisionally accredited by the ABA since 1998. It’s hard to blame the universities or for-profit companies that established law schools a decade or two ago when enrollments—and revenue—were surging. But there are two good targets: the federal government student loan program and the ABA.

¶10 Many have criticized a student loan program that is both too generous and too lax. The federal government will loan a student money for living expenses and law school tuition—even for a non-ABA-accredited school—notwithstanding the...
quality of the school or, for want of better words, the quality of the student.25 It took for-profit Charlotte School of Law’s violation of Department of Education regulations and noncompliance with ABA standards for the agency to pull the plug on Charlotte’s qualifying for federal student loan programs.26 To combat the problem, others have proposed that schools assume some of the lending risk of student default, a position we agree with.27

¶11 How much money did Charlotte, owned by the for-profit InfiLaw System (which also owns Florida Coastal School of Law and now closed Arizona Summit Law School),28 reap from the DOE’s pool of money? “During the 2015–16 award year, CSL enrolled 946 federal aid recipients and received more than $48 million in federal student aid funds, primarily federal student loans.”29 Charlotte Law closed down on August 11, 2017, after the ABA rejected the teach-out plan it submitted to the Council on Legal Education, and the University of North Carolina revoked, and then declined to extend, Charlotte’s operating license.30

¶12 Our other target is the American Bar Association. Concededly, you could argue that the ABA is not blameworthy, that it could not be aggressive (or even assertive) after being subject to several lawsuits challenging the ABA accreditation process under federal antitrust laws.

¶13 In 1993, the Massachusetts School of Law (MSL) engaged in a five-year fight with the ABA in the media and in the courts. The legal battle ended in 1998 after MSL lost several district court cases and appeals to the Third Circuit and the U.S. Supreme Court. But a small victory was achieved when, after being sued by the U.S. Department of Justice for violating the Sherman Act, the ABA agreed to change its accreditation procedures.31

¶14 MSL wasn’t the only party unhappy with the way the ABA accredits law schools—or the fact that it accredits schools at all. In 1989, four years before MSL’s

lawsuit, third-year law students at CBN (the predecessor to Regent Law School in Virginia Beach, VA) sought a preliminary injunction requiring the ABA to provisionally accredit the law school. The court denied the plaintiffs’ motion, granted the ABAs motion for summary judgment, and dismissed the suit.32 Students at Barry University School of Law didn’t learn much from the CBN lawsuit; they unsuccessfully sued in 2001 to force the ABA to provisionally accredit Barry.33 In 2011, Lincoln Memorial University’s Duncan School of Law claimed that the ABA violated antitrust laws and deprived the school of due process for denying it provisional accreditation.34 LMU withdrew the lawsuit after the ABA allowed the school to resubmit its application for provisional accreditation.35 More recently, Thomas M. Cooley Law School lost its motion for a temporary restraining order to prevent the ABA from publicizing its November 13, 2017, letter regarding the school’s failure to meet ABA standards.36 Although Cooley lost the battle, it won the war: in April 2018, the ABA reversed its decision that Cooley was not in compliance.37

¶15 The ABA is taking it from both sides regarding now-closed Charlotte. In May 2018, the law school sued the ABA for violating due process, shortly after its sister InfiLaw-owned school, Florida Coastal, sued the accrediting body.38 One week earlier, a former professor at Charlotte Law, and a graduate of the law school, sued the ABA for negligently accrediting it.39

¶16 Although the ABA hasn’t yet lost a court battle, it rarely bared its teeth for two decades after its 1995–1996 consent decree with the Department of Justice that fundamentally changed how it operated.40 The ABA agreed (1) not to collect or

disseminate the salaries of law school employees, (2) to change its procedures so that the accreditation process would not be controlled by law faculty, and (3) to abandon policies that both denied accreditation to for-profit law schools and prohibited ABA-approved schools from accepting credits from nonaccredited schools. Lawyers being lawyers, the ABA didn’t comply fully with the settlement agreement until 2006, after the Justice Department filed a petition asking a federal district court to hold the association in civil contempt.41

¶17 Because state bar associations ultimately determine who can practice law, some contend that the ABA’s role in accrediting law schools should be muted.42 Several of the ABA’s critics write that accreditation requirements impede innovation, limit the number of minority law students and lawyers, and drive up the costs of both legal education and legal services.43 Others, somewhat echoing the Department of Justice, say that the ABA and AALS act as cartels that benefit their (mostly white) law professor members, rather than law students and those who need legal services.44 As former Lewis & Clark Law School Dean James Huffman put it:

[T]he core factor in the escalating cost of legal education is that the guild of law school professors long ago captured the combined regulatory apparatus of the American Bar Association (ABA) and the AALS. We law professors have constructed a legal education model that, first and foremost, serves faculty interests—higher salaries, more faculty protected by tenure, smaller and fewer classes, shorter semesters, generous sabbatical and leave policies, and supplemental grants for research and writing. We could not have done better for ourselves, except that the system is now collapsing.45

¶18 The Department of Education joined the fray in 2016, attacking the ABA for being too lax. In June 2016, the DOE’s National Advisory Committee on Institutional Quality and Integrity proposed suspending the ABA’s accreditation power for new law schools for one year for allowing law schools to enroll students who had a high chance of not completing law school or not passing the bar, and by not putting schools on probation for violating ABA standards.46 Rather than suspend...
the ABA’s accreditation power, the DOE’s chief of staff gave the ABA 12 months to comply with DOE regulations, and another month to submit a compliance report.47

¶19 The DOE may be credited for at least trying to put a little more bite into the ABA’s bark. Three years ago, the ABA failed in its attempt to tighten up Standard 316 dealing with bar passage rates by requiring a law school to show that 75 percent of its graduates pass a bar exam within two (rather than five) years. After fielding criticism from nearly half of the U.S. law school deans, the ABA House of Delegates voted down the proposal in January 2017. But in May 2019, with the Council of the ABA Section of Legal Education and Admissions to the Bar now having the final say on accreditation matters, the two-year rule is now in effect.48

¶20 It took 95 years for the ABA to revoke accreditation from a fully accredited law school. But in recent years, a more activist ABA de-accredited Arizona Summit and Thomas Jefferson, placed Charlotte School of Law on probation (essentially forcing the school to close), and censured Valparaiso and Texas Southern’s Thurgood Marshall School of Law. Ave Maria, Florida Coastal, Thomas Cooley, and Appalachian also have been in the ABA’s crosshairs.49 Arguing for even more bite, Law School Transparency (LST) argues for a far more rigorous ABA, including more public sanctions, a required bar passage rate of 85 percent within two years of graduation, and an exam to identify students who should not continue school after the first year.50


¶21 With the proliferation of digital information, online media, and social network websites, what’s been going on in the world of legal education over the last two or three decades is well documented and pretty easy to find. What is far less known—with contemporary newspaper articles, correspondence, and other documents buried in file cabinets—is how the William & Mary Law School, founded in 1779 as the first law school in the United States, was threatened with losing its ABA accreditation in the 1970s.

¶22 Because William & Mary’s problems were both external (lack of funding from the Commonwealth of Virginia) and self-inflicted (neglect from the college administration), there is abundant correspondence to and from law school and college administrators, disgruntled students and alumni, and state officials. We also see an ongoing dialogue with the ABA, as well as numerous local newspaper articles that document what appeared to be the law school’s near-death experience.

¶23 One may wonder whether the ABA was a paper tiger 40 years ago, baring its teeth at William & Mary even though it would never bite. Was it just a ploy by the ABA—with W&M a willing accomplice—to force the Commonwealth of Virginia to provide more funding and a new building for the law school, or was the ABA really prepared to pull the accreditation of America’s first law school? You can be the judge.

The William & Mary Law School Accreditation Crisis

¶24 On February 28, 1973, Peter L. Wolff, Assistant to the Executive Director of the Association of American Law Schools, sent a memorandum regarding the “forthcoming ABA-AALS joint visit to the College of William and Mary School of Law, which will take place on March 19–21, 1973.” In anticipation of the inspection, School of Law Dean James P. Whyte directed J. Madison Whitehead, the law librarian, to do several things: enforce the no smoking rules, exclude all animals from the library, reshelve all books and periodicals, repair broken chairs, make sure chairs were neatly placed around tables, remove boxes from passageways, dust benches, and police all areas for neatness. If getting into those weeds wasn’t enough, Whyte also told Whitehead to “be prepared to explain to inspectors the state of the reclassification of the collection.”

¶25 Not long after the site visit, the ABA and AALS submitted undated reports “based on information gathered by the team’s visit and from the Inspection Questionnaire, dated March 1, 1973, prepared by Dean James P. Whyte of the School of Law.” Early on, the accrediting bodies noted that the law school was approved by the ABA in 1932, admitted to the AALS in 1936, and had a distinguished history.

The College of William and Mary was chartered in 1693. The Marshall-Wythe School of Law traces its history to the creation of a professorship in Law and Police by resolution of

51. Memorandum from Office of Exec. Dir., Ass’n of Am. Law Schs., to Professor Thomas J. O’Toole, Professor Cameron Allen, & John P. Tracey, Esq. (Feb. 28, 1973) (on file with author).
53. Id.
the Board of Visitors of the College on December 4, 1779, as part of a major revision in curriculum attributed to the influence of Thomas Jefferson, then Governor of the Commonwealth of Virginia and a member of the Board of Visitors. The chair of law at the College, first held by George Wyeth [sic], is the oldest in the United States.55

The ABA and AALS complimented William & Mary’s top administrators, Vice President for Academic Affairs George R. Healy and President Thomas A. Graves, Jr., for being “well informed regarding all aspects of the law school and current trends in legal education,” and wrote that neither evoked surprise “of the concerns of the team regarding the special needs of the law school in areas such as facility expansion, library resources, and increased salaries for the Dean and faculty.”56

¶26 That was the high point. Although Healy and Graves “viewed the law school as a priority in the overall College administration . . . [u]nfortunately, the special problems and needs of this law school require more than a sympathetic institutional administration.” The problems and needs “were largely the result of inadequate financial resources being appropriated by the legislature.”57

¶27 Blaming the law school’s budget woes on the Virginia General Assembly stemmed from the committee’s finding that state funding depended on how the Commonwealth classified its universities.

William and Mary suffers from an invidious classification as compared with the University of Virginia. . . . Since the students must prepare for the same bar and serve the same population, this discriminatory practice is unjustified. The problem is compounded by the fact that the system operates to give William and Mary an inadequate financial budget, faculty salaries 30% lower than at Charlottesville, and deficient physical facilities.58

¶28 The team was not finished. Other concerns identified in the next eight pages of the report included

• large classes;
• unimpressive scholarly output by the faculty;
• a library with a weak collection, insufficient space, and a staff much too small;
• a weak clinical program; and
• inadequate administrative and student office space.59

Some of the inspection team’s concerns were due to a surge in enrollment at the law school. From 190 students in 1969–1970, total enrollment one year later was 308 due to a huge entering class of 182 J.D. students. When the ABA visited in March 1973, the law school had 388 students. Had its representatives visited one year later, they would have found 459 students crowded into classrooms, the library, and student office space.60

¶29 Despite these problems, the ABA and AALS wrote that the law school is a sound, lively though not exciting, institution of learning where a relatively traditional
program of teaching and style of administration are followed. It has just passed through a period of rapid expansion. This has left it with sub-marginal physical facilities, significant library deficiencies, and an inadequate operating budget. Nevertheless, the quality of the School was not sacrificed during the expansion. Able leadership has left its mark.\textsuperscript{61}

The ABA concluded that although the law school met its general goals, it failed to “fully satisfy 602(a) of the Standards” (the library collection) and that in the school’s “present overcrowded condition it falls short of the Standard 704 with respect to library seating.”\textsuperscript{62} Finally, it required the law school dean to report to the ABA Section on Legal Education and Admission to the Bar on its progress regarding “the physical plant needs of the School”; these reports were to be submitted at least every six months.\textsuperscript{63}

\textsuperscript{¶}30 Vice President Healy wrote that the college was relieved that the ABA team laid “considerable blame upon Richmond and the state appropriations rather than the internal College administration” and “that their criticism did not, in sum, amount to a negative recommendation.”\textsuperscript{64} Healy also hoped that the ABA/AALS report would result in substantially better state support.

\textsuperscript{¶}31 On June 27, 1973, Millard H. Rudd, the consultant on legal education to the ABA (and soon-to-be executive director of the AALS), wrote to Dean Whyte, enclosing a copy of the reinspection report that would be submitted to the ABA Council and its Accreditation Committee. Rudd also wrote that he would notify William & Mary of the Council’s action after its August meeting.\textsuperscript{65}

\textsuperscript{¶}32 Unfortunately, we cannot uncover other documents regarding the 1973 inspection in our archival files from the date of Rudd’s letter until May 1975—nothing from the ABA or the AALS, and no internal memoranda. We can, however, cobble together some of what transpired during this two-year period from newspaper articles. Several documents from 1972 regarding ABA accreditation inspections shed further light on its accrediting process and purpose.

\textsuperscript{¶}33 Six months before the W&M inspection, Rudd sent a memorandum to all law school deans whose schools were scheduled to be reinspected.\textsuperscript{66} In his memo, Rudd wrote:

> The foremost purpose of this [reinspection] program is to help the law school visited. To facilitate the accomplishment of this, the dean should write a letter to the visiting team describing the goals that the school has set forth for itself and evaluating how well the law school is accomplishing its objectives. This letter should also identify the areas of the law school’s strengths and those areas of its program that need additional attention.\textsuperscript{67}

He continued: “A second purpose is, of course, to determine whether the law school remains in full compliance with the accreditation criteria,” and a “third purpose is to identify and report on the developments in curriculum, teaching,

\textsuperscript{61} Report on the Marshall-Wythe School of Law, supra note 54, at 12.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Internal Communication, George R. Healy, Vice Pres. for Acad. Affairs, William & Mary Law Sch., to James P. Whyte, Dean, William & Mary Law Sch. (June 8, 1973) (on file with author).
\textsuperscript{65} Letter from Millard H. Rudd, Consultant, ABA, to James P. Whyte, Dean, William & Mary Law Sch. (June 27, 1973) (on file with author).
\textsuperscript{66} Memorandum from Millard H. Rudd, Consultant, ABA, to Deans of Approved Law Schools Scheduled to be Reinspected (Sept. 1972).
\textsuperscript{67} Id. at 1.
research, public service, and the like at the law school that would be of interest to others in legal education. 68

¶34 The main purpose of the inspection process—from the ABA’s own mouth—was not to see whether a law school met the criteria for accreditation. 69 The “threat” of losing ABA and/or AALS accreditation was used as leverage for a law school to get what it needed (or wanted) from its parent university and, if it was publicly funded, the state government. An unfavorable ABA/AALS inspection report could help a law school that itself identified, for those accrediting bodies, “areas of its program that need additional attention.” 70

¶35 The ABA Standards from the early 1970s do not seem to have been very rigorous. In an undated news release that appears to be from 1973, the ABA wrote that it “adopted new standards which set higher, but more flexible, requirements for ABA approval of law schools.” 71 The new standards required that a law school have at least six full-time faculty members (raised from the 1921 requirement of three full-time faculty), and at least one full-time teacher for every 75 students. The ABA also required that law schools “offer training in professional skills, such as counseling, drafting, and trial and appellate advocacy.” 72

¶36 William & Mary reacted quickly to the ABA/AALS reports. A document that appears to be from 1974 indicates that W&M President Thomas A. Graves, Jr. appointed a Space Reassignment Committee, chaired by Executive Vice President Carter Lowance, “charged with the responsibility for equalizing the adequacy of facilities assigned to the various departments and schools and for making the best possible use of all available space.” 73 Half of the five-page report addressed the law school:

Most of the remaining implementation of the long-range plan for space utilization now depends upon the availability of the proposed Law Building. There has been a great deal of discussion of this project, in the press as well as elsewhere. The unacceptability of the present facilities available for the Marshall-Wythe School of Law in terms of the accreditation standards of the American Bar Association has been widely publicized and probably need not be reemphasized here, although the importance of meeting accreditation standards should certainly not be minimized.

. . .

It seems to be generally accepted that the present facilities of the School of Law are inadequate by any standards. Both the faculty and, probably more critically, the library are scattered across the campus among a number of buildings. In other words, something must be done. 74

Getting into more detail, the report noted that

• converting Marshall-Wythe Hall into a law library would cost $2,000,000 and would take 18 months;

68. Id. at 2.
69. Id.
70. Press Release, ABA, Higher Requirements for Law Schools Approved by the ABA House of Delegates (1973?) (on file with author).
71. Id.
72. Id.
73. Utilization of Academic Space at the College of William and Mary, author unknown (1974?) (on file with author).
74. Id. at 3.
• such a remodeled library would be filled to maximum capacity from the start;
• renovating Old Rogers for the law school would cost $1,600,000;
• the site would be more than a mile from the National Center for State Courts;
• the two old buildings would have limited life and high maintenance costs; and
• there would be no space to locate the law school during the renovation period.75

¶37 Stating that both the business and education schools would benefit by moving the law school off campus, the author wrote that a new law building was the logical choice.

In summary, William and Mary has developed a long range plan for utilization of academic space. The plan was recognized as a significant contribution by the State Council of Higher Education and other State agencies. We have moved forward with the implementation of the plan in good faith. Further progress is dependent upon the availability of the proposed Law Building. There appears to be significant advantages to the new buildings when compared to the available alternative. The advantages would apply to the entire College, not only the School of Law.76

Things appeared to be looking up at the law school; by 1974, the student body had doubled in only four years, there were more than 20 tenured or tenure-track faculty (12 under the age of 40), and the college appeared committed to addressing the accrediting agencies’ concerns over its facilities.

¶38 Law school facilities actually had been on the college’s radar for years. In a 1971 letter to a law student, Graves wrote:

While ideally we would have liked very much to construct a new Law School building, our plans to renovate Rogers Hall were based on conversations with State officials and with various College officials, including the Dean of the Law School. It became all too apparent to us that there was very little likelihood of getting a new Law School building within the next several years. However, as you know, the expansion of the Law School to an enrollment of approximately 400 students will make it essential that the School has more space within the immediate future.

... 

Let me add that while William and Mary may be primarily an undergraduate institution in terms of numbers and character, its strength and prestige, in my opinion, as a great small national university is derived in a substantial way from the excellence of its graduate and professional schools. The Law School has my full and unqualified support in its efforts to move toward its full growth and the highest level of national prominence.77

¶39 A few months earlier, the media had picked up the story—one of many articles that would appear over the next several years. The January 10, 1974, Richmond Times-Dispatch reported “the Marshall-Wythe School of Law at the College of William and Mary received a ‘tremendous boost’ Wednesday with the governor’s request to the General Assembly for an expanded facility and a $500,000 pledge

75. Id. at 4.
76. Id. at 5.
from its alumni for support.”

D. Wayne O’Bryan, president of the Law School Association, “indicated that the pledge ‘was made on the assumption that the General Assembly will appropriate the $4,850,000 necessary to construct a modern facility for the school of law.’”

¶40 O’Bryan’s optimism was based on Governor Linwood Holton’s address at the opening session of the Virginia General Assembly where Holton “voiced strong support of Virginia’s two state-supported law schools . . . and that expansion in Williamsburg would allow for an additional 150 law students and would cost well below the $12 million estimated sum for initial financing of a third state law school.”

¶41 Despite a state budget shortfall, Holton said that “[t]he capital outlay request in the budget deserves special comment, namely the proposed new building for expansion of the law school of the College of William and Mary.” He continued:

Although there have been suggestions that a new law school be built in another area of the State, I feel that the Commonwealth simply cannot afford or support three state law schools. I therefore recommend that a new building be constructed at this, the oldest law school, after all, in the United States. I urge you to appropriate both planning and construction money at this session to dedicate this expansion of the Marshall-Wythe School of Law on July 4, 1976, the 200th anniversary of the signing of the Declaration of Independence. I can think of nothing more appropriate for us to do to commemorate this event.

The Times-Dispatch contacted Dean Whyte, who “commented via telephone from Atlanta that the two announcements Wednesday ‘give more than a significant boost, they give a tremendous boost to our law school efforts.’”

¶42 But what Holton wanted made little difference; his term as governor would end three days later. Newly installed governor Mills E. Godwin, Jr. and the General Assembly did not follow up on Holton’s grand scheme of having a legal center at William & Mary with a new law building located adjacent to the National Center for State Courts, a few blocks from the college’s main campus. It was time for lobbying by the college and its friends.

¶43 Soon after Godwin took office, B. Walton Turnbull (W&M ’49), Executive Vice President of United Virginia Bank (now Truist, after the 2019 SunTrust/BB&T merger), wrote to state senator Edward E. Willey, making “a special plea for planning money for the new Marshall-Wythe School of Law.” After noting that Virginia’s three other law schools—the University of Virginia, T.C. Williams (University of Richmond), and Washington and Lee—all had or were building new law school facilities, Turnbull wrote:

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79. Id.
81. Holton, supra note 80.
82. Id.
83. State Staff, supra note 78.
William and Mary is the only college or university in the State, either public or private, that does not have a new building for its law school. In my judgment, it is a disgrace that the State has never been willing to provide William and Mary with adequate facilities to enable it to promote the Marshall-Wythe School of Law as Virginia’s oldest law school. In light of the present situation and the continuing demand of students for a legal education, I urge you to strongly recommend that funds be allocated for planning the proposed new Marshall-Wythe Law School Building.\(^{85}\)

\(^{44}\) Dr. Robert J. Faulconer (W&M ’43) told state delegate J. Warren White that “[t]he proposal of Governor Godwin to defer building the new law school for William and Mary is unthinkable for several reasons,” including the National Center for State Courts’ future move to Williamsburg and the possibility of the law school losing its accreditation or closing, and that deferring building “can only mean indefinite postponement, for building costs are skyrocketing. . . . I know you will use your good offices to assure that the State, and nation’s oldest law school will not be destroyed for the sake of short term expediency.”\(^{86}\)

\(^{45}\) At the end of 1974, the Times-Dispatch followed up with another article on the law school’s accreditation and the lack of progress toward a new law school facility. The reporter, Wilford Kale,\(^{87}\) referring to a staff report issued on December 3 by the State Council of Higher Education, wrote, “the American Bar Association and the Association of American Law Schools feel that state support of the William and Mary law school is ‘submarginal’ and that accreditation of the law school is, therefore, in jeopardy until deficiencies are corrected.”\(^{88}\) Dean Whyte was quoted as saying, “to say our accreditation is in jeopardy is a bit of an overstatement. We’re not on the verge of going out of existence.”\(^{89}\)

\(^{46}\) Although the General Assembly eliminated from the 1976–1978 biennium budget former governor Linwood Holton’s request for $4.8 million for a new law school building, it did provide funds for architectural planning, along with money to upgrade faculty salaries and the law library. Appreciating what they could get, the William & Mary administration did not want to ruffle feathers in Richmond. President Graves commented that the college would not ask the 1975 General Assembly for a new law school building because “[w]e’ve been asked only to submit a request [for funds] if they are absolutely of an emergency nature. I talk in terms of critical need and absolute need when I talk about a new law school building. . . . But I can not honestly talk about the new project as an emergency.”\(^{90}\) Whyte followed Graves’s lead; the dean was “certain that the accreditation agencies ‘will give us plenty of time’ to secure our new building and meet their requirements.”\(^{91}\)

\(^{47}\) Shortly thereafter, William Swindler, a constitutional law professor at the law school from 1958–1979, followed suit, writing that when the law school cele-


\(^{87}\) Kale, a longtime Williamsburg resident, wrote a history of the college, Hark Upon the Gale: An Illustrated History of the College of William and Mary in Virginia. The first edition was published in 1985, the second in 2007.


\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.
brated the 200th anniversary of George Wythe’s appointment as Chair of Law and Police in December 1979, it “should be functioning out of a new law complex, consisting of its own building and a companion facility housing the headquarters of the National Center for State Courts. . . .”  

¶48 James White, Consultant on Legal Education to the American Bar Association, visited the law school on March 19–20, 1975. White was charged to report to the ABA’s Council of the Section of Legal Education and Admissions to the Bar “on progress made and being made . . . with regard to concerns expressed in the previous inspection report.”  

After commending the college and law school for providing additional monies for “faculty support and library growth,” White made the following points in a letter to Graves and Whyte:

The Law School has possibly the most inadequate physical plant of any ABA approved law school in the country. . . . It is my opinion, given the dearth of adequate and satisfactory condition of the facilities at the College of William and Mary, [a new law school building] should be of the very highest priority, both within the College and within the State College System. Continued instruction and research in existing facilities is not possible.

The fringe benefit package available to the Marshall-Wythe School of Law faculty is one of the lowest in monetary value of all ABA approved law schools . . . It seems to me very difficult for the oldest Law School in the United States to recruit the kind of faculty which the Dean and faculty wish to recruit, given the salary structure and fringe benefits of the Law School.

Given the fact that the Library is in a bifurcated physical setting and that professional librarians should man both parts of the library at all times, it seems to me imperative that at least three additional professional librarians are provided in the forthcoming academic year.

It was anticipated that an additional $35,000–$40,000 be added to the book budget to compensate for inflation. . . . [T]his funding is badly needed to strengthen the Law School Library which is approximately at the range of 80,000 volumes, a minimum for a law school the size of the Marshall-Wythe School of Law. Additionally, more clerical staff are needed to adequately serve the existing Law School Library. A law library is the heart of the law school.

It is imperative that the University Administration recognize the Law School as a graduate and professional institution—one that requires a higher FTE student funding than is given in normal undergraduate programs and akin to that level of support for graduate study at the doctoral level.

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94. Id. at 2.
95. Id. at 3.
96. Id. at 3–4.
97. Id. at 4.
The school may not admit applicants who do not appear capable of satisfactorily completing the program. . . . I found that there was substantial influence by the Central Administration in admissions and some difficulties arising from this influence. . . . I would suggest that there cannot be interference or influence exerted by the Central Administration in the operation of their admission procedures.98

. . .

During my visit . . . six faculty members were recommended for promotion by the faculty Promotion and Tenure Committee . . . but were not recommended by the Vice President for Academic Affairs, Dr. Healy. Dr. Healy informed me that he believed there should be parity between promotion practices in the College of William and Mary and its Law School. . . . This matter is particularly troublesome to me and I believe will be troublesome to the Council and its Accreditation Committee. . . . I would suggest that the action of the University, taken in spite of the recommendations of the law faculty Promotion and Tenure Committee and Dean Whyte is clearly in violation of Standards 204 and 405.99

White concluded by asking the college to update him “as to developments which have taken place subsequent to my visit and matters about which I am particularly troubled, that is, funding and promotion.”100

¶49 Whyte and Graves replied to White on June 3, 1975.101 As for the facility, they concurred that the “present facility is too small and crowded for our current enrollment,” that “plans have been completed for a new building,” that “the job of obtaining funding for construction of the new building remains and will continue to remain the number one priority of all William and Mary capital projects,” and that the college was “making every possible effort” to convince the State Council of Higher Education and state officials that a new law school building for W&M “should be first on the state-wide priority list for new educational buildings in the 1976–78 biennium.”102 Strategically, they welcomed “any assistance the American Bar Association might choose to offer in convincing” the State Council and the General Assembly “of the urgent need for a new law building.”103

¶50 Whyte and Graves next addressed funding, writing that the college made substantial progress on salaries (rising from a median of 134th out of 148 law schools in 1973–1974 to 94th among 156 schools in 1974–1975), that the stability of senior faculty “has remained high,” and that by 1975–1976 they hoped to have four partially endowed chairs. As for the poorly funded law library, its 1975–1976 budget would increase 53 percent by 1977–1978.104

¶51 Addressing the fourth item in White’s May 15 letter, they wrote that recognizing the law school as a graduate and professional institution by the central administration “is manifest,” noting that FTE funding for law students was slightly higher than for undergraduates—$1487 vs. $1457. Finally, they noted that the law

98. Id. at 4–5.
99. Id. at 5–6.
100. Id. at 6.
102. Id. at 1.
103. Id.
104. Id.
school’s 1974–1975 budget, excluding the library, increased by 13.68 percent from
the previous year.\textsuperscript{105}

\textsection{52} Whyte and Graves then addressed the ABA’s concerns about admissions
and promotion practices. As for admissions, there was a “misunderstanding,” and
“it can be stated without qualification that no one has been admitted to the law
school who, on balance, appeared incapable of completing our program.”\textsuperscript{106} Regarding
the central administration’s failure to follow the recommendations of the law
school’s Promotion and Tenure Committee to promote six law faculty, “with our
full support three of the six candidates . . . have been granted promotions following
rather extended discussions”; they “do not believe that there were any violations of
standards 205 or 405 in this matter, and we further respectfully submit that this
matter need not be of concern to you or to the Council.”\textsuperscript{107}

\textsection{53} The ABA’s White wrote to Graves and Whyte on July 31, 1975, to report on
the July 10–13 meeting of the ABA’s Council of the Section of Legal Education and
Admissions to the Bar and its Accreditation Committee.\textsuperscript{108} As evidenced by this
detailed resolution, the college’s progress report had not alleviated the ABA’s concerns:

WHEREAS, the Council has received and considered the progress report of President
Graves of the College of William and Mary and Dean Whyte of its Marshall-Wythe School
of Law dated June 3, 1975, and the report of the Consultant on Legal Education to the
American Bar Association as the result of his visit to the College of William and Mary on
March 19, 1975; and

WHEREAS, the Council has considered the recommendations of its Accreditation
Committee; and

WHEREAS, the Council notes very grave concern with regard to the following matters:

1) the continued inadequacy of the law building of the Marshall-Wythe School of Law
and the fact that portions of the School of Law are housed in four additional buildings other
than the building of the School of Law;

2) the continued inadequacy of faculty salaries of the Marshall-Wythe School of Law,
which are below the national median and below those schools in the geographical area in
which the school is located;

3) the continued inadequacy of professional staffing support for the law library;

4) the continued need for additional strengthening of the law library;

5) the need for clarification with regard to the autonomy of the admissions process
within the School of Law;

6) the law school promotion pattern and the equating of the law school promotion pat-
tern with those of the undergraduate components of the College and the possible violation
of Standards 205 and 405;

WHEREAS, the Council expresses increased concern because of the resignation of Dean
Whyte at the conclusion of the 1974-75 academic year;

NOW, THEREFORE, BE IT RESOLVED, that the President of the College of William
and Mary and the Dean of its Marshall-Wythe School of Law are hereby notified, pursuant
to Rule IV (2), Rules of Procedure for Approval of Law Schools by the American Bar

\textsuperscript{105} Id. at 1–2.

\textsuperscript{106} Id. at 2.

\textsuperscript{107} Id. at 2–3.

\textsuperscript{108} Letter from James P. White, Consultant on Legal Educ. to the ABA, to Dr. Thomas A.
Graves, Pres., Coll. of William & Mary, and James P. Whyte, Dean, William & Mary Law Sch. (July 31,
1975) (on file with author).
that the Council has reason to believe that the Marshall-Wythe School of Law of the College of William and Mary has failed to maintain the Standards established by the American Bar Association. Further, that unless the deficiencies shown in this resolution are resolved satisfactorily on or before December 1, 1975, the Marshall-Wythe School of Law of the College of William and Mary will be placed on the agenda of the Accreditation Committee at its first 1976 meeting for the purpose of determining whether a notice for a hearing shall issue.109

¶54 White wrote that if the Council concluded that the law school did not comply with the ABA standards, “it will take appropriate action for removal of the . . . School of Law from the list of law schools approved by the American Bar Association.”110 He then outlined the process under Rule IV of the standards:

If the Council believed that an approved law school failed to maintain the Standards and did not resolve them by a certain date, a hearing would take place;

If after the hearing the Council believed the school was still not in compliance, the school could appear before the Council at yet another meeting, after which the Council would decide whether to “recommend to the [ABA] House of Delegates that the school should be removed from the list of approved schools.”111

¶55 White warned that “[i]f your Law School were removed from the list of schools approved by the American Bar Association, your graduates would not be eligible to take the bar examination in almost every American admitting jurisdiction.”112 He concluded by offering “to assist both of you in any way you might find helpful in preparing your response . . . including a visit to meet with you and your Trustees and the law school faculty to discuss the action of the Council and its Accreditation Committee if you believe such a visit would be helpful.”113

¶56 White’s letter unleashed a storm of activity both inside and outside the college. President Graves wrote to R. Harvey Chappell, Jr. (W&M ’48, B.C.L. ’50, LL.D. ’84), a member of the college’s board of visitors and rector of W&M, “in response to the understandable concern expressed at the August meeting of the Executive Committee in regard to the July 31, 1975 letter . . . from James P. White.”114 He focused on the law school’s facilities, offering various alternatives that “may be responsive to the concerns expressed in Mr. White’s letter.”115

¶57 Graves suggested that if the General Assembly moved forward with a referendum for a bond issue, and if the referendum passed, the law school could have a new building no later than September 1980:

Under this assumption, it is our judgment that the Law School should remain in its present facilities . . . for the next four years working out of them as best it can under conditions which are clearly less than ideal. This would have the Law School operating in Marshall-Wythe, in the basement of Bryan, to a very limited degree in James Blair, and to a very limited degree in Washington.116

109. Id. at 2–3.
110. Id. at 3.
111. Id.
112. Id.
113. Id. at 8.
115. Id. at 1.
116. Id.
Graves believed “that this action . . . will be sufficient evidence of our responsiveness to the American Bar Association.”

¶58 Alternatively, if the 1976 General Assembly did not move forward with a bond referendum, but acted “in a manner that is optimistic for 1977 and other conditions seem to suggest optimism, we would be inclined to urge that we hold out for the new building for one more year.” If, however, there was “little reason to hope for better things in 1977, we would be inclined to encourage the Board to abandon the new building . . . and place as a top priority for the College the renovation of Rogers Hall and some more renovation of Marshall-Wythe for the Law School.” Were this the case, Graves said that the size of the law school would have to be reduced to 350 students, as “we are agreed that it would be impossible to meet ABA standards for more than a brief period of time in a renovated Rogers and Marshall-Wythe at the present level of 450 students.”

¶59 The college’s executive committee discussed alternative means of paying for a new building, including the issuance of state revenue bonds that would be funded by an annual tuition increase at the law school of almost $1000 or an increase for all students at William & Mary of about $150. The committee decided, however, that the “$1,000 increase for law students would make the Law School non-competitive” and a “collegewide increase would not be responsive to the Commonwealth’s expressed desire that we hold down state college tuitions, and it would seriously affect internal relationships at the College.”

¶60 Graves concluded by writing that “the fact that this letter has been written is increasingly known, and it is important that we dispel rumors and be in a position to respond positively to inquiries which we shall receive from the press and others.” He also planned to use the ABA’s accreditation threat as leverage: “[w]e shall also be discussing how we can use this action by the ABA to our advantage in preliminary discussions with members of the General Assembly,” and he had “written to Carter Lowance [Governor Godwin’s chief of staff] toward this end.”

¶61 On September 4, at the request of W&M Rector Harvey Chappell, Graves shared his August 14 letter with the college’s board of visitors, informed the board that White would return to the law school on September 16, and said that he would have “more to report to you on our strategy and plans at the [September] Board meeting.”

¶62 The minutes of the law school’s first faculty meeting of the 1975–1976 academic year present a stark picture:

Dean Fischer [appointed acting dean following James Whyte’s resignation at the end of the 1974-75 academic year] reported that the letter from the A.B.A. recently received constitutes a bleak and harsh report. A.B.A. representative, J.P. White, is to be here on September 16th
and will see the President, Vice President for Academic Affairs, and Dean Fischer. Dean Fischer stated that he intends to mobilize the alumni, the Virginia Bar, and Justices Burger, Clark and Powell, in connection with the school’s need for a new building. Deficiencies indicated by the A.B.A. report include building, library books and personnel, faculty salaries, admissions interferences, and rules regarding promotion, tenure, and appointments. Professor Powell then moved that a copy be distributed to each faculty member. This motion was seconded but amended to the effect that no faculty member should release the contents of the report. As amended, the motion carried unanimously.\(^{125}\)

\(\underline{63}\) It is worth noting that Dean Fischer intended to seek support from three Supreme Court Justices. Chief Justice Burger’s and Justice Powell’s connections to William & Mary were clear. Burger helped found the National Center for State Courts (now located adjacent to the law school) and served as chancellor of William & Mary from 1986–1993.\(^{126}\) Powell was a Virginian and former partner in the Richmond law firm Hunton, Williams, Gay, Powell & Gibson.\(^{127}\) Less clear is why Fischer would contact Clark, a Texan.\(^{128}\) In addition to the motion to contact the legal elite, the faculty also voted to hold a special faculty meeting on September 16 “so that the entire faculty could meet with James White.”\(^{129}\)

\(\underline{64}\) Graves, it appears, spent the better part of the autumn of 1975 dealing with the law school’s problems. An unauthored “Statement on the Proposed New Building and Law Library for the Marshall-Wythe School of Law,” presented to the William & Mary Board of Visitors (BOV) at its September 19 meeting, described the law school accreditation problems as far back as the ABA/AALS August 1973 reinspection visit.\(^{130}\)

\(\underline{65}\) “President Graves reported to the Board of Visitors . . . regarding the serious and critical situation at the Marshall-Wythe School of Law resulting from the wholly inadequate physical facilities that are now provided,” and he reminded the board that a new law school building had been the college’s highest priority for the last three years.\(^{131}\) These other points were made during the BOV meeting:

- In December 1974, the State Council of Higher Education took the position that:

  [t]he College of William and Mary has an old and respected law school. The Council recommends that the Commonwealth would do well to increase its support from a marginal level to one which will enable it to maintain its reputation as a strong law school of national stature. With this support, especially in constructing its new building, the law school . . . will be able to expand to almost double its present size should any unforeseen need for lawyers develop;\(^{132}\)


\(^{127}\) Oyez, Lewis F. Powell, Jr., https://www.oyez.org/justices/lewis_f_powell_jr [https://perma.cc/A338-PHW6].

\(^{128}\) Oyez, Tom C. Clark, https://www.oyez.org/justices/tom_c_clark [https://perma.cc/7FS3-ZY3P].

\(^{129}\) Minutes, supra note 125, at 3.


\(^{131}\) Id. at 1.

\(^{132}\) Id.
• The 1974 General Assembly provided $218,750 in planning funds for a new building, but the Assembly had not as yet provided any construction funds;133
• A $5,105,900 new law school building was the college’s number one capital outlay project for the 1976–1978 biennium;134
• Graves informed the BOV that “the situation at the Law School was of an emergency nature. Failure to provide a new law school building and adequate funding for a law library . . . is seriously jeopardizing the Law School’s continuing accreditation” . . . threatens “the future of the oldest professional law program in America” . . . and “would make it extremely difficult to attract an eminently qualified person to provide leadership to the Law School as its new Dean,”135 and
• The National Center for State Courts’ relocation to Williamsburg “was based largely on the assumption that the new building of the Law School would be adjoined to its headquarters on College land.”136

§66 Viewing the situation as desperate, the board decided to pull out all of its guns—as well as the guns of others. It directed Graves to make relevant portions of the ABA reports and recommendations public at this time and take all appropriate steps to bring the serious problem at the Law School to the direct attention of the State Council of Higher Education, the General Assembly, the Governor, and all other individuals and groups who are in a position to take positive action in providing capital outlay funds from the General Funds of the Commonwealth for the construction of the new building, and providing adequate M&O funds for the staffing and collections of the law library, at the 1976 General Assembly.137

The college’s news office distributed a two-page press release in mid-September including the ABAs statements that the law school had “the most inadequate physical plant of any ABA approved law school in the country” and that the situation was “of an emergency nature.”138 It also reported what Graves told the BOV: that the future of the law school was threatened, that it would be difficult to attract a new dean, and that the National Center for State Courts relocated to Williamsburg in anticipation of a new law school building next door to it.139

§67 Graves sent numerous personal letters out and received several replies. One dated September 24, 1975, from W&M alumnus and Virginia state senator Hunter B. Andrews140 thanked Graves “kindly for your letter of September 22 relative to the crisis at the Marshall-Wythe School of Law.”141 Andrews assured Graves that he would “do whatever I can . . . to have a new law school built in Williamsburg.”142

133. Id.
134. Id.
135. Id. at 7.
136. Id.
137. Id. at 7–8.
139. Id. at 2.
142. Id. at 1.
Andrews’s support came with a warning: “I am led to believe our friends in Northern Virginia will continue to push for a new law school at George Mason University; and I think we must be alert for this challenge.”\textsuperscript{143}

¶68 One of the more interesting documents in our files is a letter from a third-year William & Mary law student to President Graves, reproduced below with Graves’s handwritten notes.\textsuperscript{144}

Graves invited the student to “make an appointment . . . to come in and talk with me about the questions which you have raised in your letter. My experience suggests that there are always reasonable answers to reasonable questions, when people of good will get together and try to communicate on common ground.”\textsuperscript{145}

Graves and the student did meet, and he sent her a letter sharing her concerns and expressing hope for progress.\textsuperscript{146}

¶69 The local media was quick to note the law school’s troubles,\textsuperscript{147} but the most thorough reporting came from the law school’s student newspaper, \textit{Amicus Curiae}.\textsuperscript{148} The September 30, 1975, issue had three stories plus an editorial on the accreditation crisis. The cover story began with Graves’s September 24 press conference, traced the accreditation problem as far back as August 1973, and reprinted the entire July 1975 resolution of the ABA Council.

¶70 A second story quoted Acting Dean Fischer telling W&M law students that there was “no need for any panic or feeling of insecurity,” and that “there is not


\textsuperscript{144}. Letter from [name deleted by author] to Thomas A. Graves, Pres., Coll. of William & Mary (Sept. 25, 1975) (on file with author).

\textsuperscript{145}. Letter from Thomas A. Graves, Pres., Coll. of William & Mary to [name deleted by author] (Sept. 16, 1975) (on file with author).

\textsuperscript{146}. Id.


going to be any discreditation of this law school.”

¶71 The 130 law students who attended the September 24 meeting heard from Associate Dean Timothy J. Sullivan, who would serve as dean of the law school from 1985-1992 and as president of William & Mary from 1992-2005. Sullivan told the students that “a massive, coordinated effort on the part of faculty, students and alumni will be necessary to convince the public and the state legislators of the seriousness of the situation.”

¶72 Trying to allay fears that a damaged law school reputation would harm students’ job searches, Sullivan told the assembly not to attach undue significance to the present situation, that prospective employers were more concerned with the individual than with the school he or she attends, and that students should point out to potential employers former students’ good professional records. He also said that the University of Virginia and William & Mary were not treated equally by the state legislature, and that W&M law students were not treated fairly by the college: “Law students are being cheated in terms of tuition. You’re not getting your money’s worth.” Finally, Sullivan urged the students to “act like lawyers in this situation. We need to get the facts and avoid an over-emotional reaction.”

¶73 Yet another story in the Amicus was written by Student Bar Association President Guy Strong, who first attempted to calm his fellow law students: “it is important to stress that a ‘crisis’ does not exist anywhere except in the minds of the misinformed,” “even if the College and the General Assembly do nothing about the ABA report it would take at least one and perhaps two years before we became officially ‘unaccredited,’” and the ABA’s concerns, “except the new facility, could be made within the College without outside funding or assistance.”

¶74 Strong blamed the central administration for the law school’s problems: “The part the College administration has played in the events leading up to the present drama should not be overlooked. Its lack of emphasis on the Graduate programs it controls is inexcusable, and the Law School has evidently been the victim of much of that neglect.” He then wrote that W&M law students could not afford to be passive—“we must either help plug the leaks below decks or head for the life-preservers. . . . Dean Fischer has assured me that the students will be given an important role in this strong effort to squeeze the needed funds out of the increasingly tight-fisted public servants in Richmond.”

¶75 Not finished, Strong criticized the administration’s decision not to widely share the full ABA report:

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150. Id.
152. Fischer, supra note 149.
153. Id.
154. Id.
156. Id.
157. Id.
Although every Law faculty member has a full copy of the [ABA] report, they have been directed to keep the unrevealed sections strictly secret. . . . President Graves has to realize the adverse impact this whole matter is having on the placement of third-year students and future job opportunities of the other students enrolled here. For these reasons, I call on him to release the full ABA report to the student body without further delay.158

Finally, the Amicus Curiae's editor-in-chief called for an exhibition of unity and purpose in seeking the necessary funding commitment . . . to correct the deficiencies at Marshall-Wythe which the ABA will be looking for on December 1. . . . Although the outlook is negative it is not entirely black and the events of September 24 may yet be the salvation of the being called Marshall-Wythe.159

We don't know how widely Graves or Fischer shared the entire ABA report, if at all, but a concerted lobbying effort began forthwith, which the college encouraged and tried to manage. An October 3 memorandum from Ross Weeks, Assistant to the President, updated Graves on the college's immediate efforts to ameliorate the negative repercussions of the law school accreditation matter, including

- having law professor William Swindler write an editorial in the Virginia Gazette, and offer the editorial to the Richmond Times-Dispatch and Norfolk Virginian-Pilot;
- arranging for Acting Dean Emeric Fischer to be interviewed on a local television morning show, and to try to have a segment of the interview included in evening news programs; and
- seeking Times-Dispatch editor Ed Grimsley's support for the law school.160

Weeks's message came with a warning: “Ed has detected the presence of a 'blitz' which could be counterproductive.”161 The blitz had begun. We have more than two dozen letters in our archival files from October 1975—presumably there were others we cannot account for—among college administrators, and between Graves and law school alumni, members of the Virginia General Assembly, the State Council of Higher Education, and the Virginia executive branch, about the law school's problems. All acknowledged the need to save William & Mary's law school. Some examples—

- From state senator J. Harry Michael, Jr., to Graves:

> As you know, I have for several years advocated vigorously the proposition that we needed to expand and support in every way we could the Marshall-Wythe School of Law. Frankly, at the moment I simply don't know what we'll be able to do in the 1976 Assembly.162

- From Graves to state senator Hunter B. Andrews:

> Thanks so much for your letter. . . . I realize of course that nothing definite will be known prior to the December 1 deadline which has been established

158. Id. at 8.
161. Id.
by the ABA. I feel confident that I can help them understand how the timing works here. I received numerous letters of encouragement and support such as yours following our public statement and my hope is that this will be sufficient for the ABA to hold off pending such action as the General Assembly may wish to take.\textsuperscript{163}

- From Graves to J. Harvie Wilkinson, Jr., chairman of the State Council of Higher Education for Virginia, about the law school building being given a “No. 3” priority by the Council while higher priority was given to community colleges:

  I respectfully request that the State Council raise, on an emergency basis, the proposed building for the Marshall-Wythe School of Law to its No. 1 priority for capital outlay funds from the General Fund at the 1976 General Assembly, and communicate this action to the Governor and the Chairman of the Appropriations Committee.\textsuperscript{164}

- From Graves to Daniel E. Marvin, Jr., Director, State Council of Higher Education:

  In your letter you encourage us to make known to you any special items which we deem worthy of your further attention. Accordingly, we have prepared the enclosed “Request for Reconsideration” in which we have attempted to re-emphasize and to highlight certain areas in our budget which we feel warrant funding beyond your recommendations.\textsuperscript{165}

- From a law school alumnus to Virginia governor Mills Godwin, Jr.:

  [T]he matter of inadequate facilities is not a problem that has surfaced only within the last sixty days as was suggested at our meeting with Mr. Lowance. You will note from Dr. Graves’ statement that representatives of the American Bar Association visited the Law School as far back as August of 1973. At that time, the representatives identified budgetary and space problems of a serious nature.

  I suggest that the loss of accreditation is not a situation that has recently been contrived in order to pressure you or the members of the General Assembly to include funds in the budget for the construction of a Law School building. I believe that this is evidenced by the letters referred to above.\textsuperscript{166}

- From a William & Mary undergraduate and law school alumnus to Governor Godwin:

  I am writing . . . to express my deep concern, shock and consternation concerning the law school’s possible loss of American Bar Association accreditation. It is an outrage that even a threatened loss of ABA accreditation is allowed to hang over the oldest and one of the most respected law schools in the Country.

  The loss of ABA accreditation is obviously going to have a deleterious effect upon the school, and the ability of the school to attract high quality students on a nationwide scale. . . . It will inevitably have a detrimental effect.


upon the morale of the faculty of the school, and upon the ability of the school to attract outstanding professors. . . . Finally . . . the State of Virginia will look foolish allowing its oldest and most venerable institution of higher learning to suffer the ignominy of losing its accreditation, because the State is unwilling to lend adequate financial support.

I have seen a copy of an article in the Richmond Times-Dispatch that lends support to the urgency I see in this matter. The banner headline proclaims, "W&M LAW SCHOOL HELD LACKING." The connotation (sic) of the headline is, I believe, clear—the education offered by the Marshall-Wythe School of Law is inferior. This surely will be the reaction . . . should the school lose accreditation. One must search the article to find out that the inadequacies are not in the education offered by the school, but rather in the school's physical plant, the faculty salaries, and the understaffing and inadequate facilities of the law library. These "inadequacies" can easily be remedied by application of a simple solvent, state support.167

• From a law school alumnus to Graves:

Thank you for your letter of October 1, 1975 and the unexpected pleasure of meeting with you and Jim Kelly for a few minutes Thursday morning. I hope that your meetings with Delegate Lane and Merrill Pasco were fruitful. Based on the article in Sunday's Richmond paper, it would appear that Senator Willey is going to continue to be a problem.

Our meeting with Governor Godwin was quite cordial and lasted approximately 45 minutes to an hour. We went as friends expressing concerns and hopes and did not attempt to state or make demands. We clarified a number of points about which the Governor seemed to have some misunderstanding. We expressed the hope that the Governor might find some way to include the necessary funds for a new law school building. . . .

. . . My assessment is that the Governor's comments were more realistic than pessimistic or optimistic but clearly he gave us no assurance whatsoever that the funds we are seeking would be in the Executive Budget recommendations for the 1976–78 biennium.168

• From Graves to Daniel E. Marvin, Jr., Director, State Council of Higher Education:

Dennis Cogle and I very much appreciated you and your colleagues seeing us today. Your consideration of our requests and your interest and support for the College are very gratifying. . . .

I think you should have copies of the full text of our correspondence with the American Bar Association regarding the problems at the Law School.

Only in this way will you be able to judge objectively why we have elected to make public only those portions of the letter of July 31 from Mr. James P. White which are relevant to the interests of the members of the General Assembly and the Governor's Office and on which they are in a position to take action in support of the School. The other two issues, having to do with admissions and faculty promotions, are reflected inaccurately . . . which is an additional reason why we prefer that the text of such letters not be made public. The letter which Dean Whyte and I wrote to Mr. White on June 3 tries to correct the misimpressions. . . . You have my permission to share this correspondence with Harvie Wilkinson. At the same time, I think you will both

understand why I believe it would not be in the best interest of the School, the State Council and the College to make these letters public.169

- From Philip M. Sadler, President of the Virginia State Bar, to Graves:

I think I can assure you that the whole legal profession in the State of Virginia is concerned about the accreditation of the George Wythe School of Law by the American Bar Association. If we in the State Bar can be of any assistance to you . . . please do not hesitate to call upon us.170

- From Andrew P. Miller, Attorney General of Virginia, to Graves:

I have read your letter of September 22nd with considerable interest and concern. It would be a tragedy indeed were the Marshall-Wythe School of Law to lose accreditation. . . . Obviously, the General Assembly must have an opportunity to become fully acquainted with the situation before acting on appropriations at the 1976 Session. I shall be greatly interested to see the proposal you will make to the General Assembly. . . . If I may be of specific assistance, please don't hesitate to communicate with me.171

¶79 While Graves was engaging with law school students and alumni, state officials, and the media, the William and Mary Law School Association, made up of ardent (and probably generous) law school alumni, conceived a plan to at least partially fund a new building. Hal Bonney, president of the association, shared it with Graves and the BOV:

I am directed by the William and Mary Law School Association to convey to you the following statement as a part of our desire to assist in every possible way in not only maintaining the accreditation granted by the American Bar Association but in efforts to have America's oldest law school become America's finest. . . .

Since the A.B.A. report involves deficiencies in addition to the physical plant, we presume these to be resolvable within the purview of the administration and/or the Board of Visitors. We convey the hope that they can and will be resolved immediately thereby avoiding some subsequent revelation that might impair the paramount efforts being directed toward the attainment of the facility. Indeed, these internal matters have too long existed unresolved. . . .

[T]he College holds more than 900 acres exclusive of the approximate 300 acres constituting its present campus. While keenly aware of the costly experience of educational institutions with too little land for expansion, we wonder however if it would not be timely to reassess the use of some of these distant, campus-detached properties . . . with the view of disposing of some acreage with the proceeds being used to help defray the cost of the new law school facility. . . .

[I]t would be timely for the Board of Visitors to adopt a formal resolution requesting the Council of the Section of Legal Education and Admissions of the Bar . . . to defer referral of this matter to the House of Delegates. . . . Surely the record of immediate past support of the Marshall-Wythe School of Law and the action of the College and State set forth in this letter could not be ignored.172

Bonney’s plan was also described enthusiastically, and in some detail, in the November 11 issue of the law school student newspaper:

If many students walk the halls of Marshall-Wythe with haunted eyes these days, the reason may be the ghostly flames that apparently only law students see threatening to engulf their small building. Whatever plans and efforts have been given birth by the minds of Dr. Graves and the Board of Visitors have been born beneath a blanket of silence. So perhaps it is not surprising that mutterings have arisen within the law school to the effect that faint violin notes hanging in the air outside the windows of Dr. Graves’s office in Ewell Hall do not, in fact, originate from the adjacent Music Department but in reality herald the rebirth in college policy of that Neronian spirit that metamorphosed the glory of Rome into an overabundance of charcoal. Into this well of silence Judge Hal J. Bonney, Jr., the new president of the William and Mary Law School Association has thrown the gage of a practical plan, publicly voiced, for raising at least part of the funds needed for the new building. Reaction to the Bonney plan has been mixed, but no one has denied that as to simplicity or solidity it is so far the preeminent solution.\(^{173}\)

Graves did not greet the association’s suggestions with the same enthusiasm as the students, but he needed to reply diplomatically, which he did on October 20.\(^{174}\) After writing that “[t]he December 1 deadline is now no longer a threat leading to possible dis-accreditation action by the ABA,”\(^{175}\) Graves continued:

Mr. White’s concerns, as expressed in his letter of July 31, regarding faculty salaries, faculty promotions and admissions, were based almost wholly upon misconceptions and misinformation which he had. Clarification was provided in his meeting with us on October 15. He now seems fully satisfied with those matters, and we are taking steps to ensure that further misconceptions and misinformation will not arise in the future. . . .

Mr. White has assured us . . . that he is sufficiently satisfied with the strenuous efforts and substantial progress being made, so that these matters will not be referred on December 1 for possible disaccreditation. Our job is to continue to make real progress and gain real support for the Law School, but the immediate threat is now behind us. Therefore, Harvey Chappell\(^{176}\) and I are agreed that the resolution you suggest is not now necessary or desirable.

. . .

We have engaged one of the top consultants on land use in this area to advise us on these complicated and difficult matters that involve long-term major policy considerations for the College. The land you refer to in your letter is, of course, being examined as part of the study. As you can imagine, I’m sure, the decisions involved in the use of land (including its possible sale) involve the most complicated and sensitive issues, from environmental, legal, community, educational, and financial points of view, and it is difficult, if not impossible, to separate our decisions on one or two parts of the holdings in question, without seriously affecting the outcome of a long-run [sic: range?] plan of major value to the College. Furthermore, I know that the Board does not take lightly the disposition of any properties of the College, for the Board is ever mindful of the possible evolving needs of the College over many years in the future, long after all of us, who currently have some custodial or governing responsibility, are gone.

\(^{173}\) Terry Grinnalds, *College Land Sale Proposed for Funding Law Building*, *Amicus Curiae*, Nov. 11, 1975, at 1 (on file with author).


\(^{175}\) Id. at 1.

The suggestions which you have made are very much a part of the full range of possibilities and approaches currently being considered by the administration and Board of Visitors. I can assure you that your views will be given the most careful attention as we continue our deliberations and reach decisions in the months ahead.\textsuperscript{177}

\textsection{82} Bonney was not pleased. The U.S. Postal Service must have delivered mail very quickly between Williamsburg and Norfolk four decades ago, for the very next day, in an October 21 letter to Graves, Bonney requested “a copy of reports James P. White of the A.B.A. may make to the College on the subject.”\textsuperscript{178} He was particularly irked at Grave’s and Chappell’s rejection of the Association’s resolution:

Respectfully, I would take exception to that summary disposition of the suggestion. I assure you that the Association would not have made it if we had not been persuaded, with good cause, that such a resolution would find reception on the part of State officials.

You should be on notice that to prematurely close the door to this possible solution might well result in no funding in 1976, when under the circumstances suggested funding may well be possible and the new facility started on its way in 1976.

I ask that the Board consider the proposal at its November meeting and preliminary to that meeting that liaison be had with State officials to determine their reaction.\textsuperscript{179}

As far as we can tell, the board did not consider the Law School Association’s recommendation that the college sell some of its undeveloped land when it met in November.

\textsection{83} Despite the extensive lobbying, it did not look like the General Assembly would fund a new building anytime soon. In an October 5 \textit{Times-Dispatch} article, state senator Edward E. Willey, chairman of the powerful Senate Finance Committee,\textsuperscript{180} said,

while he “is committed to support a new law school building at William and Mary . . . it is doubtful that there will be any funds available next year, in spite of a warning from the American Bar Association that the college could lose its law school accreditation because of its poor facilities.”\textsuperscript{181}

\textsection{84} A seasoned politician, Willey would not be easily swayed by the ABA, Graves, or anyone else. It also was a mistake to make Willey feel that he had been threatened.

“I know what Tom Graves wants,” Willey said. “He wants a new law school building but a lot of other people want something, too.”

\textsuperscript{177} Letter from Thomas A. Graves, \textit{supra} note 174, at 2–3.
\textsuperscript{178} Letter from Hal J. Bonney, Jr., Pres., William & Mary Law Sch. Ass’n, to Thomas A. Graves, Pres., Coll. of William & Mary (Oct. 21, 1975) (on file with author).
\textsuperscript{179} Id.
Willey says he does not consider the release of the ABA report to the press to be an attempt to blackmail the State of Virginia. “But you ask Tom Graves where we’re going to get the money. The Medical College of Virginia has tried the same thing. They say their accreditation is threatened because of their hospital facilities.”

... 

“You tell Tom Graves that he should make some kind of recommendation of where we can get this money, but not to tell the General Assembly how to spend the money.”

Willey said “my suggestion to him is that he’d better start shuffling [rooms] down there.” He indicated that reports to the State Council of Higher Education noted that there is “a lot of excess space down there, a lot of wasted space.”

“It seems like to me he’d better look around for a new and temporary plan for the near future.” . . . Willey indicated that it could be several more years before money would be available to construct the new law school building.

... 

“There is a reality about all of this and I’m not going to let Tom Graves or anybody else threaten me.”182

Graves had been forewarned. The day before Willey’s letter arrived in his office, law school alumnus Mark Dray told Graves that “it would appear that Senator Willey is going to continue to be a problem.”183

¶85 While all this was happening, the ABA’s James White visited William & Mary on October 15. White scheduled three separate meetings: one with the law faculty; one with the law students; and one with Graves, Vice President for Academic Affairs George Healey, and acting law school Dean Emeric Fischer. After meeting with college officials and the law school faculty—and just before meeting with the students—White held a press conference explaining “why I am here and what has transpired, and what the current situation is.”184 In his introductory remarks, White wanted the ABA’s concerns made clear:

Let me very briefly state, and this is for the press, and also for the students, and indeed anyone who wandered in off the streets, that the Marshall-Wythe Law School is a school approved by the ABA and it continues to be fully approved by the ABA.

Do you want me to repeat that statement? [And he did.] . . . [W]e are convinced that the school has a very good faculty. We believe that the quality of the school is good, the academic program, is good, and I hesitate to say this in front of the students but it has a good student body. The academic program at the school is a good program. This is not to say that we do not have grave concerns about the institution . . . [which] relate to several things, primarily the facilities of the law school.185

¶86 In addition to the “very inadequate” facilities, White recounted his earlier findings about the weak library collection, the small library staff, and the limited number of clinical programs.186 He clarified what the ABA expected from the college by December 1, and occasionally injected some humor into his remarks:

The intent of the ABA is to assist the school in maintaining [sic] standards and its development. It is not here as some sort of “super dragon” to impose sanctions on the school.
We do not expect the problems to be solved by December 1 because wands have gone out of style.\textsuperscript{187}

\textsection 87 When asked what the ABA would do if the state did not commit to fund a new building, White replied,

Would we recommend to the House of Delegates in December action to remove approval to the school at that point? I think that’s unlikely because I believe both the College and the State are responding in good faith given the financial exigencies and problems that exist. I hope that some solution can be devised that will satisfy the ABA. If no action has been taken than \textit{[sic]} it is a very grave matter. What action the Council will take I do not know. That’s asking me to determine what the jury will do before the facts have been submitted.\textsuperscript{188}

\textsection 88 White acknowledged that while no law school lost its ABA accreditation within the last decade,

\[\text{we have had for the first time since 1936 four show-cause hearings on law schools which have been considered by the ABA this year, and we will probably have about four or five more. . . . [T]he standards that we are operating under were new in 1973 and have been mandatory since February 1975. They are a good deal more strict than standards that once existed. In part this is a response to the public and the concern about consumer protection, it is a response to the highest courts of several states which have delegated since 1921 to the ABA the approval of law schools in order to permit graduates to take the Bar examination.}\textsuperscript{189}

\textsection 89 The transcript concluded on a positive note, with White saying that although the law faculty’s salaries\textsuperscript{190} were third from the bottom among ABA-approved law schools several years ago, they had improved due to the efforts of Graves and Whyte.\textsuperscript{191}

\textsection 90 Both the \textit{Newport News Daily Press} and \textit{Richmond Times-Dispatch} published articles about the law school on October 15, the day White visited Williamsburg. Both papers reported that three weeks earlier, at a September 24 press conference, Graves stated that the law school’s accreditation was at risk because of its terrible physical plant, and that other areas of concern were inadequate faculty salaries, inadequate professional staffing for the law library, and not enough books in the library.\textsuperscript{192} The articles also noted what Graves had \textit{not} disclosed—the ABA’s concern over the law school’s lack of control over student admissions and faculty appointments and promotions.

\textsection 91 From the \textit{Newport News Times Herald}:

One W&M official who asked not to be identified said the college and the law school administration do not want to divert attention from the need for a new law school building. “The new building is the most important thing. . . . Those other suggestions . . . regarding internal governance and admissions are just petty matters.” W&M administrators, the offi-

\begin{itemize}
\item \textsuperscript{187} Id. at 3–4.
\item \textsuperscript{188} Id. at 5.
\item \textsuperscript{189} Id. at 5–6.
\item \textsuperscript{190} The ABA no longer collects data on faculty salaries after an antitrust suit by the Department of Justice. Holmes, \textit{supra} note 40.
\item \textsuperscript{191} Transcript of Press Conference, \textit{supra} note 184, at 7–8 (noting that the ABA collected the data and made it available to approved law schools).
\end{itemize}
cial said, fear that release of White's criticism of intracollege policies might give state legislators an excuse to ignore W&M's pleas for money to construct the new law building.193

¶92 From the *Times-Dispatch*:

A school spokesman declined to discuss the report Tuesday, which he said “pertained strictly to internal matters and the relationship of the law school with the rest of the college.”

The ABA communication also indicated that the William and Mary administration should not have veto power over the law school faculty appointments and promotions.194

¶93 From the *Daily Press*:

William and Mary's Law School should have complete autonomy over admissions and faculty appointments and promotions, according to the American Bar Association.

... The autonomy issue was not revealed during the Sept. 24 announcement of the law school’s accreditation problems because it is an internal matter, according to President Thomas A. Graves Jr.

Calling the ABA report "private correspondence," Graves said he brought to the attention of the governor and the General Assembly only "those portions [sic] which require state funds to correct."195

¶94 The *Times-Dispatch* had another article on the law school the following day:

General Assembly financing for a new law school building during the coming biennium apparently is not crucial to the continued American Bar Association accreditation of the Marshall-Wythe School of Law at the College of William and Mary.

... If the funds do not come through next year, White said, “we would hope that there is some sort of interim solution devised by the state and by the college that would satisfy our concerns.”196

The law school was not happy to see any suggestion that a new building was not critical for its survival; this undermined its efforts to convince the college administration, the governor, and the Virginia General Assembly of the need to move quickly. Time was of the essence, and Graves was quoted in the law school student newspaper as saying,

I made it clear to Mr. White that it will not be possible to hold the College to the December 1, 1975 deadline in terms of responding definitely to the questions of facilities and resources, and he now has a good understanding for the way in which the Commonwealth of Virginia prepares and completes its budgeting process. With regard to that process, I advised him that the General Assembly would not adopt its budget legislation until March 1976, and that this legislation would then be subject to the Governor's approval thereafter.197

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¶95 The same issue of *Amicus Curiae* included the complete text of Graves’s presentation to the governor and the State Budget Advisory Committee. Graves sought funding “for proper staffing and acquisitions in the Law Library, where the deficiencies are now of critical proportions, according to the American Bar Association resolution.”198 Graves also reiterated what was at stake, including the educational status of the law school, its ranking, its ability to attract high-quality students, and its place as one of two state law schools in Virginia.199

¶96 Despite the gravity of the situation, at least one law student retained a sense of humor:

This spring the school will have a lottery . . . and each student will be given a number. Those who receive an even number will be allowed to use the library on Monday, Wednesday, and Friday, while those drawing an odd digit will be limited to Tuesday, Thursday, and Saturday use. (Sunday will be set aside for faculty members and their wives.)200

¶97 On October 17, Fischer called White to tell him about the *Times-Dispatch* article. Two days later, Graves and Fischer received a telegram from White with a blunt message:

DEAN FISCHER HAS INFORMED ME REGARDING PUBLICATION OF NEWS STORIES PUBLISHED SUBSEQUENT TO MY VISIT TO WILLIAM AND MARY ON OCTOBER 15. AS I UNDERSTAND THE TENOR OF THESE STORIES, THEY ARE INCORRECT. MY STATEMENT TO ALL PARTIES WAS THAT ADEQUATE FACILITIES FOR THE MARSHALL-WYTHE LAW SCHOOL ARE IMPERATIVE AND FAILURE OF THE COLLEGE AND THE COMMONWEALTH TO TAKE STEPS BY JULY 1, 1976 TO PROVIDE FOR ADEQUATE FACILITIES FOR THE LAW SCHOOL WOULD, IN MY OPINION, RESULT IN STEPS BEING TAKEN DURING THE SUMMER OF 1976 TO REMOVE APPROVAL BY THE ABA OF THE MARSHALL-WYTHE LAW SCHOOL.

THE POSITION OF THE COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR IS CLEARLY STATED IN MY LETTER OF JULY 31, 1975 ADDRESSED TO EACH OF YOU. THE COUNCIL EXPECTS PRIOR TO JULY 1, 1976 A SATISFACTORY RESPONSE TO ITS ACTIONS IF THE MARSHALL-WYTHE SCHOOL OF LAW IS TO REMAIN AN APPROVED LAW SCHOOL.201

¶98 Graves probably was not unhappy to receive the telegram; the ABA’s leverage was back. In his letter to White on October 24, Graves wrote:

I regret the misinterpretation in the media regarding your remarks at the press conference. Having read the transcript, I find it difficult to imagine how that interpretation of what you actually said was made. . . . We shall be clarifying the facts and deadline to those who will most influence the decision within the next two weeks and before the Governor finalizes his executive budget.202

¶99 White wrote back on October 27, telling Graves and Fischer that while he enjoyed his meetings with the faculty and students, and that “the faculty is one of the real strengths of the law school,” he was “naturally distressed with the report of
the conferences that appeared in the press.”203 White also wrote that he was “par-
ticularly concerned that these news reports may have mislead [sic] or disheartened
faculty in light of my conversations with them” and hoped “you can each report to
the faculty for the correctness of this matter.”204

¶100 Something else happening in the law school appears also to have been
brewing for some time: an effort to make William B. Spong its next dean. Spong
was well known and well connected in Virginia. Born in Portsmouth, Virginia, he
graduated from Hampden-Sydney College and the University of Virginia Law
School, served in both the state House of Delegates (1954–1955) and Senate (1956–
1966), and was a U.S. senator from 1967–1973. Since being defeated in his 1972
reelection bid, Spong was practicing law in Portsmouth and teaching part-time at
William & Mary Law School.205

¶101 An article in the November 4, 1975, Richmond Times-Dispatch reported
that Spong was “the only person being considered by the College of William and
Mary Board of Visitors” to be the next law school dean.206 The board, it was
reported, met in executive session on November 3 to consider a request by the law
school’s search committee to bring to the board only one name—Spong—instead
of the three that the board requested. It also wrote:

As early as May 9 [one week after James P. Whyte announced his resignation as dean],
law school faculty members were suggesting Spong . . . as a man of national and statewide
prestige and legal reputation who would serve the law school well.207

The article continued:

It is understood now that the major hurdles in the appointment lie in the agreements that
will have to be worked out with college officials. Those talks involve questions of law school
autonomy and definite lines of authority which Spong as dean would have regarding pro-
motions and faculty appointments within the law school.208

¶102 On November 22, 1975, the BOV named Spong (who was then president-
elect of the Virginia State Bar) dean and Dudley Warner Woodbridge Professor of
Law, effective July 1, 1976.209 Spong would step into his role even sooner; on Janu-
ary 1, 1976, he joined the faculty on a part-time basis as Woodbridge Professor and
dean-designate.210

¶103 An article in the college newspaper also reported on Spong’s appointment,
with more information on the “lines of authority” mentioned in the November 3
Times-Dispatch article:

203. Letter from James P. White, Consultant on Legal Educ. to the ABA, to Thomas A.
Graves, Pres., Coll. of William & Mary, and Emeric Fischer, Prof., William & Mary Law at 1 (Oct. 27,
1975) (on file with author).
204. Id. at 2–3.
205. Ronald L. Heinemann, William Belser Spong Jr. (1920–1997), ENCYCLOPEDIA VIR-
/3XGP-2LC4].
206. Wilford Kale, Spong Only Nominee for W&M Law Post, RICHMOND TIMES-DISPATCH,
Nov. 4, 1975, at A1 (on file with author).
207. Id. at A6.
208. Id.
209. Wilford Kale, W&M Names Spong Head of Law School, RICHMOND TIMES-DISPATCH,
Nov. 23, 1975, at C1 (on file with author).
210. Id.
In a related action, the Board of Visitors stated its intention to modify its By-Laws by July 1, 1976, in order to provide for the Dean of the Law School to report directly to the President of the College, while working in close coordination and consultation with the Vice President of Academic Affairs on all matters having a direct relationship with College-wide policies, practices, and budgetary considerations.\footnote{William Spong Named Dean of Law School, William & Mary News, Nov. 25, 1975, at 1 (reporting bylaw revisions giving the law school more authority over appointments and promotions) (on file with author).}

\section{¶104 George Healy, Vice President of Academic Affairs, was not at all happy.}

He shared his feelings in a four-page confidential memo to Graves:\footnote{Confidential Interdepartmental Communication from George R. Healy, Vice Pres. for Acad. Affairs, to Thomas A. Graves, Pres., Coll. of William & Mary, “Governance of the College” (1975) (on file with author).}

There were several things I criticized about the process of reaching a decision last week concerning the law school, importantly including the fact that the timing imposed left no room for the thoughtful exploration of implications and possible alternatives that should characterize any significant administrative decision.\footnote{Id. at 1.}

It got stronger:

As you know, I considered the arrangement [favoring the law school] laid down by Mr. Spong as a condition of his acceptance a poor idea when he belatedly announced it, and on reflection it strikes me as even worse.

. . .

I believe it is an exceedingly bad precedent to allow an individual, whoever he is, to lay down non-negotiable demands on the institution as a whole. A candidate reasonably can be expected to negotiate personally for things like titles and salaries. . . . [o]ne would expect him to explain what, if anything, the governance structures affecting his office he foresee as undesirable and would, if appointed, work to change through established channels.

. . .

Inevitably, the other professional schools will seek similar treatment; even more inevitably, Arts and Sciences will not allow that to happen without demanding comparable arrangements.\footnote{Id.}

\section{¶105 As for how to respond “[t]o such clamor from the other schools and faculties,” Healy said he could not support a plan that would favor just the law school.}

What he suggested, instead, was to study the “entire central administrative structure of the College, and to change it as needed to restore a reasonably equitable balance of apparent favor to the schools and faculties.”\footnote{Id.} Healy thought that this course of action had some risk, but he was not worried about offending Spong or the law school:

I recognize that such a charge might appear to Mr. Spong and the Law School to be in bad faith, since special favor was promised in his contractual arrangement. I don't know how to avoid this, and quite frankly don't much care whether such a reading is made or not. As I have indicated strongly before, I believe Mr. Spong negotiated with us in something less than timely candor, and the Board made its pragmatic decision in this case without making
any effort to ascertain how it would be received by the other schools and faculties, which I would at least regard as a form of bad faith. Moreover, I don’t see how any reasonable person—and the Law School has at least several—could legitimately object to a general study which obviously is initiated and practically forced by a particular action favoring them, especially if . . . the most likely outcome . . . would leave their recently won “autonomy” pretty intact.218

¶106 Spong’s appointment did not assuage Hal Bonney’s fear about the future of the law school. After resigning as president of the Law School Association, Bonney wrote to Rector Harvey Chappell on December 15:

Certainly, any statements made by any of us relative to the College administration’s support for or lack of support for the Law School will be self-serving. History shall be the judge. I would expect you to support the administration; too, there are perhaps things of which you are not aware. My conclusion is born neither of ignorance nor of haste. Indeed, I regret the necessity for having to reach such a conclusion, but I am not blind or dumb.

This is past. I hope very much that present and future action on the part of the administration will prove me wrong. This dish of crow I would eat with relish. However, the past would lead me to conclude that the College does not merit a law school. Boards of Visitors have not been aware and administrations—and law alumni I would hasten to add—have not promoted and fought for Marshall-Wythe. It is a history of neglect. I pray sincerely that we are coming out of this dark age and, therefore, I appreciate your assurance that every effort will be made to improve the resources.

. . . Thank you especially for your goodwill relative to the Law School Association. My resignation as President is of no moment. It is a purely personal decision. . . . In fact, the opportunities for service and support outside of office have surprised me and, perhaps, I shall be more effective and certainly at greater liberty. Fortunately, I know many people and I plan to be active and always boosting the nation’s oldest law school until it becomes the foremost.219

¶107 Good news was forthcoming; in January 1976, Governor Godwin included a new law school building and other capital projects in his proposed 1976–1977 biennium budget, to be paid for by additional taxes.220 However, while Godwin proposed $5,624,335 for the entire project, the General Assembly authorized less than 10 percent of that amount by the time it adjourned that spring.221 Spong, at least according to media reports, was helpful securing the startup money.

¶108 According to the March 16 edition of the Washington Post, Assembly delegates credited Dean-Designate Spong’s efforts as a major reason for the law school’s funding. Spong remained in Richmond during the weekend session and consulted with Assembly members during the time when it appeared that the Assembly would adjourn without allocating any funds to M-W.222

¶109 While the General Assembly was putting its budget together, Graves and Fischer received a letter from the ABA’s White informing them of recent action by

218. Id. at 3.
222. Id.
the Council of the Section of Legal Education and Admissions to the Bar.²²³ The
Council first noted “significant improvement in the salary level of the School of
Law” and “improvements . . . with regard to the autonomy of the students’ admis-
sion process and with regard to the faculty promotion process.”²²⁴ But it then
expressed “extensive concern [about] the continued gross inadequacy of physical
facilities . . . and continued need for substantial additional funding for the Law
Library.”²²⁵

¶110 Writing that the law school continued to meet the ABA’s standards, White
announced a hearing would be held before May 1, 1976, “to determine whether the
Standards have been violated and whether the Marshall-Wythe School of Law
should be removed from the list of approved schools.”²²⁶ If this wasn’t clear enough,
White continued: “If the Council feels that Marshall-Wythe . . . is not in compliance
with the Standards . . . it will take appropriate action for removal of the . . . School
of Law from the list of law schools approved by the American Bar Association.”²²⁷

¶111 Spong and Acting Dean Fischer went to Chicago to speak to the ABA on
May 13, 1976, after which an ABA hearing commissioner made several findings:

• The law school was in “total and complete compliance with Standard 205”
  regarding autonomy of the law school faculty over admissions.

• The law school was in compliance with standards regarding faculty
  compensation, as well as how promotion and tenure decisions were made.
  (Regarding salaries, the law school moved from 134th among 148 accredited
  law schools to 83rd among 156 schools in 1975–1976.)

• The law library had improved greatly: Carolyn Heriot would be the new
  director in July 1976; there were new acquisitions and cataloging librarians;
  the library would hire a reference librarian after Heriot came on board; and
  there were now six library assistants. Furthermore, the General Assembly
  nearly doubled the acquisition budget, from $135,000 in 1974–1975 to
  $258,000 in 1976–1977. The law school was in compliance with the ABA’s
  law library standards, except for its facilities.

• After noting that plans for a $5 million new building had been completed
  and that the General Assembly appropriated $486,150 for utilities and site
  work—and also authorized the governor to appropriate from the capital
  improvements budget up to $5 million for a new building—the ABA wrote:

  [W]hile the School of Law is not in compliance with Standard 701, the
  Commonwealth, the College and the School of Law are fully launched on a
  course that will lead to the construction of a new building. The representatives
  of the School of Law displayed to the Hearing Commissioner and the ABA
  Consultant an architects drawing of the proposed facility. From all appearances, it
  will be more than adequate and would appear to be a facility that would bring the
  School of Law into complete and total compliance with the ABA Standards.²²⁸

²²³. Letter from James P. White, Consultant on Legal Educ. to the ABA, to Thomas A.
Graves, Pres., Coll. of William & Mary, and Emeric Fischer, Prof., William & Mary Law (Jan. 21,
1976) (on file with author).
²²⁴. Id. at 2.
²²⁵. Id.
²²⁶. Id.
²²⁷. Id.
²²⁸. Memorandum from James P. White, Consultant on Legal Educ. to the ABA, and L.
¶112 Notwithstanding those positive words, the hearing commissioner recommended that the council find the law school not in compliance with Standard 701, but it should continue accreditation on condition that “the Dean of the School of Law and the President of the College of William and Mary file statements with the Council prior to the February 1977 meeting and prior to the May 1977 meeting concerning the progress of the funding and construction progress of the new building.”229 If there was a delay in the construction of the new building due to failure of funding, the council should “immediately docket a Rule IV hearing, directing the Law School to show cause why its accreditation should not be withdrawn.”230

¶113 Finally, after acknowledging the work of Fischer and Spong, the ABA wrote,

Undoubtedly, these two gentlemen would have preferred that the Hearing Commissioner recommend that the Council relax its vigil. Perhaps, one could find in their dedication and conviction a reason for doing so. As indicated, that is not the recommendation of this Hearing Commissioner. Accreditation Standards are not a personal matter. Neither may the Accreditation Standards be avoided by good will and good faith. The Standards are as applicable in hard times as they are in good times. The State, not the accrediting agency, must decide whether the Marshall-Wythe School of Law shall receive the necessary funding to bring it into compliance with the Standards.231

¶114 Both the college and the Virginia General Assembly must have felt pressure to fix the law school’s problems; Marshall-Wythe was not only the oldest law school in Virginia, but in the entire United States. William & Mary and the ABA had put so many eggs in the new building basket that no other solution was possible, and the college clearly wanted to avoid a Rule IV hearing.

¶115 With Governor Godwin on board, Marshall-Wythe’s situation continued to improve. The 1976 General Assembly finally applied the fix; it gave Godwin discretion to spend what was necessary to retain the law school’s accreditation as part of a $25 million capital outlay package.232

¶116 We would be remiss not to note that, throughout the process, the ABA insisted that it was not pressuring the Commonwealth to spend funds; it was simply insisting on compliance with its standards.233 That said, the accrediting body also mentioned that the new building would bring the school in “total compliance” with its standards—a facility that was projected to cost $5,624,335.234

¶117 With all funds in hand—and despite the feeling of some members of the General Assembly that the college was using the ABA’s threats to hold the legislative body hostage—the new law school building went forward. Construction began March 22, 1978, with completion scheduled for the beginning of the 1980–1981 school year.235 The new law building did open for the fall semester of 1980,236 and in

229. Id. at 3.
230. Id.
231. Id.
232. Virginia Gabriele, Law School Retains Accreditation, VA. GAZETTE (date unknown) (on file with author).
233. Id.
234. Id.
an accommodating move, the ABA agreed to postpone its next inspection of Marshall-Wythe until after the building was completed. As expected, the ABA never subjected William & Mary to the final accreditation hearing that it threatened.

The Question

Would the ABA have pulled the school's accreditation if the school did not accede to the ABA's demands, or were its threats empty? Because the new building went forward as planned, we will never know how much danger William & Mary was actually in. That it took 95 years for the ABA to revoke accreditation from a fully accredited law school (Arizona Summit in 2018; Thomas Jefferson in 2019) makes it hard to imagine that it would make an example of the nation's oldest.

But William & Mary had to—or at least thought it had to—convince the General Assembly that the survival of its law school was in the hands of state senators and assembly representatives. The college faced pressure from its students, its faculty, and its alumni. The ABA held show-cause hearings for four law schools in 1973—more than it had since 1936—and promulgated new, stricter accreditation standards in 1975. The ABA was baring its teeth, and it is easy to see why college officials feared that it might actually bite.

William & Mary was not alone. J.D. enrollment in U.S. law schools more than doubled from 1963–1964 to 1973–1974, and schools across the country lobbied for new buildings based on (or perhaps assisted by) ABA threats. The construction of the University of Iowa Law School's new building mirrored the process William & Mary went through. For Iowa, the process began in May 1978 when the ABA Accreditation Committee told UI that its law building was “woefully inadequate”—the very same language used at William & Mary. In March 1979, Iowa Law faculty voted unanimously to construct a new building, and two years later the Iowa General Assembly authorized spending through the issuance of special bonds. But the story did not end there.

In January 1982, Iowa Governor Robert D. Ray asked for more funding from the general assembly, just as Governor Godwin did in Virginia. The legislators eventually provided the funding, but not until the Iowa Board of Regents
requested additional bonds to fund construction later that year.\textsuperscript{244} That request came in response to an ABA threat: obtain funding by July 1, 1983, or lose accreditation.\textsuperscript{245} The ABA threat ended the same time as William & Mary’s; Iowa got its new building, and the ABA took no further action.\textsuperscript{246}

\numparagraph{122} Four decades later, the ABA de-accredited Arizona Summit and Thomas Jefferson, and sanctioned Valparaiso, Texas Southern, and Charlotte. The ABA never de-accredited Charlotte; the school closed because the Department of Education pulled its federal student loan funding.\textsuperscript{247} Valparaiso, Indiana Tech, and Arizona Summit all decided to close their law schools, as did Whittier.\textsuperscript{248}

\numparagraph{123} One may ask whether the 21st century ABA, which \textit{seems} to be more aggressive than the ABA of the 1970s, would have stripped accreditation from schools like William & Mary and Iowa. But by 1975, the ABA was operating under new, stricter standards in response to public concerns about consumer protection and state courts delegating to the ABA its approval for law school graduates to take a state bar exam.\textsuperscript{249} Furthermore, by 1975, William & Mary seems to have addressed the ABA’s concerns, except for its facilities.\textsuperscript{250} As was the case at Iowa, pressure was now on the state to come up with significant funding for a new building.

\numparagraph{124} The problems at the seven law schools subject to more recent ABA sanctions—problematic admission practices, weak academic programs, and low bar passage rates—are far different. They also are (or were) within the power of the law schools to address. Of the seven schools, only Texas Southern’s Thurgood Marshall School of Law has state funding, and the state of Texas may not be able to solve the school’s problems. The nonprofit universities—Indiana Tech, Whittier, and Valparaiso—chose to stop investing in their law schools. And of the three stand-alone schools—Arizona Summit, Charlotte, and Thomas Jefferson—only Thomas Jefferson remains, at the time of writing. Although the school appealed the ABA’s de-accreditation decision, its many problems will probably be fatal.

\textbf{Conclusion}

\numparagraph{125} The reality for well-established and well-regarded (or at least \textit{decent}) law schools is probably akin to what William & Mary faced in the 1970s: the ABA sets its standards, makes threats, and holds hearings. But if a school fails—like Arizona Summit, Charlotte, Indiana Tech, Valparaiso, and Whittier—it’s unlikely to be because of the American Bar Association.

\textsuperscript{244} \textit{Id.}
\textsuperscript{245} \textit{Id.}
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} Crim, \textit{supra} note 26.
\textsuperscript{248} ABA, \textit{supra} note 6.
\textsuperscript{249} Transcript, \textit{supra} note 184.
\textsuperscript{250} At his October 15, 1975, press conference, White praised the William & Mary Law School faculty, the quality of the academic program, and the students. \textit{Id.}
How Many Copies Are Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Constraints

Kincaid C. Brown

This article discusses the results of a study into the open access availability of law reviews, followed by a discussion of why open access has such a high rate of adoption among law reviews, especially in comparison to the journal literature in other disciplines.

Introduction ......................................................... 551
Law Review Open Access Study ........................................ 553
Methodology ...................................................... 553
Findings .......................................................... 554
   Currency in All Journals ........................................... 554
   Initial Online Access for All Journals ............................... 554
   Institutional Repositories and Journal Websites ...................... 555
   Top Journals .................................................... 555
   Issues and Articles ............................................... 555
   Total Volume Coverage ........................................... 556
Growth of Open Access Law Reviews and Journals ......................... 556
Law Library Economics ............................................. 556
The Economics and Place of Law Reviews (aka Law Reviews Are Different from Journals in Other Disciplines) ....................... 557
Growth of Institutional Repositories .................................. 561
Interoperability, Search, and Change in Research ....................... 562
   Interoperability and Search ...................................... 562
   Open Access Is Easier ............................................ 564
   Expanded Access to Relevant Content .............................. 565
   Greater Exchange of Ideas ......................................... 568
Moving Forward ...................................................... 570

Introduction

¶1 Over 15 years ago I wrote about using citation studies to figure out how many copies of a law journal title a library might hold.1 At that time, the University

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of Michigan law library held as many as four copies of a journal (three in print, one in microfiche) for some titles.² And now? One copy or no copies in print or microform. Obviously, things have changed in both the legal education and publishing worlds with the rise of electronic publishing, the legal market crash,³ and bad press⁴ about legal education.

Law libraries have had to cut copies and titles of print law journals to meet cuts in library budgets as law schools shift budgetary dollars from the library to other law school programs, such as financial aid, new and additional clinics, upgraded facilities, and expanded legal skills education offerings. The cost of a single law review is small change compared to the cost, plus the high inflationary rate, for legal publications by the likes of Lexis, West, or Aspen, but canceling a few law reviews can make up for the price increase in a single trade publisher title. Additionally, it is no longer feasible for any library to hold titles “just in case”; all libraries must be selective to constrain costs. Law reviews are easy targets for cancellation, not because of their cost but because of their ubiquity. Law reviews are available electronically in full text and/or page image in a variety of sources that will be among the last resources that hit the library’s budgetary chopping block, including Lexis, Westlaw, HeinOnline, LegalTrac, Index to Legal Periodicals Full-text, and JSTOR.

Law journals have also been available for free, via open access on the Internet, in varying degrees for approximately 20 years now. Open access is defined here using the 2002 Budapest Open Access Initiative definition:

free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself.⁵

Journal editorial boards have been posting articles and issues on journal websites at least since the turn of the century, and more recently journals have been freely available in many law school and university institutional repositories. But how widely are journals available via open access, and how does open access integrate into other legal education and economic issues of the day? That is the focus of this article.

For now it suffices to say that since open access has come to law reviews, the time of open access legal scholarship has come. After all, law reviews “are the primary repositories of legal scholarship . . . influencing how attorneys argue cases,

². Id. at 305, ¶ 11.
how judges decide cases, what regulations administrative agencies adopt, and what laws legislatures enact.6

**Law Review Open Access Study**

6 In 2016 and 2018, I performed studies wherein I looked at law reviews and journals for currency via open access, using print publication and HeinOnline (as the primary platform offering page-image law review content) as benchmarks for comparison. I found that more than three-quarters of all law reviews and journal articles were current in open access and half of all law review historical content is available via open access.7 If anything, this study undersells the percentage of current law review scholarship that is available in open access because the survey is limited to the more official open access channels of law journal publishing, the journal’s website, and the journal’s institutional repository. The survey undersells law review open access as it does not attempt to study other open access avenues such as author websites, faculty scholarship collections in the institutional repository of the author, or Social Science Research Network (hereinafter “SSRN”).

**Methodology**

7 To create a finite list of journals, I limited my study of open access law journals to student-edited law school journals. So law journals from publishers such as the American Bar Association or Oxford University Press were not part of this study. Even so, the vast majority of long-form scholarly articles are published in student-edited law reviews,8 so the fact that a wide majority of these works are available in open access9 represents a success for the open access movement and increased access to legal scholarship worldwide.

8 To generate the list of journals, I searched each law school's website for its journals.10 To figure out the most recent published issue of a journal, I reviewed the journal website; the institutional repository, if any; HeinOnline; and the same law school library's catalog.11 I omitted titles that had ceased publication or had not published an issue within a year, since those journals could no longer be considered “current.” Also omitted were online companions, since those are a different type of publication,12 and any title that was co-published with other schools in

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7. See discussion infra pages 555–56.
8. See Sudha Setty, *Student-Edited Law Reviews Should Continue to Flourish*, 32 Touro L. Rev. 235, 239–40 (2016) (regarding the inability of peer-reviewed journals in law to replace law reviews in such numbers as to be able to handle the volume needed for tenure scholarship at U.S. law schools).
10. Some titles may have been missed as law schools were not always perfectly accurate with the list of journals on their websites; this was especially true with title changes, which I tracked so as to not duplicate journal titles in the study.
12. One scholar likens the increased tempo of law blogs and companions to be “more like journalism.” Jack M. Balkin, *Online Legal Scholarship: The Medium and the Message*, 116 Yale L.J. Pocket
university, an association, or faculty editors, since those titles are not purely law student-edited law school journals.

¶9 To discover a journal’s “most recent volume,” I looked at the most recent issue and then went backward to complete the volume, based on the title’s recent publication schedule. If an issue was published out of order, I made a complete volume using all issue numbers because many journals will have a special issue, book review issue, or symposium in the same issue number each year.

¶10 To count the number of scholarly articles in each issue and volume, I counted authored articles, essays, notes, book reviews, comments, symposia articles, and tributes, omitting items like editor introductions, letters, and forewords. For the purpose of determining an article’s availability through open access, if the journal website linked to the institutional repository or vice versa for the actual article document itself, it was counted as available only on the one site where the document was hosted.

Findings

Currency in All Journals

¶11 In 2016, 597 journals met the survey criteria. Of those 597 journals, 423 (71 percent) were current, meaning “as or more current than the print,” in free open access. In comparison, 422 titles (71 percent) in HeinOnline were as current. Only 5 journals were not current in either HeinOnline or open access. In 2018, 555 journals met the survey criteria. In the two-year time span, the number of journals “as or more current than the print” in open access had risen to 80 percent (446 titles). In comparison, the percentage current in HeinOnline remained about the same (70 percent, or 387 titles). Seven titles in 2018 were not as current as the print in either open access or HeinOnline.

Initial Online Access for All Journals

¶12 In 2016, of the 597 journals, 170 (28 percent) were more current in open access than HeinOnline, while 169 (28 percent) were more current in HeinOnline. In 2018, 161 titles (29 percent) were more current in open access than HeinOnline, while the percentage of journals more current in HeinOnline had dropped by approximately a third (to 18 percent, or 98 titles).

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14. For example, if a volume of XYZ Law Review is complete in four issues and 44#2 was the most recently published, the most recent volume for my purposes consisted of issues 43#3, 43#4, 44#1, and 44#2.

15. For example, if a volume of ABC Law Review is complete in four issues and 21#1, 21#2, and 21#4 were published, 20#3 was considered to make a complete volume for my purposes.

Institutional Repositories and Journal Websites

¶13 Of the 423 current open access journals in 2016, 206 (35 percent of the total of 597 journals) were current in their law school or university institutional repository, and 260 (44 percent of the total of 597 journals) were current on the journal’s website. Forty-three journals were current in both open access platforms. In 2018, the percentage of open access journals that were current in their law school or university institutional repository rose by approximately a quarter (to 43 percent, or 239 titles), while the rate of currency on the law journal’s website remained about the same (45 percent, or 252 titles). Forty-five journals were current in both open access platforms in 2018.

Top Journals

¶14 When the list of journals is restricted to top journals,17 the adoption of open access publication is even more striking. In 2016, when the top 101 (because of a tie) student-edited journals in the survey were considered, 84 were current via open access (32 via institutional repository, 62 via journal website, 10 in both). Fifty-eight of the same journals were current in HeinOnline. When the top 25 student-edited journals in the survey were considered, 24 (96 percent) were current via open access (9 via institutional repository, 21 via journal website, 6 in both). Nine of these same journals were current in HeinOnline. In 2018, the numbers were higher. For the top 100 student-edited journals, 88 were current via open access (32 via institutional repository, 69 via journal website, 13 in both), while 62 were current in HeinOnline. All of the top 25 student-edited journals were current in open access this year (7 via institutional repository, 23 via journal website, 5 in both), while only 12 were current in HeinOnline.

Issues and Articles

¶15 The adoption of open access is more pronounced when current-volume issues and articles are studied. For all 597 journals in the 2016 study, 77 percent of current-volume issues (1716 total) and 77 percent of current-volume articles (11,528 total) are open access. For the top 101 journals, the adoption of open access rises to 88 percent of the 475 current-volume issues and 86 percent of the 3541 current-volume articles. For the top 25 journals, the percentages rise again to 98 percent of the 158 current-volume issues and 97 percent of the 1089 current-volume articles. The percentages rise due to the high adoption rate of open access for top journals combined with the fact that the top journals tend to publish more issues and articles per volume than lower-ranked titles. In 2018, for the 555 current journals, 83 percent of current-volume issues (1583 total) and 84 percent of current-volume articles (10,315 total) are available via open access. For the top 100 journals, the numbers rise to 92 percent of the 472 current-volume issues and 91 percent of the 3394 current-volume articles. For the top 25 journals, 100 percent of the current volume issues (161 total) and articles (1121 total) are available via open access.

Total Volume Coverage

¶16 When the entire run of current student-edited law reviews and journals were surveyed in 2016, almost half (48 percent) of journal content for the 597 surveyed journals was available for free either on the journal website and/or the school’s institutional repository. This percentage drops for top journals (45 percent for top 100 journals and 43 percent for top 25 journals) as those titles tend to have more years of backfiles to digitize and post. By 2018, the percentage of all journal content available via open access for the 555 current journals in the survey rose to 55 percent, with over 10,900 volumes of open access student-edited law review content available. When including law review titles that were not currently published, the percentage dips to 54 percent, with over 11,500 volumes of open access content.

Growth of Open Access Law Reviews and Journals

¶17 How did we reach this level of open access for law reviews and journals? In this section, I discuss the forces in play that propelled us to where nearly three-quarters of student-edited law journals provide open access to their most current content.18

Law Library Economics

¶18 The collection budgets of law libraries have contributed to the push toward open access law review publishing. The cost of commercial publications continues to increase exorbitantly, resulting in what a pair of commentators termed a library “serials crisis.”19 Looking at the 2014 AALL Price Index for Legal Publications, the five-year increase in all serials was over 42 percent, with an average 2014 price of $1,587.97.20 When periodicals are excluded from the serials definition, the increase is over 47 percent, with an average price of $2,511.73.21 The increase is even higher looking at specific categories of publications, like reporters (over 117 percent) and digests (over 61 percent).22

¶19 The increased cost of legal materials also must be viewed alongside the reality of flat or declining law library budgets. Especially since the economic downturn in 2008 and the focus on the costs of legal education vis-à-vis debt load and job prospects,23 law schools have had to reorganize their priorities and programs to respond to criticism and to attract students while having fewer tuition dollars to spend with the drop in law school enrollment.24 Law schools are rerouting dollars

21. Id.
22. Id.
23. See supra note 4.
to programs such as alumni relations, career services, entrepreneurship, and technology laboratories, so libraries have to meet collection needs without budget increases. Accordingly, libraries have been canceling serials and continuations so that “legal scholars can no longer assume that the law library can afford subscriptions beyond these basic databases to meet proliferating and increasingly narrow faculty research needs.”25 The George Washington University library system has gone so far as to post an infographic inflation statement that highlights the high costs of journals and resources and the necessity to cancel; the statement is labeled “scholarly resources are not luxury goods but they are priced as though they were.”26 For law school library cancellations, law reviews are low-hanging fruit27 even though they sit outside the monopoly rent area described by Hunter.28 Law reviews are readily canceled because they are available in so many other venues, and even though they are individually inexpensive,29 they are expensive as a collection because they contain so many titles. The combination of budget restrictions and the increasing costs of continuations has forced libraries, even large academic research libraries, to move to a “just in time” collection model, where alternatives to the historical all-encompassing research collection must be considered.30 In this current state, open access legal scholarship, especially law review content, is an important and necessary alternative to relying only on a library’s print collection.

The Economics and Place of Law Reviews (aka Law Reviews Are Different from Journals in Other Disciplines)

20 As Jessica Litman notes in her seminal article on the subject of open access and law reviews, the actual costs of publishing a law review dwarf both the official budget and the review’s revenue.31 As Litman acknowledges, her discussion model sets law review budgets and costs artificially low as she omits items such as rent, electricity, law school clerical staff, and other administrative overhead like printing and computers.32 On the budget and costs side, I argue that the unseen costs of publishing law reviews are even higher when you factor in (a) direct costs such as interlibrary loan and journal website hosting (if hosted outside of the law school’s website environment), and (b) indirect opportunity costs of law school or university personnel who could be performing other work instead of interacting with the journal (e.g., by resolving conflicts among law review student editors or providing research consultation).
¶21 On the reverse side of law review finances, subscription revenues are even less likely to cover even the costs of printing today than in 2006 when Litman wrote her article. Law reviews are inexpensive compared to scholarly journals in general, and for most law reviews, subscription prices have increased little in the last decade. Law reviews have thus escaped the inflationary pressures of other legal publication types, as well as journals in other scholarly fields, because of their law school–subsidized publication system. The stagnant subscription monies combined with a lack of royalties do not offset the inflationary increase in production costs and postage or the decline in subscription rates as subscribers cancel print in reliance on electronic sources. Two commentators describe journal economics as “a massive and unsupportable investment in what benefits a few people in a narrow universe.”

¶22 The cost of law journal publishing and decreasing revenues from subscriptions has helped push many student-edited journals toward publishing in electronic format only and in open access. The cost of printing and mailing journal issues is the largest expense in a journal’s budget, so posting articles in open access cuts journal expenses generally by more than half. Accordingly, open access works well for law reviews because it saves money, attracts more readers, retains the valuable pedagogical exercise of staffing a law school journal for law students, and continues a forum for law professors to publish. This attraction of additional readers via open access helps a law review’s prestige and branding. Litman agrees there is “no financial or reputation benefit to universities restricting access” to law review articles. The economic case alone will force many journals to migrate to online-only, open access publications. One scholar estimates that nearly 10 percent of law reviews are already online only. Some journals that have recently decided to publish online open access only include Berkeley Journal of African-American Law & Policy, Hastings Business Law Journal, Oklahoma Law Review, and Santa Clara High Technology Law Journal.

¶23 Of course, a big factor in the rise of open access law school journals is that by their very nature they differ from journals published by the large trade publishers. True, the two share similarities: they provide forums for faculty to gain tenure and to exhibit new research and knowledge, and they provide a historical record for scholarship. The obvious difference is commercial journals are expected to turn

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34. From an average price of $39.43 in 2006 to $51.90 in 2014 per AALL Price Index for Legal Pubs., supra note 20. The increase is a large percentage (over 30 percent), but not a large increase in terms of actual dollars ($12.47).
36. See also Schaffzin, supra note 12, at 244–45.
37. See discussion infra pages 568–69.
38. Litman, supra note 31, at 790.
40. Available at http://scholarship.law.berkeley.edu/bjalp/ [https://perma.cc/8WC8-RG5C].
41. Available at https://repository.uchastings.edu/hastings_business_law_journal/ [https://perma.cc/G2GP-AVXR].
42. Available at http://digitalcommons.law.ou.edu/olr/ [https://perma.cc/37G3-BRF8].
43. Available at http://digitalcommons.law.scu.edu/chtlj/ [https://perma.cc/7LTC-JPDC].
a profit, while student-edited law reviews have no such expectation and generally run at a loss. Because of law school control of the journals, limited expectation of financial gain, the journal’s retention of the distribution license, author interest in being read, and the general mission of, especially, public-funded law schools, the thumb weighs heavily on the open access side of the scale because “once that scholarship is generated . . . its investors get the most bang for their buck if it is disseminated, read, and cited as widely as possible.”

¶24 This differs from for-profit journal publication where “much of the world’s scholarly knowledge is owned and controlled by commercial enterprises that operate the journals that academic researchers publish in.” These journals generally require copyright transfer and often prohibit sharing or posting of the final published version of the author’s work, as the publishing houses seek the highest return on their publishing investment. Indeed, “law is the exception to the rule that scholarship is published primarily in expensive, peer-reviewed commercial or academic society journals controlled by a handful of powerful publishers.” Law, as a discipline, also differs from other subjects because the percentage of journals published by law schools and not the large publishing houses is so high and because the prestige and status of the student-edited journals is generally higher than for the for-profit journals. For instance, looking at the Washington and Lee Law Journal Rankings shows only one non-student-edited journal, Supreme Court Review, ranked in the top 50. As Michael W. Carroll writes, “the editorial and economic structure of American legal scholarship is sufficiently different from


45. In public-funded law schools, the investment and production of legal scholarship is a “core mission, as important . . . as educating lawyers,” Litman, supra note 31, at 790.

46. Id.


48. Id.


50. One scholar commenting on scholarly publishing writes:

Scholarly publishing is a quite remarkable market indeed, where the suppliers of the basic product, the authors and editors, provide their content and services for free to commercial publishers, who are then able to extract monopoly rents from the same group of individuals who provided the content in the first place. There are many troubling social costs of this peculiar system: the public pays multiple times for the scholarly product, researchers from the developing world are incapable of accessing and contributing to scholarly knowledge, and student tuition is unfairly inflated in a fruitless effort to keep research programs and libraries afloat.

Hunter, supra note 28, at 615 (citations omitted).

51. Arewa, supra note 33, at 805–08.

52. See supra note 17.

53. As one academic law library director puts it:

The situation of purchasers of journals in the STM disciplines bears little resemblance to that of law libraries today. The most prestigious law journals are published, not by commercial publishers or scholarly societies, but by student editors heavily subsidized by law schools.

other disciplines that no group stands to gain from resisting open access other than commercial legal publishers, who lack direct leverage to sabotage the movement for open access law. 54 The issue with law reviews is not about the prestige (or perceived lack thereof) of open access since the most prestigious journals are all open access already. The issue concerns ending print publication and going online only where print is a deciding factor for some scholars choosing among publication offers. 55 This preference is generational, however; the lack of a print edition is less of an issue with younger faculty. 56

¶25 The licensing and copyright of law review articles is another area where student-edited law reviews are generally different from the journals in other disciplines, which has helped fuel the increase in open access law journals. A decade ago, a standard practice was that the “student-edited legal periodicals frequently require[d] assignment of copyright in legal scholarship,” 57 despite confusion about authors’ ability to appropriately assign copyright through author agreements in relation to copyright law’s work-for-hire doctrine. 58 As Litman points out, “uncertainty over whether scholarly articles are subject to the copyright work made for hire doctrine . . . remains unresolved chiefly because so little turns on the answer” 59 (i.e., economically). While copyright uncertainty aids the move to open access for law review content, it has the inverse effect for commercial legal scholarship. As Alissa Centivany points out, commercial “publishers are able to charge expensive fees and limit access largely as a result of their standard practice of conditioning publication on the scholar’s transfer of copyright.” 60 (She also notes that many universities with open access mandates provide waivers in the case of a conflict with a publisher’s copyright transfer agreement.) This proves Dan Hunter’s point that “although it is commonly thought that the copyright incentive is aimed primarily at the author . . . the reality is that incentive operates mostly in favor of the commercial intermediaries who publish and distribute the work.” 61

¶26 As other scholars note, practices for law reviews have changed so that “[r]ather than asking for a complete transfer of copyright, many journals now request a temporary exclusive license or even a nonexclusive license.” 62 Law journals now retain a license to distribute content not just through the journal’s website and the law school institutional repository, but also through for-fee platforms such as Lexis, Westlaw, and HeinOnline. 63

56. Id. at 14.
57. Carroll, supra note 54, at 754.
58. Litman, supra note 31, at 790.
59. Id. at 791.
63. Id. at 386, ¶ 7.
Between the copyright transfer for older volumes and the license to distribute of more recent author agreements, law reviews are able to post their content online and take advantage of open access availability for their journals. In addition to the open access journals and for-fee platforms, author agreements also generally permit authors to post articles on personal websites and working paper series sites, such as SSRN. Even with the competing access to the same work, there is little desire to funnel access to a particular avenue because, returning to Litman, so little money is at stake versus the importance of widely disseminating the author’s work. Centivany agrees that since all of the incentives push scholars to publish in the most prestigious journals possible, then if the publishers require copyright transfers there is little reason for scholars to push back to retain their intellectual property rights. Indeed, Hunter agrees that the law reviews themselves are not interested in the economic copyright argument against open access, as “law reviews are not primarily interested in a return on investment but rather on furthering the mission of the law school, either by way of a branding exercise, education for students, or contributing generally to the production of knowledge.”

Growth of Institutional Repositories

The rapid growth of institutional repositories at law schools and universities has also aided the rise of open access law reviews. In 2011, there were approximately 30 institutional repositories at academic law libraries. By 2016, at least 80 of the top 100 law schools had a law school institutional repository or participated in a university-wide repository. At the time of that survey, these 80 institutional repositories published 215 open access journals, of which 137 (64 percent) were current. In the 2018 survey of 555 currently published journals, 239 (43 percent) were current in the law school’s open access institutional repository, while 252 (45 percent) were current on the journal’s website. In terms of issues and articles, 43 percent of current-volume issues and 45 percent of current-volume articles were available in the institutional repository. For journal websites, the rates were 52 percent of current-volume issues and 53 percent of current-volume articles. In terms of total coverage, 43 percent of all of published volumes for the 555 journals were available in open access in institutional repositories, and 17 percent of volumes were available in open access on the journal websites.

The institutional repository inclusion of open access law journals is a net gain in open access coverage to the content available on journal websites. Individual journals have published content in open access on their websites since the mid-1990s, but the rise of institutional repositories is more recent and has contributed

64. Id. ¶ 8.
65. See discussion infra pages 565–68.
66. Centivany, supra note 60, at 377–78.
67. Hunter, supra note 61, at 775.
70. Id. at 22.
to the expansion of both current and historical law journal content in open access. This transition of law school institutional repositories into the realm of electronic publication of current law review content aligns the repositories with one of law schools’ core missions, namely faculty research and scholarship, and no longer limits the scope of law school repositories to archiving historical content. This transition moves institutional repositories from a preservation supplement for scholarship to a disseminator and a part of the scholarly conversation. Institutional repositories also act as a more stable publishing environment that provides unique identifiers and less link rot than law journal websites with their annual change in governance and oversight.

Interoperability, Search, and Change in Research

Interoperability and Search

¶31 The rise of open access law reviews has come at a time of change in research, including legal research. Because so much information is now available so easily, researchers look for ways to cut through the discovery process, often relying on chance and serendipity.72 It can be harder for researchers to find their way to librarian-vetted resources that use controlled vocabularies. Research often starts with Google or Google Scholar,73 even for primary sources,74 or other sites housing academic papers, such as Sci-Hub.75 It increasingly relies on the interoperability76 of a search system (e.g., Google) and a separate metadata/text system (e.g., an institutional repository). As discussed elsewhere, the online environment deemphasizes the distribution of issues and increases the importance of the individual article available online.77 Search services now search full text in addition to metadata, and relevance guides results lists instead of reverse chronological order, as was the rule in the past.78 This interoperability of search and open access content systems now also provides a real alternative to closed legal research systems79 for the research of legal scholarship.

¶32 Aside from Google, search engines and portals now exist that focus exclusively on open access legal scholarship. The American Bar Association takes full advantage of interoperability with its Free Full-Text Online Law Review/Journal

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74. Hersey et al., supra note 72, at 4.

75. Sci-Hub is a search engine for academic papers in the sciences that can be accessed by bypassing publisher paywalls. Sci-Hub has been sued for copyright infringement by Elsevier and has been forced to change domains to continue to provide access to pirated papers. See further discussion of Sci-Hub, infra page 565.

76. Defined by Merriam-Webster as the "ability of a system . . . to work with or use the parts or equipment of another system." Interoperability, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/interoperability [https://perma.cc/M6MD-46YJ].


78. Id.

79. See, e.g., Arewa, supra note 33.
Search engine\(^{80}\) (using Google technology) of more than 300 open access law reviews and journals, searching metadata and full text of articles on journal websites and institutional repositories. Law Review Commons\(^{81}\) and Law Commons\(^{82}\) are examples of well-trafficked portals that connect researchers to legal scholarship on law school or consortial repository and working paper sites; this interoperability among repositories contributes to national and international legal scholarship\(^{83}\) as a centralized access point with a controlled vocabulary. Law Review Commons is a portal to over 300 open access law reviews and journals\(^{84}\) from more than 100 law schools\(^{85}\) that use the bepress Digital Commons platform to publish and provide access to online journals. Law Review Commons includes over 220,000 law review articles.\(^{86}\) In 2015, more than 18.3 million downloads of Law Review Commons articles were made.\(^{87}\) Law Commons is a larger portal of legal scholarship from Digital Commons repositories that includes the journal-published content in addition to working papers, books, law school publications, government material and other materials. Most law school repositories include faculty scholarship sections providing open access to their faculty’s scholarship.\(^{88}\) The largest portion of the materials within faculty scholarship collections are law review and journal articles that include journal-published content, but also individual articles from titles not available as a journal publication (i.e., in volumes and issues) via open access. Due to the addition of these faculty scholarship collections to the journal-published content, open access to law review content in Law Commons is more extensive than on Law Review Commons. As of this writing, the over 460,000 works posted in Law Commons were downloaded over 178 million times.\(^{89}\) The statistics show that vast collections of scholarship are accessible from these two sites and that these works are highly used\(^{90}\) (306 times per work in Law Commons and 349 times per article in Law Review Commons).\(^{91}\)

\(\S 33\) According to a 2015 study on the use of free journal content, including both open access and pirated material, usage is now more widespread via free platforms than usage via licensed publisher or aggregator platforms, with over 60 percent of

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83. Mary Westall, Institutional Repositories: Proposed Indicators of Success, 24 L/i.sc/b.sc/r.sc. H/i.sc T/e.sc/c.sc/h.sc 211, 216 (2006).

84. As of Aug. 27, 2019, supra note 81.

85. Id.

86. Id.

87. Email from Kathleen Cowan, bepress Vice President for Sales, on file with author; 18,370,163 article downloads in 2015.

88. Brown, supra note 69, at 22 (81 percent of repositories at the top 100 law schools include faculty scholarship collections).

89. As of Aug. 27, 2019, per the counters at the top of the page, see supra note 82.

90. See infra note 108 and surrounding text on use of downloads as a metric.

91. Based on 75,502,055 total downloads in Law Review Commons as of Oct. 20, 2016, per Cowan email, supra note 87.
journal content delivery coming from free versions of articles. While social media sites are a major source of free articles in lower-income countries, the high use of free resources to access journal content is persistent even in the academic sector of high-income countries, where a large proportion of journal content is licensed for use by the library system:

Approximately 60% of the time, readers in high income countries in the academic sector are accessing articles from a free resource. This means that they are 1.5 times as likely to be reading an article from a free resource. In lower income countries this rises to over 2 times as likely.

The way Google indexes publisher platforms also pushes researchers toward the free incarnation of an article. Google does not automatically index the full text of scholarly articles behind a paywall, so these articles are more difficult to find for a Google user (but not a Google Scholar researcher; Google Scholar does index the full text of these same articles).

Open Access Is Easier

What matters in research is that people find what they need, and open access fits into this framework by easing access to scholarship. As Peter Suber states, this "barrier-free access . . . helps readers find and retrieve the research they need, and helps authors reach readers who can apply, cite and build on their work." To many researchers, open access scholarship would be an answer to the difficulty of using licensed library resources, a need that currently is met in many disciplines via piracy. Examples of barriers that are confusing roadblocks for many researchers include the myriad publisher content platforms, the requirement of an individual account for many platforms, the need to download additional software (e.g., Adobe Digital Editions) to use content, increases in distance learning so that more researchers are not on campus, inconsistency of indexing by search engines, and the inconstancy of coverage data. All of these barriers are eliminated or mitigated for open access articles and journals. For many library users, the difficulty in navigating library discovery systems to locate papers pushes researchers to alternate methods:

The high cost of journal access and the cumbersome and complex interfaces that libraries provide to their subscription holdings, has fed an underground movement to pirate academic literature. While news headlines about online piracy tend to focus on illegal downloading of music tracks or streaming of videos, the academic community is facing its own pirating crisis.

92. Gardner & Inger, supra note 73, at 39.
93. Id.
94. Id.
95. Id. at 29; see also Aaron Tay, 8 Surprising Things I Learnt About Google Scholar, Musings About Librarianship (June 11, 2014), http://musingsaboutlibrarianship.blogspot.com/2014/06/8-surprising-things-i-learnt-about.html [https://perma.cc/7X3X-T9NA].
98. Leetaru, supra note 47.
A researcher who performed an empirical study of Sci-Hub use found that some of the users downloading the highest number of pirated academic papers were at European and U.S. universities, where the researchers generally would have access to the papers through library-mediated licensed databases. This was echoed by a second study whose author concluded that the convenience of users was a driving force in Sci-Hub use. A study of Yale University doctoral students found that many actively avoided using library subscription databases as a first step, try to bypass library-provided options if they believe the resources are too complicated to use, and often turn to peers at other institutions for copies of particular works. A 2015 study of law review citations found that 2007 was the year when open access became sufficiently common to be a reliable, easy source for access to legal scholarship.

**Expanded Access to Relevant Content**

Open access scholarship provides expanded access vis-à-vis mediated electronic access. As indicated earlier, 84 percent of current-volume articles and 55 percent of all historical law review content are available via open access. This growth in open access counteracts the serials crisis by permitting “more efficient distribution of scholarly communication” outside the traditional publishing avenues that are represented by the “walled gardens” of licensed, publisher databases and journal portals. This expanded access to law review scholarship can be demonstrated by both use, via citation studies, and consumption, via download metrics. I touch on both types of measures briefly here.

Recent studies have measured the use and impact of scholarly journal content with the rise of accessibility and open access and have found increased usage of older articles and articles from non-elite publications. The older article study found that in 2013, 36 percent of citations to journal articles were to articles

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101. Id. at 14.

102. Id. at 14.


104. See supra pages 555–56.

105. See discussion supra pages 556–57.


108. Some scholars argue that downloads, and even hits, are better metrics for scholarly impact than citations counts because those numbers look at consumption. See, e.g., Paul L. Caron, *The Long Tail of Legal Scholarship*, 116 YALE L.J. POCKET PART 38, 41 (2006). Other scholars argue that neither citation counts nor downloads are good metrics because they lack an analysis of quality, see, e.g., Jack M. Balkin, *Online Legal Scholarship: The Medium and the Message*, 116 YALE L.J. POCKET PART 23 (2006), or “pervert” the notion of scholarly value. Harrison & Mashburn, supra note 35, at 59–61.


110. Acharya et al., supra note 77.
more than 10 years old, a rise of 28 percent since 1990.111 This growing impact of older articles was also seen in the percentage increases for citations even older.112 The study also found the rate of citation to the older articles was rising more steadily in articles published in the second half of the study period (2002–2013) than in the articles published in the 1990–2001 portion of the study.113 The non-elite study found that the percentage of citations in non-elite journals rose from 27 percent in 1995 to 47 percent in 2013.114 Both studies found that with the increased saturation of electronic content, the rise of open access, the increased access to archived content, and the use of relevance rankings in search results, it is no more difficult to find these older or “non-elite” articles.115 This additional access and more reliable search functionality allows researchers to find and use higher-relevance, higher-quality content than that found using only the ranking status of publications. These aids to research will only continue as more repositories and individual journals work through backfile projects. The percentage of journal content currently available in open access will continue to rise and will allow for more discovery of relevant quality older and non-elite published articles. This increased usage of previously underutilized scholarship is part and parcel of open access, expanding the reach of scholarship and leading to a greater exchange of ideas.116 Cass R. Sunstein defends law review scholarship, and specialized academic writing in general, even though it often takes time before it is used by the bar. He believes it adds to the overall store of knowledge and potentially turns into “common sense.”117

¶38 Other citation studies have also found a greater impact in terms of citations for articles available via open access. As far back as 2001, a researcher found that the free availability of a computer science article increased an article’s average usage by almost three times (286 percent) when controlled for by publication.118 Other studies have shown citation increases between 40 and 80 percent, depending on discipline, for papers available in open access.119 The open access citation advantage has been found to extend to legal scholarship as well. A study of three law journals published by the University of Georgia found a 58 percent increase in citations to articles available in open access compared to articles in the same journals without open access availability.120 A later, more robust study of 30 flagship law reviews found the open access advantage across journals to be 53 percent121 and above 60 percent for contemporary works released in both print and open access

111. Verstak, supra note 109, at 1.
112. Id. Over the same period, citations to articles older than 15 years had grown 30 percent and for articles older than 20 years, 36 percent.
113. Id.
114. Acharya et al., supra note 77, at 3.
115. Acharya, supra note 77, at 11; Verstak, supra note 109, at 1–2, 9.
116. See discussion infra pages 568–69.
120. Donovan & Watson, supra note 25, at 569, ¶ 46.
121. Donovan et al., supra note 103, at 10.
formats simultaneously. This study also found a higher open access advantage for journals published by lower-tier law schools than for top law schools, suggesting that open access is allowing for more discovery of relevant, non-elite published legal scholarship similar to the results of Acharya's multidiscipline study. That study also found that open access articles are not only more heavily cited in the years immediately after publication, but also are more cited than articles not available freely on the Internet for the entire life of the work. This same study found the open access citation advantage translates to citations by courts as well.

§39 Studies have proved the correctness of Hunter's hypothesis that there is no substitution effect among the various for-fee and free online versions of an article. Donovan and Watson found no zero-sum correlation in downloads between SSRN and the school institutional repository, the two primary and most findable-by-search open access locations for legal scholarship. Another scholar echoed Donovan and Watson's findings “that redundant posting dramatically increases net downloads.” Indeed, redundant electronic versions are not a negative, but a necessity:

'To be a “well-placed” law review article means being available in multiple places at once: in the bound volume, on the law review website, on SSRN, and on the author's own website or law school faculty page. The need for wide, multiple-platform distribution takes on even more urgency in an ever-more-internationalizing legal environment.

With so much scholarly communication happening in blogs and on Twitter, open access copies are also important as part of a larger scholarly conversation. They allow readers to access sources for additional information or to read the works being discussed and to make up their own minds about the analysis.

§40 The increased availability of legal scholarship has also increased the importance of content over placement, where the ease of research in open access scholarship allows researchers to find relevant, quality content regardless of its original place of publication. Open access articles in mid- and lower-tier law reviews have over a 50 percent 15-year citation advantage over closed access articles in those same journals. There are fewer open access citations to top-tier journals, but the open access advantage disproportionately benefits lower-level journals because of the increased discoverability of that content compared to the print world, where

122. Id. at 16.
123. Id. at 11, 16.
124. See Acharya et al., supra note 77.
125. Donovan et al., supra note 103, at 8.
126. Id. at 18.
131. For example, an article in the University of Michigan Law Scholarship Repository, Nicholas Bagley, Medicine as a Public Calling, 114 MICH. L. REV. 57 (2015), was cited in a blog post and was downloaded 1800 times in a month's span. The University of Michigan Law Scholarship Repository showed that in October 2016 this article was downloaded 1806 times, over half of which were from the blog MARGINAL REVOLUTION, https://marginalrevolution.com/ [https://perma.cc/PT2V-AJRD](statistical report on file with author).
132. Donovan et al., supra note 103, at 11.
elite journals had a large discoverability advantage because of their higher number of subscribers.133 That said, while diminishing, top-tier journals still maintain a citation advantage even with the increase to citation of lower-tier journal content.134 While article placement still matters for citations by other legal scholars,135 courts cite more evenly to articles from across the different law journal tiers.136 Some scholars argue that with the increased access to legal scholarship, article selection by law reviews is less important than in the past because quality articles will be discovered and relied upon regardless of their original journal of publication.137 At the journal level, open access increases the impact of the journal title by allowing more access and citation to its articles, thus raising the reputation of its affiliated school. Additionally, an open access law school journal increases the reputation and impact of the affiliated school’s faculty, as law school journals publish a higher proportion of articles by their own faculty than other schools’ journals.

Greater Exchange of Ideas

¶41 Open access legal scholarship allows for a greater exchange of ideas, both domestically and globally. Even in the United States, once you leave the realm of the large research university, access to major research databases is inconsistent even at many educational institutions138 and is even lower for international researchers139 and for U.S. practitioners.140 Open access legal scholarship widens the conversation to include additional voices outside of law professors, including nonlaw bloggers and journalists141 and foreign researchers.142 Greater availability of legal scholarship will extend law reviews’ development and their examination of new legal doctrine and schools of thought, as has happened in the past with law and economics, feminist legal theory, critical race theory, and expansions of tort

133. Id. at 16.
134. Id. at 11.
135. Harrison & Mashburn, supra note 35, at 76–77. Additionally, the rank of the law school from which the author graduated also correlated with higher citation counts. Id.
137. See, e.g., Cameron Stracher, Reading, Writing, and Citing: In Praise of Law Reviews, 52 N.Y. L. SCH. L. REV. 349 (2007–08); Wise, supra note 6, at 3.
138. Lawrence B. Solum, Download It While It’s Hot: Open Access and Legal Scholarship, 10 LEWIS & CLARK L. REV. 841, 843 (2006).
139. See, e.g., Bohannon, supra note 99.
140. Over 60 percent of attorneys in the United States are solo practitioners or work in firms of five lawyers or fewer, where there is low willingness to spend overhead dollars on research databases. Lawyer Demographics, AM. BAR ASS’N (2013), https://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf [https://perma.cc/6LKP-R8DE]; see also Carroll, supra note 54, at 756.
141. See, e.g., Hunter, supra note 28, at 624.
doctrine. After all, law reviews are “the primary repositories of legal scholarship . . . influencing how attorneys argue cases, how judges decide cases, what regulations administrative agencies adopt, and what laws legislatures enact.” Thus, opening the work of the academy to the wider world releases valuable information and allows the public to access scholarship that, if acted upon, could affect their rights and governments. In an example of the extension of the reach of scholarship via open access, a study found that users from low- and low-middle-income countries, as defined by the World Bank, had more engagement with social justice materials on studied institutional repositories than did users in higher-income countries.

§42 Open access also increases the likelihood that thinkers will join together to build on and improve their ideas. In the 1850s, Charles Darwin relied on the penny post to communicate with a network of naturalists and breeders to gather evidence to support his theory of natural selection, as he was unable to build his case on his own. Today, open access scholarship increases researchers’ abilities to both create and expand the reach and impact of scholarship. In the case of legal scholarship, there is a strong justification for a greater exchange of ideas because of the law’s direct impact on individuals and larger society.

§43 Open access publication of scholarship can increase the exchange of ideas through reduced transaction costs, but online publication also offers the ability to expand scholarly discussion, especially when a journal is no longer tied to a print complement. The online environment allows for alternate article formats, volume organizations, easy access to cited and discussed material through hyperlinks, and supplementary data or files to support a scholar’s thesis or provide information on their method. With electronic-only journals, longer or more articles, or an article and response format, would have no additional printing costs and would increase the speed of scholarship by eliminating the time needed for the printing process; many print law reviews already have online companions or additional electronic-only issues toward these ends.
Moving Forward

¶ 44 It is clear that open access law review content will continue to grow as more titles become open access, more law schools upload archival journal content, and those titles that are currently open access publish into the future. Additionally, as law schools aim to contain journal budgets, the number of electronic-only law reviews and journals will continue to rise, making open access the only unlocked scholarship distribution method for those titles. That said, there may be a shakeup in how some open access law review content is offered. The acquisition of bepress by Elsevier has shocked some in the academic community and made others uneasy. With the news of the Elsevier acquisition, the University of Pennsylvania Libraries announced that it was commencing “Operation beprexit”—a project to migrate Penn’s institutional repository from the bepress Digital Commons platform because of Elsevier’s long “history of aggressive confidentiality agreements, steep price increases, and opaque data mining practices,” and its current “move toward the consolidation and monopolization of products and services impacting all areas of the research lifecycle.” The bepress purchase by Elsevier looms large in law open access because such a large proportion of law institutional repositories, housing the vast majority of open access backfile content, use the bepress Digital Commons platform. A possible future alternative to bepress Digital Commons could be LawArXiv, an open access legal scholarship repository overseen by the scholarly legal community on a nonproprietary platform. While LawArXiv does not currently have a journal title format, the ability to host journals on the platform is a developmental goal. With enough adoption from law schools, LawArXiv could be a viable search microcosm, similar to Law Commons.

¶ 45 A growing push to support open access scholarship is evident. The University of California, for example, is prioritizing open access to UC authors’ scholarship to constrain costs and increase the dissemination of research outcomes; and Science Europe is calling for research funded by public grants to be published on

151. See GALLAGHER L. LIR., supra note 149.
152. See Schonfeld, supra note 81.
155. Id.
156. Approximately 8500 volumes are hosted in institutional repositories compared to approximately 3400 on journal websites.
open access platforms by 2020.\textsuperscript{161} There is also growth in search tools such as Unpaywall,\textsuperscript{162} Kopernio,\textsuperscript{163} and Open Access Button\textsuperscript{164} that can make open access scholarship more locatable and accessible. This push for open access, in combination with the lower costs for electronic-only publishing and the wider use of scholarship published in open access, will continue to advance the growth of open access law reviews going forward until nearly all law reviews will be openly available.

\begin{footnotesize}
\textsuperscript{162} Unpaywall, https://unpaywall.org/ [https://perma.cc/V7DK-M66Y].
\end{footnotesize}
Revisiting the Open Access Citation Advantage for Legal Scholarship

John R. Beatty**

Citation studies in law have shown a significant citation advantage for open access legal scholarship. A recent cross-disciplinary study, however, gave opposite results. This article shows how methodology, including the definition of open access and the source of the citation data, can affect the results of open access citation studies.

Introduction

¶1 Scholarship exists to be used but, unfortunately, use is difficult to measure. Citations are the most visible and easily counted artifacts of use, and citation studies have become the bedrock of scholarship use studies. Because citations are the easiest measure of use and, therefore, usefulness, citation studies are an important measure in tenure review. Scholars pore over journal metrics to target the most-cited journals for their articles. They are always on the lookout for anything they can find that will lead to more citations. Outside of other reasons for open access publishing, there is an interest in whether open access will help scholars obtain more citations to their work.

¶2 Consequently, much discussion has centered around the citation advantage of open access journal articles. Citation studies, however, have reached little agreement. Their results vary depending on discipline, the population studied, and the definition of open access.1 Atchison and Bull found that self-archived articles in

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** Faculty Scholarship Outreach Librarian, Charles B. Sears Law Library, University at Buffalo School of Law, Buffalo, New York.
political science were cited two-and-a-half times more often than those only available via toll access. Davis found an increase in readership, but no effect on citation counts for open access articles in a set of medical journals. Dorta-González et al. found no generalizable gold open access citation advantage in a total population study of the Web of Science core collection during 2009. Salisbury et al. found that publications in fully open access journals of faculty at the University of Arkansas indexed in the Web of Science core collections from 2005 to 2015 were less likely to be cited than those in non-open access journals.

A number of reasons have been hypothesized for the possible lack of citation benefit derived from open access scholarship. Gaulé and Maystre suggest that the slight citation advantage they found for open access articles in the hybrid journal *Proceedings of the National Academy of Sciences* was due to author self-selection. Davis suggests although he and his colleagues found an increase in readership of the scientific articles they studied, the lack of an increase in citations was due to an increase in readership “outside of the community of core authors” of the scientific literature. Similarly, Thelwall suggests that the difference between downloads and citation counts may be due to use by communities that do not publish research, like students or the general public, or publish in places not indexed by the citation database used (in that case, Scopus). Plotin discusses the need for researchers to understand the scholarly culture of the discipline being studied to explain how and why it has or has not adopted open access, or whether it is likely to do so. Davis and Walters hypothesize that the large citation advantage found in early studies was due to improper methodology.

Davis and Walters also highlight one of the problems not only of citation studies but studies on scholarly literature use in general. Studies that look only at citations ignore the communities of those who use, but do not cite, the literature. They argue that the greatest value of open access is its potential to make scholarly information available to those communities. Other kinds of utility are not studied, however, because they are harder to measure and of “less immediate value” than the traditional indicators of scholarly value.

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11. *Id.* at 213–14.
12. *Id.* at 213.
But some researchers have attempted to quantify these other kinds of utility. Thelwall, for example, found that counts of Mendeley readers correlate with citation counts for individual journal articles.13

Although not 100 percent predictive, Mendeley reader counts appear earlier than citation counts, and therefore have some use as a metric.14 Additionally, companies such as Altmetric and Plum Analytics have turned this type of research into products that collect a number of pre-citation events and attempt to turn them into metrics that supplement traditional citation metrics.

Very few citation studies have been conducted in law. Donovan and Watson found a clear benefit for green open access in their study of citations to the law journals published by the University of Georgia.15 Twenty-two percent of the articles published from 1990 through 2007 in the studied publications were available in an open access version.16 Those open access articles accrued 58 percent more citations than the non-open access articles.17 Donovan (2014) conducted a follow-up study of 30 flagship law reviews, finding an average open access advantage of 53 percent over the same time period.18 This later study also found that journals from the middle-ranked law schools received a greater increase in citations when their articles were openly available than did journals from the highest-ranked schools.19

Their conclusions are what one might expect, given earlier studies looking at citation patterns in law after the introduction of electronic research. Joergensen found that second-tier (lower-cited) journal articles were cited more frequently when full text was included in LexisNexis and Westlaw.20 Similarly, Rumsey found that as international law journals became more available in electronic format, journals became more frequently cited than books, a reversal of earlier patterns.21

These studies all support the idea that legal scholarship is more likely to be cited when it becomes more available or more visible. Donovan (2014)’s finding that mid-tier open access journals experienced a larger increase in citations than the top-tier journals offers further support. If scholars are already reading the top journals, then further accessibility through open access will have a limited effect on citation. It may, however, increase readership by communities who are unlikely to produce scholarship that will lead to countable citations.22 If mid-tier journals are not widely read but are publishing quality scholarship, the visibility boost from open access articles may lead to more citations.

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13. Thelwall, supra note 8, at 145. Mendeley is a research management and social network platform for sharing research.
14. Id. at 144–45.
15. James M. Donovan & Carol A. Watson, Citation Advantage of Open Access Legal Scholarship, 103 LAW LIBR. J. 553, 2011 LAW LIBR. J. 35.
16. Id. at 566, ¶ 40.
17. Id. at 569, ¶ 46.
19. Id. at 10–11.
22. Thelwall, supra note 8, at 150.
¶10 In stark contrast, Dorta-González found, in a total population study of articles indexed in Web of Science in all disciplines for the year 2009, that open access law journals were 40 percent less likely to be cited than journals that were not open access.23

¶11 This study aims to reconcile the difference between these two results. I suspected that the different methodologies were the cause of the vastly different results. My initial hypothesis was that the difference was largely due to the different definitions of open access. While this turned out to be one cause, other methodological choices also contributed to the size of the difference.

**The Problem in Law: Law Is Not Science**

¶12 One problem with studies that examine citation of open access scholarly literature in multiple disciplines is that they do not take the scholarly culture of each discipline into account. The culture of each discipline, including its research methods, affects the extent to which it adopts new technology.24 If a discipline is slow to abandon traditional library research, the immediate nonavailability of a particular source may not preclude its use. But if, for example, the members of a discipline are instead searching Google Scholar, they may be more likely to eschew unavailable sources in favor of the full-text ones immediately available. This suggests the one-size-fits-all approach of Dorta-González and others is less useful than studies within a single discipline, which can take culture into account. Moreover, these studies may be searching for an intrinsic citation advantage or disadvantage of open access that does not exist.

¶13 Law as a discipline in the United States has evolved differently than other disciplines.25 Whereas most disciplines publish research in peer-edited journals, in law the vast majority of journals are edited by law students.26 In the peer review model, professional or faculty editors choose which articles to publish.27 Those articles are reviewed by faculty scholars, generally anonymous, who comment on the drafts.28 The drafts are revised by the author, edited, and published.29

¶14 In the student-edited law review model, most of the journals are published by law schools and the journals are run by students.30 Students choose the articles from the submissions received, often on the basis of the author’s prestige or the


prestige of the author’s institution. The students also edit the articles, with little or no peer review. Authors, for their part, seek to place their articles in the most prestigious journals. In doing so, they are likely to submit an article to multiple journals and may withdraw an article accepted by a journal that the author does not consider prestigious enough. Prestige of the journal is often correlated with the school’s *U.S. News* ranking.

¶15 Regardless of the lack of peer review, the student-run journals are generally cited more than peer-reviewed law journals. As Milles has noted, the most prestigious law journals are those run by law students, not those run by commercial publishers or scholarly societies. In a survey of the 2001 to 2007 *ISI* Journal Citation Reports, Plotin found that 18 of the top 20 journals by impact factor over that time were student-run law reviews published by law schools. She also found that in 2007, the majority of the top 100 journals were student run. The Washington and Lee journal rankings show a similar pattern. For the years 2012 to 2017, no more than four peer-reviewed or refereed journals have made the top 50 journals by impact factor in any one year.

¶16 Another problem with citation studies in law is that the science databases that offer the most robust citation metrics, such as Web of Science and Scopus, generally index only peer-reviewed journals. Both make some exceptions in law. As of August 2019, Web of Science indexes 155 of the top-cited law journals, including a number of student-edited law reviews. There are, however, currently about 681 student-edited journals being published. Including faculty-edited journals, journals produced by scholarly societies, and professionally published, peer-reviewed journals, the total number of legal journals in the United States is approximately 950. Because Web of Science indexes only a small fraction of the currently

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33. Hunter, supra note 29, at 767.
34. Id.
37. Plotin, supra note 9, at 45, ¶ 42.
38. Id.
42. Id.
43. See We-L Law Journal Rankings, supra note 39 (click “Edit Type: Student-Edited,” select “Show: All,” click any ranking criteria box for 2017, click “Submit”).
44. LegalTrac indexes almost 2000 titles, but many of those are bar journals or other nonscholarly magazines. HeinOnline indexes more than 3000 titles, but that number includes bar journals and historical journals. Index to Legal Periodicals and Books indexes 947 serials that it categorizes as “Academic Journals.” Current Index to Legal Periodicals is more selective, indexing 589 current law journals. As of August 2019, Washington and Lee’s journal ranking tool tracked 942 U.S.-based law journals.
published law reviews, it is necessarily missing a large number of the citations to these works. Consequently, citation studies conducted in law generally use either Westlaw or LexisNexis, the two largest legal databases, rather than Web of Science or Scopus. Westlaw and LexisNexis, however, contain few of the commercial journals indexed in Web of Science.

Defining Open Access

¶17 There are many conflicting definitions of open access and no standards. Early definitions were provided by statements drafted at three meetings. The first, the Budapest Open Access Initiative, dated February 4, 2002, states that “peer-reviewed journal literature should be accessible online without cost to readers.” To meet this goal, it recommends two strategies: self-archiving and open-access journals. Self-archiving is defined as authors “deposit[ing] their refereed journal articles in open electronic archives.” It defines open access as “free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose.”

¶18 Under the Bethesda Statement on Open Access Publishing, April 11, 2003, open access means that

author(s) and copyright holder(s) grant(s) to all users a free, irrevocable, worldwide, perpetual right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use.

It also requires immediate deposit upon publication into at least one online repository.

¶19 Finally, the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, promulgated October 22, 2003, uses almost the exact same definition as the Bethesda Statement, but widens the description of type of work to include not only primary scientific literature but also documents reflecting human knowledge and cultural heritage, including original research, raw data, source materials, and other documents. Table 1 summarizes these three definitions.

¶20 All three definitions are narrow and require authors and publishers to grant wide reuse rights to readers. In the time since these statements, other definitions of

47. Id.
48. Id.
49. Id.
51. Id.
52. The Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, Max-Planck-Gesellschaft, https://openaccess.mpg.de/Berlin-Declaration [https://perma.cc/AM2G-QHB3].
what is called open access have broadened the term’s meaning. One such definition of open access is “the free, immediate, online availability of research articles coupled with the rights to use these articles fully in the digital environment.” Another states, “Open access literature is available online to be read for free by anyone, anytime, anywhere—as long as they have Internet access.”

Researchers have largely settled on two main definitions of open access: gold and green (summarized in table 2). The main difference between the two is whether the journal or the author makes the article available. Gold open access is provided by the journal. At a minimum, gold open access requires that journals provide “immediate full-text online access at no charge to readers.” Under the Scholarly Publishing and Academic Resources Coalition’s (SPARC) more restricted definition, a typical gold journal would publish its peer-reviewed articles online; allow its authors to not only republish but also to post the final version of the article on personal websites, department websites, institutional repositories, and commercial services; and allow readers to freely share the final version. The Directory of Open Access Journals (DOAJ) is even more rigid, not only requiring the Budapest definition of open access but also requiring that journals “use a funding model that does not charge readers or their institutions for access.”

Gold open access includes both fully open access journals and hybrid journals. Hybrid journals are generally subscription journals that allow authors, for a fee, to publish articles under an open access (usually Creative Commons) license.

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55. CRAWFORD, supra note 53, at 1.
56. See, e.g., Parker, supra note 24, at 440.
57. CRAWFORD, supra note 53, at 18.
60. See Pinfield, supra note 1, at 618, 619.
Additionally, articles are made available for free to nonsubscribers on the journal website.

¶23 In contrast, green open access does not require the journal to post a freely available copy. Green access is instead a product of author self-archiving. In general, a green open access option allows an author to post some version of the article on a personal, departmental, or institutional repository or website.\textsuperscript{61} The version may be the final version, the post–peer review or edited version (often called “post-print” or “accepted manuscript”), or the author’s pre–peer review draft (usually called a “pre-print”).\textsuperscript{62} Posting may also be allowed on a commercial, discipline-specific repository like SSRN.\textsuperscript{63} The version that the author may post might be different depending on where the article is being posted.\textsuperscript{64} An embargo of six months to two years may also be imposed. Again, the length of the embargo may change depending on where the article is posted.\textsuperscript{65} Hybrid journals often allow authors not paying the fee to self-archive a post-print after an embargo period.\textsuperscript{66}

¶24 After a rather limited start, open access has expanded throughout the student-run law journals. In 2005, Creative Commons and Science Commons created the Open Access Law Program.\textsuperscript{67} The program’s statement of principles called on law reviews to require that authors grant only “a reasonable, limited-term exclusive license,” allow authors to grant a Creative Commons to their published work, provide authors with electronic copies of the final publication to deposit in an open access repository, and to either use the program’s model publication agreement or

\begin{table}[h]
\centering
\caption{Gold vs. Green Open Access} \label{table:gold_vs_green}
\begin{tabular}{|l|l|l|l|l|}
\hline
OA Type & Who Posts? & Version Posted & Cost to Author & Availability & When Posted? \\
\hline
Gold & Journal & Version of record & Maybe & Journal website \small May be available elsewhere depending on license & Immediately \\
\hline
Green & Author & Version of record \small Post-print \small Pre-print & None & Depends on license; may be available on author’s website, on an institutional repository, or on disciplinary repositories & Immediately, or after embargo period, depending on journal’s policy \\
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\end{table}

61. Parker, supra note 24, at 440.
62. Atchison & Bull, supra note 1, at 132.
63. See Green Open Access Policy for Journals, CAMBRIDGE UNIVERSITY PRESS, https://www.cambridge.org/core/services/open-access-policies/open-access-journals/green-open-access-policy-for-journals [https://perma.cc/B7Y6-DZZ5].
65. See Green Open Access Policy for Journals, supra note 63.
67. Plotin, supra note 9, at 42, ¶ 33.
post the law review’s current agreement on its website. In return, authors agree to attribute the journal with first publication upon any reuse. As of October 2008, 33 law reviews had signed on.

¶ 25 Two other major events followed. In 2008, the faculty of Harvard Law School unanimously voted to make its scholarship “freely available on an online repository.” The same year, a meeting between directors of major academic law libraries resulted in the Durham Statement on Open Access to Legal Scholarship. The Statement calls on law schools to abandon print and make the definitive versions of their journals available immediately “upon publication in stable, open, digital formats.”

¶ 26 But even before all of this, Duke Law School began publishing new articles from its print journals on the law school website in 1998; since then, it has added all back issues. An increasing number of journals have followed this lead, publishing their content for free on the Internet, either on their websites or in institutional repositories (or both), simultaneously with or even prior to print publication. Recently, some schools have ceased publishing their journals in print altogether and are publishing only online.

¶ 27 It is not always easy to determine whether journals that provide free access to their articles online allow republication, author deposit, or sharing. The Durham Statement calls for open publishing in repositories but does not speak to reuse rights. Any law review that uses either the model publication agreement from AALS or the one from Science Commons does allow author self-archiving and sharing. But even when they use an agreement allowing authors expansive reuse rights, law reviews do not always publish their policies publicly. Although signers to the Science Commons Open Law Statement promise to post their policies and

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69. Id.
70. Plotin, supra note 9, at 42, n.91. The program seems to have ended. Although a list is still available at https://wiki.creativecommons.org/wiki/Open_Access_Law_Adopting_Journals [https://perma.cc/GF5W-ATBL], most Science Commons pages redirect to the main Creative Commons website, and information is no longer available there; see, e.g., Open Access Law: Principles, supra note 68, first URL (redirecting to a Creative Commons page).
72. Id.
74. Danner, supra note 27, at 72.
75. Of the 47 student-run journals indexed in Web of Science for 2009, 14 have their full runs available for free on the Internet. Twenty-two more have all issues from 2009 or earlier available. Ten more started publishing full issues online between 2010 and 2016. Eight remain unavailable in a free version.
77. Durham Statement on Open Access to Legal Scholarship, supra note 73.
author agreement on their websites, fewer than half have a policy or agreement posted in an obvious place on their public websites.\(^\text{79}\) SHERPA, a resource for finding publishers’ open access policies, has only very sparse coverage of law reviews.\(^\text{80}\) There is, to date, no other central public list of law review open access policies.

\(^{28}\) DOAJ, in keeping with its rigid adherence to the Budapest definition, indexes only peer-reviewed journals, with no exception for law.\(^\text{81}\) DOAJ currently indexes 248 law journals, only 4 of which are published in the United States.\(^\text{82}\) Almost half of these journals (113 as of August 2019) are published in two countries: Brazil and Indonesia.\(^\text{83}\) A number of student-edited law reviews were formerly included in DOAJ, including all of the law reviews published by Duke Law School.\(^\text{84}\) They were removed, however, when DOAJ changed its criteria for inclusion.\(^\text{85}\) Bopape similarly found that only 3 percent of the journals indexed in DOAJ were law journals.\(^\text{86}\)

\(^{29}\) Nevertheless, a number of student-run journals publish their articles in full text online. Plotin found that 14 of the top 20 journals by impact factor in ISI (now included in Web of Science) between 2001 and 2007 were available online.\(^\text{87}\) In addition to websites, legal scholarship is both more available and more downloaded than that of other disciplines on SSRN and Bepress’s Digital Commons.\(^\text{88}\) Consequently, any study using DOAJ to identify open access journals is drastically undercounting open access law journals.

\(^{30}\) But a public access policy does not matter to researchers as long as they can find what they need. Consequently, studies looking at citation rates of green open access tend to use Crawford’s definition of an article that “is available to be read for free by anyone, anytime, anywhere—as long as they have Internet access.”\(^\text{89}\) Studies investigating a hypothesis that researchers will use the sources most conveniently accessible to them generally use a version of this definition, often marking an article open access when full text is found through a Google search on the title.\(^\text{90}\)

79. Of the 37 journals listed at https://wiki.creativecommons.org/wiki/Open_Access_Law_Ado...Adopting_Journals [https://perma.cc/GF5W-ATBL], only 12 have a posted policy or author agreement. Four more either note that they are “open access” with no further definition or mention that they comply with the Open Access Law Journal Principles. Twenty more make no mention of open access or the principles and have no available author agreement. One is defunct.

80. Donovan (2014), supra note 18, at 3, n.5.


83. Id.

84. Hart, supra note 81, at 23.

85. DOAJ, DOAJ to Remove Approximately 3300 Journals (May 9, 2016), https://blog.doaj.org/2016/05/09/doaj-to-remove-approximately-3300-journals/ [https://perma.cc/DNW8-MLX6]. DOAJ has published a spreadsheet listing all of the removed journals, which is linked on this post. The list includes at least 57 law journals, including five Duke Law School journals.


87. Plotin, supra note 9, at 47, ¶ 45.

88. Bopape, supra note 86, at 95.

89. Crawford, supra note 53, at 1. Studies using this definition include Atchison and Bull, supra note 1, at 130.

Other researchers looking at hybrid journals look at how individual articles are treated on the publisher’s website. Researchers skeptical of an open access citation advantage often use restrictive gold open access definitions, such as counting only all–open access journals and ignoring open access articles in hybrid journals. Such methodologies likely undercount citations in legal journals, especially student-run law reviews.

**Previous Studies**

¶ These differences in approach likely explain the large difference in results between the Dorta-González and the Donovan studies. Dorta-González looked at gold open access journals exclusively. Each article was classified as open access if it was published in a journal that published only open access articles. Hybrid journals were treated as non–open access. So any individual articles that were published as gold open access in those journals were counted with the non–open access articles. In contrast, Donovan and his coauthors conducted Google searches, and if any free version of an article was found online, it was counted as open access.

¶ Dorta-González determined whether a journal was open access by consulting Web of Science. Although the Web of Science documentation does not specifically state this, the underlying journal information appears to come from Ulrichsweb. Ulrich’s documentation is similarly nonspecific, but it appears that it determines whether a journal is open access by consulting DOAJ. As discussed above, DOAJ does not consider the vast majority of U.S. law reviews for inclusion in the directory because they are not peer reviewed. Web of Science does include some non-peer-reviewed journals in law. Even though many of those journals are available for free online, Web of Science does not mark any of them as open access. By restricting the definition of open access in this way, the Dorta-González study significantly undercounts the number of open access articles, undermining the impact of their results.

¶ Donovan and Watson consider green open access articles in the three law journals published by the University of Georgia. None of the journals were open access during the time period considered. The study looked at every article pub-

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91. See, e.g., Davis, supra note 1; Gaulé & Maystre, supra note 6, at 1334.
92. See, e.g., Dorta-González, supra note 4, at 879; Salisbury, supra note 5, at 188–89.
93. Dorta-González, supra note 4, at 879.
94. Id.
95. Id.
97. Dorta-González, supra note 4, at 879. In a follow-up study comparing open access and non–open access journals in Scopus, Dorta-González and Santana-Jiménez used DOAJ to determine whether journals were open access. See Pablo Dorta-González & Yolanda Santana-Jiménez, Prevalence and Citation Advantage of Gold Open Access in the Subject Areas of the Scopus Database, 27 RES. EVALUATION 1, 10–11 (2018).
98. See ULRICHSWEB, https://ulrichsweb.serialssolutions.com [https://perma.cc/CGA6-FP8A]. The Web of Science interface offers some detail on each journal, but a link for more information leads to Ulrich’s.
99. For example, the list of open access journals indexed by Web of Science for 2017 coincides with those included in DOAJ.
100. Donovan & Watson, supra note 15, at 565, ¶ 34.
101. Id.
lished between 1990 and 2008. Every article for which they could find any free version posted online was counted as open access. Citation counts were obtained from Shepard’s citation reports on LexisNexis, or from KeyCite on Westlaw if there was no Shepard’s report. The citation counts were compared between the open access and non–open access articles. The follow-up study by Donovan (2014) looked at articles from 30 flagship law reviews published between 1990 and 2010, using the same methods to determine open access.

Methodology

Initially, I attempted to recreate the Dorta-González study. Their methodology states that the article information was exported in aggregate, sorted by subject. Because I was exporting the data several years later, the Web of Science citation analysis reports included several more years of citations. To more closely replicate their dataset, I exported all of the article records under the Web of Science category Law and removed the post-2014 citations by hand. The number of articles was slightly smaller than what Dorta-González pulled in 2016, likely due to changes in the journal list.

Their methodology states they determined open access at the journal level. However, as of May 2018 there are no fully open access journals listed in Web of Science for law in 2009, so I was unable to replicate their comparison of articles from fully open access journals to all other articles.

Web of Science also categorizes open access articles at the article level as gold or green. Gold open access includes gold articles in hybrid journals, which were excluded by Dorta-González. First, I compared the citations for open access and non–open access articles, counting only gold open access. I then compared all gold and green open access articles, as determined by Web of Science, against all other articles. Finally, I did the comparison once again using an expanded definition of open access.

To determine which journals were open access under this expanded definition, I looked at the website of each of the 145 journals in the dataset. All journals that offered full text of every article in the years examined (2009 and 2014) on their websites or institutional repositories were counted as open access. To more closely replicate the methodology of Dorta-González, and in contrast to Donovan and Watson, articles in non–open access journals were not checked for self-archiving.

One shortcoming of the Dorta-González study is that it used no control for quality of publication. Only 3 percent of the articles were open access, and all open access articles were in open access, peer-reviewed journals. Because of the nature of law publishing, the peer-reviewed open access journals are unlikely to be ones that are heavily cited. The most prestigious legal journals are those published by the

102. Id. at 565, ¶ 35.
103. Id. at 565, ¶ 36. This methodology was also used by Atchison and Bull. See Atchison & Bull, supra note 1, at 130.
105. Id. at 566, ¶ 41.
107. Dorta-González, supra note 4, at 880.
108. Id. at 886.
top-ranked law schools, which are not peer reviewed. Consequently, the open access articles counted by Dorta-González are not in the top-cited journals. Here, however, under the expanded definition of open access many, but not all, of the top-cited journals are included in the list of open access journals. The remainder of the journals are much lower on Washington and Lee’s list of the top-cited journals.

¶39 To help mitigate the effect of journal quality on the results, I divided the journals by publisher into five different types. Commercial journals are those published by large publishing companies, society journals are published by professional societies and nonprofits, student-run journals are the student-run general subject flagship journals, specialty journals are student-run topical journals, and other contains any other type of publisher, including small commercial publishers and university presses. Table 3 summarizes these five types of publishers’ journals.

Results/Discussion

¶40 At the time of Dorta-González’s research, there were 3865 law articles indexed in Web of Science for 2009. Three percent were open access. At the time of this research, there were 3821 law articles indexed in Web of Science for 2009, 3 percent of which are categorized in Web of Science as gold open access. Web of Science also includes green open access. Adding green and gold open access results in 4.1 percent of the articles being open access. Under the expanded definition of open access, including all of the open access student journals and the articles that Web of Science marked as open access, 28.5 percent of the articles were open access. Of the 145 law journals represented in that dataset, no journals were open access. Under the expanded definition of open access discussed above, 39 of the journals (26 percent) are open access.

¶41 Because the dataset has changed, it is impossible to exactly replicate the Dorta-González study. Under the current dataset, however, the results (summarized in table 4) are completely different. The current set has only 44 fewer articles but the same percentage (3.0 percent) of gold open access. The citation counts, however, are completely different. The citation rate for open access articles has more than quadrupled, from 2.17 per article to 9.33. The citation rate for non–open access articles has also increased, from 3.65 to 4.49. Including green open access articles increases the citation advantage further, to 118.55 percent.

¶42 Without knowing which journals were changed between the studies, it is difficult to know why the results are so different. One possibility is the small number of open access articles in the dataset. Given the small number of open access articles, substituting the articles from two obscure open access titles with a similar number of hybrid journals that are much more heavily cited could completely change the results.

¶43 Some clues, however, are available. Dorta-González counted only fully open access journals as open access, so the dataset must have contained some open access

110. Cambridge University Press and Oxford University Press journals are counted as commercial journals because both publishers have large journal publishing operations with similar policies to large publishers like Taylor and Francis, Sage, and Wiley. In contrast, the University of Chicago Press publishes only a few journals. Its three journals indexed in Web of Science are also in Westlaw.
111. The complete 2009 volume of European Journal of International Law and almost complete volume of ICON are open access, although not every volume of each is.
### Table 3
Types of Publishers’ Journals

<table>
<thead>
<tr>
<th>Publisher Type</th>
<th>Example Journals</th>
<th>Example Publishers</th>
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<tbody>
<tr>
<td>Commercial</td>
<td>American Journal of International Law</td>
<td>Cambridge University Press</td>
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<tr>
<td></td>
<td>Asia Pacific Law Review</td>
<td>Taylor and Francis</td>
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<tr>
<td></td>
<td>International Journal of Law and Economics</td>
<td>Elsevier</td>
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<tr>
<td></td>
<td>Law and Social Inquiry: Journal of the American Bar Foundation</td>
<td>Wiley</td>
</tr>
<tr>
<td>Other</td>
<td>Annual Review of Law and Social Science</td>
<td>Annual Reviews</td>
</tr>
<tr>
<td></td>
<td>Military Law Review</td>
<td>Judge Advocate General's Legal Center &amp; School</td>
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<tr>
<td></td>
<td>Supreme Court Review</td>
<td>University of Chicago Press</td>
</tr>
<tr>
<td>Society</td>
<td>American Journal of Comparative Law</td>
<td>American Society of Comparative Law</td>
</tr>
<tr>
<td></td>
<td>Family Law Quarterly</td>
<td>American Bar Association</td>
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<tr>
<td></td>
<td>Journal of Legal Education</td>
<td>American Association of Law Schools</td>
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<tr>
<td></td>
<td>Judicature</td>
<td>Duke Law Center for Judicial Studies</td>
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<tr>
<td>Specialty</td>
<td>Cornell International Law Journal</td>
<td>Cornell Law School</td>
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<tr>
<td></td>
<td>Ecology Law Quarterly</td>
<td>UC Berkeley School of Law</td>
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<tr>
<td></td>
<td>Journal of Criminal Law &amp; Criminology</td>
<td>Northwestern University School of Law</td>
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<tr>
<td></td>
<td>Stanford Journal of International Law</td>
<td>Stanford Law School</td>
</tr>
<tr>
<td>Student-Run</td>
<td>Duke Law Journal</td>
<td>Duke Law School</td>
</tr>
<tr>
<td></td>
<td>Harvard Law Review</td>
<td>Harvard Law School</td>
</tr>
<tr>
<td></td>
<td>New York University Law Review</td>
<td>New York University School of Law</td>
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<tr>
<td></td>
<td>Virginia Law Review</td>
<td>University of Virginia School of Law</td>
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</tbody>
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### Table 4
Open Access Citation Advantage by Definition of Open Access

<table>
<thead>
<tr>
<th></th>
<th>2009</th>
<th>Average Citations in 2009–2014</th>
<th>OA Citation Advantage (%)</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Total articles</td>
<td>% OA</td>
<td>OA</td>
</tr>
<tr>
<td>Dorta-González</td>
<td>3865</td>
<td>3.00</td>
<td>2.17</td>
</tr>
<tr>
<td>This study (gold OA)</td>
<td>3821</td>
<td>3.00</td>
<td>9.33</td>
</tr>
<tr>
<td>This study (all OA)</td>
<td>3821</td>
<td>4.10</td>
<td>9.66</td>
</tr>
<tr>
<td>Expanded OA</td>
<td>3821</td>
<td>28.50</td>
<td>5.07</td>
</tr>
</tbody>
</table>
journals. One journal in the current dataset, *Estudios Constitucionales*, was in DOAJ until February 2007, when it was removed. Its 16 articles in the dataset received four total citations between 2006 and 2014. Eight of those articles are currently marked as open access in Web of Science. Other gold open access articles in the dataset now include the complete 2009 volumes of the *European Journal of International Law* and *ICON-International Journal of Constitutional Law*, and issue one of the 2009 volume of the *Journal of Law and Society*.112 Eighty of the 115 open access articles in the dataset are from these three titles. They account for 743 of the 1073 gold open access citations.

¶44 Web of Science now has slightly fewer articles for 2009 (3821 down from 3865). Using the expanded definition of open access, the percentage of open access articles jumps from 3 percent to 28.5 percent. For 2014, Web of Science now indexes 227 fewer articles. However, there is a similar jump in the number of open access articles. In 2014, Dorta-González found about an 11 percent increase in the number of articles, with a 50 percent decrease in open access articles. Under Web of Science’s current indexing, there is a 6 percent increase in the number of total articles from 2009 to 2014. This is probably the result of both a changing journal list on Web of Science and DOAJ’s journal delisting program. However, under the expanded definition of open access, there is an enormous increase in the percentage of open access articles, from 26.54 percent in 2009 to 42.47 percent in 2014. This is mainly due to a 46 percent increase in the number of student-run journals that became open access between 2009 and 2014. During this period, 18 of the Web of Science–indexed journals started posting their new content, bringing the total from 39 to 57.

¶45 With the increase in number of open access articles, the average citations for open access articles more than doubled, from 2.17 to 5.07, changing the finding for open access citation advantage from a 40.5 percent disadvantage to a 13.68 percent advantage. While a radical change, this still falls short of what Donovan and Watson found. It is, however, fairly close to the 11.4 percent advantage that Donovan (2014) found for tier 1 journals.113 Table 5 summarizes the number of open access articles and citations for each type of journal publisher.

¶46 Here, controlling for journal type, the results are again different. Using the Web of Science data, the student-run flagship journals show a slight (8.66 percent) disadvantage, while the greatest gains were for commercial journals (96.9 percent).

¶47 Web of Science carries 31 of Washington and Lee’s top 50 most-cited journals from 2009 to 2016.114 Sorted by combined score, Washington and Lee’s top 50 is almost entirely composed of student-edited journals. The lone exception is *Supreme Court Review*, published by the University of Chicago Press, ranked at 27

112. It appears that *ICON*’s volumes are generally made open access about six years after publication, while certain volumes or issues of the other two titles may be made open access at some point after publication.


in 2016 and 17 in 2017. What is more, almost all of the top 300 journals are student run. Commercially published journals do not show up in any number until after 500.

¶48 Although Web of Science indexes many of the highest-cited journals, it still indexes only about 15 percent of currently published U.S. law journals. With 85 percent of journals unrepresented, it is likely significantly undercounting citations even to the journals that it does index. The journals in Donovan (2014) produced an average of 31.4 citations per non–open access article and 35.9 citations per open access article.115 Here, using the Web of Science citation data, the average was only 5.07 for open access and 4.46 for non–open access. Donovan (2014)’s study covered a 15-year period, almost three times as long as the 5-year period here. That study found a citation half-life of 7 years for non–open access articles and 5 years for open access articles.116 Given a 5 to 7 year half-life, roughly half of the citations for these articles should be in this dataset, which covers 6 years. Accounting for this, Web of Science counts only about one-third the number of citations that Donovan (2014) found on LexisNexis.

¶49 Additionally, Web of Science indexes almost twice as many commercial journals as it does student-run journals. Of the 91 non-student-run journals it carries, only three are in Washington and Lee’s top 100. Five more are in the top 200. Fifty-one are ranked below 500. Twelve are not ranked. Only three are open access. In contrast, the 54 student-run journals on the service are overwhelmingly top-ranked and open access. Thirty-seven are top 100. Only five are ranked below 300. Thirty-six are open access.

¶50 In contrast, Donovan (2014) worked with a list of 30 student-run journals that included a number of the top journals and some journals that were less heavily cited.117 Only nine journals appear on both lists. Of those, one (California Law Review) was open access for the entire time period studied. One more (Columbia

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116. Id. at 11.
117. Id. at 9, tbl.1.
Law Review) is still not. The remainder became open access during the period studied. Only three had a double-digit open access advantage.

¶51 Donovan (2014) found only an 11 percent open access advantage for first-tier journals, but found the greatest gains for second- and third-tier journals. The student-run journals in Web of Science are mostly in the first tier, so the sets are directly comparable. Donovan (2014) found minimal cumulative advantages over 15 years, with some journals having an overall open access disadvantage. Therefore, an 8 percent disadvantage for one year may not be too far from their general results.

¶52 The result may, however, be due to the large number of open access articles in the dataset. More than half of the articles in this category and in specialty journals were open access, which may depress the open access advantage. Donovan (2014) speculated that specialty journals would have a similar open access advantage to second- and third-tier journals. But instead, the gains were closer to what they found for first-tier journals.

¶53 The commercial publications had the greatest gains, which would support the convenience hypothesis. In general, the commercial publications are the least visible, as they are behind paywalls and are not in the most-used legal databases. Consequently, they have the most to gain from the increased visibility of open access.

¶54 Finally, the society and the other publications had large disadvantages for open source. This seems to be largely a product of the small sample size. All of the open access society publications were in one low-ranked title. The bulk of the open access other publications were in three titles, two of which are not ranked by Washington and Lee.

Conclusions

¶55 Contrary to what Dorta-González found, there is at least a small open access citation advantage for law journal articles. When using their methodology with a more accurate count of open access law journals, there was a 13.68 percent citation advantage for law journals, considerably higher than the 40 percent disadvantage that they found. While a large increase, it is a lot lower than what Donovan and Watson found in their initial study.

¶56 This could suggest that self-selection is at work, as could the dramatic increase in citation to commercial journals when hybrid gold and green access articles are counted as open access. However, Donovan (2014) used a mixture of fully open access and non–open access journals, but they had a number of self-archived articles, which should offset any self-selection bias in their original study. The second study did find a slightly lower citation advantage, but still one far above the one here using the Web of Science data.

¶57 This difference in citation databases appears to be the factor most skewing the results. Donovan (2014) compared open access and non–open access articles across the same journals, all of which were flagship law reviews that are likely to be cited by other flagship law reviews, of which Westlaw and LexisNexis have excellent coverage. Additionally, their study included top-tier, highly cited journals as well as mid-tier, less-cited journals. The Web of Science journal list is made up of about one-quarter highly cited, student-run flagship law journals, a small number of student-run specialty journals, and a large number of low-cited commercial jour-
nals. Additionally, because of the short journal list, Web of Science appears to be missing about two-thirds of citations to law scholarship, which could skew the results.

¶ 58 One further factor is likely the time periods covered. Dorta-González covers only articles published in 2009. Donovan (2014) looks at a 15-year publication window. To truly see the difference that the citation source makes, they need to be compared over the same time period.

¶ 59 In sum, this study reconfirms that there is a citation advantage for open access law journal articles. It also suggests that Web of Science is inadequate for obtaining citation metrics for student-run law journals, the venue where most legal scholarship in the United States is published. Dorta-González posited that they could find no generalized open access citation advantage. What they also seem to have found is that there is no generalized methodology for conducting an open access citation study across disciplines. Open access studies can easily be biased by the definition of open access used. They may also be biased by the choice of citation data source and its indexed journal list. Further study is necessary to determine the extent of bias.
## Keeping Up with New Legal Titles

Compiled by Susan Azyndar** and Susan David deMaine***

### Contents

<table>
<thead>
<tr>
<th>Title</th>
<th>Reviewer</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>The Modern Law Library</em> by ABA Journal</td>
<td>Kathryn Crandall</td>
<td>592</td>
</tr>
<tr>
<td><em>American Prison: A Reporter’s Undercover Journey into the Business of Punishment</em> by Shane Bauer</td>
<td>Alison P. Sherwin</td>
<td>594</td>
</tr>
<tr>
<td><em>Untangling Fear in Lawyering: A Four-Step Journey toward Powerful Advocacy</em> by Heidi K. Brown</td>
<td>Sherry L. Leysen</td>
<td>595</td>
</tr>
<tr>
<td><em>Foundations of Information Ethics</em> by John T.F. Burgess and Emily J.M. Knox, eds.</td>
<td>Charles Perkins</td>
<td>597</td>
</tr>
<tr>
<td><em>Field Guide to Legal Research</em> by Paul D. Callister</td>
<td>Nathan A. Preuss</td>
<td>598</td>
</tr>
<tr>
<td><em>Furious Hours: Murder, Fraud, and the Last Trial of Harper Lee</em> by Casey Cep</td>
<td>Christine Anne George</td>
<td>599</td>
</tr>
<tr>
<td><em>Copyright’s Highway: From the Printing Press to the Cloud, Second Edition</em> by Paul Goldstein</td>
<td>Elizabeth Manriquez</td>
<td>601</td>
</tr>
<tr>
<td><em>Feminist Dialogues on International Law: Successes, Tensions, Futures</em> by Gina Heathcote</td>
<td>Loren Turner</td>
<td>603</td>
</tr>
</tbody>
</table>

* The works reviewed in this issue were published in 2018 and 2019. If you would like to write a review for “Keeping Up with New Legal Titles,” please send an email to sdemaine@iu.edu and/or azyndar.1@osu.edu.

** Reference Librarian, Moritz Law Library, Ohio State University Moritz College of Law, Columbus, Ohio.

*** Associate Director, Ruth Lilly Law Library, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana.
Keeping up with new legal titles—typically, that is why librarians care about publication reviews. It is also the primary goal of this section of Law Library Journal. It is with this knowledge of a common aim that I recommend readers of Law Library Journal listen to the Modern Law Library podcast from the American Bar Association and Legal Talk Network. This podcast will help law librarians make more informed collection development decisions and provide awareness of upcoming publications that may not be on a collection committee’s radar.

Though not regularly produced (typically averaging two podcasts a month), the Modern Law Library presents polished and professional author interviews that provide a deep dive into recent publications in less than an hour. The focus is generally on more popular titles addressing legal theories and historical events. The primary host, Lee Rawles, begins each interview with an introduction to the author and a brief publication summary. With a conversational interview style reminiscent of Fresh Air’s Terry Gross, Rawles then prompts a broad look into the author’s perspective on his or her story and how the author chose to tell it in the work being discussed. The interview is always set at an easy pace and follows a narrative arc. Rawles tends to ask questions that reveal the author’s views on how his or her publication will be received by critics, any particular motivations behind the author’s writing or in his or her life, and other publication recommendations.

* © Kathryn Crandall, 2019. Associate Director, College of Law Research Center, Florida State University, Tallahassee, Florida.
¶3 These short interviews provide more than just a blurb; they offer a unique view into the author’s mind and an understanding of his or her voice. Often, the Modern Law Library interviews lead to revelations of other sources of information, including award-winning books, articles, and essays. For example, in the episode entitled “How to Become a Federal Criminal: It’s Easier Than You May Think” (http://www.abajournal.com/books/article/podcast-episode-101 [https://perma.cc/VS6V-6SRL]), author Mike Chase discusses an upcoming publication based on his Web 100–nominated Twitter account. This Twitter account highlights a federal crime each day with the end goal of covering every existing federal crime. The interview with Chase provides insight into the motivation behind the Twitter account and the book, as well as suggestions about who would be interested in reading both. Chase hopes that the reader will realize that it is “not a joke book” but rather an opportunity to approach legal issues with a new mindset. The podcast also provides brief excerpts from the publication. With these excerpts, authors highlight the context in which they were written and share anecdotes that shaped their writings. By the end of an interview, the Modern Law Library listener truly has a sense of the author’s work, his or her inspiration, and the choices he or she made during the process of creating a narrative.

¶4 Sometimes, an author of a new edition of a book is invited to speak on the podcast. These interviews can offer much-needed information about how the updated edition provides a different take on a topic, which is not always readily apparent. For example, Mark Herrmann, author of the latest edition of A Curmudgeon’s Guide to Surviving and Thriving in BigLaw, explains how the new edition differs from the popular 2006 edition (http://www.abajournal.com/books/article/podcast-episode-100 [https://perma.cc/2F4D-XTVT]). Herrmann shares how certain sections can be of real use to those entering the legal profession now. For instance, he spends a great deal of time on demystifying depositions, aiming to give readers confidence when tackling their first deposition. Tips like Herrmann’s are not often provided to law students or even to newer associates. This kind of in-depth look into an author’s reasoning as to how or why he or she wrote a publication, or even who they view as the intended reader, is extremely valuable when making purchasing decisions.

¶5 Overall, this podcast should not be missed. However, I would be negligent if I did not include one small critique. Unlike other podcasts, where the guest joins the interviewer in a professionally equipped sound space, on the Modern Law Library, the author is often calling in from a personal phone. Although the host’s questions are clear, the sound quality of the answers can be somewhat distracting. That said, this podcast is recommended for anyone interested in discussions of history, legal concepts, and the viewpoints of authors who write in these areas. The Modern Law Library podcast provides librarians with a behind-the-scenes peek into newer legal publications in an easy-to-consume format. It is available on Spotify, Apple, Stitcher, Google Play, and at the ABA website.

Reviewed by Alison P. Sherwin*

¶6 From the rare bipartisan support for the First Step Act of 2018 to Joe Biden’s authorship of the controversial Violent Crime Control and Law Enforcement Act of 1994 to Kamala Harris’s divisive record as a prosecutor, criminal justice reform has been in recent headlines almost daily. Shane Bauer’s *American Prison: A Reporter’s Undercover Journey into the Business of Punishment* is an excellent addition to the reform debate. This book can be read for many different reasons: as a shocking memoir of life inside a private prison, as a critical history of the U.S. penal system, and as an exposé of the horrifying manner in which private companies profit from the incarceration and labor of prisoners. Bauer is an extremely talented writer. I did not want to stop reading as he recounted his experiences as a guard at Corrections Corporation of America’s (CCA) Winn Correctional Center in Winnfield, Louisiana (the “oldest privately operated medium-security prison” (p.9) in the United States), and those of the prisoners and his fellow employees, interspersed with the history of the penal system in the United States. His prose is easy to read, with extensive notes and a select bibliography for further information and background.

¶7 While I was busy being horrified at what I was reading, I was also continuously struck by the glimpses Bauer offers into his journalistic methods and ethical decision making. I very much appreciated Bauer’s explaining his approach to this undercover investigation, especially since controversies regarding journalists’ use of classified materials and anonymous sources are a current concern. Bauer was hired using his real name, employment history, and background check, and he did not hide that he was planning to report on his experiences at the prison. He gives a short primer on undercover reporting and the rules he and his editors established regarding his “cover.” Omissions were acceptable; lying was not. Clandestine recording devices were also okay—a wristwatch with camera, a pen that records audio, and a coffee mug with a camera. We learn how Bauer eventually obtained access to CCA executives and board members in an attempt to obtain more answers—he bought a single share of stock and attended the annual shareholders’ meeting. Bauer’s openness regarding his methods lends credibility to his reporting and heightens the reader’s appreciation for the life-and-death risks he took each day working in the prison.

¶8 I was also struck by Bauer’s reflections on the way his past affected his participation in the prison system. Bauer spent more than two years as a prisoner in Iran after coming close to the Iranian border during a hike in Iraq. Because of this experience, he was gentler than other guards when searching prisoners’ belongings, even putting them back in place until being told not to. He felt conflicted about a prisoner pulling away from him while being escorted, remembering doing the same to his prison guards in search of some personal autonomy. And he ultimately decided to quit the job after placing an inmate in solitary confinement for possessing drugs.

* © Alison P. Sherwin, 2019. Associate Director, Graduate Legal Studies, Columbia Law School, New York, New York.
Bauer’s reporting did frustrate me in one instance—his description of an inmate’s attempted suicide and eventual death while hospitalized. Only in the notes did I discover that Bauer did not witness the incident; it occurred after he left the prison. He discloses this fact and explains how he obtained knowledge of the event, but it was frustrating to learn this detail only in the notes at the end of the book. After he was so open about his methods throughout the rest of the book, it felt misleading, even upon rereading the section at issue.

Bauer set out to expose the appalling practices of a private prison. He succeeds. He also very eloquently describes the history of penal institutions in the United States, complete with the racial injustices and failings of our criminal justice system. Finally, he is able to explain how he went about reporting, and what standards and ethics he followed in doing so. In addition to the important contributions he makes to the debate over the criminal justice system, this book should appeal to anyone interested in the ethics of undercover investigative reporting. American Prison is recommended for all law libraries and would also be a good choice for academic and public libraries.


Reviewed by Sherry L. Leysen*

There is so much to appreciate about this insightful, candid, and personal treatment of fear in the legal profession. For those of us who do experience the types of fear that Professor Heidi K. Brown describes, Untangling Fear in Lawyering provides a refreshing and encouraging perspective that illuminates a way forward. While the fear-wary among us will benefit greatly from this work (and experience sincere gratitude and relief that it exists), Brown’s holistic approach to the subject makes this an exceptional resource and guidebook for a wide range of audiences, whether law student, legal practitioner, legal educator, law firm manager, or mentor.

In this thoughtfully organized work, Brown does not ask us to smash, bury, or conquer fear. To the contrary, she wants to “untangle” the fear by pulling it apart, identifying it, and preparing for it, while teaching the reader a means of differentiating it from other emotions. Using an engaging blend of substantive commentary, stories, quotes, guided exercises, checklists, and ideas, Brown explores the concept of fear and what it means for three audiences in particular: law students, lawyers, and clients. By breaking down how fear manifests both physically and mentally, her discussion of how unproductive “pro-fear” messages can be—whether as self-talk or directed at us by others, and even when the messenger is well meaning (“just do it,” “fake it until you make it,” “fear is good!”)—is especially beneficial.

Brown emphasizes the deep fears and worries surrounding “mistake-making” by practicing lawyers with suggested strategies to address it. Offering a multidisciplinary perspective, Brown synthesizes how fear manifests among other professionals, too, including physicians, nurses, journalists, engineers, entrepreneurs, and athletes. The goal with these chapters is to highlight successful training and education strate-
gies that “address failure and mistake-making head on” (p.115) and to consider their application to the legal profession.

¶14 Having always relied on running as a way to manage my own doubts and worries, I enjoyed learning about Brown's personal experiences as an athlete (particularly her experience with boxing) to build confidence and to embrace physical distress. Summarizing the approaches of performance experts and sports psychologists and sharing their techniques, she wields the power of thinking like both a scholar/lawyer and an athlete as a way to untangle fear, both mentally and physically. To great effect, Brown revisits the “inner athlete” theme in various passages throughout the work.

¶15 Following the foundational chapters, Brown dives deeply into the methods that we can use to untangle our fears, offering a four-step process. A detailed checklist accompanying each narrative provides an opportunity for guided self-reflection. In Step 1, Brown invites us to differentiate between, and to think hard about, specific experiences in which we are not afraid (but should be) and specific experiences where we really have no reason to be afraid (but are). In Step 2, “Mentally Rebooting,” we are tasked with reframing useless personal messages that prevent us from being our most authentic and powerful selves. Step 3 continues with exploring our “Inner Athlete” and asks that we develop our own preparatory physical performance routines and rituals. Step 4 offers excellent strategies for the fearful to develop both fortitude and resilience. It also provides additional suggestions for law schools (especially useful for educators discussing ethics and professional responsibility scenarios) and law firms, themes further explored in several appendices rich with valuable content.

¶16 This book will appeal to many different constituencies. For the law student or new associate, it offers an accessible means to understand fear and suggests productive methods to process it. For legal educators, whether in the fearful or fearless category, it provides insight into strategies to help facilitate a learning environment that remains rigorous but is more inclusive—from considering language in a syllabus directed at the quiet among us, to exploring courses and course exercises that allow mistakes to be made and processed in a nonjudgmental and lower-stakes environment. Especially helpful for experiential learning in the clinical context are the sections on understanding client fears; these chapters could be required reading for clinic students. For the law practice environment, this book offers practical guidance on shepherding new attorneys through the process of developing professional judgment and identity.

¶17 At times, I have approached books dealing with fear and anxiety with fear and anxiety. This is because thinking about fear or engaging with it can sometimes make it worse. That is certainly not the case with Brown's book. This book does not dwell on fear in the negative sense. It opens it up and makes it accessible in a non-threatening way so that it can be processed and prepared for. For these reasons and more, this book would be a very welcome addition to academic law libraries and firm law libraries and is highly recommended.
Foundations of Information Ethics will leave the reader with more questions than answers, but that is not necessarily a bad thing. If the preceding sentence warmed your heart, then this book just might be for you. On the other hand, if you are looking for a straightforward professional code of ethics for the information worker, you will need to look elsewhere.

According to its preface, the goal of Foundations of Information Ethics is to “articulat[e] the intellectual underpinnings of the information ethics discipline” (p.ix). Information ethics is a relatively young discipline. In the book’s foreword, Robert Hauptman takes credit for first using the term only 30 years ago. John T.F. Burgess, one of the volume’s editors as well as a contributing author, observes that one of the challenges facing this young discipline is that “the boundaries of information ethics are still being drawn” (p.25). This book serves as both an introduction to the field and a marker intended to help set out the contours of information ethics for a larger academic audience. One hope, expressed in chapter 3, is that by studying the similarities and differences in the ethical codes used by various information professions, a set of information ethics standards might be found that is not tethered to the practice requirements of any specific profession.

Each of the book’s 12 chapters is self-contained and does not require the reader to be familiar with what has come before. However, the editors have arranged the chapters with an eye toward creating a flow from the familiar to the more specialized, with the final chapter reserved for a survey of emerging issues. The topics covered include basic principles and concepts, history of the field, privacy, cybersecurity, and data usage, as well as more esoteric subjects such as human rights, information access, and global citizenship.

While authors were free to write their chapters as they saw fit, the editors suggested a basic template, and this template repeats throughout the book. It includes a brief introduction of the chapter’s specific topic, a short history, a list of key terms and/or leading thinkers for the topic, a section on current issues, a case study or discussion question (if appropriate), and an extensive list of references to aid the reader in locating additional works on the topic.

A few inquiries struck me as particularly interesting. In the chapter “Cybersecurity Ethics,” the author raises provocative questions associated with computer security. For example, what does it mean to have “ethical hackers”? I was also intrigued by the question of patches: is it better to monitor a known vulnerability and hope it goes unnoticed, or release a patch, thereby alerting potential bad actors to the vulnerability? The release of a patch can set off a race where you hope your users update their systems before hackers exploit the vulnerability. The chapter also provides a compelling discussion on the ethics of ransomware.

In the chapter entitled “Cognitive Justice and Intercultural Information Ethics,” the contributing authors tackle cultural clashes regarding the nature and meaning of information. Discussions of how information from different traditions...
can be in dialogue and suggestions that truth may be universal or, conversely, relativistic, can create strong knee-jerk reactions in some readers. Regardless, I join with the chapter’s authors in encouraging readers to spend time with the key concepts and major thinkers that are highlighted. It is a useful experience to consider how intercultural information is evaluated, and it can be done without “enter[ing] the debate on whether cognitive justice is representative and supportive of relativism [or] whether it argues that all forms of information have valid and instrumental value” (p.103).

¶24 The book closes with a chapter on emerging issues. The topics include ownership of health data, 3-D printing, fake news, social media, and algorithmic bias, just to name a few. Each emerging issue is given a short introduction and then a brief list of titles for further reading. Many of the topics appear in earlier chapters, but that does not diminish their value here. This chapter is especially helpful for an instructor looking for discussion starters in class.

¶25 *Foundations of Information Ethics* is a short, well-organized work. It is an appropriate resource for library or IT staff who are interested in taking on leadership or management roles. This book will expose them to new ways of thinking about the ethical dimensions of managing information, but it does not replace the applied ethics found in the various applicable professional codes of ethics. This book can also support an ethics component of an advanced legal research course. Additionally, many of the topics, including cybersecurity, data ethics, intellectual property, and privacy, could serve as launching points for students looking for inspiration for an advanced writing requirement paper or law review note. It is highly recommended for academic law libraries and other college and university libraries.


Reviewed by Nathan A. Preuss*

¶26 Targeting soon-to-graduate students, recent graduates, and experienced practitioners who need to refresh their legal research skills, Paul D. Callister’s *Field Guide to Legal Research* is a refreshing and novel approach to textual legal research instruction. While it includes bibliographic information (see chapter 4, “Understanding the Terrain of Legal Authority”), Callister focuses strongly on processes and constructs. Instead of the commonly utilized charts or lists of the steps in the legal research process with the caveat that real-world research is iterative and non-linear, Callister describes varied processes including “Working the Problem,” which involves asking who, what, when, where, why, and how to pinpoint researchable questions (see chapter 2), and “Problem Typing,” which prompts students to think at the outset about what kind of information they are seeking: for example, known items, news, general information on a subject, or information about an institution, among others (see chapter 3).

¶27 Instead of the bibliographic-centric focus on research that seems to predominate legal research instruction, even in flipped classrooms, each of Callister’s

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* © Nathan A. Preuss 2019. Associate Professor and Reference/Student Services Librarian, Joel A. Katz Law Library, University of Tennessee College of Law, Knoxville, Tennessee.
chapters layers additional constructs of thinking about types of legal research issues and the sources and systems that might resolve them. Given Callister’s prior research on metacognition (thinking about how one thinks about a particular subject or skill set), this structure seems appropriate to his constructivist approach to instruction. The structure seems ideal for his target audience but is likely to be too advanced for the law student being introduced to legal research. However, the concepts and approach make this a great resource for instructors of basic legal research who can add modeling (e.g., demonstrating the proper use of West’s Key Number System) and scaffolding (the gradual removal of prompts or hand-holding as students develop greater knowledge and skills) to help students crawl, then walk, and finally run.

I particularly like that each chapter, to varying degrees, integrates multiple resources or approaches instead of treating resource types like disconnected silos of information. As described in the Field Guide’s introduction, this book is not comprehensive but a resource that can be quickly read and digested by a busy professional who needs to become more efficient and successful in legal research. As such, this book does not provide detailed descriptions of (nearly) all available resources, as other legal research texts do, but is ideal for sharpening the skills of a practitioner.

The Field Guide to Legal Research fills a niche need in legal research instruction—a refresher for those familiar with legal research but not expert in it. If used by an instructor for an advanced legal research course or a prepare-to-practice course, this book and its teacher’s manual will make it easier to incorporate proven pedagogical methods in the classroom. The Field Guide is ideal not only for the academic law library but also for law firm and court libraries and even the practitioner’s shelf. I highly recommend it.


Reviewed by Christine Anne George*

Casey Cep wrote an absolutely fantastic book that I could not help but devour, and I am so furious with her I can barely stand it. I should not be. After all, Cep laid out the entire book in the final lines of the prologue:

One of the state’s best trial lawyers was arguing one of the state’s strangest cases, and the state’s most famous author was there to write about it. . . . The mystery in the courtroom that day was what would become of the man who shot the Reverend Willie Maxwell. But for decades after the verdict, the mystery was what became of Harper Lee’s book. (p.4)

I should have known what I was getting into, but Cep so deftly unraveled the tale, strand by strand, that I forgot what I had known before I cracked the spine of Cep’s book—Harper Lee had never published her own true crime book. It is entirely Cep’s fault that I felt that loss so acutely.

Furious Hours is structured in three parts: “The Reverend,” “The Lawyer,” and “The Writer.” It begins in a straightforward manner with an introduction to

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* © Christine Anne George, 2019. Assistant Director for Faculty & Scholarly Services and Editorial Coordinator, Chutick Law Library, Benjamin N. Cardozo School of Law, Yeshiva University, New York, New York.
Willie Maxwell, a sometime preacher who, as it turns out, had a proclivity for purchasing life insurance on relatives—who then wound up dead. Beginning with the death of his first wife, there was a whiff of suspicion around Maxwell. Something did not seem quite right. The deaths continued, as did the insurance payouts. With law enforcement and insurance agencies scrambling to find something that would stick to Reverend Maxwell, those around him began to feel concerned. With life insurance far less regulated than it is now, it was entirely possible for someone like Maxwell to take out a policy on someone without their knowing. Maxwell’s narrative comes to an abrupt end when the relative of one of his alleged victims kills him at said victim’s funeral.

¶32 “The Lawyer” shifts the narrative from Maxwell to Tom Radney, Mr. Alabama Democrat, who had the distinction of being Maxwell’s attorney and then, upon Maxwell’s death, becoming the attorney for the man who shot Maxwell, Robert Burns. “The Lawyer” shifts back in time, giving Radney’s backstory before diving into Burns’s murder trial. It becomes apparent from the start that Radney is a larger-than-life character. One would have to be to employ the trial strategy of demonizing a former client to acquit a current client. While “The Reverend” lays out the facts about Willie Maxwell and his alleged victims, “The Lawyer” is about the spin. This part does not shy away from the uncomfortable question of Radney’s own culpability in benefiting from Maxwell’s insurance policy schemes. This case had everything—family drama, revenge, murder, and voodoo. As the verdict is handed down at the end of “The Lawyer,” a lingering feeling develops that this couldn’t possibly be the end of the story. Enter “The Writer.”

¶33 Harper Lee was beyond qualified to tell the story of Maxwell, Burns, and Radney. This is made abundantly clear when Cep once again circles back in time to give Lee’s backstory before her decision to recount the Maxwell case. I had not realized how little I knew about Nelle Harper Lee, but if there is one thing “The Writer” makes clear, this anonymity was wholly by Lee’s design. Those closest to her were not ever to mention To Kill a Mockingbird, but were more than likely to hear the author complain about her tax bracket. Much like Scout, Lee had lawyers in the family—her father and sister—so she had heard about court cases from a young age. She had even attended law school, but dropped out just shy of graduation to write instead. After the struggle to create Mockingbird—along with the never-to-be-mentioned-in-this-review-again Go Set a Watchman, which had come first—Lee went on a trip with her lifelong friend Truman Capote to Kansas to act as his “researchist.” The things Lee learned while working on what would become In Cold Blood would pave the way for how she approached the Maxwell case. It was a long time coming after Mockingbird, but Lee’s new work, which she called The Reverend, was set to be a blockbuster.

¶34 When immersed in the pages of a book, sometimes reality slips away. You get so caught up in the story that you forget things you know are true. Within Furious Hours, many of the people involved are caught up in stories. Willie Maxwell killed before, and I could be next. All of my clients are innocent. Nelle’s new book will be finished any day now. Harper Lee is going to tell my story, and Gregory Peck will play me in the movie. Are they true? Maybe Willie Maxwell really did kill five relatives for insurance money. Maybe it was a strange series of coincidences. There is no way to know. What we do know is that Lee did not publish her book. We do not know whether she even wrote it because her archives are sealed. What we do know
is that there was a very unusual case, one alleged murderer, one confessed mur-
derer, lots of insurance money, an over-the-top defense attorney, and one woman
who could spin the tale. Cep's brilliance is that she makes you realize what could
have been, which is entirely enraging because with that realization comes the
knowledge that it will never be.¹

³³⁵ Furious Hours is highly recommended for academic and university
libraries.

Goldstein, Paul. Copyright's Highway: From the Printing Press to the Cloud, Second
$85 Cloth.

Reviewed by Elizabeth Manriquez²

³³⁶ Professor Paul Goldstein returns with a new edition of his well-known
book, Copyright's Highway,² and takes the reader on an enjoyable journey through
the history of intellectual property, with pit stops at all the important landmarks.

³³⁷ Goldstein, the Lillick Professor of Law at Stanford University, is a world-
renowned expert on intellectual property and the author of several treatises and
books on the subject. In this latest monograph, he deftly weaves the history of
copyright with digestible explanations of basic concepts in intellectual property law.
He manages to simultaneously entertain and educate as he leads us through the
conception of intellectual property rights to current challenges facing the copyright
industry, such as the advent of digitization and the open source movement. Well
researched, with ample citations and documentation, Copyright's Highway draws
the reader into the judicial and legislative dramas that shaped our modern-day
intellectual property laws, both domestic and international.

³³⁸ The book begins with “[t]he metaphysics of copyright” (p.1), an explana-
tion of the competing interests involved in copyright law. Goldstein posits a “battle”
between “natural rights’ for the optimists, [and] ‘individual freedoms’ for the pes-
simists” (p.10). He then details the history of intellectual property rights, beginning
with the Statute of Anne in eighteenth century England, and how these rights have
been apportioned between the author, the printer/publisher, and the consumer
throughout the centuries. He explains both the American conception of copyright
and the European conception, which vary greatly as reflected in their respective
legislation on the issues.

³³⁹ Perhaps the greatest distinction Goldstein draws between the domestic
understanding of copyright and the international approach are the competing con-
cepts of ownership and authorship. While domestic legislation often involves the
parceling of rights in a similar manner to real property, international laws instead
focus on the moral right of authorship. Goldstein argues that if copyright is to sur-
vive, Americans need to refocus attention on this right of authorship, the face of

¹ Cep notes in her epilogue, “Nelle Harper Lee’s estate is sealed. The entirety of her literary
assets, including whatever else exists of The Reverend, remains unpublished and unknown” (p.276).
So perhaps my “never” is tempting fate.

² © Elizabeth Manriquez, 2019. Scholarly Communications and Reference Librarian, Universi-
ty of Wisconsin Law School Library, Madison, Wisconsin.

² Paul Goldstein, Copyright’s Highway: From Gutenberg to the Celestial Jukebox (1994,
creation. In a world where pirated work is available at the click of a mouse, one is unlikely to feel compunction about the loss of income to a publisher or distributor but may feel remorse over a loss incurred by the individual creator.

¶40 Copyright's Highway offers much more than a primer on copyright laws and concepts. It also weaves a narrative guaranteed to snag the interest of any librarian involved in the web of fair use, digital initiatives, and creative commons. While Goldstein includes all major cases and legislation in this book, he devotes particular attention to the battle between William Passano, a well-established publisher of medical journals, and the National Library of Medicine and National Institutes of Health over the defendants’ photocopying and distribution of articles from journals published by Passano’s company. Goldstein describes the case’s path through the courts while also explaining the legislature’s concurrent attempts to revise copyright law to account for new technologies. It makes for an enjoyable story as Williams & Wilkins Co. v. United States3 involves a cast of political actors, Supreme Court Justices, notable litigators, and Passano himself.

¶41 While the history and courtroom dramas provide the reader with knowledge and understanding, the true gifts of Goldstein’s book come from his insights and intuition for the future of copyright. He concluded the first edition with a discussion of what he termed the “celestial jukebox,” a prescient view of an information landscape where transaction costs are substantially reduced, and subscribers can order any media they desire from technology-packed satellites. Such technologies were in their infancy in 1994, so these predictions are particularly impressive. When Goldstein released a revised edition in 2003, these predictions were already becoming reality, and he amended the final chapters to include discussions of Napster, the Digital Millennium Copyright Act, and the WIPO Copyright Treaty. A great deal has changed since the publication of the 2003 revised edition, and Goldstein now returns with greater analysis of fair use, digitization, orphan works, and Creative Commons. Scrapping the analogy of the celestial jukebox for the actuality of the cloud, Goldstein examines the newest developments in technology, how they have changed the way the user thinks of copyright, and the implications of these changed attitudes for everyday practice and future litigation.

¶42 Copyright's Highway is an excellent addition to the collection of any law library, even those that already hold the two earlier editions. Copyright is a technology-laden area of law, with advancements and changes occurring all the time. In this latest edition, Goldstein recounts these advancements, examines their implications, and encourages the reader to think critically about the future of copyright law. Even without a background in intellectual property, the reader will enjoy the well-paced prose offered by Goldstein and will likely come away with a new appreciation for copyright.

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3. 487 F.2d 1345 (Ct. Cl. 1973), aff’d per curiam, 420 U.S. 376 (1975).

**Reviewed by Loren Turner***

¶43 It takes a certain amount of recklessness to admit in the book review column of a professional law library journal that I barely managed to finish this book and, worse, that I struggled, really struggled, to follow the academic, jargon-filled phrases enough to cobble together this review. In my defense, this book was not written for me. Or, most likely, for you. This book was written for the dozen or so feminist scholars and activists with whom academic law librarians work. Presumably, given the prestige of both the author and the publisher (and the flashy title), it is a book that many academic law libraries will own soon if they do not already.

¶44 The author, Gina Heathcote, is an Australian feminist scholar of gender studies and international law at SOAS University of London. *Feminist Dialogues on International Law* is her second book, and its central purpose is to encourage cross-disciplinary dialogue among feminist scholars and activists, particularly those who specialize in international law, in order to “unlock future feminist approaches to international law where questions contribute to further questions, further projects, new mappings, new understandings of power, discourse, and law, mechanisms for listening with responsibility, while re-re-presenting sex/gender as temporally and geographically fluid” (p.25).

¶45 Heathcote argues that feminist projects within international law have focused primarily on advocating for women through gender law reform. These efforts have successfully led to the appointment of gender law experts within the United Nations System, as well as changes to international law, particularly in the areas of international criminal law, human rights law, and collective security. According to Heathcote, though, gender law reform efforts are underinclusive because they focus only on women and not those outside the gender binary. Also, gender law reform efforts pursue a “Unitedstatesean” (p.8) feminist agenda, which can conflict with local feminist priorities. Moreover, gender law reform has a limited impact in its current, fragmented state. Heathcote claims that use of transnational feminist methodologies outside of gender law reform would create a more inclusive, less Western feminist platform to pursue progress within international law and legal institutions.

¶46 In particular, Heathcote advocates for a “structural bias feminism approach” defined as “the use of diverse feminist methodologies to interrogate and expose the role gendered assumptions play in the construction of the foundations of law” (p.6). To this end, Heathcote applies a structural bias feminism approach to foundational concepts of international law, including the role of international legal experts (chapter 2), fragmentation (chapter 3), sovereignty (chapter 4), the role of international institutions (chapter 5), and the ultimate authority of law (chapter 6).

¶47 Throughout the book, Heathcote constantly insists that she, a white Australian colonist, is not the appropriate person to answer the questions she poses or to propose pathways for future progress. She identifies her goal as asking “a series of awkward questions as a prelude to future feminist dialogues on international law,

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acknowledging that the answers are not mine to give or to formulate, and may require my silence, and my cultivating of space for others to speak over me” (p.176). While I admire her self-awareness, I found the barrage of disclaimers before she poses a particular idea exhausting (e.g., “[t]hroughout the chapter and especially in the final section, I draw upon the voices of Black British feminists and indigenous Australian authors to question my own complicity in the production of privilege and to explore the preceding steps that are necessary to genuinely open feminist dialogues on international law. . . .” (p.174)).

¶48 Overall, this book has a limited potential audience; it may appeal to and perhaps inspire feminist legal scholars of international law. It is recommended, with some reservations, for academic law libraries.


Reviewed by Nicole P. Dyszlewski*

¶49 In 1997, Beverly Daniel Tatum authored the book, *Why Are All the Black Kids Sitting Together in the Cafeteria? And Other Conversations About Race*. This seminal text was updated by the author and rereleased several times, most recently on its 20th anniversary in 2017. In the updated text, the author asserts, “We need to continually break the silence about racism whenever we can. . . . But talk does not mean idle chatter. It means meaningful, productive dialogue to raise consciousness and lead to effective action and social change. But how do we start?” Ijeoma Oluo’s 2018 book *So You Want to Talk About Race* is how.

¶50 The chapters of Oluo’s book are structured as responses to common questions she gets asked as a black, female, queer writer. The author understands that conversations about race, racism, and racial oppression can be difficult, and she has created a toolkit of sorts for those willing to engage in this challenging work. Although primarily about race, the book also discusses sexuality, gender, and intersectionality, generally. Each chapter asks and answers one discrete question. For example, chapter 10 asks and answers the question: what is cultural appropriation? Without exception, the chapters are thought-provoking, passionate, and informative.

¶51 Oluo does not write for just one type of reader. Her work is written for and useful to all readers. The book can be read as a whole work or as freestanding chapters on important issues of race, racism, and racial oppression. The author’s writing is sometimes strident, sometimes pained, sometimes frustrated, sometimes sad, and sometimes personal, but it is always thoughtful. Each chapter gives concrete examples and, when necessary, presents readable, data-driven information to support the author’s positions, such as in the chapters on hate crimes, police brutality, and the school-to-prison pipeline.

¶52 *So You Want to Talk About Race* is not forgiving of racism, but it is generous toward people who have grown up in a racially biased social and economic system and are genuinely trying to come to terms with what that means for a person of privilege. As such, Oluo gives advice on how to confront systems of racism, how to

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see microaggressions, how to act if you have been accused of a racist microaggression, and how to act if you have been confronted with the possibility of your own racism. Oluo particularly shines during chapter 10’s discussion of tone policing. The chapter contains concrete suggestions for white people who want to avoid tone policing and for people of color being criticized for their tone during a conversation on race and/or racial oppression.

§53 Additionally, the 2019 paperback edition of the book contains an outstanding discussion guide. This guide includes suggested guidelines or ground rules for group discussions to reduce harm and increase productivity in these conversations. The only thing lacking is an index.

§54 *So You Want to Talk About Race* is recommended for all law libraries, plus college and public libraries. It is appropriate for faculty, legislators, judges, staff, students, attorneys, and the general public. In fact, it is beyond appropriate; it is needed. It not only introduces difficult topics of race and privilege, but it also acts as an accessible primer on how to get into, get out of, and get proximate with conversations on race and racism. This book is not about idle chatter; it is about difficult but productive dialogue.


*Reviewed by Pat Newcombe*

§55 This lively and engrossing biography of the fourth Chief Justice of the United States examines Marshall’s path to the Court, providing insight into his personality, his career, and the personal experiences that forged his judicial philosophy. Professor Joel Richard Paul’s historical narrative humanizes Marshall, one of the preeminent founders of the United States, and emphasizes Marshall’s focus on moderation, compromise, and pragmatism during the country’s turbulent early years.

§56 Paul starts with Marshall’s inauspicious beginnings as the oldest of 15 children growing up on the remote Virginia frontier with little formal education. The self-taught Marshall went on to serve in the American Revolution, where he made a favorable impression on George Washington, and later gained prominence as a successful attorney. He was elected to the Virginia legislature and, at the request of President Adams, served on a diplomatic mission in France to forge a peaceful solution to French attacks on American shipping. Not long after, he began his tenure as Adams’s secretary of state. A year later, Adams appointed him to the Supreme Court where Marshall served for 34 years—the longest term as chief justice in the history of the Court.

§57 After this exploration of Marshall’s pre-Court years, Paul shifts the focus to Marshall’s years on the Court and analysis of Marshall’s landmark cases—*Marbury v. Madison* and *McCulloch v. Maryland*, among many others. When Marshall began serving as Chief Justice in 1801, the Court had little authority, very few cases before it, and no home of its own (the Court met in the basement of the U.S. Capitol). Yet Marshall completely reconstructed the Court during his time. To begin with, he
implemented the concept of a single majority decision instead of individual opinions by each justice. Marshall's reasoning was that a sole opinion would heighten legal clarity. He also wrote about half of the more than 1000 opinions issued by the Marshall Court, most of which were unanimous decisions forged by his compelling persuasive skills and ability to unite. This ability to build consensus and accord was quite extraordinary, especially considering that Marshall was a committed Federalist among justices appointed during Republican administrations with conflicting beliefs.

¶58 Marshall established fundamental constitutional cornerstones of our legal system such as judicial review, which was fiercely debated at that time. Marshall consistently favored a broad reading of the Constitution and the Court's power, maintaining that the document must be flexible in response to the country's needs. Marshall's tenure established an independent judiciary as a legitimately equal branch in the tripartite federal government, and secured both the supremacy of the Constitution and the Court's role as the absolute arbiter of its meaning. His opinions shape a clear denial of the states' rights ideology. Marshall fervently believed that it was important to maintain a strong central government to act in the national interest, and his decisions were crafted with this thesis in mind.

¶59 Paul ably conveys Marshall's judicial reasoning without resorting to dense legal language. Although legal readers will find this book of great interest, the layperson will be able to appreciate the legal opinions as Paul presents the issues, facts, details, and background with a wide-lens view that captures personal stories and political context fundamental to the sophisticated cases. By providing many detailed particulars, Paul brings Marshall's decisions to life, as if the reader is right there; one can almost see a film unwinding as the story truly comes alive.

¶60 Several threads are woven throughout this book. Paul traces the conflict between Marshall and Thomas Jefferson, his cousin and his adversary in matters of ideology; the competing ideologies and political discord of the era; Marshall's friendship with James Madison, who happened to be Jefferson's ally; and Marshall's dutiful relationship with his chronically ill wife. It is clear that Paul holds Marshall in high esteem, yet Paul also manages to convey Marshall's imperfections and those times when Marshall was unpredictable in his judgments, compromised his ethics, or shaped his arguments to reach the desired result expediently.

¶61 Marshall died in July 1835, and the country greatly grieved the loss of the man who would go down in history as one the most influential chief justices. Paul ends his narrative by comparing Marshall to his adversary, Jefferson. Paul reasons that, notwithstanding his failings, Marshall's intention to safeguard the union by choosing compromise over chaos and having a courageous imagination was laudable, allowing Marshall to play a pivotal role in helping shape the country's future and our legal principles.

¶62 Without Precedent is a scholarly work, yet very readable, and should be of interest to most readers. Paul relies on ample and deep primary sources, yet manages to present John Marshall in a very human and accessible way. This narrative would be an excellent selection for any academic or public library, especially those that collect in the American history area, and it is highly recommended.

Reviewed by Benjamin J. Keele*

¶ 63 When teaching legal research to first-year students, I often find myself balancing between teaching the *concepts* of research (is this judicial opinion mandatory or persuasive authority?) and the *mechanics* of research (what does the jurisdiction filter do?). The concepts are relatively stable and tend to inform discussions of what the law is and should be, while the mechanics fluctuate with every software release and are more about user interface design than law.

¶ 64 While teaching the mechanics of legal research is certainly necessary—a student who understands every nuance of *stare decisis* is still in trouble if unable to formulate a reasonable Boolean search—I was pleased to find that *Legal Research*, a title in Wolters Kluwer’s Examples & Explanations series, focuses its attention on the concepts. One of the ideas underlying the book is that “principles of weight of authority underlie all the choices you make as you research” (p.1). The authors consistently weigh the authority of each source in different research contexts.

¶ 65 Given the authors’ focus on authority, it is not surprising that the book spends relatively little time on secondary sources. All secondary sources are discussed in chapter 10 (of 11 chapters), while judicial opinions, statutes, and regulations receive two chapters each. At first, I thought this approach shortchanged the great variety of secondary sources and research tools available. The legal research course I teach spends the first quarter on secondary sources. *Legal Research* now makes me question this allocation of attention. Primary sources are the actual law, and students are probably less familiar with primary sources than they are with books, academic journals, and specialized journalism. I have also noticed some students are initially overwhelmed by the variety of secondary sources, some of which will not be relevant to their field of practice. On the other hand, most practical research will involve some cases, statutes, or regulations.

¶ 66 My sense is that textbooks often present only an ideal version of methods or analysis, which can be intimidating to novices. *Legal Research*, though, is refreshingly realistic, suggesting students start their research with a simple Google search or checking Wikipedia. Crucially, the book always notes that this is only the beginning of a research process that should end with relevant and applicable primary sources. The examples show a variety of starting points, sometimes beginning with a statute and other times with a case, and then proceeding to find other primary sources. This approach encourages adaptability and empowers students to think creatively if they hit an obstacle in their research.

¶ 67 Like other titles in the E&E series, each chapter ends with a set of practice questions. The answers provide complete and nuanced explanations. Since the mechanics of using legal research tools is mostly bypassed (the last 20 pages are appendices mostly on Boolean searching, filtering, and citation), the questions can work in any legal research database, and I expect the book will age well, even as vendors introduce new interfaces and tools.

* © Benjamin J. Keele, 2019. Research and Instructional Services Librarian and Lecturer in Law, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana. This review is licensed under the Creative Commons Attribution License, Version 4.0.
¶68 If pressed for a criticism, I would note that the discussions of headnotes, digest systems, and different types of negative case treatment are not as robust as I would like. That said, the book is clearly a supplemental text, and the authors overwhelmingly hit the right points in limited space. Legal Research is worth considering for first-year research, writing, and methods courses, and as a refresher for students participating in clinics. It is also highly recommended for academic law libraries.


Reviewed by Colleen Martinez Skinner*

¶69 Librarians the world over have helped students and patrons find answers to specific questions. Sometimes the questions are legal in nature; other times, they seek general information. Karen M. Ross's Essential Legal English in Context: Understanding the Vocabulary of US Law and Government covers both types of information.

¶70 This short, easy-to-read book focuses on explaining all those governmental nuances that are assumed but, as we discover when delving further into the reference interview, are actually not known. While Essential Legal English in Context is designed especially for foreign students, international lawyers, and others who are unfamiliar with the U.S. legal system, it is a nice refresher and suitable for anyone who finds themselves far removed from high school civics class. At the budget-friendly price of $30 for the paperback, it can be added to any library collection for use when a government refresher is needed. It would also make a good textbook recommendation for a professor teaching a U.S. law class for an LL.M. program.

¶71 The book is broken down into five units, with three to four lessons per unit. Each lesson also has two to four exercises (answers are in the back of the book) to drive the information home. The lessons are pretty straightforward and are for the most part quite short. For instance, lesson 3.1 is 3 pages long, but lesson 3.3 is 12 pages. Lesson 4.2, “The Structure of the Federal Judiciary,” is by far the longest in the book at 36 pages. Although lesson 4.2 is long, each page contains a chart, picture, diagram, or other visually friendly way to break up the information into smaller, more easily digestible pieces. You can rest assured that a student is not going to complain about page length, or that they need Black’s Law Dictionary handy while reading Essential Legal English in Context.

¶72 At first glance, some of the visuals may seem a bit juvenile and not of law-school-level rigor. For example, the information presented on the federal court hierarchy in lesson 4.2 is in the form of a triangle diagram with the U.S. Supreme Court at the top, and the courts of appeals and the district courts below. Despite its elementary appearance, however, the court structure diagram is correct, and visual learners may appreciate this approach and find it a welcome departure from the usual wordy casebooks they are accustomed to.

* © Colleen Martinez Skinner, 2019. Former Director, Law Library and Technology Center, Florida Coastal School of Law, Jacksonville, Florida.
One part of the lessons that I found helpful was “Word Study.” The sections on word study illustrate how a phrase such as “blanket ban” is used in current contexts. These explanations are particularly helpful for English-as-a-second-language readers, as evidenced in this example: “A blanket ban means a total ban or prohibition. A blanket of snow entirely covers the grass; a blanket for sleeping entirely covers a bed; a blanket ban entirely covers a specified act.” The book further uses the phrase blanket ban when discussing the Parkland shooting and gun control, President Trump and immigrating foreign nationals, and former Housing and Urban Development Secretary Julián Castro’s fight against landlord refusals to rent to convicted criminals. Adding current events increases the comprehension and relevance of the word or phrase for many students and helps bring the law to life. Currently, “blanket ban” cannot be found in Black’s, but Essential Legal English in Context offers a workable definition.

Law students will find this book to be a very easy read, and at a total of 203 pages (including exercise answers in the back of the book), they may actually read it and get out of it what you were hoping they would. Other students—undergraduates, graduate students in other fields, foreign LL.M. and S.J.D. students, even high school students—can learn from Essential Legal English in Context. I dare say they might actually enjoy it; I know I did. I highly recommend this title for all law libraries as well as undergraduate, public, and school libraries.


Reviewed by Amelia Landenberger*

Unless you have a close personal friendship with a state appeals court judge who also served for years as a state trial court judge, this book will pull back the curtain on a decision-making process opaque to most of the public. The book is divided into three parts. Part 1 gives a necessary overview of what judges do, describes the path many judges take from the ranks of state prosecutors to election or appointment as judges, and discusses the challenges of defining corruption, fairness, and independence. Like an ensemble film that nevertheless focuses on one or two characters, these chapters make some generalizations about the judicial profession while also following the path of the author’s career from state and federal prosecutor to Wisconsin appellate judge.

Part 2 is the real highlight of the book, and it is truly compelling reading. Judge Schudson describes eight cases over which he presided, four as a trial court judge and four as an appellate judge. The first is a gripping account of Schudson’s decision not to recuse himself from the trial of a woman who was charged with disorderly conduct, unlawful assembly, and obstructing an officer while she had been protesting outside an abortion clinic. Judge Schudson describes his thought processes while deciding to hear this case, but he also lays bare his personal circumstances and beliefs that might have affected his independence—for example, the fact that his wife had taken part in counterprotests as a pro-choice activist. He also acknowledges that he took the case in part because other judges had recused them-

* © Amelia Landenberger, 2019. Legal Information Librarian, Fineman & Pappas Law Libraries, Boston University School of Law, Boston, Massachusetts.
selves, and he wanted the notoriety such a case would bring. Later in part 2, he describes a case that he did not hear because he had been offered an unethical manipulation of caseloads to ensure that he would receive the most newsworthy cases; he turned down the offer as a matter of principle.

¶77 These stories, and the others presented in Independence Corrupted, bring life—with all its fascinating detail and complexity—to the seemingly dull judicial process. While the book should be read in its entirety, the eight chapters in part 2, which range from 5 to 16 pages apiece, could be used as stand-alone readings to spark a class discussion on judicial independence, contempt of court, standards of review, or guilty pleas and sentencing. The author often summarizes the main points in numbered lists near the end of a chapter, a clarity much appreciated when reading about the complicated dance of sentencing, for example.

¶78 The third and final part of the book discusses the impact of four recent U.S. Supreme Court decisions: Republican Party of Minnesota v. White; Caperton v. A.T. Massey Coal Co.; Citizens United v. Federal Election Commission; and Williams-Yulee v. Florida Bar. While this section is not as riveting as the stories from the bench, it provides the necessary legal context for the author's concerns about the future of judicial independence.

¶79 In the acknowledgments to the book, Schudson recognizes the unusual position of this book as both a memoir and a treatise. While I leave the final determination of the book's proper category to the library catalogers, I think that this unusual combination has largely succeeded. The book is more readable than the average treatise but more academic than the average memoir.

¶80 Independence Corrupted is well written, is easy to read, and offers a window into the current and future challenges of the independent judiciary. It should be thought-provoking for students and attorneys while still remaining mostly accessible to the dedicated nonattorney reader. I recommend it to all law school and court libraries.


Reviewed by Justin O. Abbasi*  

¶81 Justice William Brennan, who served on both the Supreme Court of New Jersey and the U.S. Supreme Court, would tell his law clerks that the most important rule of law at the U.S. Supreme Court is the rule of five: a majority of five votes declares what the law is. Scholars have written extensively about decision making at the U.S. Supreme Court, but there is much less discussion about decision making by state supreme courts, even though these courts are responsible for final decisions in the vast majority of cases litigated in the United States. The number of justices on state supreme courts, the diversity of the courts’ membership, the partisanship of the positions or lack thereof, and the methods states use to select their justices and chief justices vary. These factors and more affect how state supreme courts make their decisions. Salmon Shomade's Decision Making and Controversies in State Supreme Courts attempts to measure how public controversies and their

interplay with judicial collegiality affect decision making in these courts of last resort.

¶ 82 Three case studies on how public controversies surrounding justices in Alabama, Louisiana, and Wisconsin affected decision making in their respective supreme courts make up the heart of Shomade’s work. Before embarking on these case studies, Shomade surveys scholarship on judicial decision making, guiding the reader as to how he will frame his research and extrapolate his findings. In the three case study chapters, he describes the controversies in rich detail, and then describes the justices’ voting patterns. He also provides necessary context about how these courts’ manners of making decisions are unique. Decisions analyzed in the case studies represent three types: unanimous decisions, majority opinions, and dissenting opinions. Each type reveals something different about how the figures mired in public controversy fared with their colleagues when deciding cases.

¶ 83 The Alabama case study centers on Chief Justice Roy Moore’s installation of a 5280-pound monument of the Ten Commandments in violation of the Establishment Clause, and his decision to defy a federal court order requiring its removal. The Louisiana case study investigates Justice Jeffrey Victory’s decision to challenge Justice Bernette Johnson’s elevation to chief justice, purportedly because she joined the court pursuant to a consent decree rather than an election. Justice Johnson had many supporters who maintained that race was the real reason Justice Victory challenged her elevation. The Wisconsin case study examines the violent actions of Justice David Prosser toward two of his female colleagues, Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley.

¶ 84 Instead of clearly articulating findings, Shomade seems to want readers to draw their own conclusions, which is something of an odd choice. While political scientists and court watchers will find this book thought-provoking, those who read it looking for concrete answers will be left dissatisfied. Nonetheless, Shomade’s descriptions of these modern judicial controversies are accessible and enjoyable. Their juxtaposition provides value in a way that studying U.S. Supreme Court decision making in isolation cannot. For example, readers will likely appreciate some of the predominant commonalities between the state courts, such as the greater frequency of writing separately when a justice is at the center of controversy. Shomade’s study of state supreme court decision making during controversies involving religion, race, and gender provides a solid foundation for further inquiry. This book is recommended for academic and court law libraries.
Practicing Reference . . .

Looking for Waldo*

Mary Whisner**

1 Waldo is a bespectacled white man with striped hat and pullover who strolls genially through crowds of people in different locations—a beach, a ski resort, a campground.1 Fans of books in the Where's Waldo? series welcome the challenge of finding him in each scene. In the wildly busy two-page spreads, Waldo isn’t the only figure with red stripes, and it’s easy to get distracted by a silly situation or a visual pun, so you have to look carefully.

2 Research2 is sort of like that. When we’re looking for case law, for instance, we are presented with a very cluttered landscape, with cases from many jurisdic-

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* © Mary Whisner, 2019. I thank Mary Hotchkiss, Maya Swanes, and Nancy Unger for commenting on a draft of this essay. Just as Waldo isn’t obvious in a drawing, our own awkward sentences can be hard to spot. Friends can help.

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

1. Martin Handford, Where’s Waldo? (1987). The pages are unnumbered, but I can tell you these scenes are the second, third, and fourth two-page spreads. There have been many books, but my examples will come from the first, because that’s the one I have. For a list of “primary” books and alternate-format books (such as sticker books), see Where’s Wally?, WIKIPEDIA (last modified Aug. 13, 2019, 09:07) [https://perma.cc/4BCP-G74T]. Waldo started out life in the United Kingdom as Wally, but changed his name to Waldo for books published in the United States and Canada. He travels under other names around the world. As a North American writing for a North American audience, I’ll stick with calling him Waldo.

I mention that Waldo is white because, well, he is. And it’s useful to remind ourselves of assumed whiteness—so we don’t say that Tonto is an Indian but simply assume that the Lone Ranger is white. Some people have criticized stereotypes—for example, Native Americans in front of a tepee and Japanese sumo wrestlers—in some of Handford’s cartoons. E.g., Elisa Gall, Looking Back: Where’s Waldo?, Reading While White (Sept. 6, 2017), http://readingwhilewhite.blogspot.com/2017/09/looking-back-where-waldo.html [https://perma.cc/ZD5Z-UEQ5]. It’s not for me to say that no one should be bothered by the drawings, but people of color are not uniquely targeted by Handford’s pen. In the drawings I’ve examined, white people overwhelmingly look foolish. Generalizing from the drawings, one might say that white people are very, very silly. A collection of picture books should be much wider than the Where’s Waldo? series, including books by illustrators of color, but I think Waldo can be a part of it.


2. Since this is Law Library Journal, I’m of course talking about legal research. But everything I say can apply to research using databases (or print tools, for that matter) in other fields, whether medicine (PubMed), sociology (Sociological Abstracts), or U.S. history (America: History and Life).
tions and time periods, addressing multifarious legal issues. After you retrieve a set of cases in an online search, you have to examine each to see whether it matches what you’re looking for; if it were a cartoon figure, you’d be asking whether it has glasses, a hat, a striped sweater, and so on. If it doesn’t have everything you’re looking for, then you move on. If it does, then you’ve solved the puzzle and can move on.

But few people examine each figure in a Where’s Waldo? spread in detail. In the beach scene, for instance, I don’t look at each figure along the bottom edge of the drawing and carefully assess whether he or she could be Waldo. I can tell at a glance that most of them are not Waldo; I don’t have to list the criteria I’m looking for and check off which are present. Of course, one could plod through methodically, but finding Waldo would be a very slow process. Similarly, experienced researchers learn to skim cases without analyzing them in depth. If a search yields, say, 100 cases, I can skim bits (e.g., the first paragraphs and the sentences where my search terms appear) and quickly decide that many aren’t worth reading in full.

I find searching for Waldo most enjoyable when I step away from careful method (such as searching by quadrant) and instead let my eyes and my mind wander. Somehow Waldo pops out of the background as a pleasant surprise. But I don’t recommend that for research. When reviewing a list of search results, I do not flit from number 27 to number 93 in a relaxed, dreamlike state. Instead, I take advantage of the database’s options for sorting. I often start with the most recent cases or articles, but I also like to sort by most cited. Sometimes I use the system’s algorithmic determination of the most relevant documents and look at those first. Whereas Waldo is nearly as likely to show up in the middle of the left page as in the top right corner of the right page, useful documents are arranged in a results list much less randomly. A case from a higher court is more likely to be useful than one from a lower court; one that has been cited by many other cases is probably more important than one that has never been cited (unless the never-cited case is very recent).

As with many tasks, machine learning can be used to automate the search for Waldo. See Dami Lee, This Robot Uses AI to Find Waldo, Thereby Ruining Where’s Waldo, VERGE (Aug. 8, 2018, 4:12 PM EDT), https://www.theverge.com/circuitbreaker/2018/8/8/17665268/wheres-waldo-finding-robot-google-cloud-automl-ai [https://perma.cc/MNB4-JT3K] (includes video). It can still be fun to do something—like looking for Waldo—even if you know that a computer can do it faster. It turns out that Waldo’s locations are not entirely random—for instance, he’s never on the very bottom of the right page. Randy Olson, Here’s Waldo: Computing the Optimal Search Strategy for Finding Waldo, RANDAL S. OLSON BLOG (Feb. 3, 2015), http://www.randalolson.com/2015/02/03/heres-waldo-computing-the-optimal-search-strategy-for-finding-waldo/ [https://perma.cc/9GWY-743C]. For purposes of this discussion, let’s assume that Waldo’s location in each drawing is nearly random.
§5 This is an important difference between recreationally looking for Waldo and doing research. The scenes in *Where’s Waldo?* are intentionally chaotic, with figures that make little sense in their context: the figure in a parka and fur hat is between two people wearing typical beach outfits; a few feet from the water’s edge a man in a white lab coat is holding a stethoscope to a horse’s behind. Research materials, on the other hand, come with lots of structure. Even an individual document (e.g., case, statute, or article) has markers that situate it within a context that adds to its meaning. For example, a case includes jurisdiction, level of court, and date; a statutory section indicates jurisdiction, the broader title it’s part of, and the year of the code. An article indicates the journal (e.g., bar journal, scholarly journal), the author and the author’s affiliation (e.g., student, professor, or judge), and the date. You don’t even need the full document: because of conventions, even the citation alone will give you this information about a case, statute, or article.7

§6 Not only does each document (or citation) have these markers, but the structure of legal materials offers many ways to see the nonrandom relationships among authorities. When Case B cites Case A, we assume that the two cases are linked by subject matter (if only one narrow point of law). When a case from Nevada cites a case from California, we know that the cited case is being used as persuasive precedent because California cases are not binding in Nevada. If a new act amends an old one, we know that the newer one is the one that has legal effect. Cases and articles that cite other cases and articles open doors to lines of authority or scholarly analysis. And, trivial though it might seem, we know that a 2003 article cannot offer insights about a law that was passed in 2012 or a case that was decided in 2015. All of this means that a list of search results is fundamentally different from a page of Waldo. While characters can appear in a scene for no reason but the visual wit of the artist, retrieved documents fit into a large, interconnected fabric of legal authority.

§7 The more experience researchers gain, the more they can take advantage of the structure built into the research universe. An apparently easy way to search in Lexis and Westlaw8 is to type terms into the general box at the top of the home page. The algorithms developed by the companies’ programmers take over and, by default, the researcher is presented with a list of materials ranked by relevance (as determined by the algorithms). Each system bows to the existence of categories of authority because, at this point, the user must choose cases, secondary sources, or whatever.9 A researcher can select filters in the sidebar to sort further—e.g., by jurisdiction or by date. As an experienced researcher, I prefer to do a lot of that sorting before I search, by choosing a narrower database (e.g., a practice area or type of secondary source) and a date range.

§8 Researchers can also use their knowledge of the interrelationship of legal materials. If you know that secondary sources will (among other things) describe important themes and cite important cases and statutes, then you might start out your research looking for a secondary source rather than jumping into a case law database. Even within secondary sources, you can use your knowledge of publishing conventions to search for material that’s likely to be useful. For instance, if you

7. See generally Alexa Z. Chew, *Citation Literacy*, 70 Ark. L. Rev. 870 (2018).
8. To use the latest names, Lexis Advance and Westlaw Edge. You know what I mean.
9. They both default to showing cases, if a researcher doesn’t look at the sidebar and choose something else.
want practice tips for lawyers on the ethical and liability issues related to data breaches, looking for recent bar journal articles will probably be more productive than searching legal encyclopedias. If you want a review of cases from many jurisdictions, you can look for an annotation from *American Law Reports*. And if you want a critique of tort law based on critical race theory, you’ll be better off searching scholarly journals than legal newsletters.

¶9 The basic *Where’s Waldo?* activity is looking for the one Waldo in each picture. If you don’t find it right away, you can keep looking, confident in the knowledge that there will be one. You don’t have to spend time thinking about the characteristics of the figures who aren’t Waldo. You don’t care about the people with blue stripes, with solid tops, without hats, and so on. And if you find Waldo, you can pat yourself on the back, knowing that you’ve found the only one in that spread. But research isn’t like that. If we use “Waldo” as a shorthand for “a useful source,” we never know for sure whether there will be a Waldo, and if there is one, we don’t know if it’s the only one. Recently a lawyer told me that she was concerned about associates who struggled with either stopping research after finding one relevant case (when there might be others) or not knowing what to do when research doesn’t yield even one. In a way, they are viewing research as a *Where’s Waldo?* exercise, assuming that every one problem will be solved by exactly one relevant case.

¶10 When teaching research, we can make it look like a search for Waldo. For example, preparing for an in-class demonstration, we might carefully craft the sample searches so they lead to a document that is obviously helpful: here’s a hypothetical research problem (that we made up) and here’s the search (that we practiced) and voilà! here’s the perfect source. Unfortunately, when the students go off to run their own searches, they might experience something different—no Waldo or too many Waldos. To build confidence, we sometimes construct exercises that steer the students to success. We can frame the question to lead to just one document (find the 1994 federal district court case brought by a spectator at a Charlotte Knights baseball game who was hit by a foul ball).

¶11 Some examples like these are probably useful, but I think we should also include more realistic illustrations. In our demonstrations, we can set up examples that yield a lot of results and explain that as researchers we would need to read them and think about them as we analyze the problem we’re working on. Even a very good search doesn’t solve a research problem in one blow. We can also try searches that don’t retrieve anything useful. And when we give assignments, we can

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10. Using checklists at the back of the book, you can look for other people and objects. For instance, the beach scene checklist includes “A dog biting a boy’s bottom” and “A man who is overdressed” as well as “A cactus” and “Two oddly fitting hats.”

11. There are many possible responses to finding no cases besides giving up. The researcher might need to reconsider the search terms used. Or it might be an occasion for broadening the search to other jurisdictions, for persuasive authority. Or the researcher might need to think of analogous situations that would have developed legal principles that could apply to these new facts. Maybe there are not published cases because the legal issue is very recent: perhaps searching pleadings and dockets would turn up some early litigation. Or maybe the issue isn’t one that lends itself to litigation at all: who would the plaintiffs be? would they have standing? would they have the resources to bring suit?


13. Among other things, the assignments that ask students to find a Waldo that we know is there are easier to grade than ones filled with ambiguity: did the student find the Waldo or not?
set up scenarios to help students explore those uncertain landscapes, where they might need to examine many potentially relevant sources, or their first searches don't turn up anything that looks good. While researchers are looking for that one good Waldo—the perfect source that perfectly fits the question presented—it is often worthwhile to look at the wider picture. For example, some related cases might suggest that there is room for the courts to change a rule as stated in the good case you found.

¶12 The Where’s Waldo? books are entertaining and can even help with reading readiness.14 Searching for Waldo is a good metaphor for research—but it is limited. Unlike the children and adults enjoying the whimsical Waldo drawings, researchers need to know about the fundamental structure of legal sources. And unlike the search for Waldo, real-life research often requires looking for a range of material, not just one man in a striped top. We need to be prepared for multiple Waldos, or none at all.

# Author Index

Azyndar, Susan, and Susan David deMaine, *Keeping Up with New Legal Titles*, 255, 439, 591

Beatty, John R., *Revisiting the Open Access Citation Advantage for Legal Scholarship*, 573


Bilder, Mary Sarah, and Laurel Davis, *The Library of Robert Morris, Antebellum Civil Rights Lawyer and Activist*, 461


Davis, Laurel, and Mary Sarah Bilder, *The Library of Robert Morris, Antebellum Civil Rights Lawyer and Activist*, 461

deMaine, Susan David, and Susan Azyndar, *Keeping Up with New Legal Titles*, 255, 439, 591

Dingledy, Frederick W., *From Stele to Silicon: Publication of Statutes, Public Access to the Law, and the Uniform Electronic Legal Material Act*, 165

Drake, Alyson M., *On Embracing the Research Conference*, 7

Frey, Scott, *“A Day in My Law Library Life,” Circa 2018*, 2018, 71

Gaylord, Tom, *From the Editor: Here Comes the Sun*, 5

Goldman, Pearl, *Legal Education and Technology III: An Annotated Bibliography*, 325

Hart, James, and Alex Zhang, *Sustainable and Open Access to Valuable Legal Research Information: A New Framework*, 229

Heller, James S., *Retrospective: 30 Lessons Learned (and a Few Strokes of Luck) at The Crossroads*, 121


Keele, Benjamin J., and Nick Sexton, *Keeping Up with New Legal Titles*, 145

Kostek, Meredith Weston, *The Case for County Law Library Consortia*, 307

Margeton, Stephen G., *A Library Design Bookshelf*, 197


Whisner, Mary, *Looking for Waldo*, 613

Whisner, Mary, *Tuesday Morning Detective Work*, 157


Zhang, Alex, and James Hart, *Sustainable and Open Access to Valuable Legal Research Information: A New Framework*, 229
Title Index

“A Day in My Law Library Life,” Circa 2018, Frey, Scott, 71
Beyond The Annals of Murder: The Life and Works of Thomas M. McDade, Behrens, Jennifer L., 281
The Case for County Law Library Consortia, Kostek, Meredith Weston, 307
From Stele to Silicon: Publication of Statutes, Public Access to the Law, and the Uniform Electronic Legal Material Act, Dingledy, Frederick W., 165
From the Editor: Here Comes the Sun, Gaylord, Tom, 5
How Many Copies Are Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Restraints, Brown, Kincaid C., 551
Keeping Up with New Legal Titles, Azyndar, Susan, and Susan David deMaine, 255, 439, 591
Keeping Up with New Legal Titles, Keele, Benjamin J., and Nick Sexton, 145
Legal Education and Technology III: An Annotated Bibliography, Goldman, Pearl, 325
A Library Design Bookshelf, Margeton, Stephen G., 197
The Library of Robert Morris, Antebellum Civil Rights Lawyer and Activist, Davis, Laurel, and Mary Sarah Bilder, 461
Looking for Waldo, Whisner, Mary, 613
On Embracing the Research Conference, Drake, Alyson M., 7
Physician-Assisted Death: A Selected Annotated Bibliography, Thurston, Alyssa, 31
Retrospective: 30 Lessons Learned (and a Few Strokes of Luck) at The Crossroads, Heller, James S., 121
Revisiting the Open Access Citation Advantage for Legal Scholarship, Beatty, John R., 573
Sticking to the Union? A Study on the Unionization of Academic Law Libraries, Slinger, Sarah C., 105
Sustainable and Open Access to Valuable Legal Research Information: A New Framework, Zhang, Alex, and James Hart, 229
Tuesday Morning Detective Work, Whisner, Mary, 157