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Black’s Law Dictionary: The Making of an American Standard*

Sarah Yates**

This article examines the history of Black’s Law Dictionary, the methods used in its creation, and its evolution. It then compares Black’s with its competitors and identifies factors both inherent in the works themselves and driven by external forces that have led to today’s primacy of Black’s over other law dictionaries.

Introduction

¶1 “Look it up in Black’s.” What law librarian hasn’t heard—and said—that sentence a thousand times? Reference librarians are expected users of Black’s Law Dictionary, but they are not alone. Black’s is an invaluable tool for catalogers assigning subject headings, particularly because catalogers are less likely than reference librarians to have a law degree.1 Most access services and circulation librarians, even if they do not have to look terms up in Black’s, are familiar with the work itself, simply from the number of requests for it.

¶2 Well-known enough that it is recognizable simply by the name of its long-deceased creator, Black’s is the most widely used law dictionary in the United States today.2 It was not the first English law dictionary, or even the first American law dictionary. Nor is it the most recently founded line of dictionaries. And yet, somehow, it has become the predominant American law dictionary.

¶3 But while law librarians frequently rely on Black’s, how much do we know about it? This article examines the history of Black’s, the methods used to create it, and its evolution. It then compares Black’s with its competitors, early and modern, and identifies factors both inherent in the works themselves and driven by external forces that have led to the primacy of Black’s over other law dictionaries.

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* © Sarah Yates, 2011. The author would like to thank Mary Rumsey for her generous support and assistance and Connie Lenz for her helpful comments.

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1. Michael J. Slinger & Rebecca M. Slinger, The Law Librarian's Role in the Scholarly Enterprise: Historical Development of the Librarian/Research Partnership in American Law Schools, 39 J.L. & EDUC. 387, 396 n.39 (2010) (“Many law school libraries now require their reference librarians to hold both law and library degrees, although librarians who work in areas such as Technical Services and Circulation are usually not required to hold a law degree.”).

2. See infra ¶¶ 12–15.
Law Dictionaries in Historical Context

§4 English law dictionaries have been around for even longer than general English dictionaries. The first dictionary of English law, John Rastell’s Expositiones Terminorum Legum Anglorum, was published in 1527. Expositiones was in Latin and Law French, with a brief preface in English. The second edition, published in 1530, includes parallel English translations.

§5 The first general English dictionary, in contrast, was The Dictionary of Syr Thomas Eliot Knyght, published in 1538. Elyot’s dictionary was bilingual, Latin to English. Because so many early written works were in Latin, it is no surprise that such bilingual dictionaries were among the first dictionaries in existence.

§6 The first monolingual general English dictionary was Robert Cawdrey’s A Table Alphabeticall, published in 1604. A Table Alphabeticall began the long tradition of “hard word” dictionaries. The makers of “hard word” dictionaries assumed that literate English speakers already understood “regular” English words, so there was no reason to include them in a monolingual English dictionary. In comparison, early English legal terminology can be seen as a special class of hard words and as a foreign language. Because by Rastell’s time there were no native speakers of

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4. When the Normans invaded England in 1066, they introduced their language—the French dialect spoken in Normandy at the time. This language is known as Anglo-Norman, a term that refers to the French language spoken in England during the period “which extends from the Conquest to the time when the two races, with their respective languages and characteristics, blended into one homogeneous nation.” Paul Studer, The Study of Anglo-Norman 4 (1920). The term “Law French” is sometimes used synonymously with Anglo-Norman. Other writers, however, make a clear distinction between “Law French” and “Anglo-Norman” or other terms. See, e.g., J.H. Baker, Manual of Law French 2–3 (2d ed. 1990) (explaining that by roughly the fifteenth century, “[t]he oral use of French in the courts became confined to the recitation of formal proceedings and certain other procedural forms, and as such continued until the eighteenth century. This lingering professional dialect, more often written than spoken, is that which is known as ‘law French.’” (footnote omitted)). For an excellent and detailed discussion of Law French, see Samuel J. Stoljar, A Common Lawyer’s French (pts. 1 & 2), 47 Law Libr. J. 119, 209 (1954).


10. David Micklethwait, Noah Webster and the American Dictionary 34 (2000) (“Cawdrey’s only purpose was to interpret ‘hard English words’ by the use of ‘plaine English words’; it would never have occurred to him to include an interpretation of the ‘plaine English words’ as well, because everybody knew what they meant.”).

11. Early English law was written largely in Law French and, to a lesser extent, in Latin. Baker, supra note 4, at 1 (“English lawyers continued to write their reports and professional notes in French
the language used in courts, statutes, and legal documents, it is no surprise that lawyers were among the first users to need dictionaries.

¶7 The seventeenth and eighteenth centuries saw the appearance of several English law dictionaries, notably Cowell’s Interpreter, Blount’s Nomo-Lexicon, Jacob’s New Law-Dictionary, and Cunningham’s New and Complete Law-Dictionary. All of these titles deal with English law; American lawyers and law students had to rely on these English dictionaries until 1839, when John Bouvier published his Law Dictionary.

The Changing Role of Law Dictionaries

¶8 Early law dictionaries were produced mainly for the benefit and use of law students. The titles of early editions of Rastell’s dictionary make the targeted audience clear. The full title of the 1579 edition, for example, is An Exposition of Certaine Difficult and Obscure Wordes, and Termes of the Lawes of this Realme, Newly Set Foorth & Augmented, Both in French and English, for the Helpe of Such Yonge Studentes as Are Desirous to Attaine the Knowledge of the Same. VVhereunto Are also Added the Olde Tenures.

¶9 By the late eighteenth century, the focus had changed slightly. Law dictionaries were still aimed at students of law, but in the broader sense of the word students that also encompassed the self-taught. It was perhaps with this new group of users until the reign of Charles II (or even later), and . . . most of our legal literature before the seventeenth century is written either in that language or in Latin.”).

12. STUDER, supra note 4, at 12 (“Anglo-Norman was a dead language by the middle of the fourteenth century.”).

13. JOHN COWELL, THE INTERPRETER (Cambridge, John L. Gate 1607). See also Bryan A. Garner, Legal Lexicography: A View from the Front Lines, 6 GREEN BAC 2D 151, 152 (2003) (“There can be little doubt that, perhaps apart from John Cowell, Black was the most erudite lawyer ever to write a dictionary.”); Thumma & Kirchmeier, supra note 5, at 239 (calling Cowell’s dictionary “more scholarly” than Rastell’s).


16. CUNNINGHAM, supra note 15. See also Garner, supra note 15, at 367 (“His [Cunningham’s] efforts produced the most copious of 18th-century law dictionaries—an attempt to restate the whole of the law and to arrange it alphabetically. . . . In calling his work an ‘abridgment,’ Cunningham was following a tradition begun in the 15th century of trying to restate the whole of English law in a single text . . . Only one other writer, Giles Jacob (1686–1744), had ever taken this approach. The result (for both Cunningham and Jacob) was more of an encyclopedia than a dictionary in the modern sense.”).


18. Two V’s were often used as a substitute for W in early English printing. See DESCRIPTIVE CATALOGING OF RARE MATERIALS (BOOKS) 192 (2007).
in mind that dictionary makers began to include much more than just definitions of legal terms.

Jacob’s dictionary, and Cunningham’s, and others of the genre reflected the decline of the Inns of Court as a sophisticated school for barristers, the scarcity and expense of law books, and the growth of a large, uneducated, undisciplined mass of attorneys. This dictionary is a quick substitute for a legal education.19

¶10 The author of the first American law dictionary, John Bouvier, begins the preface to his work: “To the difficulties which the author experienced on his admission to the bar, the present publication is to be attributed,”20 indicating that he, too, had law students in mind. Black’s preface to his first edition, coming more than fifty years later, indicates a somewhat wider intended audience: “the working lawyer and judge, as well as . . . the student of legal history or comparative jurisprudence.”21

¶11 The use of dictionaries by the courts, and specifically by the U.S. Supreme Court, was already on the rise in the late nineteenth century when Black offered his dictionary to “the working lawyer and judge.”22 Yet even if Black was aware of this trend, it is unlikely that he could have foreseen the exponential increase in dictionary use by the Court in the century to come. After a brief decline in the first two decades of the twentieth century, dictionary use began to climb slowly through the 1960s, then rapidly from the 1970s onward.23 “From 1990 through the 1997–1998 term, the Court cited dictionaries in nearly 180 opinions to define more than 220 terms.”24 While a detailed analysis of the Court’s use of dictionaries since 1998 is beyond the scope of this article, Westlaw searches for two of the most-cited dictionaries25 from 1999 to the present show no reversal of the overall trend: seventy-three decisions cite Webster’s Third New International Dictionary,26 and 103 cite Black’s.27 The reliance of the U.S. Supreme Court on dictionaries has not gone unnoticed or uncriticized,28 but regardless of whether such use is advisable, the

20. BOUVIER, supra note 17, reprinted in 1 BOUVIER’S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA, at vii (Francis Rawle ed., 8th ed. 1914) [hereinafter BOUVIER’S LAW DICTIONARY].
21. BLACK, supra note 14, at iii.
22. Thumma & Kirchmeier, supra note 5, at 248–49 (“Although the Court relied on dictionaries only three times prior to 1864, in the 1860s, the Court cited dictionaries in seven opinions in the course of defining nine terms. In the 1870s, the Court cited dictionaries in ten opinions to define thirteen terms, while in the 1880s, the Court cited dictionaries in seven opinions to define eleven terms.” (footnotes omitted)).
23. Id. at 250–52.
24. Id. at 256.
25. See Lawrence Solan, When Judges Use the Dictionary, 68 AM. SPEECH 50, 51 (1993) (naming Webster’s Third New International Dictionary as the most frequently cited contemporary American general dictionary and Black’s as the most-cited technical dictionary).
26. The following search was performed in Westlaw’s SCT database on Sept. 7, 2010: “webster’s third” /s “international dictionary” & da(> 1998).
27. The following search was performed in Westlaw’s SCT database on Aug. 16, 2010: black /s dictionary & da(> 1998).
pervasiveness of these citations makes a basic understanding of the “standard” American law dictionary important for anyone doing legal research.

Black’s Law Dictionary as the American Standard

Every subject has its seminal reference book—the one that becomes a household word. . . . [W]henever somebody thinks of law dictionaries, Black’s seems inevitably to come to mind. 29

¶12 If anyone had a selfish reason to overstate the position of Black’s, it would be the author of this statement, Bryan A. Garner. Garner began overhauling Black’s with a pocket edition in 199630 and has been editor-in-chief since. But here Garner is not engaged in self-promotion; he is simply stating a widely accepted fact.

¶13 Henry Campbell Black first published A Dictionary of Law in 1891. By that date, Bouvier’s Law Dictionary was already in its fourteenth edition and was widely considered the predominant law dictionary until well into the twentieth century.31 But while it is difficult to find credible scholarly sources claiming the continuing superiority of Bouvier’s,32 references to Black’s Law Dictionary as the current standard abound.33

¶14 The Supreme Court’s use of law dictionaries supports scholars’ views. In a 1996 LexisNexis search comparing the number of Supreme Court citations of Bouvier’s with those of Black’s, Mary Whisner found that Bouvier’s was cited more frequently through the 1930s and that the two dictionaries were cited with equal frequency in the 1940s and 1950s. Since then, the Court has shown an increasing preference for Black’s.34 Whisner’s search was not a formal study, but her conclusions are supported by a detailed analysis of dictionary use in the Supreme Court

It Up: Dictionaries and Statutory Interpretation, 107 Harv. L. Rev. 1437 (1994) [hereinafter Looking It Up].

34. Whisner, supra note 32, at 100, ¶ 6.
through the 1997–1998 session, which found 107 citations to just the fifth and sixth editions of Black’s, compared to only thirty-six citations to all editions of Bouvier’s.35 This trend toward Black’s has in no way reversed since the 1990s; another informal database search, this time performed in Westlaw in 2010, shows 103 cases since 1998 with at least one citation to Black’s36 and only three cases in that time span with at least one citation to Bouvier’s.37

¶15 What do we know about the man who challenged and (eventually, posthumously) surpassed the country’s first and long-time top law dictionary? Not very much.

**Henry Campbell Black and His Lexicographic Approach**

I wish we knew nothing of Carlyle but his writings; I am thankful we know so little of Chaucer & Shakspere . . . I have persistently refused to answer the whole buzzing swarm of biographers, saying simply “I am a nobody—if you have anything to say about the Dictionary, there it is at your will—but treat me as a solar myth, or an echo, or an irrational quantity, or ignore me altogether.”38

¶16 This quotation is by one of the most famous lexicographers of the English language, James A.H. Murray, editor of *A New English Dictionary on Historical Principles*—a work better known now as the first edition of *The Oxford English Dictionary*. Scholars actually do know a lot about Murray; in fact, the anti-biography quotation comes from his own papers, and is included in the prologue to a biography of Murray written by his granddaughter.39 The sentiment expressed might apply even more appropriately to Henry Campbell Black, about whom no biography has been written. Or it might not. Black’s thoughts on himself as lexicographer remain unknown.

¶17 A mere outline of the life of Henry Campbell Black is all that is now available. The title page to his 1891 *Dictionary of Law* gives him as “Henry Campbell Black, M.A. Author of Treatises on ‘Judgments,’ ‘Tax-Titles,’ ‘Constitutional Prohibitions,’ etc.”40 By the second edition, he is “Henry Campbell Black, M.A.: author of treatises on judgments, tax titles, intoxicating liquors, bankruptcy, mortgages, constitutional law, interpretation of laws, etc.”41

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35. Thumma & Kirchmeier, *supra* note 5, at 263.
36. See the search described *supra* note 27.
37. The following search was performed in Westlaw’s SCT database on Aug. 16, 2010: *bouvier /s dictionary & da (> 1998)*.
39. Elisabeth Murray follows these excerpts with the assurance that “[h]e did, however, in later life reveal that he had always intended to write out a narrative of his life and memories when he had completed the Dictionary and leave it to his family ‘to suppress or publish it, or such parts of it, as their wisdom should choose.’” *Id.* (quoting draft of letter from James A.H. Murray to Sir Herbert Warren (Jan. 19, 1911)). One of James Murray’s sons also wrote a biography of his father. WILFRID G.R. MURRAY, *MURRAY THE DICTIONARY-MAKER* (1943).
40. Black, *supra* note 14, at i.
¶18 Black was born in 1860 in Ossining, New York. He received an A.B. in 1880, an A.M. in 1887, and an LL.D. in 1916, all from Trinity College in Hartford, Connecticut. He was admitted to the bar in 1883 and practiced law in Williamsport, Pennsylvania, and Saint Paul, Minnesota, before devoting himself full-time to legal writing and editing. Black was the author of more than a dozen books on constitutional law, tax law, bankruptcy law, and other legal topics; additionally, he served as editor of The Constitutional Review from its first issue in 1917 until his death in 1927.

¶19 Information on Black’s aims and methodology for compiling the law dictionary is only slightly less sketchy. The most direct source is the dictionary itself. Like many books published in the nineteenth century, the first edition had a lengthy and descriptive title: A Dictionary of Law Containing the Terms and Phrases of American and English Jurisprudence, Ancient and Modern Including the Principal Terms of International, Constitutional, and Commercial Law; With a Collection of Legal Maxims and Numerous Select Titles from the Civil Law and Other Foreign Systems. The title of the second edition—the only revision to the dictionary that Black himself undertook—is even longer and indicates a broader scope: A Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern and Including the Principal Terms of International, Constitutional, Ecclesiastical and Commercial Law, and Medical Jurisprudence, with a Collection of Legal Maxims, Numerous Select Titles from the Roman, Modern Civil, Scotch, French, Spanish, and Mexican Law, and Other Foreign Systems, and a Table of Abbreviations. The subtitles clearly spell out Black’s intent.

¶20 Black further describes the intended scope of the dictionary in his preface:

The dictionary now offered to the profession is the result of the author’s endeavor to prepare a concise and yet comprehensive book of definitions of the terms, phrases, and maxims used in American and English law and necessary to be understood by the working lawyer and judge, as well as those important to the student of legal history or comparative jurisprudence.

He then proceeds to detail what his dictionary is not: a compilation of the law, a textbook, an encyclopedia, or a general English dictionary, “although vernacular words and phrases, so far as construed by the courts, are not excluded from its pages.” Black elaborates on what types of “vernacular” words he has included: those “which, in consequence of their interpretation by the courts or in statutes, have acquired a quasi-technical meaning, or which, being frequently used in laws or private documents, have often been referred to the courts for construction.”

¶21 Above all, Black intended for the Dictionary of Law to contain a comprehensive collection of legal terminology for an Anglo-American audience. He states

42. Black, Henry Campbell, in 1 Who Was Who in America 100 (8th prtg. 1981).
44. Black, supra note 14, at iii.
45. Id.
46. Id.
47. Id. (“[T]he main body of the work is given to the definition of the technical terms and phrases used in modern American and English jurisprudence.”).
that a law dictionary’s “value is impaired if any single word that may reasonably be sought between its covers is not found there.”\textsuperscript{48} and asserts that his law dictionary is the most comprehensive in existence at the time:

> Of the most esteemed law dictionaries now in use, each will be found to contain a very considerable number of words not defined in any other. None is quite comprehensive in itself. The author has made it his aim to include \textit{all} these terms and phrases here, together with some not elsewhere defined.\textsuperscript{49}

\textsuperscript{¶}22 The closest Black comes to defining his methodology is in his listing of the sources for definitions. While he used a variety of sources, his greatest emphasis was on primary legal materials. Definitions given within statutes and codes are given top priority; Black notes that “[t]he definitions thus enacted by law are for the most part terse, practical, and of course authoritative.”\textsuperscript{50} Here Black implies, but does not state explicitly, that these statutory definitions are given verbatim in the dictionary.

\textsuperscript{¶}23 As one might expect for a legal dictionary of common law jurisdictions, “[d]ue prominence has also been given to definitions formulated by the appellate courts and embodied in the reports.”\textsuperscript{51} Black is explicit that

> [m]any of these judicial definitions have been literally copied and adopted as the author’s definition of the particular term, of course with a proper reference. But as the constant aim has been to present a definition at once concise, comprehensive, accurate, and lucid, he has not felt bound to copy the language of the courts in any instance where, in his judgment, a better definition could be found in treatises of acknowledged authority, or could be framed by adaptation or re-arrangement.\textsuperscript{52}

\textsuperscript{¶}24 A bit further down the page, Black mentions several additional sources, many by name.\textsuperscript{53} These include English law dictionaries, both contemporaneous\textsuperscript{54} and early,\textsuperscript{55} dictionaries\textsuperscript{56} and other works of Roman and civil law;\textsuperscript{57} dictionaries of\textsuperscript{58} and treatises on French, Spanish, and Scotch law; “sages of the early [English] law”;\textsuperscript{59} and “the institutional writings of Blackstone, Kent, and Bouvier, and a very

\textsuperscript{48.} Id.
\textsuperscript{49.} Id.
\textsuperscript{50.} Id.
\textsuperscript{51.} Id.
\textsuperscript{52.} Id. at iii–iv.
\textsuperscript{53.} Presumably some of the named sources are the “treatises of acknowledged authority” he notes above. Id. at iv.
\textsuperscript{54.} Id. (naming Wharton, Sweet, Brown, Mozley & Whitley, Abbott, Anderson, Bouvier, Burrill, and Rapalje & Lawrence).
\textsuperscript{55.} Id. (Cowell, Spelman, Blount, Jacob, Cunningham, Whishaw, Skene, Tomlins, and \textit{Termes de la Ley}).
\textsuperscript{56.} Id. (Calvinus, Scheller, Vicat, Brown, and Burrill).
\textsuperscript{57.} Id. (Mackelday, Hunter, Browne, Halifax, Wolff, Maine, and especially Gaius and \textit{Corpus Juris Civilis}).
\textsuperscript{58.} Id. (Dalloy, Bell, and Escriche). In addition to the dictionaries already specified, a “Bibliographical List of the Principal Law Dictionaries in English and Foreign Languages” is given. Id. at vii–x.
\textsuperscript{59.} Id. (Pothier, Merlin, Toullier, Schmidt, Argles, Hall, White, and others).
\textsuperscript{60.} Id. (Bracton, Littleton, Coke, and others).
great number of text-books on special topics of the law.”

Furthermore, Black states that he has written many definitions “entirely de novo.” Whatever else we know about Black’s methods must be inferred from the dictionary itself.

§25 Bryan Garner has probably studied *Black’s Law Dictionary* in more depth than anyone. In his preface to the 1996 pocket edition, he writes: “Little is known about exactly how Black and his contemporaries worked, but one thing is certain to anyone who has spent any time examining 19th-century and early-20th-century law dictionaries: a great deal of the ‘work’ was accomplished through wholesale borrowing from other dictionaries.” Black implies as much in his own preface to the first edition, and Garner notes that this was common among lexicographers of the time. Garner offers an additional possible reason for Black’s adherence to earlier lexicographers’ definitions: “[D]ictionary editors in the legal field were trained as common-law lawyers, under the Anglo-American system of precedent. As a result, they might have thought that accuracy precluded a reconsideration of their predecessors’ words—especially if the earlier dictionary-maker cited caselaw in support of a definition.”

§26 Just how much did Black copy from his predecessors’ dictionaries? An in-depth study and comparison of American law dictionaries, such as the one completed by Starns and Noyes of early general English dictionaries, would be a welcome addition to the scholarship. While such an analysis is beyond the scope of this article, it is useful to look at a few examples.

§27 Some of Black’s definitions are taken directly from his predecessors’ dictionaries, as is shown in table 1.

### Table 1

Comparison of Definitions between Black’s and Blount’s Dictionaries

<table>
<thead>
<tr>
<th></th>
<th>Black</th>
<th>Blount</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>afforare</em></td>
<td>To set a price or value on a thing.</td>
<td>To set a Value or Price on a Thing [followed by usage examples in Latin]</td>
</tr>
<tr>
<td><em>manipulus</em></td>
<td>In canon law. A handkerchief, which the priest always had in his left hand.</td>
<td>A Handkerchief which the Priest always had in his Left-hand.</td>
</tr>
</tbody>
</table>

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61. *Id.* (naming no specific textbooks or textbook authors).
62. *Id.*
64. See BLACK, *supra* note 14, at iii–iv.
65. Garner, *supra* note 29, at iv. See also MICKLETHWAIT, *supra* note 10, at 35; STARNES & NOYES, *supra* note 9 passim (showing many examples of similar and identical definitions from different dictionaries).
68. BLACK, *supra* note 14, at 50. Black does state “Blount” right after the definition.
69. THOMAS BLount, A LAW-DICTIONARY AND GLOSSARY, at leaf D1r (3d ed. 1717).
70. BLACK, *supra* note 14, at 749. Again, Blount is noted after the definition.
71. BLount, *supra* note 69, at leaf 3C1v.
Elsewhere, Black quotes from another dictionary directly, but the quoted text is not the whole of his definition. Consider the definition of fact. Black’s entry begins, “A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence.”72 This opening paragraph—the basic definition—is not attributed to any source and can be presumed to be Black’s own definition. Six more paragraphs follow, four of which end with source attributions. For example, a paragraph distinguishing fact from law is taken directly from Abbott.73 This paragraph is the second in Abbott’s own seven-paragraph entry; in Black’s dictionary it comes sixth. Abbott’s basic definition of fact, that is, the first paragraph in his entry, is, “An actual occurrence; a circumstance or event; something which has been done.”74 Black’s definition is similar, but this is not surprising given that the definitions are for the same word.

For many definitions, Black has consulted more than one source but does not quote directly from any. For example, his entry for gemot refers to two earlier dictionaries: those of Cunningham and Wharton. Black’s basic definition is very similar, but not identical, to Wharton’s; it is significantly different from Cunningham’s—this is illustrated in table 2.

Table 2

<table>
<thead>
<tr>
<th></th>
<th>Black</th>
<th>Cunningham</th>
<th>Wharton</th>
</tr>
</thead>
<tbody>
<tr>
<td>gemot</td>
<td>In Saxon law.75 A meeting or moot; a convention; a public assemblage.76</td>
<td>Is a Saxon word signifying conventus, an assembly.77</td>
<td>[A] mote or moot, meeting, public assembly.78</td>
</tr>
</tbody>
</table>

All three entries continue past the basic definition. Cunningham’s is the briefest; he notes that the word is “used in the laws of Edward the Confessor . . . for a court.”79 Black and Wharton, however, go on to list and describe various types of gemots. The full descriptions are shown in table 3.

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72. BLACK, supra note 14, at 469.
73. 1 BENJAMIN VAUGHAN ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 475 (1879) (“The word is much used in phrases which contrast it with law. . . . The fact that it exists, if important to the rights of parties, must be alleged and proved, the same as the actual existence of any other institution.”).
74. Id.
75. By “Saxon,” Black and Cunningham mean Anglo-Saxon, i.e., pertaining to England before the Norman Conquest, not to Saxony in present-day Germany. The Oxford English Dictionary gives the etymology of gemot(e) as Old English. 6 OXFORD ENGLISH DICTIONARY 426 (2d ed. 1989). It also gives as one of the definitions of Saxon: “Formerly often used (like Anglo-Saxon) as the distinctive epithet of the Old English language . . . and of the period of English history between the conquest of Britain by the Saxons, Angles, and Jutes, and the Norman Conquest.” 14 id. at 540 (definition B.1.a).
76. BLACK, supra note 14, at 533.
77. 2 CUNNINGHAM, supra note 15, at leaf 202r. Cunningham spells the word gemote.
79. 2 CUNNINGHAM, supra note 15, at leaf 202r.
Descriptions of Gemot Types in Black’s and Wharton’s Dictionaries

<table>
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<th>Black</th>
<th>Wharton</th>
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| These were of several sorts, such as the witena-gemot, or meeting of the wise men; the folc-gemot, or general assembly of the people; the shire-gemot, or county court; the burg-gemot, or borough court; the hundred-gemot, or hundred court; the hali-gemot, or court-baron; the hal-mote, a convention of citizens in their public hall; the holy-mote, or holy court; the swein-gemote, or forest court; the ward-mote, or ward court. | The various kinds were—
1. The folc-gemot, or general assembly of the people, whether it was held in a city or town, or consisted of the whole shire. It was sometimes summoned by the ringing of the moot-bell. Its regular meetings were annual.
2. The shire-gemot, or county court, which met twice during the year.
3. The burg-gemot, which met thrice in the year.
4. The hundred-gemot, or hundred court, which met twelve times a year in the Saxon ages; but afterwards a full, perhaps an extraordinary meeting of every hundred was ordered to be held twice a year . . . .
5. The Halle-gemot, or the court baron.

¶30 Black may have consulted Wharton’s list, but he clearly did not copy it. Whereas Wharton gives information such as how often the different gemots met, Black’s descriptions are essentially just translations of the Old English terms. Also, Black mentions the witena-gemot, hal-mote, holy-mote, and swein-gemote, all of which Wharton neglects.

¶31 Black’s use of judicial sources is similar to his use of earlier dictionaries; he “felt no compunction to mindlessly mimic the language of judicial opinions . . . Black was not hesitant to create a definition out of whole cloth . . . .” His definitions are sometimes verbatim or nearly so, but more often he paraphrases, as can be seen in table 4.

¶32 As in other instances where he relied heavily on existing sources, Black combined relevant parts from different sources, as well as adding his own material. The definition from Black’s of salary, as given in table 4, is the third of three paragraphs

80. Black, supra note 14, at 533.
81. Wharton, supra note 78, at 417.
82. Mersky & Price, supra note 33, at 732.
for the entry. The first paragraph credits Cowell, and the second is unattributed and presumably Black’s own. Likewise, Black’s comparison between legal interest and conventional interest is just one paragraph in a longer entry on interest, and Fowler v. Smith is just one of several sources cited throughout the entry; others include cases from other states, treatises, and the California civil code.

### What Set Black’s Apart from the Rest?

¶33 Black’s dictionary arrived on a very different scene than Bouvier’s had fifty-two years earlier; John Bouvier was a pioneer who paved the way for Black and other American legal lexicographers. While English-language law dictionaries existed at the time, they were published in England, sometimes with editions also published in Scotland or Ireland. Bouvier cites this as a prime motivating factor for his entrance into the field of legal lexicography:

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83. Black, supra note 14, at 1059.
84. Cowdin v. Huff, 10 Ind. 83, 85 (1858).
85. Black, supra note 14, at 636.
86. Fowler v. Smith, 2 Cal. 568, 570 (1852).
87. Black, supra note 14, at 1059. “Cowell” refers to Cowell, supra note 13. Black’s “Bibliographical List of the Principal Law Dictionaries” gives a first edition, dated 1607; a second, dated 1672; and a third, dated 1708. Black, supra note 14, at viii. The citation does not specify which edition was consulted. Id. at 1059.
88. Black, supra note 14, at 636.
89. Some of the dictionaries were also published in later, “American” editions, although these still pertained to British law. See, e.g., Giles Jacob, The Law-Dictionary (T.E. Tomlins ed., New
They were written for a different country, possessing laws different from our own, and it became a question how far they were or were not applicable here. Besides, most of the matter in the English law dictionaries will be found to have been written while the feudal law was in its full vigor, and not fitted to the present times, nor calculated for present use, even in England. And there is a great portion which, though useful to an English lawyer, is almost useless to the American student. “What, for example, have we to do with those laws of Great Britain which relate to the person of their king, their nobility, their clergy, their navy, their army; with their game laws; their local statutes, such as regulate their banks, their canals, their exchequer, their marriages, their births, their burials, their beer and ale houses, and a variety of similar subjects?”

§34 Nor was Black the first American jurist to follow Bouvier’s example. “He entered a crowded field, for there were many law dictionaries then in print—several more major ones, in fact, than there are now.” Black mentions seven titles published in the United States between 1839 and 1891 as being among the “principal law dictionaries.”

§35 This raises several questions: Why did Black even think a new law dictionary was necessary? Why did he think he was the man for the job? How did Bouvier’s dictionary fall from its place as the standard American law dictionary? Why was it Black’s dictionary and not a competitor that became the standard? Black offers a few clues about his motivation in the preface to the first edition. The most explicit is his claim that his dictionary is comprehensive, unlike any other law dictionary available at the time.

§36 While Black’s was an American law dictionary, his scope was broader than just American law:

For the convenience of those who desire to study the law in its historical development, as well as in its relations to political and social philosophy, place has been found for numerous titles of the old English law, and words used in old European and feudal law, and for the principal terminology of the Roman law. And in view of the modern interest in comparative jurisprudence and similar studies, it has seemed necessary to introduce a considerable vocabulary from the civil, canon, French, Spanish, Scotch, and Mexican law and other foreign systems.
Black goes on to note the inclusion of vocabulary of several specialized areas of law, such as “the principal phraseology of international and maritime law and forensic medicine.”

¶37 Some of Black’s other remarks in the preface seem as if they might have been written with Bouvier’s dictionary in mind, although it is not mentioned specifically. He writes that his dictionary “does not purport to be an epitome or compilation of the body of the law. . . . Neither is the book encyclopædic in its character.” This point touches on one of what Garner calls the five major questions that face the makers of law dictionaries: “To what extent should a law dictionary be a dictionary—as opposed to a legal encyclopedia? That is, to what extent should it merely define terms, as opposed to expansively discussing the law relating to those terms?”

¶38 As Garner’s phrasing of the question suggests, there is a continuum between a “pure” dictionary and a “pure” encyclopedia. The earliest law dictionaries were little more than “glossaries, with short explanations of legal terms,” as such, they were not encyclopedic at all. But starting with Giles Jacob and the publication in 1729 of his Law-Dictionary, which purports as part of its extensive subtitle to contain “also the whole law,” law dictionaries became increasingly encyclopedic.

¶39 John Bouvier wanted to reverse this trend, criticizing the encyclopedic nature of existing law dictionaries: “It is true such works contain a great mass of information, but, from the manner in which they have been compiled, they sometimes embarrassed [the author] more than if he had not consulted them.”

¶40 However, Bouvier died forty years before Black published his first edition, and “[t]he later editions of Bouvier rejected his concise approach and moved once again more toward an overdeveloped encyclopedic treatment.” Law professor and plain-English advocate David Mellinkoff calls the Bouvier’s edition he used in law school “swollen . . . . It added entries that the live John Bouvier had deliberately omitted.”

95. Id.
96. Id.
98. Id.
99. Id.; Mellinkoff, supra note 19, at 430. See also M.D. Chalmers, Wanted—A Law Dictionary, 8 L.Q. REV. 283, 283 (1892) (“Wharton’s Law Lexicon is a work of great learning and research—but it is not a dictionary. It is an imperfectly developed encyclopedia.”). Chalmers’s paper was originally read at the Oxford Law Club in 1892—a year after the publication of Black’s dictionary—but Chalmers makes no mention of Black’s. The slight might not have been intentional, however. Perhaps Chalmers was not interested in an American dictionary, or perhaps Black’s was not yet available in England.
100. BOUVIER, supra note 20, at vii. But see Mellinkoff, supra note 19, at 430 (contending that, while Bouvier “omitted much of the old excess in the English law dictionaries,” he never fully succeeded in breaking with the encyclopedic tradition of law dictionaries: “[L]ike Jacob and Cunningham, Bouvier was writing not so much a dictionary of legal language as a short encyclopedia, but designed for use in America. Like the English dictionaries, Bouvier’s dictionary was offering a legal education.”).
102. Mellinkoff, supra note 19, at 434.
¶41 The encyclopedic nature of Bouvier’s became explicit in 1914, when Francis Rawle offered up a third revision with the title *Bouvier’s Law Dictionary and Concise Encyclopedia.* While Rawle did alter the title, he did not single-handedly change the dictionary’s structure. Rawle’s stated purpose in editing the third revision was “to treat much more fully all encyclopædic titles, except those in which there has been no development in recent years, while adding many dictionary and other minor titles not found in the last Revision.” Rawle did not claim to have introduced encyclopedic entries where none existed before, simply to have expanded existing ones—and he did not claim even to have done that in all cases.

¶42 Rawle’s 1914 revision added an extra volume to the dictionary, but Bouvier’s had always been a multivolume work. Black’s foremost goal for his dictionary—what would set it apart from existing law dictionaries—was comprehensiveness. But he was also aware of the practical advantages of publishing a dictionary in one volume. He explained his reconciling of the two potentially conflicting aims thus: “[C]omprehensiveness is possible (within the compass of a single volume) only on condition that whatever is foreign to the true function of a lexicon be rigidly excluded. The work must therefore contain nothing but the legitimate matter of a dictionary, or else it cannot include all the necessary terms.”

¶43 If Black’s insistence on a single volume was a response to Bouvier, however, it was not directed at Bouvier alone. Of the seven post-Bouvier American law dictionaries that Black cites, only three are complete in one volume; many of the European dictionaries are also multivolume publications.

¶44 Black’s views on the need for a new law dictionary—one that would be comprehensive but exclude all nondictionary material and therefore fit in one volume—are reasonably clear. But then why, rather than simply calling for a better law dictionary as others have, did Black undertake to write one himself?

¶45 Although Black’s name is most closely associated today with his *Law Dictionary,* neither legal lexicography nor even legal language in general was his primary scholarly interest. According to the memorial written by his friend and colleague David Hill, “throughout his career it was the Constitution of the United...
States, its origin, its influence and its significance for social security and development, that occupied the background of his thoughts.”

¶ 46 Perhaps it never occurred to Henry Campbell Black that he was “unqualified” to write a law dictionary. He knew the law, after all, and he was a respected legal writer and editor. Furthermore, “legal lexicographer” was not a profession for which any specific qualifications were required. John Bouvier was a lawyer and judge, not a lexicographer or even an academic. Law dictionary compilers from John Rastell and John Cowell to Charles Winfield and Benjamin Vaughan Abbott lacked scholarly backgrounds in lexicography or related fields. Rastell and Abbott were practicing lawyers, Winfield was a lawyer and U.S. representative from New York, and Cowell was a professor of civil law.

¶ 47 Even for writing general English dictionaries, no particular training or study was required. Robert Cawdrey, author of the first English dictionary, A Table Alphabeticall, was a schoolmaster. The famous Samuel Johnson, creator of what most scholars agree was the first great English dictionary, had left Oxford without a degree and spent the years leading up to his preliminary Plan of a Dictionary of the English Language (1747) toiling as a writer of little renown. The same is true of early American dictionary makers. Samuel Johnson, Jr. (no relation), “America’s first lexicographer,” was a schoolteacher by profession and also

110. Id. at 67.
111. See, e.g., Garner, supra note 29, at iii (noting that the supremacy of Black’s dictionary is “partly because of his academic standing”).
112. In proposing an ideal law dictionary, one contemporary writer stipulated simply: “It would require a paid editor who must be a competent lawyer, and he would require paid assistants. . . .” Chalmers, supra note 99, at 286.
117. STARNES & NOYES, supra note 9, at 13.
119. Johnson, Samuel, in British Authors Before 1800, at 293, 294 ( Stanley J. Kunitz & Howard Haycraft eds., 1952).
known for his enthusiasm for and skills in pomology, genealogy, and calligraphy; \textsuperscript{122} Noah Webster\textsuperscript{123} was a teacher and lawyer. \textsuperscript{124}

\S 48 This trend began to change with James Murray, the creator of the \textit{Oxford English Dictionary}. \textsuperscript{125} Murray was a schoolmaster, like many of his predecessors, but he had also studied widely in subjects that included languages, and from his work on Scottish dialects he was known as a prominent philologist. \textsuperscript{126} But while Black and Murray were contemporaries, it took time for an academic background similar to Murray’s to be widely considered a qualification for editing a dictionary.

\S 49 Especially for dictionaries in specialized subjects such as law, expertise in the subject field was often considered more important than expertise in lexicography. Indeed, the first editor of a major American law dictionary who shows signs of having given much thought to his lexicographic methods is Bryan Garner.

\S 50 Garner has described the state of modern legal lexicography as being analogous to the stage that general lexicography had reached in the mid-eighteenth century: “The legal lexicographer of the late twentieth century finds something akin to what Samuel Johnson found when he undertook his great \textit{Dictionary}: a speech copious without order, and energetic without rules; perplexities to be disentangled, and confusion to be regulated; choices to be made out of boundless variety.”\textsuperscript{127}

\S 51 Garner’s editorship is considered to have revived an old standard. \textsuperscript{128} But how did Black’s manage to stay on top until Garner’s arrival on the scene in 1996? And how did it manage to usurp the top spot from \textit{Bouvier’s} in the first place?

\S 52 One probable reason for \textit{Bouvier’s} longtime popularity was that it was considered “perhaps the most scholarly in its treatment, providing besides definitions articles on many of the legal topics.”\textsuperscript{129} Whisner makes an intriguing and persuasive argument that a significant part of what motivates users to choose one dictionary over another is the not unreasonable tendency to trust the opinions of colleagues and mentors. \textsuperscript{130} If law professors consistently recommend one specific dictionary, it is only natural for students to consider that dictionary the authority and continue using it in their work. One would hope that Supreme Court justices would put more thought than the average student or lawyer into which dictionaries they con-

\textsuperscript{122} Id. at 285. Gibson also notes that Johnson was “given to writing down ‘choice English extracts from classic authors.’” (quoting Henry Pynchon Robinson, \textit{Samuel Johnson Jr. of Guilford and His Dictionaries}, 5 CONN. MAG. 526, 527 (1899)).

\textsuperscript{123} NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

\textsuperscript{124} MICKLETHWAIT, supra note 10, at 19–20.

\textsuperscript{125} A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (James A.H. Murray et al. eds., Oxford, Clarendon Press 1888).


\textsuperscript{128} See Mersky & Price, supra note 33, at 720 (suggesting that Garner has done so much to update and improve \textit{Black’s Law Dictionary} that it may one day be known as Garner’s instead of Black’s).

\textsuperscript{129} ERVIN H. POLLACK, LEGAL RESEARCH AND MATERIALS 166 (1950) (discussing Rawle’s revision of \textit{Bouvier’s}).

\textsuperscript{130} Whisner, supra note 32, at 101–02, ¶ 8–9.
sult. However, Thumma and Kirchmeier conclude, based on their detailed analysis of the Supreme Court’s use of dictionaries, that “the Court’s analysis to date and the broad range of dictionaries used do not demonstrate that the Court is following a particularly principled method in selecting specific dictionaries.”

¶53 The easy answer to why Black’s caught up with and then surpassed Bouvier’s in popularity in the mid-twentieth century is that Bouvier’s was never updated after 1934. In contrast, West published a fourth edition of Black’s in 1951, a fifth in 1979, and a sixth in 1990. Since Garner took over with an unnumbered “pocket” edition in 1996, three more editions have come out: in 1999, 2004, and 2009. The currency of a legal dictionary is important to practitioners because, as the law develops, new terms appear and the meanings of established terms may change.

¶54 Whisner discusses users who still prefer Bouvier’s, some of them specifically because it has not been updated. However, virtually all mainstream legal students, scholars, and practitioners see the advantage of an up-to-date dictionary, although many acknowledge that Bouvier’s is still useful for understanding the historical meanings of terms.

¶55 The question then becomes: Why did Black’s continue to be revised periodically, while Bouvier’s languished? Both brands continued long beyond the lives of their creators, so the answer does not lie in the lexicographers’ personalities. It is more instructive to consider the publishers.

131. Thumma & Kirchmeier, supra note 5, at 272 (footnote omitted); see also Looking It Up, supra note 28, at 1447 (“[T]here has been no apparent pattern to (or discussion of) the Justices’ choices of volumes or vintage.”).

132. There was also a “revised fourth edition” in 1968, with additional printings over the next ten years.

133. Various abridged editions are not counted here.

134. Editors of dictionary revisions often make this point. See, e.g., Foreword to Ballentine’s Law Dictionary, at iii, iii (3d ed. 1969) (“Language is alive! To remain relevant, a dictionary requires periodic revision and updating. . . . [L]aw and language change too quickly for a practicing attorney to rely on a dictionary a generation old.”); Garner, supra note 33, at ix (“[M]odern law hurries headlong into decade after decade of new statutes, new doctrines, and new tripartite tests. The world—as well as the law that tries to govern it—is changing at a dizzying pace. If you want evidence of this change, look inside for the hundreds of new entries such as cyberstalking, jurimetrics, parental kidnapping, quid pro quo sexual harassment, reproductive rights, and viatical settlement.”). Likewise, a common criticism of law dictionaries is the lack of newer legal terms. See, e.g., Chalmers, supra note 99, at 284 (“As law develops and changes, so the meanings of the terms used develop and change.”); Shapiro, supra note 108, at 150 (criticizing the then-current editions of Black’s and Ballentine’s for “their failure to collect important newer vocabulary, with ‘newer’ denoting terms entering currency within the last half-century”).


136. Id. at 105–06, ¶ 16 (“[M]any . . . believe that the law took a wrong turn around the time of the Civil War, so they do not want sources that reflect changing legal standards.”).

137. See, e.g., Barkan et al., supra note 33, at 405; Aprill, supra note 28, at 310 n.190 (“The Court quite regularly uses Bouvier’s as a historical source, citing its earlier editions along with other dictionaries, legal encyclopedias, and additional authorities to show contemporaneous usage of a word at issue in an older statute.”).

138. The last edition of Bouvier’s was published eighty-three years after his death; the latest edition of Black’s (so far), eighty-two years after his.
Bouvier’s had a number of different publishers over its life span: T. and J.W. Johnson in Philadelphia, The Boston Book Company, and the Banks Law Publishing Company in New York, among others. Black’s, on the other hand, has always been published by West.\footnote{West also published Bouvier’s eighth edition in 1914, along with the Vernon Law Book Company in Kansas City, Missouri. Vernon is named above West on the title page, at least on the volume that was scanned for HeinOnline. \textit{Bouvier’s Law Dictionary}, \textit{supra} note 20, at i.} The long-standing patronage of a major law publisher has surely helped keep Black’s going.

Beyond the practical difficulties of perpetuating a line of dictionaries for over a century and with changing publishers, there may have been a factor inherent in Bouvier’s dictionary itself that led to its discontinuation: its encyclopedic nature, which Bouvier himself wanted to avoid. The encyclopedic approach of later editors is not “bad” per se; in fact, it is this characteristic that has been widely praised as scholarly. But the size and scope of later editions of Bouvier’s may have made it too difficult to work with, both for many users and for potential editors or publishers who might otherwise have continued to issue updated editions.

[H]ypertrophy is what led Bouvier’s law dictionary to become obsolete. It couldn’t accurately restate the whole law in two or three volumes. The essays had already been superseded by specialist treatises and by much bigger encyclopedias. It became impossible to keep the essays up to date. So by the late 1930s, the publishers had abandoned Bouvier’s dictionary as an unworkable venture.\footnote{Garner, \textit{supra} note 13, at 152.}

The cessation of Bouvier’s did not necessarily lead to the supremacy of Black’s, of course. While it is probably not worthwhile to examine every law dictionary that was contemporaneous with Bouvier’s or Black’s and analyze what went wrong, there is one other dictionary well known enough to merit discussion: Ballentine’s.

In the 1980s, Ballentine’s was still considered by some to be one of “[t]wo dictionaries [that] took over the turf, and have kept it.”\footnote{Mellinkoff, \textit{supra} note 19, at 434 (the other of the two dictionaries is Black’s); \textit{see also} COHEN ET AL., \textit{supra} note 31, at 413 (“The two major legal dictionaries most used in the United States are \textit{Black’s Law Dictionary}, 5th ed. (West, 1979) and \textit{Ballentine’s Law Dictionary}, 3d ed. (Lawyer’s Co-op, 1969).”).} The Ballentine name continued to appear now and then up until the 1990s: Lawyers Cooperative Publishing issued a “legal assistant edition” in 1994\footnote{Jack G. Handler, \textit{Ballentine’s Law Dictionary} (legal assistant ed. 1994).} and a “legal dictionary and thesaurus” in 1995.\footnote{Jonathan S. Lynton, \textit{Ballentine’s Legal Dictionary and Thesaurus} (1995).} However, the last revision of \textit{Ballentine’s Law Dictionary} itself was in 1969. Understandably, Ballentine’s has become a largely negligible competitor in the twenty-first century.\footnote{See Mersky & Price, \textit{supra} note 33, at 720.}

So where did Ballentine’s go wrong? Why has it not been deemed worth revising in over forty years? It might be more interesting to ask why Ballentine’s \textit{was} updated twice and why the Ballentine name was applied to two minor 1990s dictionaries. While Ballentine’s has garnered some positive responses,\footnote{See, e.g., COHEN ET AL., \textit{supra} note 31, at 414 (“Although older and slightly smaller than Black’s, \textit{Ballentine’s Law Dictionary} is an excellent comprehensive dictionary.”); Mudge, \textit{supra} note 31, at 130 (calling Ballentine’s an “[e]xcellent one-volume dictionary” and giving a relatively lengthy description of its features).} real enthusiasm
for the work has sometimes been conspicuously absent. For example, the foreword to the first edition contains no direct praise of Ballentine or his work—the only time that Ballentine is even mentioned is in the final, one-sentence paragraph: “I am glad to take advantage of the request to write a foreword for Mr. Ballentine’s dictionary in order to say to law students generally what I have been saying to my own students with all earnestness for the past thirty years.”

The unsigned foreword to the third edition fails to mention James Ballentine at all.

¶61 Ballentine did introduce one innovation in law dictionaries: a guide to pronunciation.

As to the pronunciation, it is the editor’s belief that this is the first law dictionary in the English language which contains this feature. His experience and that of other lawyers and law teachers has proved the need and importance of a law dictionary giving the correct pronunciation of legal terms.

The forewords to both the first and the third editions point out this feature—and only this one: “The pronunciation feature, which first brought this dictionary to the legal profession’s immediate attention in 1930, has been retained and improved by the adoption of the simplest, clearest available keys and guides.”

¶62 Ironically, it is this very feature that is the first to be attacked in a scathing 1970 review of Ballentine’s third edition. “[T]he front inside cover is devoted to a ‘key’ presumably to these pronunciations. ‘Lock’ would be a better word than ‘key,’ because the material does nothing more than obfuscate the question of how a word is to be pronounced.” But whether other law dictionary users shared this dissatisfaction with the pronunciation guidance is almost beside the point. Pronunciation guidance was Ballentine’s one claim to fame, and by 1969 it was no longer the only American law dictionary with this feature. The 1951 fourth edition of Black’s boasts “with guide to pronunciation” at the end of its subtitle.

Bryan Garner has continued to include and improve the pronunciation guides, explaining that they now “reflect how American lawyers actually say the words and phrases—not how English lawyers used to say them (and not necessarily how Latin teachers would


147. Foreword to Ballentine’s Law Dictionary, supra note 134, at iii, iii.


149. Foreword, supra note 147, at iii. See also Pound, supra note 146, at v (mentioning especially the importance of pronunciation guidance for Latin terms).

150. Victor M. Gordon, Book Review, 44 Conn. B.J. 126, 126 (1970) (reviewing Ballentine’s Law Dictionary, supra note 134). Gordon’s main objection to the pronunciation key is that the same symbol is used for short i (as in pin, it, and biscuit) and for long i (as in pine, fight, and file). After complaining of many other flaws, Gordon confusingly ends the review with a lukewarm recommendation: “[D]espite the many adverse criticisms in this review, if an office or student has to have one dictionary, this may as well be it, on the theory that Black’s will certainly not be immune from some of Ballentine’s faults, and will certainly be possessed of some of its own foibles and limitations not inherent in the work here under review.” Id. at 129–30.

have us say them).”152 So with its one signature feature no longer unique, it is not surprising that interest in Ballentine’s waned.

**Black’s Today**

¶63 By the middle of the 1990s, Black’s Law Dictionary was the premier American legal dictionary, but its status as such was more or less by default. With a sixth edition having been published in 1990, it was by far the most current of the three major dictionaries. Even the fifth edition in 1979 made Black’s the most current by a decade throughout the 1980s.153

¶64 Despite its advantage over Ballentine’s in currency, Black’s was sometimes lumped together with Ballentine’s for common criticism in the 1980s and 1990s. “Black’s and Ballentine’s are not the same; each has special virtues and special vices. They have sufficient in common to warrant discussing them collectively as B & B, without specifying which is sweeter and which is drier.”154

¶65 The main critiques of Black’s (and Ballentine’s) from this era fall into four categories: (1) inclusion of too many obsolete legal terms, or, “claptrap from the feudal system”;155 (2) inclusion of too many terms that are not specifically legal;156 (3) exclusion of more recently introduced terms;157 and, (4) as with the dictionaries of old, copying from earlier dictionaries. As an example of the latter, Mellinkoff points to the long-obsolete word doitkin, which is still to be found in the 1969 Ballentine’s and the 1979 Black’s—with Black’s even retaining Thomas Blount’s 1670 comment about the word, using some of Blount’s original phrasing.158 Mellinkoff is not charging the twentieth-century editors of Black’s and Ballentine’s with plagiarism; he is suggesting that editors of the dictionary revisions copy too many terms from previous editions without evaluating whether definitions need updating or whether the terms are even still relevant to law dictionary users.

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153. Black’s did receive some accolades during this time on its own merits and not just in comparison to the outdated Ballentine’s and Bouvier’s. See, e.g., Dan Henke, Book Review, Black’s Law Dictionary, 65 A.B.A. J. 1378, 1380 (1979) (“In substantive content and usable format Black’s is unbeatable. . . . The book is a delight to use and read.”).
154. Mellinkoff, supra note 19, at 434. Black’s and Ballentine’s are also criticized collectively in Shapiro, supra note 108.
155. Mellinkoff, supra note 19, at 435. This complaint about law dictionaries had been around for nearly a century by the time Mellinkoff penned his article. See William C. Anderson, Law Dictionaries, 28 AM. L. REV. 531, 532–33 (1894) (calling “[t]he antiquated expressions in question . . . [which] for one to ten or more centuries have been dead beyond resuscitation . . . . such information as delights only the antiquarian, the pedant and the bookworm (for whom law books are not made) . . . .”).
157. Shapiro, supra note 108, at 150. Similarly, Sloane found that “there are expanding branches of law that receive too little attention from the editors.” Sloane, supra note 156, at 324.
158. Mellinkoff, supra note 19, at 435. (quoting the fifth edition of Black’s: “We still retain the phrase, in the common saying, when we would undervalue a man, that he is not worth a doit.”).
¶66 Before assuming the editorship of *Black’s*, Bryan Garner was editor of the *Oxford Law Dictionary (OLD)*, intended as “the first-ever historical law dictionary.”159 Plans for the dictionary were canceled for financial reasons, but Garner wrote about the project while it was still under way. His argument for the need for a new law dictionary contains inherent criticisms of those that existed at the time. “Because the language of the law has remained largely untraversed by our best lexicographers since the days of Noah Webster (himself a lawyer), abundant inconsistencies have grown up within it.”160

¶67 Like Shapiro, Garner notes that “much of the legal lexicon has remained unrecorded. Until the appearance of my *Dictionary of Modern Legal Usage*161 . . . many 19th-century and 20th-century legal neologisms found no place in existing dictionaries, legal or nonlegal.” He continues, “More important than tracking down all these neologisms, however, is setting forth the changes in meaning that particular legal terms have undergone.”162

¶68 Far more than just adding new vocabulary and updating the definitions, Garner promised a completely new approach to legal lexicography: “The OLD will be unique. No law dictionary has yet been compiled on modern lexicographical principles. Many existing law dictionaries are poorly written, function more as encyclopedias than as dictionaries, lack comprehensive treatment, and provide little if any guidance on the development of legal language . . . .”163

¶69 With the procedure for compiling the *Oxford English Dictionary* as a model, Garner envisioned that “[m]embers of the OLD staff and volunteer readers will systematically read and excerpt historical legal texts, so that the Center for Legal Lexicography164 may build a storehouse of lexical items, in the form of illustrative quotations, from which to construct the OLD.”165

¶70 Human readers would not be the only ones systematically searching texts.166 Full-text database searching, a relatively new research tool in 1989, offered possibilities never before available to lexicographers. “Full-text databases such as LEXIS or WESTLAW, by searching billions of words of text, can retrieve usage examples for less common words that elude even the largest dictionaries.”167 In addition to identifying words that had previously been omitted from dictionaries because they are either uncommon or newly emerging, database searching can show when terms fall out of use. “A new law dictionary, seeking to exclude obsolete

161. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE (2d ed. 1995). Despite the title, *A Dictionary of Modern Legal Usage* is more a style guide than a true dictionary. For example, under and: “Beginning Sentences. It is a rank superstition that this coordinating conjunction cannot properly begin a sentence. And for that matter, the same superstition has plagued but, q.v.” *Id.* at 55.
162. Garner, supra note 159, at 337.
163. *Id.*
164. The Center for Legal Lexicography, a collaboration between the University of Texas and Oxford University Press, was the group that was to be responsible for the OLD. See *Id.* at 335.
165. *Id.* at 337.
166. See *Id.* at 338.
167. Shapiro, supra note 108, at 149.
entries from its word-list, could adopt a policy that terms which do not appear in any nineteenth or twentieth century case on LEXIS or WESTLAW will be left out.”168

§71 The *Oxford Law Dictionary* never came to be, but, luckily, Garner’s talents have not gone to waste. Garner applied the same “modern lexicographical principles” that he had discussed regarding the *OLD* when he turned his attention to revamping *Black’s*, making the 1996 pocket edition “something of a radical leap forward in the evolutionary line” of revisions.169

§72 The main difference between the envisioned *OLD* and the actual revised editions of *Black’s* under Garner’s editorship seems to be in the historical focus. Garner states of the seventh edition, the first full-length edition of *Black’s* that he produced, “Significant strides have been made both in modernizing this edition and in improving its historical depth.”170 Nevertheless, it cannot be said that in the seventh and subsequent editions of *Black’s* “the entirety of the legal vocabulary [is] marshaled and defined so as to trace its historical development from the 16th century to the present day,” as was planned for the *OLD*.171 This is inevitable, given that *Black’s* continues to be published in a single volume, whereas the *OLD* was to be a multivolume work containing about 25,000 entries of about 250 words each.172

§73 Garner’s revision of *Black’s* was, in fact, more of a rewriting than a revision. Beginning with the 1996 pocket edition, Garner and his team “[c]onsidered entries entirely anew rather than merely accepting what previous editions have said.”173 They continued this practice when compiling the seventh edition, which introduced more than 4500 new entries; furthermore, “[o]f the remaining 20,000 entries, all have been thoroughly revised: sharpened and tightened.”174

§74 Like the planned *OLD*, the rewriting of *Black’s* was the work of many scholars and practitioners, including experts in specialized areas of law.175 The team examined a wide range of sources, including Westlaw.176 Likewise, Garner fulfills the promise he made for the *OLD*, to include illustrative quotations. While he has probably not been able to include as many quotations in the one-volume *Black’s* as he would have liked to in the multivolume *OLD*, the seventh edition of *Black’s* does include more than 2000 scholarly quotations.177

§75 Another change that has brought *Black’s* in line with modern lexicographical practice is that, starting with the seventh edition, *Black’s* is constantly subject to review and revision:

West Group has now made the editing of *Black’s Law Dictionary*, in its various editions, an ongoing project. This means that *Black’s*, like all major dictionaries outside the law, will

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168. *Id.* at 150.
172. *Id.*
175. *Id.* at xii–xiv.
176. *Id.* at x. Garner does not mention LexisNexis or any other databases, no doubt because *Black’s* is a West product.
177. *Id.*
be a continuing work in progress. As the law continues its rapid evolution, *Black’s Law Dictionary* will keep pace.\(^{178}\)

And *Black’s* is keeping pace so far, with two new editions published in the decade between the appearance of the seventh edition and the present.

\(^{76}\) Bryan Garner may have taken over *Black’s* just in time to save the brand from obsolescence. It is still the most prominent law dictionary by default—if only in that it has no rival that is nearly as current. However, it seems entirely possible that if *Black’s* had not been radically revised when it was, a competing law dictionary—perhaps a brand-new one—could have taken over the top spot.

\(^{77}\) Now, when users “look it up in *Black’s*,” they may be doing so only because it is the one their law professors told them to use once upon a time. Or they may choose *Black’s* only because it is searchable on Westlaw.\(^{179}\) And that is probably all right. But law librarians, who are in the business of knowing and using the best legal research tools, can recommend *Black’s* with confidence, understanding why it is the standard American law dictionary.

\(^{178}\) *Id.*

\(^{179}\) As of this writing, the ninth edition of *Black’s* is searchable through Westlaw, and the third edition of *Ballentine’s* is searchable through LexisNexis.
Tenure Advice for Law Librarians and Their Directors*

Carol A. Parker **

Professor Parker explores the significant investment of time and effort required of law librarian tenure candidates and their directors and supervisors to bring a tenure track to a successful conclusion. She also describes guidelines and procedures that will facilitate the process. Successful tenure candidates will excel as librarians, master shared-governance concepts, and understand their institution’s culture. Candidates should also engage in self-reflection and seek feedback throughout the tenure process. Supportive directors and supervisors will provide support to candidates and ensure that well-developed promotion and tenure policies exist and are consistently applied.

Introduction

1. This article explores the significant investment of time and effort required of law librarian tenure candidates and their directors and supervisors to bring a tenure track to a successful conclusion.1 It also describes guidelines and procedures

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* © Carol A. Parker, 2011. The author thanks R. David Myers, Michelle Rigual, Eileen Cohen, and Carolyn Kelly for their insight and feedback throughout the process of writing this article. The University of New Mexico School of Law Library offers a tenure track for law librarians, and the author supports the concept of tenure and faculty status for nondirector law librarians.

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1. The term “tenure” is used throughout the article to refer to both tenure and other forms of continuous appointment that require similar processes, procedures, and commitments, unless it is necessary to distinguish between the two for purposes of clarity.
that will facilitate the process. Its intended audience is tenure candidates and directors and supervisors who oversee the tenure process. While other articles in the law library literature discuss performance standards used to review librarians for tenure or continuous appointment decisions, few discuss internal best practices that should accompany pursuit of and support for the tenure process itself. In contrast, the question of how best to pursue and support the tenure process is more fully developed in the literature of general academic librarians.

The American Association of Law Libraries (AALL) and the Association of College and Research Libraries (ACRL) both endorse academic librarians’ having tenured or continuous appointment status. Various surveys indicate that about twenty-five percent of nondirector academic law librarians have an opportunity to achieve tenured status at their institutions. Roughly another forty percent have opportunities to secure some form of continuous appointment. The remaining one-third simply work as at-will employees.

While these figures indicate that pursuit of tenure or continuous appointment will not be available to all academic law librarians, a significant number will find themselves in such positions or will aspire to attain such positions. It is vital that law librarians who find themselves on a tenure track understand what tenure and faculty status represent, and understand that their employment will end if they do not earn tenured status by the time their probationary period of employment ends.


6. An informal survey of academic law libraries that provide tenure or continuous appointment opportunities for law librarians, conducted by the author in 2009, revealed that 53.8% (28 of 52) of respondents give candidates six years to complete the tenure or continuous appointment process; nine respondents give more than six years, six respondents give five years, six respondents give between one and three years, and three respondents give four years. See infra note 14 for more information on the survey.

Exactly what tenure encompasses . . . proves difficult to define and many misconceptions are associated with it.

Defining tenure is no easier when examined in the context of librarian roles. Tenure is not simply a guarantee of lifetime employment, as is commonly thought. As explicated by the AAUP, tenure instead seeks to guarantee that educators will be afforded academic freedom in their teaching and research pursuits—important components in realizing the common good that education provides. Tenure is also a condition of employment, providing enough economic security to make fulfillment of a faculty member’s obligations to students and society a more attractive proposition.\footnote{Parker, *supra* note 2, at 14–15, ¶¶ 17–18 (footnotes omitted).}

Additionally, in order to attain tenure in its highest form of expression—as opposed to other forms of continuous appointment—one must also hold faculty status. Faculty status provides the ability to participate in the shared faculty governance of an institution. Faculty status expands librarian roles, making librarians more aware of, and involved in, the overall educational process, and raises the status of librarians in the eyes of the teaching faculty. Matthew Simon wrote that faculty status for librarians reflects “administrative recognition of a central educational contribution and implies a partnership with classroom faculty” on the part of librarians.\footnote{Simon, *supra* note 3, at 20 (footnote omitted).}

In some universities, by obtaining faculty status, academic librarians are able to hold ten-month appointments like teaching faculty, rather than twelve-month appointments. As faculty members, librarians are hired through rigorous processes similar to those undertaken to recruit teaching faculty. Librarians with faculty status participate in campus governance and have comparable criteria for retention, promotion in rank, and tenure.\footnote{Parker, *supra* note 2, ¶ 14 (footnotes omitted).}

Approximately one-quarter of law librarians presently report holding faculty status.\footnote{Huddleston, *supra* note 5, at 45. See also Katherine E. Malmquist, *Academic Law Librarians Today: Survey of Salary and Position Information*, 85 LAW LIBR. J. 135, 141, 148 (1993) (respondents to a 1991 survey indicated the number of nondirector law librarians with faculty rank had decreased from earlier surveys to about one-quarter of the respondents).}

Given what tenure represents, it should be granted only after a rigorous review process through which candidates demonstrate they are, and will continue to be, excellent librarians, scholars, and often teachers, in addition to being a force
for good\textsuperscript{12} in carrying out the mission of the library and law school. If all involved excelled at completing and administering tenure-track processes, then pursuit of tenured status would not cause the stress it can when, inevitably, some librarians fail to pass muster. Although no statistics specific to law librarians exist, the great majority of academic librarians who pursue tenure achieve it—around ninety percent, according to one report.\textsuperscript{13} If the same holds true for law librarians, then possibly as many as ten percent of law librarians who aspire to achieve tenured status will not succeed. The price paid by these librarians, and their directors and supervisors, is a high one in terms of stress, disappointment, and career and institutional disruption. Understanding the commitment required by all involved in the process may shed light on why some fail to make the cut and what can be done to improve the odds of success.

\textsuperscript{¶}7 To inform this discussion, a review was undertaken of law librarian and general collection librarian literature on the topic of faculty and tenured status for academic librarians. Additionally, an informal survey was conducted in August 2009 [hereinafter 2009 Survey] of academic law library directors whose institutions currently provide tenure or continuous appointment opportunities for nondirector law librarians. The survey gathered data on both standards and procedures currently used in tenure decisions in law libraries.\textsuperscript{14}

\begin{center}
\textbf{Guidelines for Tenure Candidates}
\end{center}

\textbf{Performance Standards and Workload}

\textsuperscript{¶}8 Generally performance standards for tenure include librarianship and service, with various combinations of professional, institutional, and community service in use. Very often, standards also include scholarship and teaching.\textsuperscript{15} Successful tenure candidates should undertake workloads and projects sufficient to demonstrate a high level of competence in all areas that will be used to assess them. To be successful, tenure candidates need to contribute to the creation and implementation of programs and policies within the library, share in library service and

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14. The 2009 Survey was administered via Survey Monkey (www.surveymonkey.com) during August 2009; participation was solicited via e-mail postings to the Law Library Directors’ listserv and the ALL-SIS listserv. It was deliberately kept brief to encourage participation. Responses from institutions that do not currently provide tenure or continuous appointment opportunities were deleted, as were duplications and a few responses that were started but not completed. Some answers were edited based on explanations and comments provided. For instance, a few respondents checked “other equivalent” rather than “continuous appointment” to describe their systems, but their comments and explanations indicated it would be accurate to count these as forms of continuous appointment. In other instances, references to faculty tenure-track options applicable only to library directors were eliminated in order to report data focusing on nondirector law librarians. All 2009 Survey results are on file with the author. A copy of the survey questions can be found in the appendix to Parker, \textit{supra} note 2, at 37.
15. \textit{See id.} at 23, ¶ 39.
\end{footnotesize}
administrative responsibilities, begin to think about ideas for publications, possibly prepare to teach a formal legal research class, and manage their time wisely. It should go without saying that a tenure candidate’s overall performance must be excellent if he or she is to earn the privilege of holding tenured status.

§9 The amount of work it can take to achieve tenure can be a surprise to some candidates, but there is no escaping the burden a tenure track imposes.\[16\] Candidates must be prepared to invest the time and effort necessary to excel as a librarian, as well as publish, provide service, and, frequently, teach. As a consequence of committing to numerous projects such as articles to be written, classes to be taught, conference presentations to prepare, and committee service to undertake, deadlines will often conflict and a substantial investment of time will be required in order to meet all of these obligations. Such demands necessitate long hours and a strong commitment to completing the process.

**Hitting the Ground Running**

§10 When starting a tenure-track position, it can seem as though there is ample time available to complete the process, but in reality, demonstrating excellence in multiple performance areas in only a handful of years can be challenging. The successful tenure candidate will understand that the first year or two can be a critical time period that sets the stage for future success. The highest priority initially for a tenure candidate should be to learn new job responsibilities, which may take months. If a schedule is not provided by the director or supervisor, tenure candidates should create one that includes deadlines for learning all of the different duties that have been assigned.\[17\] A clear sense of what will be expected in order to demonstrate excellence or the potential for excellence in the factors used to assess

16. Because of the work imposed by the tenure process, some librarians are ambivalent about both holding faculty status and the pursuit of tenure. For example, Hersberger reports that librarians generally accept having additional responsibilities in order to obtain tenure. Hersberger, supra note 3, at 361–62. However, others report that some regard these additional responsibilities as too burdensome to be worth the effort. See Huddleston, supra note 5, at 36; Simon, supra note 3, at 21. Representative of explorations of the way in which tenure—which was developed for teaching faculties—can have an adverse impact on librarians by dividing their focus and changing their priorities in the work place are Jerry D. Campbell, *An Administrator’s View of the Negative Impact of Tenure on Librarians*, 6 TECHNICAL SERVICES Q. 3 (1988); and Joyce A. McCray Pearson, *The Director and Law School Librarian's Role as Educator, in INSIDE THE MINDS: THE LAW SCHOOL LIBRARIAN’S ROLE AS AN EDUCATOR* 31, 33–34 (2008). For more discussion of librarians who are reluctant to undertake the extra effort the process requires, see Donovan, supra note 7, at 385–86, and Editorial, *Faculty Status: Playing on a Tilted Field*, 19 J. ACAD. LIBRAR.SHIPS 67 (1993). Others argue that librarianship itself is equivalent to the contribution of teaching faculties; thus, doing a good job as a librarian should be enough. See, e.g., *Status of Academic Law Librarians*, 73 LAW LIBR. J. 882, 886 (1980) (reporting comments by Kathleen Carrick made during an ALL-SIS panel discussion: “We should not feel we must fit the traditional mold for faculty members. We have different professional responsibilities and commitments.”). But see Donald J. Dunn, *The Law Librarian's Obligation to Publish*, 75 LAW LIBR. J. 225 (1972) (arguing law librarians have a professional obligation to publish, even apart from possible mandatory obligations associated with seeking tenure). In fact, the viewpoint that excellent librarianship alone should be enough to earn tenure has not won out, and almost universally, academic law librarians will be required to do more in order to earn tenure. See Parker, supra note 2, at 22–23, ¶ 39.

performance should be acquired as quickly as possible. It is also important to know whether any factors are given more weight than others. For example, many policies give more weight to librarianship than to other factors. If the director or supervisor does not automatically schedule regular meetings to discuss policies and progress, candidates should request them.

**Mentors and Networking**

¶11 Successful tenure candidates will quickly start to network and join professional associations. Professional contacts made locally, as well as through national association meetings, will not only provide advice and guidance but may also be potential partners for future presentations at conferences, or informal reviewers with whom to share drafts of scholarship for feedback.

¶12 Successful tenure candidates will also seek out professional mentors, both formal and informal. Formal mentoring programs and other professional development programs offered by AALL and other professional associations could be helpful. Tenure candidates should also look into institutional service opportunities that are afforded by law school and university faculty committees.

**Mastering the Concept of Shared Governance**

¶13 The concept of shared governance figures prominently in any discussion of tenured status for law librarians if they also enjoy faculty status. It is essential for tenure candidates to understand what shared governance represents. Unfortunately, a general lack of knowledge about faculty status and shared governance among law librarians is common. Unlike graduate and doctoral programs in other disciplines, law school and graduate library degree programs provide little opportunity to fully absorb the academic culture of faculty and tenured status, let alone master the concept of shared governance.

¶14 According to the American Association of University Professors (AAUP), shared governance is “[o]ne of the key tenets of quality higher education” and “refers to governance of higher education institutions in which responsibility is shared by faculty, administrators, and trustees.” Fully implemented, shared governance for law librarians means they can expect to have a say in determining a law library’s mission, values, direction, and programming. They can also expect to

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18. *Id.* at 85.
22. Ass’n of Univ. Professors, Informal Glossary of AAUP Terms and Abbreviations, http://www.aaup.org/AAUP/about/mission/glossary.htm (last visited Jan. 17, 2011) (“Faculty should have primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process . . .”).
23. For example, library directors might invite program review by the library faculty, and work to achieve consensus among the library faculty whenever possible on programming elements. *See* Hersberger, *supra* note 3, at 364–65.
participate in policy development for “the hiring, review, retention, and continuing appointment of their peers.”  

¶15 Shared governance is both benefit and burden. Realizing a shared governance role in a law library for nondirector law librarians comes at the price of requiring them to share responsibility for the outcome of collective decisions. If any of the parties involved, including the tenure candidates themselves, are unwilling to assume or share responsibility, then arguments for librarians holding faculty status are weakened. Librarians who, whether by choice or because of institutional constraints, do not fulfill their obligations as faculty members and participate in the shared governance of the library may also weaken arguments for holding tenured status. Attempting to hold tenured status without being involved in this aspect of academic library life is inconsistent with the premise of tenure.  

¶16 Successful tenure candidates will be aware of the potential for conflict that exists concerning how the concept of shared governance is implemented within a given library. Commentators have noted an awkwardness that comes from superimposing the teaching faculty model of collegial shared governance upon the administrative hierarchy of a library, describing the result as unsettling and causing conflict. Some argue that shared governance is difficult to implement in libraries because library operations are so different from other academic units, and so complex that they require a bureaucracy to deliver resources and services. This complexity results in libraries having hierarchies and layers of middle managers that other academic departments do not have.  

¶17 However, other academic units can be as large or larger than libraries and arguably just as complex to administer. If shared governance is awkward in a library setting, and one theorizes that the difficulties in implementation do not necessarily come from organizational complexity, then the origin of any awkwardness must lie elsewhere. Awkwardness in implementing shared governance in libraries instead might come from individuals who are unable to regard librarians—who provide services—as anything other than support staff. The more library directors, supervisors, or law faculties persist in regarding law librarians as support staff rather than

24. Ass’n of Coll. & Research Libraries, Guidelines for Academic Status for College and University Librarians (approved Jan. 23, 2007), http://www.ala.org/ala/mgrps/divs/acrl/standards/guidelinesacademic.cfm (“[L]ibrarians should also participate in the development of the institution's mission, curriculum, and governance. Librarians should participate in the development of policies and procedures for their library including the hiring, review, retention, and continuing appointment of their peers.”).

25. Tenure is not simply a guarantee of lifetime employment, although that is what it has come to mean for many who achieve it. “Faculty tenure in higher education is, in its essence, a presumption of competence and continuing service that can be overcome only if specified conditions are met.” Donna R. Euben, Tenure: Perspectives and Challenges (Oct. 2002), http://www.aaup.org/AAUP/programs/legal/topics/tenure-perspectives.htm. A faculty member must give something, and continue to give something, on an ongoing basis, in return for receiving tenure. AM. ASS’N OF UNIV. PROFESSORS (AAUP), 1940 Statement of Principles on Academic Freedom and Tenure, in POLICY DOCUMENTS AND REPORTS 3 (10th ed. 2006). See also Richard A. Danner & Barbara Bintliff, Academic Freedom Issues for Academic Librarians, LEGAL REFERENCE SERVICES Q., no. 4, 2007, at 13, 17.


27. See id.

as equals of teaching faculties, the greater the conflict is likely to be when law librarians demand to participate in the governance of the law library.

¶18 Difficulties in implementing shared governance in a library setting might also reflect another significant difference between library faculties and teaching faculties. Librarians, by the nature of their work, are much more deeply involved in administrative aspects of the organization than are members of teaching faculties. Members of teaching faculties often can operate as independent actors, more or less loosely aligned with each other or with the administration, depending upon the issues. In other words, their contributions to shared governance rarely go beyond curriculum development and hiring, retention, promotion, and tenure decisions. For librarians, in contrast, participation in shared governance must, by its very nature, reflect participation in library administration at least to the extent it involves creation and implementation of policies and service goals. If librarians disagree with the direction these goals and policies should take, they cannot retreat to the classroom or to research and scholarship. Librarians must continue to be involved in delivering services and implementing policies. In some ways, it can be harder to be asked for input if one’s ideas are not ultimately implemented than it is to never be asked in the first place. Successful tenure candidates will not take such an outcome as a personal rejection, but will recognize it for what it is—a legitimate difference of opinion on how best to proceed.

¶19 Successful tenure candidates will also understand that shared governance in an administrative context does not mean that a library director cedes all of his or her administrative authority and responsibility to the rest of the library faculty. Rather, shared governance means librarians who hold faculty status should expect to be consulted about important administrative decisions and be active participants in the decision-making process. After a thorough, inclusive, and transparent decision-making process, the director, as chief administrative officer of the library, must then exercise the responsibility vested in him- or herself for deciding future courses of action consistent with the best interests of the library. This may or may not result in the director’s deciding to delegate some decision-making ability to some or all of the library faculty members. Ultimately, with respect to shared governance, it is worth noting again the importance of understanding local institutional culture.

Mission, Values, Collegiality, and Becoming a Team Player

¶20 Successful tenure candidates will seek out mentors, both formal and informal, to help them learn about the institutional culture of their libraries. The mission and values of the law library are, of course, heavily influenced by the mission and values of the parent law school as well as the political realities at each institution. 29 Library missions are often articulated and recorded, but values statements are less commonly written. Philip Howze distinguished mission from values, stating: “Value statements articulate what the members of the organization believe.

29. Michelle Rigual, Teaching a New Dog the Same Old Trick, in INSIDE THE MINDS, supra note 16, at 7, 8.
‘Why we are here’ is not the same as ‘what we believe.’” He gives examples of values such as candor, cooperation, respect, fairness, inclusiveness, and sharing. Ideally, all law librarians, if asked, could articulate a clear understanding of their institution’s values. If not, or if there is disagreement about what these should be, there is likely to be conflict.

§21 These value-laden considerations often underlie the concept of collegiality, which is perhaps the least understood aspect of the tenure process. Collegiality is defined as “the sharing of authority among colleagues.” It is fairly common for tenure polices of teaching faculties to explicitly reference collegiality as a factor in tenure reviews. The concept appears less often in law librarian tenure policies, but it is likely to be implicit—even if not explicitly stated. Given the strong association between collegiality and shared governance, it is perhaps understandable that collegiality does not appear to be widely used in librarian tenure policies, especially if those policies do not emphasize shared governance.

§22 Performance factors such as scholarship, teaching, and librarianship are much more easily assessed than is collegiality. One author has likened recognizing a lack of collegiality to recognizing pornography: “Collegiality is an amorphous criterion, often defined in terms of a Supreme Court pornography test, in which perception is reality. The absence of collegiality, however, is quickly known and readily described when the purpose is to deny tenure.” It is not uncommon to see allegations that tenure candidates lack collegiality forming the basis for retention, promotion, or tenure denials. Often, charging that a tenure candidate lacks collegiality is perceived by the candidate as discrimination under another guise, and lawsuits ensue.

§23 The successful tenure candidate will understand that, in a truly collegial environment, the focus is less on the promotion of self-interest and more on the promotion of the mission of the institution. One author described the consideration of collegiality during the librarian tenure process as asking “whether the librarian has been a distinct force for good in carrying out the mission of the institution.”

30. Howze, supra note 12, at 41.
31. Id. at 41–42.
32. Id. at 40 (quoting WEBSTER’S NEW WORLD DICTIONARY (1989)).
33. Searching the web for the terms such as “faculty handbook” and “collegiality” reveals numerous references to collegiality requirements in university policy documents. The AAUP, however, discourages the use of collegiality as a criterion for tenure evaluation. On Collegiality as a Criterion for Faculty Evaluation, Am. Ass’n Univ. Professors (Nov. 1999), http://www.aaup.org/AAUP/pubsres/policydocs/contents/collegiality.htm. In the 2009 Survey, only one library—under an “other factors” category—indicated that collegiality is explicitly mentioned in its librarian promotion and tenure policy.
34. Howze, supra note 12, at 40.
35. “Collegiality can be a code word for favoring candidates with backgrounds, interests, and political and social perspectives similar to one’s own.” Id. (quoting Jonathan R. Alger, How to Recruit and Promote Minority Faculty: Start by Playing Fair, 17 BLACK ISSUES HIGHER Educ. 160, 160 (2000)). The AAUP cautions that collegiality requirements should not serve to inhibit dissent or produce excessive deference to administrative or faculty decisions. To do otherwise would be inconsistent with tenure’s stated purpose, which is to protect faculty from being punished for expressing controversial or unpopular views. On Collegiality as a Criterion for Faculty Evaluation, supra note 33.
library.”

Franklin Silverman, in a recent book on the topic of the importance of collegiality for tenure candidates, states:

While a reputation as a team player is unlikely to compensate for a weak teaching or publication record . . . , not having one can nullify an adequate, but marginal, publication and teaching record . . . . In fact, a lack of collegiality that’s regarded as being substantial can nullify even a relatively strong teaching and publication record.

Collegiality, however, has often come to mean something more than promoting the best interests of the library. The term has, in fact, come to be equated with congeniality—embODYing an ability to get along with one’s colleagues—rather than as a reflection of shared governance in action. Consequently, successful tenure candidates will understand that they should also demonstrate congeniality, interpersonal skills, and emotional intelligence. While being congenial technically has nothing to do with the concept of collegiality, it clearly is a distinct advantage if a tenure candidate is able to get along with others at the library.

If librarian roles were more like those of teaching faculties who are engaged primarily in teaching and research, then perhaps good interpersonal skills might be less critical to the success of a library’s mission. Within a highly collaborative law library environment, however, where performing well often entails being able to trust and depend on one’s fellow librarians in a closely cooperative setting, a person who causes rancor and disharmony can be devastating to morale and often interferes with work getting done. Notably, good communication and interpersonal skills underpin several of the core competencies for law librarians that have been recognized by AALL.

Silverman provides a four-page chart of behaviors for tenure candidates to avoid. One can discern the need for congeniality in Silverman’s advice, even though it is offered in the context of promoting collegiality. To paraphrase Silverman, the successful tenure candidate will not

- Avoid doing his or her fair share;
- Invest as little time and energy as possible in committee work, or avoid it altogether;
- Be disrespectful toward others in the library, particularly senior faculty;
- Be a chronic complainer;
- Become enmeshed in politics, or align themselves with particular factions;
- Demand more than his or her fair share of resources;

36. Howze, supra note 12, at 42.
37. Franklin Silverman, Collegiality and Service for Tenure and Beyond 1 (2004).
38. See id. at 7–8; Howze, supra note 12, at 40, 43.
39. For a discussion of the importance of emotional intelligence in the workplace, see Phillip Gragg, From Theory to Practice: Operation Emotional Intelligence, 27 LEGAL REFERENCE SERVICES Q. 241 (2008).
40. See Barbara Bintliff, The Roles and Status of the Academic Law Library Director, in INSIDE THE MINDS, supra note 16, at 121, 123 (describing the need to hire librarians and staff with well-developed communication and interpersonal skills).
42. Silverman, supra note 37, at 3–6.
• Spend a significant amount of time gossiping;
• Use “I want” rather than “I’d appreciate it if”;
• Fail to establish a reputation as being dependable;
• Be a “pain in the ass” to have around;
• Fail to conduct him- or herself in a professional manner when it is important to do so;
• Be culturally insensitive;
• Excessively promote him- or herself or ignore the professional accomplishments of others;
• Demand concessions, policy exceptions, and special favors;
• Resist mentoring junior faculty;
• Rarely be willing to compromise or negotiate; or
• Proselytize for religious, moral, ethical, and political beliefs.

¶27 Being a good citizen and working toward the good of the library and law school also means that library faculty members have an obligation to attend a variety of events and functions. For example, if the law school offers colloquia for faculty to present their scholarship, candidates should try to attend and hopefully also participate. Likewise, if the library or law school offers lectures or similar events for students or the public, candidates need to put in an appearance. If law faculty or fellow librarians are honored for their work, or library and law school donors are honored for their support, candidates should plan to attend. This goes beyond political expediency. Although politically it could be imprudent to consistently fail to attend such events because absences will be noticed and possibly held against candidates, there is more to it than that. Librarians are obligated to attend and support those who present at such events because it is a way to honor the work and contribution of one’s colleagues, regardless of whether one is on a tenure track. Successful tenure candidates will understand that this is the hallmark of being a professional, and is an obligation that does not diminish with time or once tenured status has been attained.

Documenting Accomplishments

¶28 Successful tenure candidates will regularly engage in self-reflection and personally assess their progress. This reflection and assessment process should include documentation of accomplishments. Most institutions require an annual self-evaluation from tenure-track librarians, which helps candidates become accustomed to the amount of documentation that is needed to demonstrate one is worthy of retention, promotion, and ultimately tenure. Thorough annual reviews of accomplishments can later be used to assemble dossiers or portfolios for retention, promotion, and tenure reviews. Thus the more effort put into annual reviews, the greater the payoff when preparing dossiers for mid-probationary and final reviews. The successful tenure candidate will find a means for keeping track of accomplishments as they occur so the task of reporting them annually does not become overwhelming, and significant accomplishments are not forgotten.

43. Id.
Investigating What Is going on in the World: The Role of Major News Media

1. Introduction

2. The Role of Major News Media in the Information Age

3. The Relevance of News Media in Shaping Public Opinion

4. The Impact of Media on Political Decision-Making

5. The Future of News Media: Challenges and Opportunities

6. Conclusion

References

2. Id. at 22–23.
In-house research projects undertaken by librarians to support planning will provide them with greater insight into the choices and decisions that need to be made to move the library forward.\textsuperscript{46}

Providing Adequate Mentoring, Support, and Resources

\textsuperscript{33} Supportive directors and supervisors will help tenure candidates identify informal mentors who can help advise them. These informal mentors should not be direct supervisors or involved in any formal review of candidates, in order to avoid creating a perceived or actual conflict of interest.

\textsuperscript{34} Many law librarian promotion, retention, and tenure policies require candidates to publish scholarly literature and to provide service to the profession.\textsuperscript{47} To ensure that tenure-track librarians can take advantage of professional development, research, and scholarship opportunities, supportive directors and supervisors will provide tenure candidates with time away from day-to-day service and administrative duties.\textsuperscript{48} Developing a system where librarians work together to cover for each other during such periods will provide support for professional development, research, and scholarship.\textsuperscript{49} For example, someone might get relief from reference or faculty support duties for a month or more in order to prepare and teach a new class. Ideally, librarians, from time to time, can also be scheduled for time away from most of their day-to-day responsibilities in order to pursue research and scholarship, or to travel for conferences and meetings. The day-to-day duties of an individual who receives such administrative relief could be covered in the same way they would be if someone took vacation or sick leave. During such periods of time away from administrative duties, librarians can research and write, free of the interruptions that come with reference, faculty support, and teaching. A committee might help the director manage administrative relief opportunities, or help to develop an in-house professional development program.\textsuperscript{50}

\textsuperscript{35} It is worth noting that the higher the degree of specialization of librarians within a given institution, the more difficult it might be to implement a program

\begin{itemize}
\item \textsuperscript{46} Id. at 23.
\item \textsuperscript{47} Parker, supra note 2, at 22–23, ¶ 39.
\item \textsuperscript{48} The AALL resolution in support of faculty status and tenure for librarians states “they should have proportional entitlement to promotion, compensation, leaves, and travel funds” to support them in “a program leading to tenure or a form of security of position reasonably similar to tenure.” AALL Resolution on Faculty or Academic Status, supra note 4, at 831.
\item \textsuperscript{49} Simon, supra note 3, at 23; see also Daniel F. Ring, Professional Development Leave as a Stepping Stone to Faculty Status, 4 J. Academic Librarianship 19 (1978).
\item \textsuperscript{50} For example, at the University of New Mexico Law Library, members of the law library faculty may be relieved of administrative duties for up to eight weeks every three years to provide time for scholarly pursuits. Some librarians use this time incrementally, while others use it in larger blocks of time. Larger blocks of time require plenty of advance notice so that time away from other teaching, administrative, and service duties can be covered. This is not regarded as time off from work; instead, it is regarded as a temporary shifting of administrative and service responsibilities to accommodate the writing, research, and teaching that librarians are expected to provide, given their faculty status. Taking advantage of this opportunity is dependent upon the pursuit of projects that have been proposed well in advance, and sanctioned by the law library director, as part of the annual review and goal-setting process.
\item \textsuperscript{51} Simon, supra note 3, at 24.
\end{itemize}
of administrative release time. If some librarians are exempt from contributing to certain roles in favor of others, for example, cataloging, faculty research support, electronic services, or collection development, it might be difficult to cover such work during periods of professional leave if no one else can provide these specialized services. Also, at some institutions, staffing and mission constraints may simply be too limiting of librarian roles to warrant a system of professional leave to support scholarship and teaching. This may well mean that if a particular library is unable to provide the proper support for tenure-track librarians, then a tenure option is not an ideal that should be pursued at that institution.52

¶36 Directors and supervisors can also encourage internal writing groups and colloquia modeled upon those supported by teaching faculties. Alternatively, law librarians can present at law faculty or university faculty colloquia. With respect to scholarship, directors, supervisors, and senior tenured librarians should also commit the time and effort needed to evaluate drafts and provide feedback throughout the process. It is easy to underestimate the time a particular project might require. Tenure-track librarians should not be allowed to set themselves up to fail by taking on more than can reasonably be accomplished.53

¶37 Supportive directors and supervisors will encourage tenure candidates who hold faculty status to seek out small university grants that are often available to faculty to cover expenses associated with research projects. Such grants can be used to cover interlibrary loan and copying expenses, or travel associated with working in other libraries or special collections.54 Law librarians might benefit from the support of a research assistant as well; there is no reason for library directors and supervisors to regard this resource as something that is only available to the law teaching faculty.

¶38 Some law librarian promotion and tenure policies require candidates to teach, either formally or informally.55 In those cases, mentoring and development of tenure candidates as teachers is essential. Candidates who hold faculty status and are affiliated with a university can be encouraged to take advantage of workshops and other professional development opportunities geared toward mastering theories of learning, developing curriculum, and creating assessment tools—all aimed at developing more effective teaching skills. Student course evaluations should

52. Possibly self-selection away from tenure has already occurred among the law school libraries that do not currently offer a tenure option. The number of academic law libraries providing a tenure option has hovered at one-quarter to one-third of total survey respondents for many decades. A survey by the law librarians at Texas Tech University demonstrated that the likelihood of providing a tenure option increases when a law school library is affiliated with a university and can presumably draw upon university resources and norms. See Blackburn et al., supra note 2, at 137, ¶ 25. Presumably, the three-fourths of ARL-affiliated university libraries that offer tenure have more resources to support tenure-track librarians than would much smaller law libraries, especially those not affiliated with a university. For a different view, however, see Status of Academic Law Librarians, supra note 16, at 904 (blaming inertia, lack of respect by law faculties, and ignorance as much as anything else for the inability of certain law libraries to provide tenure options to their law librarians).


54. For example, the University of New Mexico offers small grants to faculty members for this purpose, and library faculty are eligible to apply. See Research Allocation Committee (RAC) Grants, Univ. of N.M., http://research.unm.edu/rac/index.cfm (last visited Feb. 20, 2011).

55. Parker, supra note 2, at 30, ¶ 67–69.
always be obtained when librarians teach formal classes. Supportive directors and supervisors will regularly visit classes taught by tenure candidates to provide feedback on ways to improve teaching skills, in addition to making a record of a candidate’s progress toward development as an effective teacher. If class visits are burdensome, candidates can arrange to have several classes recorded for later review.

¶39 The supportive director or supervisor will promote the service, teaching, and scholarly contributions of tenure candidates in school and campus newsletters and publications, as well as through e-mail and web page announcements. This publicity helps ensure that the work of the librarians and their contributions to the educational mission of the school are recognized.56 To raise the profile of law librarian scholarship, publications should be deposited into online repositories such as SSRN, bepress, and local institutional repositories.57

¶40 Supportive library directors will also provide institutional financial support for tenure candidates to travel to national and regional conferences for continuing education and professional service opportunities. If travel must be restricted due to revenue constraints, a schedule can be developed anticipating that committee service often requires conference attendance in subsequent years. Tenure candidates can feel comfortable volunteering for service in one year if they know they can return the following year. In exchange, they may then need to wait a year or two before traveling again. Ideally, the law library will also cover the cost of membership in various professional associations such as AALL, AALS, and ABA to facilitate pursuit of professional development opportunities and mentoring programs. Community service and law school and university committee service should be encouraged and supported.

¶41 At a minimum, tenure candidates should be able to expect administrative support from directors and supervisors for all of a candidate’s efforts related to professional development, teaching, research, scholarship, and service. Examples of such institutional support would include photocopying; library computer use; installation of specialized software applications; access to computer networks and related services such as e-mail and server storage space, access to licensed databases, postage, access to telephone and fax services, etc. If possible, candidates will also be provided with clerical support.

Policy Documentation

¶42 Supportive directors will ensure that when a tenure track is available to law librarians, written policy documents also exist, fully describing all retention, promotion, and tenure evaluation criteria.58 Policies must document the performance

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56. Simon, supra note 3, at 23.
57. Law librarians enjoy numerous nontraditional ways to promote their scholarship to national and international audiences through the use of commercial online repositories such as the Legal Information & Technology eJournal on SSRN (http://papers.ssrn.com/sol3/IELJOUR_Results.cfm?form_name=journalBrowse&journal_id=1334262) and the bepress Legal Repository (http://law.bepress.com/repository/), as well as institutional online repositories such as the NELLCO Legal Scholarship Repository (http://lsr.nellco.org).
58. Simon, supra note 3, at 25.
standards that will be used to determine who is qualified to be a tenured librarian, as well as who will review and assess performance, how often reviews will be undertaken, and who may vote as to whether a candidate is retained, promoted, or receives tenure. 59 It is the responsibility of the library director to ensure that policy documentation exists and is appropriate for the individual library.

¶43 Whether a candidate is retained, promoted, or receives tenure is essentially a determination of whether the candidate has met requirements spelled out in the policy document. In its simplest form, the analysis can resemble the process of legal analysis—the rules described in the tenure policy documentation are applied to the facts of the candidate’s accomplishments as shown by the material and information available for review. The candidate’s accomplishments either meet the standards described in the policy, or they do not. Policies explicated in the documentation not only determine whether someone should be promoted, retained, or receive tenure, but also make it possible to determine whether the decision-making process was based on the facts and appropriate evaluation criteria, and whether the reviewers applied the correct standards during the performance review.

¶44 Tenure policies often require multiple levels of candidate assessment beyond peer review within the law library. Outside reviewers are common. 60 So is subsequent review of recommendations by law school deans. Review of recommendations typically also extends to the university level, often with review by either the Provost’s Office or a university faculty tenure review committee or both.

¶45 All parties involved in the process should be completely familiar with any law school or university-wide faculty policies and handbooks that govern the process or potentially even preempt inconsistent internal policies. Typically, these are sources of the rights and responsibilities of all parties involved in tenure processes, including rights and responsibilities related to annual reviews, and appeals of promotion, retention, and tenure denials.

Providing Systematic and Regular Reviews

¶46 It is essential for a supportive library director to ensure that equitable and appropriate procedures are in place for regularly assessing tenure candidates and ensuring the integrity of the assessment process. 61 Regular meetings with tenure candidates to check on their progress and to provide feedback, both positive and negative, must be scheduled. 62 Suggestions for improvement can be given orally during these meetings. Criticism and suggestions for improvement should never be

59. What those procedures should be is outside the scope of this article. The general academic library literature is a rich source of recommendations. See, e.g., S. Nazim Ali et al., Determining the Quality of Publications and Research for Tenure or Promotion Decisions: A Preliminary Checklist to Assist, 45 LIBR. REV. 39 (1996).


conveyed for the first time in a written report. If something in an annual written report is a surprise to a tenure candidate, it means the library director or supervisor failed to provide consistent feedback and guidance when the problem was first noted.\(^63\)

¶47 An AALL Special Committee to Develop Performance Measurements for Law Librarians has produced measurement tools to assist with meaningful and relevant evaluation of librarians in a variety of library settings. The measurement tools reflect AALL’s Competencies of Law Librarianship and are adaptable to the progression of librarians from inexperienced beginners to experienced veterans, thus remaining highly relevant over time.\(^64\) These measurement tools are relevant to evaluating the “librarianship” or job performance component typically included in law librarian tenure policies, and a supportive library director might encourage library faculties to consider adopting the AALL Competencies as a means for assessing librarianship job performance.

¶48 Some tenure performance standards are more difficult to quantify than others. For example, a typical standard for tenure candidates to meet is “continuing excellence in the future.” Evidence that a librarian will continue to be an excellent performer in the future includes whether the candidate is open to change and to trying new things. The more a candidate shows a reluctance to try new things and tends to automatically say “no” in the face of new proposals while still a candidate for tenure, the greater the potential that as their career matures, they will be less likely to embrace change, be motivated to keep their skills fresh, or be willing to adapt to new paradigms. Library directors and supervisors should be mindful of such behavior patterns and counsel tenure candidates accordingly.

**Performance Problems and Tenure Denials**

¶49 Library directors and supervisors must be prepared to address performance problems that arise during a tenure track and ensure that tenure candidates understand that if performance standards are not met, their employment contract will not be renewed. It is worth noting that without the time pressures associated with a tenure track, it might be possible to give underperformers more time to improve. The deadlines associated with a tenure track can preclude that option.

¶50 Tenure systems inject an element of peer review and judging that may be absent in libraries where librarians are simply regarded as employees and have no shared governance role. Supportive library directors will ensure that library faculty members understand that their responsibility in a tenure system includes having to review peers and contributing to the management of the library, possibly to a much greater extent than if they were simply at-will employees. If a tenure-track librarian is underperforming, knowing that those problems are going to have to be addressed...

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\(^{63}\) The need for regular performance reviews exists whether a librarian is on a tenure track or not, and addressing performance problems in tenure-track situations is largely the same as that involved in managing any direct-report librarian.

can add an element of significant stress for all members of the library faculty, not just the tenure candidate, supervisors, and directors. A supportive library director will understand this potential and be prepared to counteract it.

¶51 Despite often enormous investments of time and resources on the parts of both the tenure candidate and library administrators, there are instances when an award of tenure status is inappropriate. In these instances, the responsibility for protecting the library’s interests as an institution must ultimately rest on the director. In serving the role in the tenure process similar to that of department chair or dean, it is ultimately the decision of the director to not renew a tenure-track librarian’s contract, independent of any recommendation or vote of the faculty as a whole. Hopefully, librarian roles can be structured in such a way that the interests of the tenure candidate, as well as the other people who comprise the organization, and the interests of the organization itself, can all be accommodated. Sometimes, however, that delicate balance cannot be achieved, and it becomes clear that one interest must be favored over another. The role of the library director in these situations is to ensure that the organization itself is not harmed by disproportionately favoring the interests of an underperforming individual over those of the organization.

¶52 If a librarian is not recommended for promotion, retention, or tenure, an often extensive appeal process is likely to be available to the librarian. The levels of review of the decision not to renew a librarian can include law school deans, university provosts, academic senate committees, and even presidents and governing boards.

¶53 Additionally, the procedures that were followed by the director and supervisor, and the documentation that was developed by them throughout the process, are subject to review. In other words, the level of scrutiny that comes with tenure-track reviews cuts both ways: not only will the candidate’s performance receive close scrutiny, but so will the director’s and supervisors’ performance with respect to how they addressed and documented candidate performance problems. The process of addressing performance problems in tenure-track situations is largely the same as what is involved in managing any direct-report employee, that is, documentation is essential. The existence of heightened scrutiny is especially prevalent when librarians enjoy faculty status recognized by a university system. It is essential that both managers and tenure-track librarians fully understand the rights and responsibilities that are expected of them in university tenure systems.

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65. The 2009 Survey showed that 43.2% (19 of 44) of respondents offered appeals to a university provost, another twelve respondents offered appeals to the law school dean, twelve offered appeals to a university faculty senate committee, nine offered appeals to the university president, and five offered appeals to a board of trustees or regents. A number of survey respondents selected “other” as an answer; comments indicated that twelve respondents chose “other” either because they did not know about the appeals process at their schools or their policy documents did not specify one.
Conclusion

¶54 The challenges presented by pursuing and managing tenure within an academic law library setting are numerous and important. Providing tenure opportunities for nondirector law librarians can be a costly endeavor—costly in terms of time on the part of both librarians and managers, and costly in terms of the effort it takes to create and sustain support systems and review processes. If a law library elects to provide a tenure track, all involved must be prepared to accept the level of responsibility that goes with it and be prepared occasionally to make hard choices. A full understanding of the work involved on the part of tenure candidates, adequate support from directors and supervisors, and equitable policies and procedures applied consistently and fairly can make the difference between tenure candidates’ success and failure.
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The Trap of Medium-Neutral Citation, or Why a Historical-Critical Edition of State Constitutions Is Necessary*  

Horst Dippel**

Professor Dippel, the editor of a recently published, multivolume collection of U.S. state constitutions,¹ explains why he believes this new edition was necessary, and discusses problems with earlier compilations and with citing to state constitutions using medium- or format-neutral citations.

¶1 Peter Martin’s *Introduction to Basic Legal Citation* provides just one illustration of the problem that establishing strict rules for how to cite a source causes us to forget to reflect on the source itself. According to his suggestion (which follows the same format as the *Bluebook*), state constitutions should be cited as follows: “N.Y. Const. art. I, § 9, cl. 2.”² As reason for this widely used form of citation, he claims:

In the United States, constitutions and statutes are structured in a way that allows citation of relevant provisions without regard to how any particular version or edition has been printed. In this fundamental sense, they are and long have been vendor- and medium-neutral. That is because articles, sections, clauses, and subsections rather than volumes and page numbers identify specific passages.³

Martin, like presumably almost all who use this form of citation, seems not to be aware of the flaw in this argument. A “vendor- and medium-neutral” citation presupposes that the quoted text is always the same, independent of the particular vendor or medium from which it is taken. And indeed, should that not be true for any particular constitution or statute?

¶2 By profession, we are all bound to answer this question in the affirmative. Otherwise legal studies would be senseless. But we must not overlook that our answer sounds more like a moral appeal—“it should be true.” Martin, however, suggests that it is true. Is that really always the case?

* © Horst Dippel, 2011. I am grateful to Brandon Haynes, John V. Orth, and Mike Widener for having read the manuscript and their valuable suggestions, and to Janet Sinder for helping to improve and clarify my argument.

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1. *Constitutional Documents of the United States of America, 1776–1860* (Horst Dippel ed., 2006–2009) [hereinafter *Dippel*]. This is a historical-critical edition of all adopted and failed constitutions and amendments from the Revolution to the Civil War, including all officially made translations, provided they are still extant. All volumes are available in print, as e-books, and online at http://www.modern-constitutions.de with freely accessible images of the original prints or of the manuscripts where there were no original prints. Addenda et corrigenda are currently being prepared. They will be added to the web site and will also appear as an eighth volume in July 2011.

2. *Peter W. Martin, Introduction to Basic Legal Citation* § 2-310 (online ed. 2010), http://www.law.cornell.edu/citation/. See also *The Bluebook: A Uniform System of Citation* R. 11 (19th ed. 2010).

Early Compilations of State Constitutions

¶3 The U.S. Supreme Court, as well as numerous scholars outside the legal community, may not outspokenly disagree, but they prefer to cite American state constitutions of the eighteenth and nineteenth centuries to specific print publications: that is, they quote from Thorpe,4 an accomplished constitutional historian, who is still considered by courts, lawyers, and scholars to have compiled the most reliable edition of America’s historical constitutions. 5 That he edited The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America, in seven volumes, published by the Government Printing Office in Washington in 1909, with the proudly added hallmark “under the Act of Congress of June 30, 1906,” gives additional luster to the compilation.

¶4 If there is any act of Congress dated June 30, 1906, that is famous, it is the Pure Food and Drug Act.6 The act Thorpe referred to in his compilation was instead the typical omnibus appropriations law passed at the end of a session of Congress: “An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and seven, and for other purposes.”7 Toward the end of this lengthy act, there is a clause on “Charters and Constitutions” consisting of the following sentence:

For the purchase from Professor Francis N. Thorpe of the manuscript for a new edition of charters, constitutions, and organic laws of all the States, Territories, and colonies now or heretofore forming the United States, and any Acts of Congress relating thereto, prepared by him, ten thousand dollars: Provided, That he shall prepare a complete index of the work and do all proof reading in connection with the preparation, printing, and publication thereof; and the Public Printer shall print and bind six thousand copies of the work, of which two thousand copies shall be for the use of the Senate and four thousand copies for the use of the House of Representatives.8

Before we look into the details of what appears to be a clever bargain for Professor Thorpe, the differences between this “new edition” and an earlier compilation, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States,9 are most telling.

¶5 On March 12, 1872, the Senate resolved, “That there be paid from the contingent fund of the Senate such sums as may be expended under the direction of the Committee on Public Printing for the compilation of colonial charters and

5. The Supreme Court first cited Thorpe in Selective Draft Law Cases, 245 U.S. 366, 380 (1918) and continues to do so to this day, at the expense of any other compilation. See also 1 Sources and Documents of United States Constitutions, at xi (William F. Swindler ed., 1975) (calling Thorpe’s “the most regularly cited source of historical information”) [hereinafter Swindler].
8. Id. at 759. Thorpe’s benefactors in the Senate were responsible for increasing his payment to $10,000. See S. Rep. No. 59-4330, at 2 (1906); H.R. Rep. No. 59-5054, at 17 (1906).
State constitutions made by order of the Senate.”\(^\text{10}\) In charge of establishing this compilation was Benjamin Perley Poore, a journalist and clerk of printing public records of the Senate.\(^\text{11}\) On January 1, 1877, Poore submitted his compilation to the Senate Committee on Public Printing, explaining how he proceeded:

> Before preparing an accurate and complete edition of the Organic Laws of the Union and of the States, the advice of distinguished historians and jurists was sought and followed in maturing the plan which received the sanction of the Committee on Public Printing, and which I endeavored to execute. While nearly all of the State Secretaries of State have cordially co-operated, some of them rendering valuable assistance, a few either did not furnish the desired information concerning the constitutions of their respective States, or indirectly demanded pecuniary compensation for the trouble entailed by the necessary researches, and a great deal of time has been unavoidably consumed in correspondence with gentlemen at the various capitals and elsewhere in obtaining reliable copies of constitutions and amendments.\(^\text{12}\)

\(^\text{¶6}\) The two-volume compilation by Poore appeared in 1877 and was an instant success. Within a year’s time, a second edition with another 5000 copies became necessary; these were to be widely distributed amongst Congress and the different branches and agencies of the federal government, with 1000 copies to be put up for sale.\(^\text{13}\)

\(^\text{¶7}\) Comparing the genesis of the first compilation of federal and state constitutions from the first century of the United States with Thorpe’s compilation thirty years later, the differences are all too obvious. In contrast to what his title page (“under the Act of Congress”) tends to suggest, Congress did not commission Thorpe, as it did Poore, to compile a collection of U.S. constitutions, nor did it impose specific conditions on him for doing so. Instead, Thorpe had offered to prepare this compilation and to hand it over to Congress for publication. For this, Thorpe was to receive $10,000 on the condition that he provided an index to his compilation and do all the proofreading. Nothing was said about what the compilation should contain or about how the reliability of the documents provided should be assured.\(^\text{14}\)

\(^\text{¶8}\) What Thorpe finally presented as a quasi-official collection of American constitutions sanctioned by Congress was instead his private compilation for which he was not accountable to the public. He was not asked to explain his collection or to offer any reasons for his selection and editorial principles, nor did he feel it necessary to do so. It is, therefore, hardly surprising that his compilation was received with criticism, at least by experts in the field. Walter F. Dodd concluded his review of the work with a devastating remark: “It is perhaps sufficient to suggest that the work is untrustworthy and should be used with care.”\(^\text{15}\) In spite of this well-founded warning, tradition made Thorpe’s work the accepted source—largely due to the

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12. 1 Poore, supra note 9, at iii.
13. Id. at ii.
lack of a convenient alternative—and it continues to be considered as such, in stub-
born denial of the facts.

¶9 There are, indeed, many questions that could be asked about Thorpe’s com-
pilation and the choices he made, and Dodd named a number of them.16 It seems
as though in many instances Thorpe adopted and followed what Poore had done,
rather than going back to original sources for his collection. For example, if Thorpe
was restricting his work to adopted constitutions, why did he include the draft
Topeka, Lecompton, and Leavenworth constitutions of Kansas? Was it only because
Poore had also published them, a practice Swindler would repeat in the 1970s?17
What about amendments? Did Thorpe aspire to publish all adopted amendments,
an endeavor in which Poore had already failed? Judging from Thorpe’s compila-
tion, one must note that he published some amendments, but not others, some of
them integrated in the constitutions, others annexed to them. What guided him in
this selection remains unknown.

¶10 What about language, for example, Spanish in the Southwest and French in
Louisiana? After all, French was the original language of the constitution of
Louisiana of 1812. In all these cases, Thorpe appears to have closely followed the
example set by Poore and published exclusively in English. But what about the
accuracy and the legal status of the English translations he published, not only of
the Louisiana constitution of 1812, but also of the constitution of Coahuila and
Texas of 1827? Thorpe, in contrast to Poore, included a long “List of Authorities,”
but publications from the first quarter-century of American constitutionalism
hardly show up, nor are any criteria mentioned for this selection of “authorities.”18

¶11 Without informing us about what he intended to do, we can only judge
Thorpe’s compilation by what he published, and this verdict must be ambivalent.
A genuine achievement must be weighed against inconsistencies, open questions,
errors, and the obvious failure to comply with one of Congress’s two requirements,
proofreading. Though the work served the country for the lack of something better
for a hundred years, we must admit that, judging from the perspective of the early
twenty-first century, its scholarly standard is no longer tenable.

¶12 The lack of adequate proofreading in Thorpe has always been particularly
embarrassing. With more diligence while looking through the proofs, Thorpe
should have easily realized that the following sentence in article I, section 25 of the
constitution of Georgia of 1798, in the form he was going to publish it, does not
make any sense:

[I]t shall be the duty of the general assembly, at their said first session, to apportion the
members of the house of representatives among the several counties, agreeably to the plans
prescribed by this constitution, and to provide an adequate compensation abode shall be
in any family on the first Monday in July next shall be returned as of such family . . . .19

16. See Dodd, supra note 15.
17. 4 SWINDLER, supra note 5, at 25, 45, 65.
18. 1 THORPE, supra note 4, at xv.
19. 2 Id. at 796. Instead, the clause actually reads: “[I]t shall be the duty of the General Assembly
at their said first Session to apportion the members of the House of Representatives among the
several Counties agreeably to the plan prescribed by this Constitution, and to provide an adequate
compensation for the taking of the said census. Every person whose usual place of abode shall be in any
family on the first monday in July next shall be returned as of such family . . . .” 2 DIPPEL, supra note 1,
at 35 (emphasis added) (footnote omitted).
¶13 It also is hard to believe that Thorpe really proofread section 7 of the first chapter of the Vermont constitution of 1786: “That government is, or ought to be, instituted for the common benefit, protection and security of the people, nation, or community; and that the community hath an indubitable, unalienable, single man, family, or set of men, who are a part only of that community.” Should the New Jersey Council, to take another example, consult itself? “[A]nd that any three or more of the Council shall, at all times, be a privy-council, to consult them . . .” In a similar way, any reader might wonder why a South Carolina minister should declare, among other things, “that he will be diligent in prayers, and in reading of the same.”

¶14 Omissions in the text, caused by errors in line, are only one group of mistakes, and they happen, unfortunately, much more often than is documented here by a few examples. It is well-known that Thorpe missed the whole Delaware Declaration of Rights of 1776, which had also escaped Poore’s attention. Thorpe, as Poore before him, similarly omitted the long concluding section 61 of the Maryland constitution of 1776, as did, a century later, Swindler, who, as he often did, copied the constitution from Poore. On the other hand, in Thorpe—though not in Poore—article I of the constitution of Georgia of 1798 benefitted from a section 26, which, regrettably, is unknown to the constitution as drafted in 1798. This raises the question of which sources Thorpe used for his compilation. In the case of the constitution of Georgia of 1798, he stated: “Verified by ‘Watkins’ Digest of the Laws of Georgia, Philadelphia, 1800,’ pp. 31–43.” But there is no section 26 in Watkins, nor could the Watkinses have known of the provision, for it only came into Georgia constitutional law with the second amendment of 1855:

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20. 6 Thorpe, supra note 4, at 3752. The clause should properly read: “That government is, or ought to be, instituted for the common benefit, protection, and security, of the people, nation, or community; and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community.” 7 Dippel, supra note 1, at 26 (footnotes omitted).

21. 5 Thorpe, supra note 4, at 2956. Instead, the clause in section 8 of the New Jersey constitution of 1776 reads: “[A]nd that any three or more of the Council shall at all Times be a privy Council to advise the Governor in all cases, where he may find it necessary to consult them . . . .” 5 Dippel, supra note 1, at 27 (footnote omitted).

22. 6 Thorpe, supra note 4, at 3257. As a matter of fact, article XXXVIII of the South Carolina constitution of 1778 required a minister to declare “that he will be diligent in Prayers and in reading of the Holy Scriptures and in such Studies as help to the knowledge of the same . . . .” 6 Dippel, supra note 1, at 31.

23. See Dodd, supra note 15, at 138 (noting the omission by both Thorpe and Poore); see also 1 Poore, supra note 9, at 273; 1 Thorpe, supra note 4, at 562 (where the Declaration of Rights would appear, between the 1701 Charter of Delaware and the 1776 Constitution of Delaware).

24. Compare 3 Thorpe, supra note 4, at 1701 (Constitution of 1776 ends with section 60), and 1 Poore, supra note 9, at 828 (same), and 4 Swindler, supra note 5, at 383 (same), with 3 Dippel, supra note 1, at 254–56.

25. Neither the original manuscript nor the original print of 1798 by the state printer, the widely used digest by Robert and George Watkins, nor Walter McElreath’s treatise, published just after Thorpe, contain this spurious section. See Robert & George Watkins, A Digest of the Laws of the State of Georgia 37 (Philadelphia, R. Aitken 1800); Walter McElreath, A Treatise on the Constitution of Georgia 258 (1912).

26. 2 Thorpe, supra note 4, at 791 n. *.

27. Watkins, supra note 25, at 37.
And be it further enacted that the following words shall be added to the first article of the Constitution as an additional Section thereof, to wit: the Legislature shall have no power to change names, nor to legitimate persons, nor to make or change precincts, nor to establish bridges or ferries, but shall by law prescribe the manner in which said power shall be exercised by the Superior or Inferior Courts, and the privileges to be enjoyed.\footnote{28}

This amendment is not reprinted in Thorpe’s very selective and incomplete compilation of the twenty-three adopted amendments to the Georgia constitution of 1798,\footnote{29} nor does he insert any note that his section 26 is not part of the original text of 1798 and was only added to it in 1855, or what his source for the text was.

\footnote{¶15} This very amendment also misled others. In his authoritative publication, McElreath inserted after the words “the Legislature shall have no power” the clause “to grant corporate powers and privileges, except to Banking, Telegraph and Railroad Companies, nor . . . .”\footnote{30} As a matter of fact, these words appeared in the February 7, 1854, version of the amendment,\footnote{31} but were struck out in the final version of December 12, 1855.\footnote{32} In spite of this, Albert Saye, in his \textit{Constitutional History of Georgia}, took up the McElreath lapsus and published the clause again as if adopted.\footnote{33} Using Martin’s “medium-neutral” form of constitutional citation here might run us into deep troubles.

\footnote{¶16} Thorpe was certainly not very strong on the Georgia constitution of 1798. He inserted an additional number of mostly minor errors. But some are rather embarrassing. For example, he distorted the oath in article I, section 19: “I will give my vote and so conduct myself as may, in my judgment, appear most conducive to the interest and prosperity of this State . . . .”\footnote{34} Instead, it should read “conducive to the interest . . . .”, as Watkins had it.\footnote{35} In article III, section 5, Thorpe spoke of “the debt or litigated demand,”\footnote{36} where it should have read, “the debt or liquidated demand.”\footnote{37} Instead of article IV, section 8 reading, “persons lying under such convictions,”\footnote{38} it should read, “persons laying under such convictions.”\footnote{39} Again, Thorpe could not blame Watkins, who was correct in both cases.\footnote{40} But Poore and McElreath committed the same errors as Thorpe.\footnote{41}

\footnote{28.} 2 Dippel, supra note 1, at 106.

\footnote{29.} 2 Thorpe, supra note 4, at 802–09 (containing fourteen amendments). It is the only amendment that Thorpe directly integrated into the text of the Georgia constitution. For all amendments to the Georgia constitution of 1798, including the twenty-two failed amendments, see 2 Dippel, supra note 1, at 44–110.

\footnote{30.} McElreath, supra note 25, at 280.


\footnote{33.} Albert Berry Saye, A Constitutional History of Georgia, 1732–1945, at 165 (1948).

\footnote{34.} 2 Thorpe, supra note 4, at 793–94.

\footnote{35.} Watkins, supra note 25, at 34. See also 2 Dippel, supra note 1, at 33.

\footnote{36.} 2 Thorpe, supra note 4, at 799.

\footnote{37.} 2 Dippel, supra note 1, at 38 (footnote omitted).

\footnote{38.} 2 Thorpe, supra note 4, at 800.

\footnote{39.} 2 Dippel, supra note 1, at 40 (footnote omitted).

\footnote{40.} Watkins, supra note 25, at 40, 42.

\footnote{41.} 1 Poore, supra note 9, at 394, 395; McElreath, supra note 25, at 262, 265.
These errors may be simply confusing, but others definitely changed the meaning of the constitution. To give just a few examples, election day in section 14 of the Maryland Constitution of 1776 was fixed, according to Thorpe “on the first day of September,” whereas the correct day was “the first Monday of September.” And according to Thorpe, in section 27, persons with the proper qualifications could represent Maryland in Congress when they were “above twenty-one years of age.” As a matter of fact, they had to be “above twenty-five years of age.” Again, the same errors had appeared in Poore.

The South Carolina Constitution of 1778 stated in article XII, in the words of Thorpe, that senators should be elected “on the last Monday in November next and the day following, and on the same days of every succeeding year thereafter.” Poore had it the same way. However, instead of annual elections, elections for the South Carolina Senate were actually fixed by the constitution to take place only in “every second year.”

A final quote may suffice. According to section 6 of the Virginia Declaration of Rights of 1776, Virginia citizens could not be bound by any law to which they had not, as Thorpe had it, “assembled, for the public good.” Neither Poore nor Thorpe’s source agreed with him, but had printed correctly, instead of “assembled,” “assented.”

The mass of Thorpe’s errors may be classified as minor, such as omitted or inserted words, articles, and plurals; change of words or word order; and the like. Normally, they do not seriously interfere with the meaning of a clause, though it is possible for even a misplaced comma to change the sense of a provision. Thorpe’s compilation, therefore, is just another strong proof of the well-established wisdom that the same texts in different publications will be different. The examples I provided are taken from constitutions of the late eighteenth century. But the assumption that those of the nineteenth century are more trustworthy in Thorpe will not stand any random sample survey. And there are reasons why that is so.

The first reason is that when speaking of historical texts generally, and American state constitutions of the eighteenth and nineteenth centuries in particular, the idea of the existence of medium-neutral texts is all but fiction. Thorpe was a remarkable scholar and certainly qualified for the job, in a professional sense much more so than Poore—whatever Poore’s undoubted merits. But with hardly any exception, Thorpe, like Poore before him and Swindler after him, had never seen an original print of a pre–Civil War constitution, not to mention an original

42. Compare 3 Thorpe, supra note 4, at 1693, 1695, with 3 DippeL, supra note 1, at 247, 249.
43. 1 Poore, supra note 9, at 822, 824. The errors appear again in 4 Swindler, supra note 5, at 377, 379.
44. 6 Thorpe, supra note 4, at 3250.
45. 2 Poore, supra note 9, at 1622.
46. 6 DippeL, supra note 1, at 25.
47. 7 Thorpe, supra note 4, at 3813.
48. 2 Poore, supra note 9, at 1909; Ordinances Passed at a General Convention of Delegates and Representatives from the Several Counties and Corporations of Virginia . . . 1776, at 3 (Richmond, Va., Ritchie, Trueheart & Du-Val 1816) (Thorpe’s cited source for the Virginia Constitution).
49. 7 DippeL, supra note 1, at 82.
or engrossed manuscript. None of these men, like almost any other editor, thought it worth the effort to look for them. They all published state constitutions relying almost exclusively on nineteenth-century reprints that were within easy reach.

\[22\] Verification of sources in editing legal documents is still today not generally considered to be a legal discipline.\(^{50}\) But the examples provided—and they could have been taken from almost any randomly selected state constitution, including most of the Internet editions recently published by state governments or state historical societies—document a complete lack of concern for any verification of sources. And although historians started the modern age of historical-critical editions with the first volume of *The Papers of Thomas Jefferson* more than half a century ago,\(^{51}\) the legal community, until today, has not considered this an example worthy of adoption. The consequence is that we continue to be widely ignorant of state constitutional developments of the past two hundred years or so, for historical-critical editing involves much more than just providing an accurately reprinted text.

**The Need for Historical-Critical Editions of State Constitutions**

\[23\] For a court, the correct legal text as established may be sufficient. But a constitutional history cannot restrict itself to adopted constitutions and their amendments. Just as the court values dissenting opinions to aid its understanding of the development of legal ideas and concepts, failed constitutions and amendments are indispensable in explaining the constitutional development of a state. But these appear in none of the preceding compilations of state constitutions at hand, with the sole exception of the three failed Kansas constitutions of the 1850s.

\[24\] In the wave of constitution-making in the 1840s and 1850s, twenty-one states (of thirty-three) drafted new constitutions, including four that failed to be adopted (Delaware, Massachusetts, Missouri, and New Hampshire)\(^{52}\)—not counting the failed constitutions of Iowa and Wisconsin,\(^{53}\) before the formal admission of those states. Though failed, these documents are an integral part of the constitutional history of the state and of the reform movement of the era, and they contain an untold story. Between the 1770s and the 1850s, thirteen constitutions failed to win adoption in already existing states. Why did all these cases, with the exception of four, occur in three New England states (Massachusetts, New Hampshire, and Rhode Island)? And why did eleven of these failed constitutions belong to two time clusters, the periods of 1778–1792 and 1841–1853? Even the two remaining failed constitutions cluster together in 1823–1824 with only nine months between them.

\[25\] Some of the reform impulse leading to new constitutions in about two-thirds of the states happened in most of the remaining states on the level of amendments. As constitutions are part of the constitutional history of a state, so are

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50. I am not speaking of the generations of student editors of law reviews who have spent a great deal of time—and continue to do so—verifying sources cited by authors.
51. *The Papers of Thomas Jefferson* (Julian P. Boyd et al. eds., 1950–).
52. For the failed constitutions of Delaware of 1853, of Massachusetts of 1853, of Missouri of 1846, and of New Hampshire of 1851, see 1 Dippel, *supra* note 1, at 269; 4 id. at 63, 289, 411.
53. See 2 id. at 239; 7 id. at 155.
amendments, whether adopted or failed. An adopted amendment may be, and in several cases was, the result of a process, extending over decades, to get a specific provision into the constitution. Looking only at the hard-won result is like writing the history leading up to *Brown* without mentioning the Harlan dissent in *Plessy*.

§26 It may not be as evident that language is also an issue that must be considered. For two state constitutions, English was not the original language. This inevitably raises the question of whether the English version is a true translation of the original. In the case of the Louisiana constitution of 1812, the Anglos lived with it for more than three decades, though the English version is anything but a faithful translation of the French original. Because it had the approval of the convention, it could pass as an official version, despite the discrepancies between the two versions. To make the situation even more confusing, in cases relating to the constitution, Louisiana courts looked to the French version in order to explain the meaning of the constitution, whereas federal courts relied on the English version because Louisiana was admitted into the Union on the basis of that version.

§27 The case of the constitution of Coahuila and Texas of 1827 is even more complicated. No official English translation was provided, but a translation was privately published in Natchitoches in 1827. It contained so many flaws that in 1839, well after the constitution had become obsolete through Texan independence,

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54. A case in point is Connecticut. An extension of suffrage failed in 1839, but was adopted in modified form in 1845. The immediate attempt to change this amendment failed in 1846–47, but led in 1855 to the absurdly phrased amendment: “Every person shall be able to read any article of the constitution or any section of the statutes of this state before being admitted as an elector.” In the remaining years up to the Civil War, all attempts to modify this amendment failed. See 1 id. at 203–05, 208.


56. Compare *Constitution ou Forme de Gouvernement de l’État de la Louisiane* (1812), *with Constitution or Form of Government of the State of Louisiana* (1812), both reprinted in 1 Civil Code of the State of Louisiana xxii (New Orleans, E. Johns & Co. 1838) (versions printed on facing pages). See also 3 Dippel, supra note 1, at 98 n.1.

57. See Tilghman v. Dias, 12 Mart. (o.s.) 691, 695 (La. 1823); Gray v. Laverty, 4 Mart. (o.s.) 463, 464–65 (La. 1816). In both cases the court referred to the original French wording to clarify the meaning of a clause of the constitution of 1812. In *Williams v. Barrow*, Justice Porter explicitly said what, with the necessary modifications, could also be said of the constitution of 1812: “A great portion of our law, particularly our codes, have been written in the French language, and badly translated into English; and that translation by the provisions of the constitution is of greater force than the original. We have heretofore resorted for assistance to the French in all cases when there was obscurity or ambiguity in the English text. Indeed many parts of the Code of Practice would be unintelligible without such aid.” 3 La. 57, 58 (1831). I am grateful to Brandon Haynes for having directed me to these Louisiana cases.

58. Only the authenticated English translation, as required by Congress, had been sent to Washington and accepted by Congress, and statehood was, accordingly, conferred by act of Congress of April 8, 1812, and took effect on April 30, 1812. An Act for the Admission of the State of Louisiana into the Union, and to Extend the Laws of the United States to the Said State, ch. 50, 2 Stat. 701 (1812). See also 1 La. Const. of 1812, art. VI, § 15; Enabling Act of 1811, ch. 20, § 3, 2 Stat. 641, 642 (1811); 3 Dippel, supra note 1, at 104 n.111 (noting discrepancy between the French and English versions of article VI, section 15 of the Louisiana Constitution).

59. Political Constitution of the Free State of Coahuila & Texas (Natchitoches, La., Courier Office 1827). See also 6 Dippel, supra note 1, at 97.
J.P. Kimball made a new translation that was much better than the first, though still not flawless. It was the Kimball translation which, at the end of the century, was reprinted in Gammel’s authoritative Laws of Texas. In fact, though, far from being official, no one in Coahuila and Texas had ever lived under this translation.

¶28 What may be true for translations into English also applies to translations from English into other languages. From the Revolution to the Civil War, time and again state conventions ordered and paid for translations of draft constitutions into the languages of relevant ethnic minorities within the state. Whatever the reasons for these decisions, the question for the constitutional lawyer is whether these translations were correct and were legally equivalent to the English original. The answers will vary, but the translations remain relevant far beyond the legal community.

¶29 Inclusion and exclusion are important questions for any scholarly edition. But for a historical-critical edition, the crucial question is that of the rules and methods for editing the texts. Starting with the verification of sources, any reprint, whether contemporary or of more recent date, has to be ruled out, as it is liable to errors and the printer will not accept any responsibility as to the accuracy of the text. Today, in the era of both online and print publication, the U.S. Supreme Court is very explicit about what constitutes “Official opinion sources” and “Unofficial opinion sources,” and insists that “the Court does not vouch for the accuracy, completeness, or currency of any unofficial source. In the case of any variance between versions of opinions published in the official United States Reports and any other source, whether print or electronic, the United States Reports controls.”

¶30 Back in the eighteenth and nineteenth centuries, things were completely different. Every state had a state printer, usually on a yearly commission. It was their exclusive responsibility to accurately print all government material for the time they held the commission. Normally this printer was also the authorized convention printer. Things became more complicated during the nineteenth century when, thanks to the growing use of shorthand reporting, an increasing number of states issued two publications from their constitutional conventions—the convention journal and the more extensive convention debates. The convention printer could be commissioned for both publications, but, for example, in New York, in

62. 1 THE LAWS OF TEXAS 1822–1897, at 423 (H.P.N. Gammel comp., Austin, Tex., Gammel Book Co. 1898).
64. The only exception was Iowa in 1844, when it was still a territory. Its first constitution was published in the Iowa Territorial Gazette and Advertiser on November 9, 1844. The paper’s editor, James Clarke, was a signer of the constitution, but neither he nor anyone else was appointed convention printer. Another version of the text was published in The Iowa Standard, on November 14, 1844. The Standard had been the major convention reporter and published the Constitution “by the authority of the Legislature creating the Convention.” See FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 7 (Benjamin F. Shambaugh comp. & ed., 1900) (reprinting the Standard’s coverage). Yet a third version exists as the only separate print by Jesse Williams from Iowa City in 1844. Thus, there are three different texts, each claiming to be the authentic constitution. The engrossed manuscript appears not to have survived.
1846, the printer was commissioned only for the convention journal.\(^{65}\) The publication of the convention debates was a private enterprise.\(^{66}\) Only the commissioned printer was accountable for the accuracy of the text. With the exception of Ohio in 1851, the convention printer was also in charge of publishing a separate print of the constitution for ready distribution.\(^{67}\)

\(^{31}\) To complicate things further, two problems have to be taken into consideration. If a convention printer was commissioned for more than one publication, it is not always evident which publication was the first to be published. The answer is important, because printers before the Civil War did not work with standing or line type. This meant that two prints of the same text by the same printer necessarily resulted in two different settings of type, which, as with any two prints, were not identical.

\(^{32}\) To assess which print was the first and most authentic one is a question that can only be decided on an individual basis. Here the general rules of historical-critical editing underline the importance of the accuracy of spelling, capitalization, punctuation, and paragraphing as in the original source, without any attempts to modernize them. Quite often, the number and character of errors in two different prints may give a clue as to which print must have been first. This decision may be easier if the original or engrossed manuscript is extant, which happily is often the case. But even a manuscript may contain errors, though normally we are only able to assess them if they are self-evident. Therefore, on a general basis we have to take the enrolled manuscript as correctly expressing the will of the convention—with one amazing exception from before the Civil War.

\(^{33}\) In Oregon in 1857, the situation was less settled than in the states on the Atlantic seaboard. Convention debates do not exist; there may have been nobody qualified to report them. A convention journal was composed, but published only in 1882.\(^{68}\) The enrolled manuscript of the constitution still exists, and the constitution was published by the printer to the convention,\(^{69}\) while several newspapers also published the constitution. None of this would have been unusually disturbing, had not the convention printer been Asahel Bush, who is considered to have been “the mastermind of Oregon’s Democratic machine.”\(^{70}\) Bush was a member of the con-
vention, an arrangement not unknown in other states, and he had his proper notes, at least of the constitution agreed to. Unlike other convention printers, however, he printed the Constitution for the State of Oregon according to his notes, and not according to the enrolled manuscript.

¶34 Before blaming Asahel Bush for improper behavior, it is worth comparing his version with that of the enrolled manuscript. Doing so, one would have to admit that there is an argument that he might have had the better version of what the convention really intended. There are numerous cases where the Bush version makes more sense and the enrolled manuscript is obviously wrong, and in most of the cases where Bush deviated from the enrolled manuscript, he was in agreement with the convention journal and fairly often also with one or the other of the newspaper printers.71 Nonetheless, though the convention was overwhelmingly Democratic,72 Bush may have had his own political interests that are unknown to us.

¶35 A much greater challenge for any editor than these Oregonian idiosyncrasies73 is the constitution of Minnesota of 1857. Minnesota’s start into the constitutional era was unique. Due to a dispute that immediately arose over the election and the subsequent convention, two conventions, strictly split along party lines—one Democratic and one Republican—set out simultaneously to write a constitution. In the end, a bipartisan conference committee was empowered to establish a common text. However, each party refused to put their names on a document the other party had signed.

¶36 On the night of August 28, 1857, two identical copies of the agreed-upon constitution were hastily established, one for the Democrats to sign, the other for the Republicans. At least sixteen copyists were engaged in writing these two documents in great haste, and their command of the English language differed widely. As an apparent consequence, more than three hundred deviations in spelling, capitalization, and punctuation occurred, in addition to numerous word omissions and further errors, some of a substantial nature. As a result, in terms of historical truth, we lack the one original text.74 For the people who had to vote on the constitution, which they adopted almost unanimously, a text was published, artificially bearing the signatures of Democrats and Republicans.75 Again, this print contained errors and could not make the deviations between the Democratic and Republican versions vanish. Given these confused circumstances, only a historical-critical edition can approximately establish the one text that the framers failed to provide, on the basis of all the relevant prints and manuscripts, and construct it in a way that

71. See 5 DIPPEL, supra note 1, at 315 n.1.
73. For another example of Oregonian idiosyncrasies, see George N. Belknap, A Typographical Error in the Deady Code, 52 OR. L. REV. 171 (1973).
74. On the whole drama, see generally the meticulously researched analysis in WILLIAM ANDERSON & ALBERT J. Lobb, A HISTORY OF THE CONSTITUTION OF MINNESOTA (Studies in the Social Sciences no. 15, 1921).
may come closest to what the conventions might have intended to set up as a political compromise.

§37 A historical-critical edition of U.S. constitutional documents is long overdue. Today, almost all these constitutions are available on the Internet, but even a reliable web site does not automatically guarantee a reliable text. Even the renowned Avalon project\(^\text{76}\) is, as far as American constitutions are concerned, nothing but a digitized Thorpe. On the other end of the scale, though much more restricted in scope, is the Texas Constitutions Digitization Project,\(^\text{77}\) which provides a wide range of sources. Its forthcoming upgraded version will also include manuscript sources, but no historical-critical edition of the constitutions.

§38 None of these Internet sources can replace a historical-critical edition of American state constitutions: a digitized manuscript does not tell us what was published; a digitized print will not be evaluated as to its merits; and a mere transcript will have its own flaws and provide no assurance of accuracy. We therefore desperately need a historical-critical edition; the courts need an accurate and reliable text basis; constitutional history needs, additionally, the complete range of adopted and failed constitutions and amendments; and they, as do other disciplines, need them in all the languages offered to the voters. Today’s technical means, which neither Poore, nor Thorpe, nor Swindler had at their disposal, substantially facilitate the creation of such a historical-critical edition. The real challenge for any modern editor, however, may be to create a general awareness that neither the trusted authorities of previous decades nor the alleged medium-neutral text are adequate to modern scholarship.


Database Ownership: Myth or Reality?*

Sallie Smith,** Susanna Leers,*** and Patricia Roncevich†

* Full-text electronic databases are problematic for librarians because of the way they are marketed, using distribution models that separate the rights of access and ownership. The authors describe their experience with a “purchase plus access” distribution model and the in-house system they created using their purchased content.

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Introduction

¶1 Librarians and publishers are struggling to find new operating paradigms for today’s evolving paperless environment. This struggle is particularly evident in the management of full-text electronic databases, which offer scholars ease of use and access unmatched by their print counterparts. Publishers work to create and market these resources so as to ensure an ongoing income stream for their businesses. Librarians strive to provide patrons with the electronic resources they require, but are uneasy about the cost and ephemeral nature of these digital products. Both

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Librarians and publishers are faced with the challenge of negotiating compromises over access to and control of these digital information resources.

§2 Libraries acquiring digital resources must often choose between access and ownership due to a changing concept of ownership, which has shifted from the simple relationship between a person and a thing to a collection of separable rights. One database distribution model attempting to compromise between access and ownership is what has been termed “purchase plus access.” In this model, a library pays a lump sum for content ownership and an annual subscription fee for access to that content and its search interface on the database provider’s remote servers. This model not only ensures a sale, but also provides an ongoing income stream for the database provider. Both the purchase and the online access agreements generally contain usage restrictions.

§3 The University of Pittsburgh’s Barco Law Library acquired one database under such a purchase-plus-access model. When we unexpectedly had to cancel our access subscription due to budget cuts, we had to develop our own delivery platform that combined our purchased content with a locally hosted database system. The project is presented as a case study that explores the issues, costs, and steps involved in creating a stand-alone, in-house system using publisher-produced content.

**The Concept of Ownership**

§4 In the legal sense as well as the popular sense, ownership has traditionally been viewed as a relation between a person and a thing, with the person possessing the maximum right to “uninterfered with” use of the thing that is owned. Historically, this view of owning and accessing tangible things meshed well with established property law and the copyright protections and incentives conveyed to information creators. The limited-duration protection that copyright law gives to the tangible expression of information was satisfactorily balanced against the public good of encouraging the production of original works.

§5 In the print-based library environment, with its physical collection of books and periodicals, the ownership relation between a person and a thing was preserved, and ownership could be equated with control, access, and use of the information embodied in that physical object. Complete control over the owned object supported the library’s traditional role as a repository of information and as an institution that preserved information for use in the future. Libraries acquired,

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5. See id. at 155.
processed, cataloged, secured, and preserved their physical collections. Libraries also measured themselves “based on the size of their print collections.”\(^7\) Scholars and other library users understood that the physical items owned by the library were accessible to them in a manner defined by library policies and the constraints of copyright law.\(^8\)

\(\S6\) Digital information has challenged the way libraries configure their collections and provide information to their users. From the patron’s perspective, the value of information lies in accessibility, and that accessibility no longer requires physical possession in the traditional sense of ownership. Library collections today include digital resources (such as databases, e-books, and electronic journals) that are readily available to any patron anywhere with an Internet connection. Patron demand for information access,\(^9\) unrestricted by operating hours and physical location, has forced libraries to rethink the concept of ownership of their collections\(^10\) and the legal framework that allows access to that information.

\(\S7\) Today’s view of ownership has shifted from the protected relation between a person and a thing to a “shadowy ‘bundle of rights’” whereby a thing can be owned by more than one person, and co-owners possess particular but limited rights.\(^11\) From the intellectual property law perspective, the rights to creative works are comparable to a bundle of sticks, with different rights (reproduction, preparation of derivative works, distribution of copies, performance, public display, and attribution) potentially being held by different entities.\(^12\) These rights may not always coexist in a physical object, but may be split apart and separately transferred.\(^13\) The once “robust unitary conception of ownership” has become fragmented.\(^14\)

\(\S8\) In response to the demand for web-based resources, publishers are converting print content into full-text electronic databases. Digitization offers enormous possibilities for producing manipulable databases with powerful search capabilities.\(^15\) Such digital infrastructures require significant investment (in hardware, software, and personnel) in order to create digital content, design dynamic user interfaces, maintain data integrity, and store large amounts of digital data. Through creative “selection and depiction” of their data, database producers can generate

\footnotesize

10. See Matheson, supra note 4, at 155.
13. McCarty, supra note 2, at 137.
14. See Grey, supra note 11, at 69.
15. Rachel E. Fenske, Transitioning from Print to Web: A Publisher’s Perspective, 39 REFERENCE & USER SERVICES Q. 342, 343 (2000).
value-added products that merit legal protection.\textsuperscript{16} Using the bundle of rights metaphor, publishers develop pricing and delivery models (with contracts and licensing agreements) that offer access to, but limit control of, their revenue-generating products. Yet licensing schemes only increase the information owner’s control over usage of the content, at a price, and do not serve the public interest goals of copyright.\textsuperscript{17} In her article on patron access in a digital world, Ann Bartow asserts: “It is the digitalization of information that enables licensing, and licensing that threatens to compromise patron access in a manner that is not possible with ink-and-paper books or periodicals.”\textsuperscript{18}

\section*{Libraries and Digital Resources}

\section*{Ownership Versus Access}

\textsuperscript{¶9} Libraries are challenged, in times of static or tightened budgets, to balance patron demand for access to digital content\textsuperscript{19} against the security of owning print collections uniquely tailored to the communities they serve.\textsuperscript{20} When print subscriptions are cancelled, libraries retain ownership and have permanent access to the back issues that were purchased. Digital information does not offer the same security. A library that cancels its subscription to a digital resource may find itself without access or archived content. Even if digital content is acquired, its long-term viability is questionable. As Richard Ekman said a decade ago, “We simply do not know how long digital information will remain stable, in comparison, say, with the expected time lines for microform or paper.”\textsuperscript{21}

\textsuperscript{¶10} Acquisition options for digital products are at the discretion of the vendor. For any particular product, libraries may or may not be able to choose the level of access or ownership that best meets the needs of their patrons. Possible choices may include pay-per-view, perpetual access, subscription, digital content ownership, and purchase plus access—each with its own method of information delivery and usage restrictions.\textsuperscript{22} Because of the way digital products are sold, or not sold, libraries have been forced to rethink the concept of ownership of their collections


\textsuperscript{17} Matheson, supra note 4, at 162.


\textsuperscript{19} See Carr, supra note 6, at 14.

\textsuperscript{20} See James M. Donovan, Libraries as Doppelgängers: A Meditation on Collection Development, SOUTHEASTERN L. LIBR., Summer/Fall 2009, at 4, 6.


\textsuperscript{22} The vendor defines the terms of access and ownership. Generally speaking, pay-per-view involves payment for a single view of the content, and that right is restricted to the patron initiating the transaction. Carr, supra note 6, at 14. Perpetual access provides continued access to subscriber content following cancellation of a subscription. See Judy Luther et al., Ensuring Perpetual Access to Online Subscriptions, 58 SERIALS LIBR. 73, 75 (2010). Ownership of digital content usually involves a lump-sum payment for an electronic backfile which, when combined with a charge for continued access and searching through the vendor’s interface, is called purchase plus access. Canick supra note 1, at 31.
and to navigate a confusing array of legal restrictions imposed on patron access and usage.

Law Library Collections

§11 Information relating to law and legal scholarship continues to proliferate as it becomes more international and interdisciplinary in scope. To meet the needs and interests of scholars, law library collections must grow to include expanding sources of legal information. With limited budgets and physical storage space, such growth realistically requires a mixture of both print and digital resources. In response to the need for such hybrid collections, publishers are developing and controlling digital databases of legal information.

§12 Despite the advantages of these legal databases (ease of access and wide availability, multiplicity of access points, full-text searching, and reduced physical storage space), libraries need to be cognizant of the potential for the permanent loss of data if a commercial vendor controls the content. Regardless of how digital information is marketed for use, true preservation of that information requires complete control of the content, and this may lie solely with the providing institution. Before law libraries can comfortably rely on digital formatting for important legal information, continued long-term access—along with freely available authoritative primary materials—must be assured.

§13 Collection assessment standards for academic law libraries have been evolving to address the reality of today’s world of legal research. As early as 1990, in an article on law library standards, Harry S. Martin predicted standards would change to “increasingly emphasize access over ownership, and service over collections.” Academic law libraries are subject to the American Bar Association’s (ABA) Standards and Rules of Procedure for Approval of Law Schools. Standards have undergone revisions over the years to provide flexibility as to format in order to reconcile the annual collection assessment questionnaire with the emergence of electronic collections. However, it has been difficult to develop a “clear and consistent” method of counting electronic resources in libraries in a way that satisfies the collection requirements of the standards. As collections continue to evolve
from physical volumes to digital formats, methods for assessing libraries are being reshaped to reflect the “changing context of collection access and ownership.”

Case Study

Background

¶14 In May 2007, the University of Pittsburgh’s Barco Law Library entered into an agreement with Gale for *U.S. Supreme Court Records and Briefs, 1832–1978*, a large but static database of historical legal documents. This digital collection was offered only as a purchase-plus-access product. This required a purchase agreement (granting ownership of the content for a sizable lump sum) and a subscription and license agreement (granting access to that content and delivery platform on the publisher’s servers for a more modest annual fee). The purchase agreement also included MARC records for the documents in the database. Both agreements contained usage limitations. Although our case study is based on this particular product, our experience is applicable to other situations where databases are sold using this distribution model.

¶15 Our law library had access to other databases from this publisher, but those were made available to us through our parent university’s library system. Thus, this acquisition arrangement was the law library’s first experience with such a purchase-plus-access distribution model. Our annual subscription agreement allowed us to access our new database using the same familiar interface, with its advanced full-text search capabilities and links to document images.

¶16 The purchase price of our digital content was substantial, but it is understandably difficult for publishers to arrive at pricing models that compensate them for their effort but are also reasonable for libraries given the value of the resource. The publisher justified the high price of our new database by emphasizing that we *owned* the digital content, which they would provide on request. We therefore asked for content delivery and received several cartridges of Digital Linear Tape (DLT) as well as a manifest on a single CD-ROM. This manifest was an alphabeti-
cal list of documents, each with a unique document identifier. Our library had no DLT drive for using these tapes, so we requested another format that would be compatible with our existing computer hardware. Several weeks were spent determining what format was acceptable for our use, whether the publisher could convert the data to that format, and at what additional cost. Six months after completing our original transaction we received, at no extra cost, two 500 GB external hard drives. We assumed we now had a “readable” version of our purchased content.

Our intent was to continue relying on the annual subscription for access to the content through the publisher’s host servers and interface. The financial crisis of 2008, however, impacted our library as it did many others. In May 2009, two years after completing our original agreements, we cancelled the annual access subscription due to budget cuts. With the database content no longer accessible to us through the publisher’s servers and delivery platform, we began to explore ways to convert our purchased content into a usable resource.

Project Planning

We initiated our project by examining the database content provided on the two external hard drives. We had been told by the publisher that the content consisted of approximately 200,000 documents totaling nearly 11,000,000 pages. (Noticeably lacking was any documentation about the database or its file structure.) The drives contained two types of files: TIFF-formatted digital image files of all the document pages in the database, and XML files of metadata to enable document retrieval and full-text searching. The image files were organized into seventeen main folders, and these contained thousands of uniquely identified subfolders. Each subfolder contained all the page images of a single document, and was accompanied by an XML file, called the manifest, which provided identifying information for the document and for each individual word in the document. The image folders were well organized, as shown in figure 1, and, while extensive, were a comprehensible collection of content that we could envision accessing in some fashion. But the sheer quantity of XML metadata marking up every word in 200,000 documents posed a serious challenge for our data manipulation capabilities.

Clearly, this project was beyond the scope of the time, technical expertise, and computer equipment available in our law library. We spent the next several months exploring outsourcing possibilities: the University of Pittsburgh’s Digital Research Library was unwilling to add our content, with its usage restrictions, to their existing web-accessible digital collection; our university’s computer services department offered to sell server space to us, but offered no programming support; our law school’s Information Technology (IT) staff estimated our project would require at least one hundred programming hours and was unable to assume the task; contracting with a digital collection management service for a database this size was estimated in the $20,000 range and would lock us into another annual maintenance fee.

36. TIFF or Tagged Image File Format is a useful image archive format because it stores digital data in a “lossless” format (i.e., no digital information is lost during data compression).
We finally contacted our university’s computer engineering program and were fortunate to find Yong Li, a skilled and enthusiastic doctoral student, who agreed to work on our project for a reasonable fee. In June 2010, with Yong Li’s guidance, and in consultation with the law school’s IT staff, we mapped a strategy for developing a stand-alone, in-house database limited to university users (per our purchase agreement).

We decided that the majority of our patrons would search the database using specific criteria, and reluctantly opted to omit full-text searching in light of our limited resources. Searches would be accomplished using defined fields; results would display with links to PDF-formatted documents. Most of the programming and development work would be done on an upgraded, stand-alone computer in the law library’s technical services department. Once functional, the database could be transferred to servers monitored by the law library’s IT staff, and access (limited by university IP address) could be provided from the law library web page.

Database Development

The initial step in our project work plan, shown in table 1, was to convert the TIFF images into PDF files using AdultPDF. This conversion process took about two weeks due to the large amount of data. We then examined the XML metadata, identified those elements required for our defined field searching, and

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37. There are a number of advantages to converting documents to PDF files: they are compressed, thereby using less space for online storage; they are automatically paginated for easy online browsing; the quality is excellent; and images can be easily magnified when the originals are faint or fuzzy.

38. AdultPDF provided the tools we needed to convert multiple TIFF page images to single PDF document files. The batch process optimized the conversion speed. See Tiff to PDF (tiff2pdf) v3.4, AdultPDF; http://www.adultpdf.com/products/tiff2pdf/index.html (last visited Feb. 6, 2011).
determined the database schema. MySQL\textsuperscript{39} was used for the database infrastructure because of its performance, functionality, and cost efficiency. The relevant metadata was then extracted from the XML files and mapped into the database schema. A data import tool used during this mapping process helped to confirm the validity and completeness of each imported file. SQL Buddy\textsuperscript{40} was used to design a customized query interface, and various search conditions were tested. The final addition to the query screen was a hyperlink to a help page explaining the structured search format.

**Table 1**

Project Work Plan

<table>
<thead>
<tr>
<th>Process</th>
<th>Technology/Expertise Used</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Convert TIFF files of individual pages into multipage PDFs for each document in the database.</td>
<td>Batch processing using a command line tool called “AdultPDF tiff2pdf.”</td>
</tr>
<tr>
<td>2. Examine metadata in XML files to determine database schema, and search and display options for user interface.</td>
<td>Law librarians discussed how database is used and chose the most important metadata categories for the database.</td>
</tr>
<tr>
<td>3. Create database and necessary data tables.</td>
<td>We chose MySQL for building the database infrastructure due to its performance, functionality, and cost efficiency.</td>
</tr>
<tr>
<td>4. Map data elements from the XML files to the database fields.</td>
<td>Yong Li developed a data import tool (“import-form.php”).</td>
</tr>
<tr>
<td>5. Import data into database, check validity and completeness.</td>
<td>Data import tool “import-form.php” checks validity, lists the names of the files being processed, and flags any files that cannot be processed.</td>
</tr>
<tr>
<td>6. Design user interface.</td>
<td>SQL Buddy, an open-source database management tool was used to design the interface.</td>
</tr>
<tr>
<td>7. Write “help” page.</td>
<td>Law librarians worked together to create “help” information geared toward law library patrons.</td>
</tr>
</tbody>
</table>

Source: Yong Li, Law School Digital Library Project (June 2010).


\textsuperscript{40} SQL Buddy is an open-source database software tool that allows you to edit SQL databases on the web. *SQL Buddy*, http://www.sqlbuddy.com (last visited Feb. 6, 2011).
also available for writing a direct SQL\textsuperscript{41} query. Search results display as a list of relevant documents, each linked to its PDF file, which can be viewed, printed, or saved.

\textsection{24} After two months of effort (155 programming hours), total expenditures of approximately $3000, and roughly 2500 lines of programming code, we had a usable database! Our product is a plain interface, to be sure, but our purchased content of valuable historical documents is no longer captive to a publisher’s servers, and our library is free from ongoing, uncontrolled vendor access fees. The monitoring and control of the data and supporting systems are now up to us. Project costs are shown in table 2.

\section*{Survey}

\textsection{25} We knew many other institutions had acquired this database under the same requisite purchase-plus-access terms and wondered about their experiences with owning and using the database, and what concerns they had about this distribution model.

\textsection{26} To answer these questions, a brief online survey was distributed in May 2010 to ninety-eight institutions listed on the publisher’s web site as holders of this database. All but three of the survey recipients were law libraries. We received twenty-eight responses to the survey.\textsuperscript{42} Twenty of the respondents identified them-

\footnotesize{\textsuperscript{41} SQL (Structured Query Language) was developed to manage information in relational databases.}
\footnotesize{\textsuperscript{42} All survey results are on file with the authors.}
Database Ownership: Myth or Reality?

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selves as academic law libraries; the remaining responded anonymously. Results, summarized in Table 3, showed that the vast majority of respondents were currently paying the annual subscription fee for access. The majority, like our library, had campus-wide access as opposed to strictly law school access. For some libraries, the ability to count titles for annual statistics was a significant factor in their decision to purchase the database; for many, though, it was not. Most respondents said the database was used frequently or occasionally, although the survey did not define those admittedly vague categories. Because the database publisher had arranged with Portico to ensure preservation of this digital collection, the libraries were asked if they had Portico membership. Some respondents were Portico members, but nearly half were not. Finally, most libraries said they had also acquired other databases with a similar distribution model (a lump sum purchase price and a more modest annual access fee).

The survey concluded with an option to comment on this purchase-plus-access distribution model. Several respondents questioned the benefit of content ownership, given the need to continue using the publisher’s interface. Other

Table 2

Project Costs

<table>
<thead>
<tr>
<th>Expenses</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Hardware:</strong></td>
<td></td>
</tr>
<tr>
<td>Computer: Dell OptiPlex Intel Core 2 Duo @ 2.33 GHz, 2GB RAM (already owned by library)</td>
<td>$0.00</td>
</tr>
<tr>
<td>1.5 Terabyte additional internal hard drive</td>
<td>$100.00</td>
</tr>
<tr>
<td>2-500 Gigabyte external hard drives for backup of contents</td>
<td>$200.00</td>
</tr>
<tr>
<td>2-1 Terabyte external hard drives for PDF &amp; interface coding backup for database</td>
<td>$200.00</td>
</tr>
<tr>
<td><strong>Software:</strong></td>
<td></td>
</tr>
<tr>
<td>TIFF to PDF conversion: “AdultPDF tiff2pdf”</td>
<td>$50.00</td>
</tr>
<tr>
<td>Other software available at no cost through the University Computing Services Dept.’s agreements with software vendors</td>
<td>$0.00</td>
</tr>
<tr>
<td><strong>Personnel:</strong></td>
<td></td>
</tr>
<tr>
<td>1 programmer, 2 months, 155 logged hours</td>
<td>$2500.00</td>
</tr>
<tr>
<td>3 law librarians, countless hours</td>
<td>N/A</td>
</tr>
<tr>
<td><strong>Total Costs:</strong></td>
<td>$3050.00</td>
</tr>
</tbody>
</table>

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respondents questioned the reality of ownership, because the provided DLT tapes did not include the interface and were not a media type they could use. Still others said they needed the content for their library, but felt trapped by the ongoing access fee. Another respondent was exploring preservation options for the content, knowing that the provided magnetic media would deteriorate over time. One respondent considered the purchase-plus-access model a win-win situation: the vendor received an up-front payment for the content, and the library could claim content ownership for annual statistics. Another felt the model was fair, given the cost of

### Table 3
Survey Results

<table>
<thead>
<tr>
<th>Question</th>
<th>Response</th>
<th>Number (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you currently paying the annual access fee?</td>
<td>Yes</td>
<td>27 (96%)</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>1 (4%)</td>
</tr>
<tr>
<td>Was the purchase a law school or university/other expense?</td>
<td>Law school</td>
<td>25 (89%)</td>
</tr>
<tr>
<td></td>
<td>University/other</td>
<td>2 (7%)</td>
</tr>
<tr>
<td></td>
<td>No response</td>
<td>1 (4%)</td>
</tr>
<tr>
<td>Who has access to the database?</td>
<td>Law school only</td>
<td>6 (21%)</td>
</tr>
<tr>
<td></td>
<td>Campus wide</td>
<td>22 (79%)</td>
</tr>
<tr>
<td>What tangible format did you receive, if any?</td>
<td>External hard drive</td>
<td>2 (7%)</td>
</tr>
<tr>
<td></td>
<td>DLT tapes</td>
<td>18 (64%)</td>
</tr>
<tr>
<td></td>
<td>Not supplied</td>
<td>1 (4%)</td>
</tr>
<tr>
<td></td>
<td>Never requested</td>
<td>3 (11%)</td>
</tr>
<tr>
<td></td>
<td>No response</td>
<td>4 (14%)</td>
</tr>
<tr>
<td>How significant a factor in your purchase decision was the ability</td>
<td>Significant</td>
<td>7 (25%)</td>
</tr>
<tr>
<td>to count (the “owned”) titles?</td>
<td>Somewhat significant</td>
<td>5 (18%)</td>
</tr>
<tr>
<td></td>
<td>Neutral</td>
<td>5 (18%)</td>
</tr>
<tr>
<td></td>
<td>Not a factor</td>
<td>11 (39%)</td>
</tr>
<tr>
<td>How often is this digital collection used?</td>
<td>Frequently</td>
<td>8 (29%)</td>
</tr>
<tr>
<td></td>
<td>Occasionally</td>
<td>11 (39%)</td>
</tr>
<tr>
<td></td>
<td>Rarely</td>
<td>4 (14%)</td>
</tr>
<tr>
<td></td>
<td>Never</td>
<td>0 (0%)</td>
</tr>
<tr>
<td></td>
<td>Unsure</td>
<td>5 (18%)</td>
</tr>
<tr>
<td>Is your institution a member of Portico?</td>
<td>Yes</td>
<td>8 (29%)</td>
</tr>
<tr>
<td></td>
<td>No</td>
<td>13 (46%)</td>
</tr>
<tr>
<td></td>
<td>Considering membership</td>
<td>1 (4%)</td>
</tr>
<tr>
<td></td>
<td>Unsure</td>
<td>6 (21%)</td>
</tr>
<tr>
<td>Does your institution have agreements for other collections with a</td>
<td>Yes</td>
<td>21 (75%)</td>
</tr>
<tr>
<td>similar (“own plus access”) pricing model?</td>
<td>No</td>
<td>3 (11%)</td>
</tr>
<tr>
<td></td>
<td>Unsure</td>
<td>4 (14%)</td>
</tr>
</tbody>
</table>
digitization, but would have preferred the choice of an alternate distribution option (e.g., traditional subscription model minus the ownership).

¶28 As our survey illustrates, this purchase-plus-access distribution model raises many important questions for libraries. Many of these same concerns were voiced in an article by Simon Canick published shortly after the new model emerged.44 Given the licensing restrictions and usage limitations, do the remaining ownership rights justify the substantial purchase price? Is an alternate distribution model offered, or is the resource available on a take-it-or-leave-it basis only? Is the search interface supplied with the content; if not, how will the content be accessed? Is the conveyed content well-organized and easily transferred to in-house technology or is substantial data manipulation, at an additional cost, required? What options, given the usage restrictions, are available for long-term preservation of the data? If a third party acts as a data preservation agent, will it impose additional access requirements (such as membership); if so, what will that access cost? And will that archival version have the same look and feel as the vendor’s interface?

Conclusion

¶29 There are many ambiguities and uncertainties regarding control over ownership of and access to digital databases. Intellectual property law protections are uncertain for such products, and publishers resort to alternative mechanisms to protect their investments.45 Dov Greenbaum further explains: “As many database producers perceive the present laws and intellectual property paradigms as unable to sufficiently protect their investment, they have turned to contracts and other self-help methods to supplement their thin copyright protection.”46

¶30 Our acquisition of this database involved two agreements, both of which contained usage restrictions. The purchase agreement conveyed ownership of the digital content (TIFF images and XML metadata), limited to authorized users. It is our understanding from library colleagues that these documents (TIFF images) are digitized versions of legal documents that were filed with a court as part of a docket, and which may or may not have copyright protection.47 A public domain document does not become copyrighted simply by being posted on a web site.48 But the legal status of digitized documents constituting a database is an unanswered question. The XML metadata markup code, like HTML markup language and other “literal elements of computer programs” is subject to copyright protection.49

44. Canick, supra note 1.
47. There has been some recent discussion as to whether legal documents are copyrightable. See Davida H. Isaacs, The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents, 71 MO. L. REV. 391, 402–11 (2006); Thomas J. Stueber, Due Diligence in Drafting: Copyrights in Legal Documents, COMPUTER & INTERNET LAW., Aug. 2007, at 21.
Our database transaction granted authorized users the right to access the provider’s servers where the same digital content was hosted, along with the delivery platform for the database. That platform was developed for compatibility with the publisher’s other digital collections, and is understandably a valuable product to be licensed rather than sold. After voluntarily cancelling our subscription agreement, we no longer had access to that delivery platform and its highly detailed, full-text search capability. The loss of that detail means our version of the database is less useful for scholars interested in gleaning more nuanced information from these historical documents.

Finally, how can our library preserve an accurate archival version of a database when we control only the digital content, absent the corresponding search platform? It is uncertain whether Portico, the publisher’s designated data preservation agent, will have access to the vendor’s search platform, in which case any future archival access provided by Portico will be limited by whatever delivery interface they themselves are able to develop. That interface may, in fact, mirror our “vanilla” version of the database, with a core set of search features for locating, viewing, and printing the digital documents. In short, it may be a functional but far more basic version of the publisher’s original database.

Digital information formatting offers publishers enormous possibilities for creatively manipulating and producing information products that are useful to a wide variety of scholars. Libraries require such resources as adjuncts to their print collections to satisfy patron demands for readily accessible, expansive sources of information. But such digital resources, particularly full-text databases, come at a steep cost in terms of fees paid as well as the relinquishment of control over owned and accessed information. In the nonprint environment, ownership rights to information content are fragmented, as are the components of database products. Using various distribution models, database providers might sell digital content, yet limit use of, and access to, that content through licensing and usage restrictions. As Ann Bartow has stated, “At a time when technology can enable unprecedented access to information, content provider business practices can undermine and virtually incapacitate the ability of nonprofit libraries to maintain the level of access provided by traditional paper-and-print books and periodicals.”

This case study underscores the need for libraries to be cognizant of the many issues involved when contemplating the purchase of a digital database. One should be knowledgeable about what is being sold, how it is formatted, what supporting database documentation will accompany the digital product, and how usage is restricted. As with any computer project, system deliverables and requirements must be well-defined and agreed upon in advance. If content ownership is separated from its corresponding search interface, a contingency plan should be in place for an alternate access method should publisher access be terminated. And the potential cost of such an alternate access method, if needed, should be factored into the cost/benefit analysis used to assess the database acquisition.

In the final analysis, we conclude that database ownership can be viewed as both reality and myth. In the sense of physically possessing digital content, data-

50. Bartow, supra note 18, at 822.
base ownership is a reality, but one that is constrained by usage restrictions that limit resource sharing and long-term information preservation. In the sense of owning a functional version of the publisher’s product, database ownership is a myth. As our experience illustrates, the reality of owning database content, isolated from access to its complementary search interface, is merely access to a massive amount of data that must be manipulated to produce even a basic approximation of the publisher’s version. Such data manipulation is a costly and technically demanding endeavor most libraries are ill-prepared to undertake.
Condominium Homeownership in the United States: 
A Selected Annotated Bibliography of Legal Sources*

Donna S. Bennett**

Following a brief historical sketch of the condominium concept from its earliest mention in historical documents, this bibliography traces the legal development and growth of condominium homeownership in the United States to the present day. Although condominium ownership has developed in some countries, such as England, under common law concepts, special statutory provisions have directed this form of ownership in the United States. Covenants, conditions, and restrictions, as well as the condominium association, have developed to collectively finance and manage the common areas and facilities of the condominium regime.

Introduction

This annotated bibliography traces the legal development of condominium homeownership in the United States from its beginnings in the early 1960s to the present. The spectacular growth of condominium homeownership in the United States in the past fifty years, as well as the development of this new area of property law, has created a need for an examination of the relevant sources that describe and examine this development.

This bibliography gathers together what the author considers the most relevant books, chapters, and journal articles on the condominium concept of property ownership. It includes sources that provide the history of the development of this area of law, comparisons of cooperative and condominium ownership,

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descriptions of enabling legislation, discussions of the legal documents required to create and regulate a condominium, and descriptions of the organizations that have evolved to govern condominium developments. The bibliography covers four general areas: (1) development of condominium law in the United States, (2) statutory foundation, (3) creation of the condominium, and (4) governance and the condominium association.

¶3 State-specific materials are not included. Following the passage of the National Housing Act in 1961, which recognized the condominium form of property ownership, condominium legislation was adopted in each state over the next eight years, with Vermont being the last state to adopt such legislation in 1969. Most state bar journals or law reviews included articles on the development of condominium legislation for that particular state. Citations to these articles can be located through the standard indexes. In addition, no attempt has been made to include sources for commercial or resort condominiums.

Historical Background

¶4 According to many scholars, the concept of condominium is quite old: “There is at least one record of the sale of part of a building, in ancient Babylon [modern Iraq], during the First Dynasty, nearly two centuries before the birth of Christ,” and there is evidence of the use of the system among the Greeks, Egyptians, and others.1 It was during the Middle Ages, when walls were constructed to enclose cities in order to provide security, that building space became scarce in many European cities. This lack of space led to individual ownership of parts of a building, sometimes even individual ownership of single rooms, in cities such as Orleans and Paris.2 This “ownership of floors of houses, and even rooms, in the hand of different persons was common in various parts of Europe.”3 The condominium concept of homeownership became especially widespread in the French cities of Nantes, Saint Malo, Caen, Rouen, Rennes, and Grenoble. “In Rennes a catastrophic fire in 1720, which destroyed most of the city, forced inhabitants to build anew under a system of wider streets and taller, multifamily buildings. The experiment was so successful that the system was firmly adopted.”4

¶5 Regulation of condominium ownership during these early years was more by usage and tradition than by formal legal rules.5 The lack of clear rules in many cities regarding the repair and maintenance of common areas, however, led to disputes among owners. Questions such as who was responsible for the repair of the roof or the stairwell or even the building’s foundation were often hotly disputed. Frequency of disputes helped to make the condominium concept unpopular in

1. 1 ALBERTO FERRER & KARL STECHER, LAW OF CONDOMINIUM § 31, at 15 (1967).
2. Id. § 32, at 18.
4. 1 FERRER & STECHER, supra note 1, § 32, at 18.
5. Id. § 35, at 23–24.
certain areas. This began to change with the first statutory recognition of the condominium concept in the Code Napoleon.

§6 The Code Napoleon of 1804 made provisions in Article 664 for the separate ownership of floors and the regulation of maintenance and repairs of the common parts of the building:

When the different stories of a house belong to different proprietors, if the titles to the property do not regulate the mode of reparations and reconstructions, they must be made in manner following: The main walls and the roof are at the charge of all the proprietors, each in proportion to the value of the story belonging to him. The proprietor of each story makes the floor belonging thereto. The proprietor of the first story erects the staircase which conducts to it; the proprietor of the second story carries the stairs from where the former ends to his apartments; and so of the rest.

§7 John Henry Wigmore said of the Code Napoleon: “That code stands out as one of those few books which have influenced the whole world. The Code Napoleon was soon translated into almost every language.” French laws, introduced into all those territories annexed by Napoleon, were often retained or incorporated into the local code by the individual countries after Napoleon’s defeat. As a result, the condominium concept spread to other European countries and, eventually, to other parts of the world as Europeans immigrated to other continents.

§8 Although the informal ownership of floors or parts of buildings existed in countries such as Austria, Switzerland, and Germany as early as the twelfth century, especially among the poorer citizens, by 1900 the German civil code included a provision “expressly forbidding the practice of ownership of a part of a building.” This was a result of much official opposition in Germany to the condominium concept by jurists, the police, and the taxing agencies. Many argued that, “a part of a building could only belong to the owner of the land on which the building rested.” Switzerland and Austria soon followed the example of Germany when they adopted restrictive provisions in 1912.

§9 The destruction of housing in Europe during two world wars, however, as well as the high cost of construction, lack of available land in densely populated areas, and the desire for homeownership rather than tenancy, fostered a renewed interest in the concept of condominium in the continental countries. “As the number of condominiums increased and the demand for standard agreements to cover a number of practical problems became stronger, special statutes were adopted.” Beginning in the 1920s, a number of European countries began to pass legislation

7. 1 FERRER & STECHER, supra note 1, § 35, at 24.
8. Id.
9. 3 JOHN HENRY WIGMORE, A PANORAMA OF THE WORLD’S LEGAL SYSTEMS 1031 (1928) (footnote omitted).
10. 1 FERRER & STECHER, supra note 1, § 33, at 20.
11. Id.
12. Id. § 34, at 22–23 (Switzerland) (noting that this form of ownership continued to exist in some cantons after 1912); id. § 40 (Austria) (noting that the 1912 legislation followed similar legislation in 1879).
that was designed to clarify the rights and obligations of the owners of flats, especially regarding responsibility for the common parts of the building. The commonality of this legislation consisted in “two separate, but closely connected rights. Of these two rights, one is a share in the undivided co-ownership, while the other is a separate right over the flat or other part of the building.” Countries have differed in their views of which right is the predominant or principal one and which the accessory. The French have made the ownership of the flat the principal right.

German law has adopted a different attitude: here the share in the co-ownership of the common parts must be regarded as the principal right of the flat owner, and his right of separate ownership of the flat as merely accessory.

It is inherent in the legal construction of flat ownership under Continental legislation that the two rights—the co-ownership share, and the right in the particular flat—cannot be severed at will.

Further Reading


This two-volume work is a comprehensive and scholarly treatment of the origins and development of the concept of condominium, with a focus on the statutory development of the field within the United States. The authors attempt to interpret the worldwide scope of condominium to the legal profession, and to emphasize that condominium is one of the most effective means of providing mass housing. They provide an extensive chapter on the history of condominium throughout the world, as well as a chapter that provides a comparative analysis of foreign statutes. The work includes a description of the various elements and requirements of the system, such as the legal documents fundamental to the creation of the condominium regime, financing, and the rights and duties of owners. Alberto Ferrer taught at the Inter-American University of Puerto Rico School of Law and was a member of the committee that acted for the National Conference of Commissioners on Uniform State Laws in preparing the Uniform Condominium Act. Karl Stecher was a professor of law at Emory University and the University of Louisville before becoming a trial attorney.


Writing in 1958, prior to the development of condominium law in the United States, Leyser focuses on the ownership of flats in continental legal systems. He provides historical information on the development of the condominium concept in the continental countries and discusses in some depth the more recent legislation of that time. He also points out the lack of uniformity in the legislation of the various countries, even though most continental countries had passed legislation providing ownership rights in individual flats. Many of the continental countries permit the rights and duties of the flat owners to be regulated by “special agreement” (p.40). “Generally, the Continental legislators have left the parties

15. Id. at 37.
16. Id. at 38–39.
full freedom with regard to the way in which they wish to regulate their relationships in connection with the ownership of flats in a building” (p.40). Leyser discusses the assembly of the co-owners and the various countries’ requirements for a quorum for decision-making, ranging from a majority of those present at a meeting in French law, to two-thirds of the value of a building in Italian law, with the quorum in subsequent meetings dealing with the same agenda greatly eased. Leyser ends with a comparative discussion of the common law approach to condominium, focusing on England.


The purpose of this article is to disprove the notion that the modern concept of condominium existed in Roman civil law. In the process of doing this, the author provides a sketch of the history of condominium and a thorough discussion of the classical texts upon which this theory of Roman origins has been based.

Development of Condominium Law in the United States

¶10 Prior to the passage of enabling legislation for condominiums in this country, many property experts debated the issue of ownership of space below and above the surface of the land. “Indirect support for the legality of strata ownership of buildings may be derived from mining and aviation law. These areas of the law have had a great influence in dispelling the notion that real property may not be divided horizontally.”17 In 1929, attorney Stuart Ball speculated about the possibility of owning “castles in the air many stories above the streets,”18 and whether it was possible to own space as opposed to owning land. “From another perspective, evidence of the legislative acceptance of airspace as real property comes from the universal acceptance in the United States of the condominium, with its three-dimensional concept of property.”19 Today’s condominium owners are familiar with the concept of owning the airspace within the boundary walls of their unit.

¶11 The model for American statutes on condominium law came not from Europe, but from Puerto Rico. A major housing shortage, along with the high cost of real estate and a shortage of land in Puerto Rico, led to the approval of the condominium form of homeownership in 1951.20 A more detailed version of the act, approved in 1958, was the Horizontal Property Act. The Puerto Rico law “is called a Horizontal Property Act because it provides a statutory method of subdividing the space occupied by a building into horizontal strata or layers. Each layer represents a

18. Stuart S. Ball, Division into Horizontal Strata of the Landspace Above the Surface, 39 Yale L.J. 616, 637 (1930).
floor in the building that is then subdivided vertically into one or more apartment spaces or units.” 21 Each unit is owned individually and has its own deed.

¶ 12 The Horizontal Property Act of Puerto Rico gave impetus to the condominium movement in America and became the model for much of the legislation approved in the various states. 22 “In 1961, a Puerto Rican delegation lobbied the U.S. Congress to enact Section 234 of the National Housing Act to extend the Federal Housing Administration’s mortgage benefits to condominiums.” 23 Although condominium homeownership was popular in Puerto Rico, additional sources of financing were needed because the banking community did not offer very attractive terms for condominium mortgages. The purchase of a condominium was out of reach for the average person. 24 When the Federal Housing Administration received authorization from Congress to insure mortgages from lenders for condominium dwellings, Puerto Ricans were able to make full use of the condominium concept. 25

¶ 13 In the United States, the severe housing shortage and the urban sprawl that occurred following the end of World War II created a “need for more efficient use of land through high rise multi-family dwellings located in those areas where facilities for employment, education, recreation, and public services already exist.” 26 In addition, there was national interest in providing more affordable housing for a larger number of people. Americans, in common with most people, preferred to own their own homes, rather than rent, and to own a home in an area that might be financially out of their reach if they attempted to purchase a single-family dwelling. “This . . . spurred interest in traditional cooperative housing developments and resulted in the introduction into the United States of a new concept of apartment ownership by individuals.” 27

¶ 14 Scarcity of land within commuting distance of large urban centers, the high cost of real estate, and a growing elderly population further increased the popularity of this type of homeownership. “The desire for the personal comforts of home and its related financial benefits, the prospect of reduced travel time, and the great advantage of being close to cultural and business centers have created a new interest in reducing the burden of inflated land costs through cooperative ownership.” 28

In a 1965 presentation at an American Bar Association (ABA) meeting, William Kerr said: “It is financially impossible for a man of even moderate means to own a

22. Cribbet, supra note 20, at 1213.
25. 1 Ferrer & Stecher, supra note 1, § 51, at 56.
28. Id.
private house near the center of a large city. Condominium should make such ownership possible with the resultant saving in time and money over commuting.”

¶15 Cooperatives became popular in response to housing shortages, beginning primarily after the First World War. Many of these early ventures experienced financial failure during the Great Depression. This type of collectively owned community was most popular in major metropolitan areas. It also underwent tremendous growth in the 1950s and 1960s in parts of Florida. By 1966, however, condominium growth outpaced the growth of cooperatives everywhere but in New York.

¶16 One of the reasons for the growth of the condominium is that most people view it as homeownership. In a cooperative, the individual owns indirectly through ownership in the cooperative stock and a long-term proprietary lease on the apartment. The corporation owns the building and common elements, and the members are stockholders who lease their units from the corporation. In a condominium, the individual owns outright through a fee title to the unit and an undivided interest in the common elements. The condominium owner is an owner of real property, while the cooperative owner is viewed as a stockholder and lessee. For many people, “[d]eeds hold tremendous symbolic value,” and this is a major advantage of the condominium over the cooperative.

¶17 In a condominium, the unit owner “is not as dependent upon the financial condition of other owners as is the tenant-stockholder in a cooperative.” While foreclosures of individual units may create financial strains on the upkeep of the common elements, the foreclosure experienced by an individual or individuals will not cause the community to fail. “The co-op required homeowners to finance purchases collectively and offered a simple way to exclude undesirable families from the community. The condominium, by contrast, permitted individual financing but offered fewer powers of exclusion.” Abraham Kazan, founder of the limited-equity co-op in New York, stated in 1962: “[I]f we encounter a bad egg, we give him back his money and tell him we don’t want him here.” The individual deeds in a condominium made this type of action difficult. “In effect, the condominium transferred certain rights from the collective to the individual; . . . homeowners greatly preferred the condominium format.”

32. Id. at 465.
33. Id. at 489.
38. Id. at 475.
39. Id. at 483.
¶18 “The condominium concept established the creation of a set of vertical boundaries separated into horizontal apartments, units, floors or stories.” The traditional form of homeownership involves a fee simple title to the land upon which the house stands. What does the condominium owner actually own? “Each condominium purchaser acquires a fee simple ownership in the unit, together with an undivided tenancy in common interest with other unit owners in the common areas.” The condominium owner, therefore, has exclusive ownership of the interior of the apartment or unit, or the apartment space. “The term ‘apartment space’ means just that. It is the space enclosed or bounded by certain, determined, vertical and horizontal boundaries. These boundaries are the interior surfaces of the perimeter walls, floor, and ceiling of the apartment that the apartment owner owns individually.” Ownership also includes a fractional ownership in the common or general facilities, usually referred to as the common elements. The common elements are, basically, all areas of the property outside the individual apartment spaces. Because individual owners share the expenses for these common areas and facilities, such as the maintenance of grounds and buildings, swimming pools, clubhouses, and other amenities, the condominium lifestyle has slowly gained in popularity. In addition, many retirees and second-home owners wanted the “emotional and physical security of neighbors above and below and the freedom to leave home for months without worry of burglary . . . .”

¶19 Following the passage of the Puerto Rico Horizontal Property Act in 1958 and the recognition of the condominium form of property ownership in the 1961 National Housing Act, “Arkansas and Hawaii were the first states to take up the Puerto Rican challenge, and Arizona, Kentucky, South Carolina, and Virginia . . . joined the parade.” According to Curtis Berger, legislation must do three things. First, it must “provide a procedure for the establishment and dissolution of a condominium . . . .” The second requirement is “to accommodate existing legislation dealing with taxation, recording procedures, liens, land-use control, and security regulatory techniques to the special needs of the condominium; and [the third is] to anticipate possible judicial antagonism involving such matters as bars on partition and covenants real.” He adds, “it seems likely that the FHA Model Statute, with local refinements, will emerge as the prevailing form in this country.”

¶20 “The concept has electrified the housing profession,” said William Schwartz of Boston University Law School. “At the beginning of 1963, only seven states and the Commonwealth of Puerto Rico had enacted legislation. During the next six months another twenty-four states adopted some form of condominium

40. David A. Thomas, Thompson on Real Property § 36.03 (2d Thomas ed. 2004).
42. Ramsey, supra note 21, at 22.
43. Id.
44. Id.
45. Lasner, supra note 31, at 490.
46. Cribbet, supra note 20, at 1218 (footnotes omitted).
46. Berger, supra note 24, at 1003.
47. Id.
48. Id. at 1004 (footnote omitted).
49. Schwartz, supra note 26, at 138.
and legislation is presently pending in ten other states.”

Indeed, forty-three states and the District of Columbia passed condominium-enabling statutes by 1965. In 1969, Vermont became the last state to enact a condominium statute.

Although in the early 1960s many people did not even know how to pronounce the word “condominium,” by 1970 a poll showed that one in four Americans was familiar with the term, and by 1972, three of every four Americans knew the term. As of 2005, there were 6.6 million condominiums nationwide.

Further Reading


In this extensive study of the rights of ownership of landspace, the author maintains that the courts will someday be receptive to the stratification of cubic space allowing for division by horizontal planes capable of ownership by different individuals; in other words, the idea of real property without land. The article discusses the separate ownership of rooms and apartments in common law and civil law jurisdictions and provides numerous footnoted references. “Just as the willingness of the courts to admit that a chamber could be separately conveyed resulted from the accustoming of the judges to the notion by the practical examples surrounding them in the Inns of Court, so will our courts of tomorrow cease to regard as strange the ownership of castles in the air many stories above the streets” (p.637).


This comment, written in the 1950s, referred to the lack of space and the increased population in Colorado that was spurring the construction of multistory buildings. The article centers around legislation passed in Colorado that allowed for ownership of spaces above the surface of the ground by individuals or corporations other than the owner of the land. The new statute established the “legality of common law methods of conveying an interest in separate airspace” and “the power to create estates above the surface of the land” (p.354). The author discusses a number of problems connected with the creation of estates in airspace and provides some possible solutions.


The key question asked in this article by Laird Bell, a Chicago attorney, is: “Can an abstract thing like space be bought and sold as land?” (p.252). The author reviews a number of cases that attempted to resolve this issue. He points out that the separate ownership of rooms and stories has been more common in England than in America. Bell concludes his article by saying, “A conveyance of the air

52. van Weesep, supra note 13, at 126.
53. Lasner, supra note 31, at 481.
54. Id. at 522.
55. Id. at 529.
lot with a right to support is obviously better adaptable to the mysteries of the future” (p.263).

Publishing a few months after the passage of the National Housing Act of 1961, the author asserted that prior to the passage of enabling legislation in California, there was “no basic problem involved in conveying title to a portion of a building, or to a cube of air space enclosed by a building” (p.604). The developer can avoid problems by drafting the deed to convey airspace and retaining the structural portions of the building as common area. “If the unit is air space, destruction of the building will not destroy the subject matter of the fee, and ownership will continue” (p.604). Borgwardt provides examples of provisions that are essential to the regulation and development of the condominium. These include each unit owner’s paying a proportionate share of common expenses, the ability of the manager to impose a lien on the unit to secure payment of this share, a restriction against any act that will impair the structural integrity of the building, an obligation to maintain insurance, the provision for easements, the specifications of the powers of the manager, and detailed information on how the declaration can be amended.

This is a comprehensive survey of condominium and cooperative ownership. Written for the legal practitioner, banker, and real estate developer, as well as for students, the book provides an overview of the history and policy of condominiums and cooperatives. The authors include information on financing, income tax factors, legal structure, and sales of condominiums and cooperatives. They also provide an excellent chapter on the development and purpose of homeowner associations. The chapter “Operation and Management of Condominium Regime” provides information on some of the problems associated with condominium living (referred to as the three P’s—pets, parking, and people), a section on typical developer mistakes, and essential information on insurance. Appendixes include HUD legal policies, model condominium bylaws, and a listing of selected American cases. David Clurman served as an Assistant Attorney General of the State of New York for twenty-three years. He concluded his term of office in the position of Director of the Bureau of Securities and Public Financing, a position in which he was responsible for directing and implementing new cooperative and condominium construction.

Written at the time when only two states, Arkansas and Hawaii, had enacted condominium legislation, this student comment stated that “[t]he need for the Condominium is becoming quite evident; it grows out of a pressing necessity to provide adequate housing in large urban areas where the high cost of land, coupled with construction and financing expenses, practically precludes the erection of single family homes and where rentals on available apartments are prohibitively high for the masses” (p.321). The article provides an analysis of the Puerto Rico Horizontal Property Act and an overview of the 1961 amendment to the National Housing Act that authorized the insurance of mortgages on condo-
minium units. The article states that the condominium concept of homeownership has been successful in countries throughout the world, and there is no reason why it should not flourish in the United States.


Professor Cribbet provides a brief history of condominium and describes the three basic factors that have led to the development of this form of homeownership in the United States and Puerto Rico. These are (1) the lack of good building sites close to urban areas and the resulting housing shortage, (2) the great desire for homeownership, and (3) the fact that this form of homeownership is more affordable for a larger number of people. Cribbet also discusses in depth the advantages of the regulation of condominium by legislation, as opposed to regulation by common law. He provides a draft of a condominium act, with comments upon the provisions within each section. The last portion of the article describes the advantages of the condominium form of homeownership, as well as its disadvantages.


This is an interesting student comment focusing on the examination and evaluation of the condominium concept of conveying space as real property. “The fee simple possessory right to the condominium unit is to ‘airspace’ and nothing more” (p.74). The state statutes also authorize the conveyance of the common elements, which cannot be partitioned or divided from the space estate.


This is an excellent introductory article on condominium development in the United States, in which the author points out the “spectacular legislative growth” (p.233) of the concept of condominium. He examines the advantages of the condominium form of homeownership, concerns regarding the recording of the legal documents, and financing issues, and makes frequent reference to the law recently adopted in his home state of Florida.


The authors discuss the nature of homeownership in a condominium and state that the concept depends on the possibility of owning airspace. They cite many early English and American cases both in favor of owning airspace and opposed to the idea. They ask the following: “To what does one have title? How enduring is that property interest? When the building is destroyed, or is no longer habitable, what remains to the ‘homeowner’?” (p.264). The authors refer to proposed condominium legislation in California and note some of the problems the ownership of space may present.


This work is part of the Legal Almanac series that attempts to explain the law on a subject in nontechnical language. Kehoe provides an excellent comparison of the two types of homeownership and discusses the pros and cons for purchasing one or the other and the tax consequences of each, and the insurance needs of each. The book includes a sample declaration, bylaws, and management agreement.

In this presentation to a 1965 ABA meeting, the author indicates that his view of condominium as “the ownership of parts of a building” may represent a minority view. He explains that most property experts of the day viewed condominium as the ownership of a unit and the unit as a cube of space above the surface of the land. “[O]wnership of the cube carries with it the right to occupy the portion of the building which it circumscribes” (p.19). Kerr discusses the value of legislation in regulating condominium homeownership, as opposed to controlling this type of ownership using common law. He provides a description of the basic documents of condominium and information on the financing of condominium projects.


This Ph.D. dissertation is an excellent history of collectively owned multifamily housing in the United States. The author describes the various types of collective homeownership, such as cooperatives, garden apartments, attached houses, “own-your-own” apartments, and condominiums. Pages 465 through 557 focus exclusively on condominiums. Lasner provides a thorough comparison of the cooperative and the condominium and describes how many Americans in the early 1960s came to feel that the cooperative board’s ability to approve or reject sales of apartments was inconvenient and distasteful. “After decades of promoting the co-op as nothing less than absolute and independent homeownership, the real estate industry, virtually overnight, changed course and began describing the condominium as a true system of homeownership and the co-op as something partial and inferior” (p.480). Many people decided that they preferred to own their units outright rather than own an interest in a cooperative. In addition, condominium homeowners appreciated the fact that they were able to finance their units individually, whereas the cooperative required homeowners to finance their purchases collectively. Lasner describes in some detail one of the earliest and largest of the condominium developments in this country. Aventura was a high-rise condominium development of over 17,000 apartments set on approximately 800 acres in northern Dade County in Florida. The development included a 270-acre golf course. The author provides a sketch of the master plan, an aerial photograph of the development, floor plans of the apartments, and copies of the marketing brochures. He also provides an extensive bibliography of sources on multifamily housing.


The author, a member of a New York City law firm specializing in real estate issues, focuses on numerous legal problems that he says must be resolved before the condominium form of homeownership can become widespread. Two of the major problems center around the ownership of airspace and the rule against perpetuities. He includes a discussion of the condominium documents and the proposed New York State legislation, the Unit Ownership Act.

O’Keefe discusses whether the condominium will be successful in the United States and if it will be able to compete in the housing market with rental apartments, cooperatives, and single-family dwellings. He thinks that the answer will be determined by whether the condominium will enable families to obtain housing at a reasonable price. The author also discusses the FHA regulations and the financing of condominium mortgage loans.


This article, written in the early days of condominium development, is primarily a description of the condominium concept. As the title states, the article compares the condominium style of homeownership with the cooperative. It does this from the point of view of the Federal Housing Administration’s regulations. The cooperative differs from the condominium in that the ownership or the title to the whole property remains with the corporation. The member of the corporation is a shareholder or a person who is entitled to occupy a unit for an indefinite period of time in a specific apartment. In the condominium, the individual owns the space within that unit and a percentage of the whole. Pohoryles emphasizes the need for enabling legislation at the state level if the condominium form of homeownership is to flourish. He also emphasizes the value of public recordation of an enabling deed. Included is a review of the role of the investor or developer, the management of the property, assessment of common expenses, and the financial issues to be considered when choosing between purchasing a condominium or an interest in a cooperative. He concludes: “The condominium may be here to stay. It has been acclaimed widely as a savior of urban housing . . . .” (p.1037). This is an excellent review of the pros and cons of condominium homeownership.


Professor Rohan addresses the possible negative aspects of condominium ownership, such as partial or total destruction of the building, excessive repair costs, obsolescence, termination of the condominium, and eminent domain. In an effort to encourage those working on enabling legislation to include provisions for these areas, he provides specific drafting recommendations for each area. Although these concerns can be problems for any property owner, in a condominium “their potential disruptive effect threatens not only the interests of the individual unit owner, but extends to the legal framework of the entire project” (p.594). Decision-making in a condominium is complicated by the absence of individual decision-making power. Understanding before purchase the voting requirements stipulated by the condominium instruments is a wise precaution.


This article discusses the history of condominiums in the United States as of 1962. The author defines condominiums as property in which each person owns an individual portion of the building. Written at the beginning of the period of creation of statutes governing condominium development, the author describes a specific condominium development that he helped to create in 1947. He worked with a group of GIs who wanted to live in an apartment building in New York City. One of the men bought a building that could be converted into twelve
individual apartments, and it was his intention to sell each apartment to one of his friends. Schlitt and his colleagues decided that under New York State law a person had the right to own airspace, and they decided “it would be perfectly feasible to insure title to an air space inside the building, provided they had some dominion over those physical elements which would permit them to get to and take possession of the air space. So we devised our castles in the air” (p.454). By the time he wrote this article in the early 1960s, that venture into condominium living had succeeded. The author points out that he has been discussing condominiums as they relate to apartment houses, but says, “I want you to recognize the fact that the possibilities are unlimited. For instance the condominium form of ownership might be applicable to a two-family house . . . . ” (p.457). He even mentions the fact that the condominium concept could apply to industrial and commercial buildings.


As the title indicates, this work contains the text of the talks given by the various panel members at the Association of the Bar of the City of New York’s Committee on Real Property Law meeting of May 11, 1964. Professor Curtis J. Berger’s talk provides an update on condominium development, a description of the pros and cons of this relatively new form of homeownership in New York, and a review of the key elements in the recently approved New York statute. Mendes Hershman explores various use restrictions and relevant court decisions. Other talks focus on mortgage lending concerns, problems of the title insurer, and issues the attorney must handle in representing the developer of a proposed condominium.

Statutory Foundation

¶22 The law of condominium developed rapidly in the United States following the passage of two important pieces of legislation. On June 30, 1961, President Kennedy signed the National Housing Act of 1961.\(^{56}\) This legislation contained section 234(c), which legally recognized the condominium concept of real property ownership for the first time.\(^{57}\) In addition, the act authorized the Federal Housing Administration to insure mortgages from lenders for condominium dwellings,\(^{58}\) and thereby made obtaining a mortgage for the purchase of a condominium much easier by eliminating the need for a large down payment, which is required to offset uninsured mortgages.\(^{59}\) This was amended by the Housing Act of 1964\(^ {60}\) to include a subsection authorizing “the insurance of a mortgage which would finance the construction or rehabilitation of a condominium, in addition to the sale of the dwelling units.”\(^ {61}\) This legislation permitting “the Federal Housing Administration

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58. Berger, supra note 24, at 988.
59. 1 Gary a. Poliakoff, thE LaW of condominium oPerAtions § 1.07 (1988–).
61. 1 Ferrer & stecher, supra note 1, § 9, at 5–6.
to insure mortgages on individual units in multi-unit structures, i.e., on condominiums\textsuperscript{62} allowed those who could not afford a single-family dwelling to realize the American dream of homeownership. According to one source that sells FHA-insured loans: “Insurance for condominiums, such as is provided through Section 234(c), can be important for low and moderate income renters who wish to avoid being displaced by the conversion of their apartment building into a condominium.”\textsuperscript{63}

Condominium’s appearance is timely, for it coincides with a growing awareness that for many urban residents home-ownership in its historic guise, the one-family house, is becoming impracticable. Still, the desire for one’s own home is likely to persist, so firmly embedded has it become within our culture. Condominium may help to redirect this desire toward the kind of structure that will largely comprise our cities of tomorrow.\textsuperscript{64}

\textsection{23} It was during the 1960s that states adopted enabling legislation permitting the creation of condominium. “Unlike most Anglo-American concepts of property law, condominium ownership is based on statutory authority, not on common law concepts.”\textsuperscript{65} Curtis Berger stated:

In considering whether condominium is a feasible form of ownership under the common law or whether it requires special statutory provision, as it has in Latin America and Europe, one might note that England and Scotland have assimilated flat-ownership without benefit of statute, and in the United States, there are instances of condominium that predate legislative recognition.\textsuperscript{66}

One such experiment was described by Carl Schlitt in his History of Condominiums.\textsuperscript{67}

\textsection{24} Berger, however, concluded that although condominium can exist under common law, it was unlikely to flourish in this country without statutory provision:

What kind of legislation does condominium in its embryonic state require? There is immediate need for an official imprimatur—an enabling statute that blesses the condominium concept and erases any doubts that our legal system can tolerate ownership of estates in airspace lots. This alone should stimulate the interest and elicit the confidence of lenders, consumers, and suppliers. The statute would ensure that unit ownership is recognized as an interest in real property—a status denied by some courts to the stock-lease arrangement for a cooperative—and that unit mortgages, whether insured or conventional, qualify for institutional investment.\textsuperscript{68}

\textsection{25} John Cribbet, author of the Principles of the Law of Property, provided two major reasons for preferring the regulation of condominium by statute. First, a carefully written statute would clarify many uncertainties that would otherwise have to await answers from the courts, and second, statutes would help to provide “uniformity in the creation of projects.”\textsuperscript{69}

\textsuperscript{62} van Weesep, supra note 13, at 122.
\textsuperscript{64} Berger, supra note 24, at 1024.
\textsuperscript{65} Thomas, supra note 40, § 36.06(a), at 237.
\textsuperscript{66} Berger, supra note 24, at 1001–02 (footnote omitted).
\textsuperscript{67} Carl D. Schlitt, History of Condominiums, 30 APPRAISAL J. 453 (1962).
\textsuperscript{68} Berger, supra note 24, at 1003.
\textsuperscript{69} Cribbet, supra note 20, at 1218.
William Schwartz of Boston University wrote:

The statutory foundation would appear desirable, if not strictly necessary, in order to clarify the rights of the parties *inter-se* and with respect to third parties, such as the taxing authorities. Thus, in the absence of a statute, it is doubtful whether a unit owner who repairs the common areas can obtain contribution from his neighbors or that a unit owner can demand that his neighbors make repairs. Likewise, in the absence of a statute, it is doubtful whether a unit would be recognized as a separate entity for tax purposes.

Section 234 of the National Housing Act included a condition requiring “that the concept of condominium homeownership must be established under the laws of the state where the property is located.”

This is not necessarily a requirement that each state approve enabling legislation, but rather that condominium ownership be permitted in the state.

However, “[i]t would be highly desirable . . . if proper state legislation were enacted to simplify and standardize the method of setting up such titles. They would then be more readily insurable.”

By 1969, every state had adopted a condominium statute. These early statutes, often referred to as first generation statutes, continue to “provide the statutory foundation for condominium development in approximately half of the states.”

They “provide for recognition of divided ownership and the utilization of conveyancing instruments that adequately and clearly demonstrate ownership and its transferability.” They also attempt to regulate procedures, delineate the duties of the individual unit owners, as well as of the condominium association, provide for distribution of responsibilities in the event of damage, destruction or condemnation, and determine the legal rights of condominium unit owners and associations in the event of defaulting individual unit owners.

In other words, the first generation of condominium statutes recognized the condominium concept of homeownership, but did not attempt to regulate potential abuses.

In order to address problems not covered by these early statutes, such as abuses in operations and development, and to require disclosure statements concerning all condominium declarations, bylaws, and restrictions, many states enacted second generation condominium statutes. The model for many of these second generation statutes was the Uniform Condominium Act (UCA), approved by the National Conference of Commissioners on Uniform State Laws in 1977.

“A second wave of state condominium legislation—in some states, even a third
wave—is providing improved guidelines for developing and governing condominiums, and consumer standards are being set to eliminate sales abuses, leading to greater satisfaction with condominium living.”

**Further Reading**


Berger believes that one of the major goals of condominium is to allow individuals to obtain homeownership within a multifamily project. Even though the desire for homeownership is so firmly ingrained in our culture, many people do not want the upkeep and maintenance that a single-family dwelling requires. The condominium form of homeownership offers major advantages to not only the consumer, but also the space supplier and the moneylender. Berger examines the need for and the specifics of enabling legislation needed by the states and emphasizes that although the condominium can exist under common law it is doubtful whether it would ever flourish without statutory provisions. He thoroughly describes two important documents that provide information on the nature of the enterprise and its internal organization—the declaration and the bylaws. Berger provides a very thorough review of the development of the condominium concept that is valuable not only from a historical perspective, but for his insight into the future of condominiums. He points out that, “As experience with condominium grows, the legislative process should enter a second phase. On the one hand, weaknesses in the prototypal laws are likely to appear and require remedy. And, on the other, condominiums may prove sufficiently desirable that new legislation will be sought to stimulate still further their establishment” (p.1024).


At the time of this presentation, Ferrer was director of the Office of Legislative Services in Puerto Rico. A few years later, he published, with Karl Stecher, the well-known two-volume treatise *Law of Condominium*. This presentation provides a brief overview of the state of condominium and indicates that, as of 1965, sixteen states refer in their statutes not to condominium, but to “horizontal property,” five states to “apartment ownership act,” nine states to “unit ownership or unit property,” and seventeen states to “condominium.” Ferrer indicates that only eleven of the states actually define the boundaries of a condominium unit. These states agree “the boundaries of an apartment are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the apartment includes both the portions of the building so described and the air space so encompassed” (p.29). He answers such questions as: Does the council of co-owners have independent legal status? Is there tort liability of an owner for injuries due to negligence occurring on the common elements? When is the public deed for new developments filed? Can condominium be used for a development of single family houses?

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The author compares condominium with other forms of property ownership and examines its principal characteristics and a few specific problems that may arise, such as determining the ratio of common interest, inseparability of the common elements from the unit, dealing with recalcitrant owners, and termination of the condominium. He discusses some solutions to these issues found in existing legislation and provides a checklist at the end that specifies the points the ideal statute must include.


This article was originally delivered as a paper before the Section on Real Property, Probate and Trust Law of the ABA in 1962. Ramsey uses the Horizontal Property Act of Puerto Rico “as an example of what condominium is and how it works, and to illustrate how some of its basic procedures may, with some modifications, be used in the United States” (p.23). The article provides an excellent overview of the requirements of condominium.


This excellent work was published shortly after the enactment of Section 234 of the National Housing Act. Ramsey, Title Officer for the Chicago Title and Trust Company, became an expert in the development of condominium in the United States. He provides background information on the development of condominium in Puerto Rico and the United States, along with a comparison of condominium and cooperative ownership. He includes a description of the FHA’s new regulations concerning mortgages insured under Section 234. He fully describes the declaration and bylaws and includes a brief discussion on restrictions to be included in the declaration.


Schwartz discusses the advantages of the condominium concept of homeownership and explores whether the concept can exist in common law. He reviews the Massachusetts statute passed in 1963 that regulates condominium and indicates that although the statute is a thorough treatment of the subject, there are major gaps in the legislation. “Problems remain which can only be resolved by statutory amendment or judicial decision” (p.144). Some of these problem areas are the un-neighborly neighbor (the author refers to condominium as an experiment in group living), the creation of a lien that has priority over all other liens, the treatment of tort liability in the statute, the lack of eminent domain provisions, and the lack of clarity in the case of a partial dissolution. He concludes with this prophecy: “Thus, at the risk of being characterized as a false prophet, the author does predict that it will not be too long before ‘castles’ will be built in the skies of Massachusetts” (p.155).

**Creation of the Condominium**

A condominium may be a high-rise apartment building, a garden type housing development, an office building, a shopping center or an industrial complex where each apartment, attached or semi-detached unit, office space unit, etc., is indi-
vidually owned, with joint ownership and control of common areas and facilities. In each of these situations, the unit owner has a fee interest which may be sold, exchanged, mortgaged, and separately assessed for tax purposes.  

§30 Developers who wish to create a condominium must declare their intent with the recording of the declaration, sometimes referred to as the master deed, as well as the bylaws and the floor plans. With these documents, “the condominium project has its legal inception.” These documents must be filed with the recording officer within the jurisdiction.  

§31 The declaration is a constitution setting out the rights and duties of the owners—the original owners, as well as all future owners—and is an important document in modern land development. It must comply with the state condominium law or other applicable statutes.  

The declaration contains fundamental ownership covenants that “run with the land” so that it binds every person who becomes a property owner in the project. In essence, this document provides for dividing ownership—a veritable declaration of independence for the separate units created by this process as well as affirmation by unit owners of the shared obligation for commonly used areas or common elements. The declaration includes a legal description of the land and buildings, as well as a description of each unit and of the common areas. According to the Uniform Condominium Act, it should include the name of the condominium, the name of every local jurisdiction in which any part of the condominium is located, a description of the boundaries of each unit, and a description of the limited common elements. The declaration includes any applicable restrictions, such as a no-rental policy, a statement that the units are for residential purposes only, and a policy that any violation of the declaration or bylaws or any rules that the Board of Administration imposes can be remedied by legal action.  

§32 The declaration provides an overview of the administration of the condominium project and information on the alteration of the project, replacement and maintenance funds, insurance, and the procedure regarding unpaid common expenses. “The owners are also granted easements to maintain pipes, wires, conduits and public utility lines, etc., and a right of access to units to make repairs.” The declaration usually includes a section on eminent domain and how that could impact the condominium project.  

§33 “One of its most important features is the statement in fractions of each owner’s ‘common interest’— i.e., his share of rights and duties with respect to the

81. Ass’n of the Bar of the City of N.Y., supra note 56, at 6.
82. See 1 Poliakoff, supra note 59, § 4.22.
84. Clurman et al., supra note 75, at 12.
86. Breuer, supra note 80, at 100.
common elements. This fraction fixes the unit owner’s pro rata burden of the common expenses . . . ”

The percentage is necessary to calculate each unit owner’s liability for the maintenance of the common areas and improvements. It also determines the weight of each unit owner’s vote for the purposes of amending the declaration or determining the association’s assessments, as well as other voting issues, such as voting for the directors of the association.

It has been held that the condominium declaration is more than a mere contract delineating the mutual rights and obligations of the parties. It also assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the use and enjoyment of real property.

¶34 The declaration is an important legal document, and it is usually difficult to amend.

The Uniform Condominium Act recommends that residential condominiums require at least sixty-seven percent of the votes in the association for amendment, but indicates that the declaration can require a larger majority.

¶35 The bylaws “are the rule book by which the association, and particularly the officers and directors, function.” The bylaws “spell out the policies and procedures that will be employed in the everyday governance and administration of the complex.” They describe members of the association, the types of meetings the members are required to have and their frequency, as well as what constitutes a quorum for these meetings. The bylaws delineate the obligations of the members, including what they are required to maintain and repair, and what happens if a member does not pay the assessment fees. They describe the makeup and responsibilities of the board of administration; the terms of office; the frequency of board meetings; the timing of the notice regarding meetings, including the annual meeting; the election process; and the board’s powers and duties. The bylaws usually include provisions for the removal of board members, the keeping of minutes, and the content and notice of the annual budget. In most communities, amending the bylaws is easier than amending the declaration.

¶36 The rules are the regulations of the condominium project and the operational rules of behavior. They are binding on each owner. The rules may include provisions for pets, parking, trash, noise, fencing, decks, patios, landscaping, exterior decorating and lighting, windows, doors, and skylights. The rules regulate the use of the common elements, the limited common elements, and the individual units. “By and large, condominium documents do not subject the rule-making authority of the board to unit owner agreement or vote. Most often, however, the board is required to distribute to each unit owner a copy of any rules that it has adopted.”

88. THOMAS, supra note 40, § 36.06(a), at 240.
89. NELSON & WHITMAN, supra note 41, at 549.
91. Hyatt, supra note 83, at 32.
92. Kehoe, supra note 34, at 19.
93. See NELSON & WHITMAN, supra note 41, at 549.
95. 1 POLIAKOFF, supra note 59, § 4.28.
These documents—the declaration, bylaws, and rules—provide the structure of the legal entity called the association and are referred to as the covenants, conditions, and restrictions or the CC&Rs.\textsuperscript{96}

Further Reading


Professor Kratovil provides a general introduction to the declaration of restrictions and illustrates how modern property law evolves. The declaration is “the operative document creating a condominium that subdivides the declarant’s interest in the land horizontally and vertically. To establish a condominium, the developer must declare his intention to do so by recording a declaration containing the information required by statute. In some states the declaration is referred to as a Master Deed” (p.75). He calls the declaration “a creation of this century’s lawyers’ ingenuity” (p.69). Kratovil describes the early development of the homeowner association, the Uniform Condominium Act, and the Uniform Common Interest Ownership Act.


This excellent handbook provides extensive information for attorneys representing the purchasers and sellers of a condominium or co-op dwelling, as well as those purchasing a commercial condominium. The author, counsel to the law firm of Thacher Proffitt & Wood and an adjunct associate professor at the New York University Real Estate Institute, provides a detailed section on preparing the contract of sale. He provides an extensive systematic checklist for the closing procedure, along with a detailed explanation of each step, “The closing represents a complex coordination of a number of steps that must come to a conclusion simultaneously” (p.4-3). The final section, a note on legal sources, provides a listing of all the statutes on condominium for the fifty states. This title is available on Westlaw.


This is an interesting report of a survey of residents in forty-nine projects in California and the Washington, D.C., area. The emphasis was on the people already living in a townhouse or condominium, not on those individuals who are considering buying. The survey attempted to determine what 1800 individuals and families in forty-nine projects like and dislike about their townhouse or condominium. Norcross provides data on owner satisfaction, irritations with condominium living, parking problems, importance of recreational facilities, a profile of buyers, as well as the density and the “people factor.” The top three complaints in the survey dealt with crowding or living too close together, noisy neighbors, and barking dogs. The author includes numerous black-and-white photographs

\textsuperscript{96} \textit{Marlene M. Coleman & William Huss, Working with Your Homeowners Association} 60 (2003).
of the various communities, as well as sketches of land plans, including building locations, street and parking layouts, and the space around them. An appendix includes the names, descriptions, price ranges, and developers of the various communities that were included in the survey.


This textbook serves as an excellent reference for all persons involved with condominiums: the developer, unit owner, property manager, and board member. It provides detailed information on the governing documents, the transfer of control from the developer to the homeowners, the board of directors, how to conduct effective membership and board meetings, the committee structure, property management and managers, maintenance and security, insurance, and the budgetary process. It also includes an extremely helpful checklist of sample forms, such as grievance or complaint forms, a sample proxy, notice of the annual membership meeting, and a budget worksheet.


This excellent source, updated annually, provides an overview of the condominium concept, as well as an extensive section of forms. The role of the association is discussed in depth, including its structure, its role in rules enforcement, its financial obligation for common expenses, and its insurance requirements. A chapter on the rights and liabilities of directors provides information on the responsibilities of the directors for maintenance and repair of association property, fiscal planning, and enforcing covenants and restrictions. There are chapters on conducting association meetings, the covenants and restrictions of the condominium, assessment of homeowners for association expenses, as well as on handling nonpayment of assessments and foreclosure. The chapter on protecting the association from risks includes information on the association’s responsibility to protect the condominium from criminal activity, to protect the association property, and to protect the residents of the condominium. An interesting chapter on warranties covers the specialized field of construction defect litigation. There are chapters on amending the condominium documents, association attorneys, and the rights and responsibilities of unit owners. Also included is a chapter on specialty condominiums, such as land condominiums, nonresidential, continued care, hotel, and resort or time-share condominiums. There is a comprehensive index and a table of cases.


This is an excellent introductory article regarding condominium, which provides extensive information about the content and requirements of the declaration. Ramsey stresses how important it is for the declaration to mandate “that no co-owner may convey or mortgage his apartment without including also his corresponding undivided interest in the common elements, and vice versa. It is most important to the continued existence and success of the cooperative venture that this combined unit ownership not be separated . . . .” (p.25).

The author indicates that at the time the article was written, in 1964, there were few sources of information available to provide either the purchaser or counsel for the purchaser with guidelines on factors to be considered and problems to be anticipated when purchasing a condominium unit. He recommends a close scrutiny of both the assessment and voting rights policy in the declaration and rules, as well as the provisions for amending the condominium instruments. He also stresses the importance of the documents requiring professional management of the property. “Shortsighted economies and outright mismanagement may produce a decline in essential services, amenities, and eventually property values” (p.856).


This excellent multivolume set is updated quarterly. The authors provide extensive information on the creation of condominiums, including examples of actual condominium documents and litigation documents. They include information on the condominium’s use of airspace, and current condominium issues, including antidiscrimination laws, construction defects, time-sharing, obsolescence, and retirement communities. They also provide citations to current condominium legislation and regulations. This title is a required resource for professionals working with condominiums.


Chapter 36 of this treatise discusses the residential property rights of owners of condominiums and cooperatives. The condominium concept provides for separate ownership of individual units in multi-unit projects, and a shared ownership as tenant in common of the common areas and facilities of a project. It reviews the property rights of occupants of separate units in multi-unit buildings and the benefits of individual ownership as well as shared responsibilities. The chapter also provides a brief history of condominiums, a description of the legal structure of the concept of condominiums, a description of condominium documents, and information on liability of the association, termination, disclosures required before sale, and the establishment of the mechanism for care and upkeep of common areas and facilities. The chapter concludes with a bibliography, complete with a listing of A.L.R. annotations. This work is updated annually.


The author, a research and marketing analyst in the condominium field, highlights many of the problems of condominiums during their first decade of development in the United States. Williams’s focus is on abusive and deceptive developers and the questionable practices of some lending institutions.
Governance and the Condominium Association

The Condominium is in reality an experiment in group living. It brings together a group of individuals with diverse personalities and attitudes and imposes upon them the “task” of living harmoniously in close proximity one to another. In addition, these individuals also assume the responsibility of collectively managing the common areas and facilities.97

§38 In other words, these individuals make up the community association, sometimes referred to as the council of homeowners or the condominium association. The association is an “automatic and mandatory membership organization.”98 “The association is created at the time the declaration is recorded . . . .”99 At the time of purchase, the title owner automatically becomes a member of the association. “They must remain citizens of that association subject to its governing and taxing powers so long as they remain owners.”100

§39 The association has the power to govern the community and to provide for the care, upkeep, and physical maintenance of the common elements.101 It must enforce the provisions of the founding documents, and establish, publicize, and enforce rules and penalties approved by the members.102 It is responsible for procuring adequate insurance coverage as required by the legal documents. It must establish sound fiscal policy, keep proper records, establish budgets and assessment rates, and support the business needs of the community. One of the ways in which it fulfills its responsibilities is to elect a board of directors from among the unit owners.103

§40 “The initial board is formed at the creation of the condominium and is appointed by the developer.”104 The administration of the condominium project rests with the developer until such time as the legal documents stipulate that the owners will take control of the association.105 This time frame can vary, but it often occurs at the time a certain percentage of the units have sold.106 Some states have taken the lead and have established the time frame for the transfer of control from developer to unit owner. “This was done in response to developer abuses such as indefinitely retaining control over a certain percentage of units, selling units to developer-controlled parties, packing the board of directors with developer-controlled parties or unilaterally reserving the right to amend either the declaration or the bylaws.”107

97. Schwartz, supra note 26, at 144.
98. WAYNE S. HYATT, CONDOMINIUMS AND HOME OWNER ASSOCIATIONS: A GUIDE TO THE DEVELOPMENT PROCESS § 1.04 (1985).
99. Id. § 1.05.
100. Id. § 1.04.
101. Id. § 1.01.
102. Id. § 1.04.
103. Id. § 10.11.
104. THOMAS, supra note 40, § 36.10(c), at 263.
105. Id.
106. Id. at 265.
107. Id. at 264.
§41 The start-up board appointed by the developer represents the developer, rather than the homeowners. “The developer initially controls the association both to protect the firm’s financial interests and to effectively promote the sale of the condominiums in this project.”108 As additional units are sold, the board will be composed of developer-appointed individuals, as well as one or more members who represent the unit owners. Eventually the unit owners will begin to outnumber the developer representatives. “The role of the developer in turning over the project to new unit owners has been likened to that of a businessperson turning over an established business to new people with no business experience. The transition process is one of the most problematic areas affecting developer/unit owner relationships.”109

The emphasis is upon creating an atmosphere for the community and upon educating the members as to the general operations of the board and of the association.

... At its best, turnover, that is, transfer of control of the association, is the culmination of a gradual process of training, involvement, and mutual trust that equals transition.110

After the transition has been completed, the board moves from appointed members to elected members.

§42 The condominium documents describe the election process for the board of directors, and they specify the board’s role and responsibility within the association. The board of directors is the most visible group in the community. These individuals are homeowners who choose to be involved in the decision-making process.111 The board “is responsible for making all the business decisions that affect the association. It has fiduciary responsibility, legal oversight, and overall management responsibility for all of the association’s business.”112 The board is also responsible for protecting, maintaining, and enhancing the value of the property.113

§43 Most condominium documents include a provision allowing the board to hire a property manager to handle the day-to-day administration of the community.114 It is the board, however, who has the ultimate responsibility for monitoring and overseeing the management company.115

§44 “In a move that confirmed the importance of the condominium to the American housing market, the Urban Land Institute helped establish an independent organization to serve as the voice for condominium homebuilders and homeowners called the Community Associations Institute [CAI] in 1973.”116 From its development, CAI was designed to represent five groups: (1) developers, (2) property managers, (3) homeowner association directors, (4) public officials, and (5)

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108. The Owner’s and Manager’s Guide to Condominium Management, supra note 79, at 49.
109. THOMAS, supra note 40, § 36.10(c), at 262.
110. HYATT, supra note 98, § 10.01, at 318.
111. COLEMAN & HUSS, supra note 96, at 23–24.
112. Id. at 23.
113. See id. at 24.
114. Berger, supra note 24, at 1005.
115. See COLEMAN & HUSS, supra note 96, at 36–37.
professionals who deal in homeowner associations, such as lawyers, landscapers, etc.\textsuperscript{117} CAI is an educational organization, which also lobbies state legislatures on behalf of homeowner associations. Homeowner associations can govern communities of detached houses, as well as semi-detached houses, row housing, and condominiums. In these communities, the members of the association own in common the recreational centers and the green areas. As of December 2008, CAI had 28,929 members. CAI reports that in 2008 there were 300,800 association-governed communities with 24.1 million housing units and 59.5 million residents. This compares with 10,000 communities in 1970 with 701,000 housing units and 2.1 million residents.\textsuperscript{118}

\textsect{45} From its beginnings, CAI has focused on communication and education through the publication of newsletters and research reports. Their publishing division, Community Associations Press, publishes numerous resources for community association volunteers and professionals. Their bimonthly newsletter is \textit{Community Manager} and their magazine is \textit{Common Ground}. They offer a number of subscription-based e-newsletters. CAI serves as a clearinghouse for information important to community associations.

\textsect{46} “Living in a condominium, unlike living in a single-family home, eliminates individual responsibility for yard work and repairs because the homeowners association assumes those duties.”\textsuperscript{119} Prospective buyers of any condominium should read the declaration prior to purchasing a unit, and they should have a clear understanding of the rules of the community. Pet owners must be aware prior to purchase if they are considering a community where pets are restricted. Rules may restrict the number of vehicles allowed per unit, the type of flowers allowed in certain areas in front of the unit, the color of window blinds, and the type of decorative items used, to name just a few. To avoid problems, the buyer should be aware of the community rules before purchasing the unit.

\textsect{47} Members of the condominium association own their own units, but all members collectively own the commonly held areas of the community and are required to finance, repair, and maintain those areas.\textsuperscript{120} When homeowners are interested in the operations of their community and participate in the process, they will find that their community exhibits participatory democracy at its best. If the organization is plagued with apathetic homeowners or dictatorial and untrained board members, the community experience will be less than satisfying. Surveys done by Zogby International in 2009, however, indicate that seventy-one percent of people living in a community association rate their experience as positive, with only twelve percent rating it as negative. Seventy percent said that the rules of their community protect and enhance their property values.\textsuperscript{121}

\textsuperscript{117} EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 111 (1994).
\textsuperscript{119} CHRISTENSEN & LEVINSON, supra note 23, at 317.
\textsuperscript{120} KEHOE, supra note 34, at 34.
Further Reading


This book focuses on building community within a homeowner association, managing the legal issues that arise in this type of community, and managing the day-to-day operations of the community. It has specific pointers for board members, property managers, and homeowners. The section on managing legal issues provides an overview of the legal issues an association may face. The third part discusses the role that residents, committee members, or board members may take as they work to improve the operations of the homeowner association. This guide offers very descriptive information on the responsibility of the board of directors and the types of committees that may exist within the association, and information about property managers and various management companies. It provides descriptions of the primary documents, such as the declaration, CC&Rs, bylaws, and articles of incorporation, and the house rules. It also discusses in some depth the types of communications that should occur within a community. It is an excellent handbook for the new board member or a person interested in learning about what is involved in condominium and homeowner association living. This book is useful for any type of community association, whether the community is condominium, cooperative, community apartment project, or planned development.


This is an excellent handbook on the creation and operation of community associations. The author provides recommendations on how to successfully transfer the control of the association to the unit owners, along with a very useful chart and description of the transition phase from developer control to unit-owner control. Although written primarily for the developer and builder, it provides practical information to any person considering buying a home in a community association and to the person interested in serving on the board of directors. Dowden served as the executive vice president of the CAI from 1974 to 1990.


This resource provides readers with a working knowledge of the important principles of condominium law; a detailed description of the documents of the condominium association; information regarding its operation and creation of rules and regulations; and a model declaration and bylaws. Also included are sample rules and regulations, a sample management agreement, and procedures for the collection of assessments as well as notes on important cases that have established precedents in this field.


This work is primarily for the practicing attorney, but it provides information of value to anyone interested in buying a home in a community association. The
author discusses the creation of a common interest community; defines the community association; and discusses the association powers and its functions, how design standards and control are developed, and enforcement within the community of these standards, as well as the liability of associations, their boards, and the association members. He also covers the development, building, and selling of a common interest community. Included are very practical guides to drafting the creation documents. Hyatt includes drafting checklists and points out that the failure to develop a good legal document can be a major developer mistake. Particularly valuable is an appendix that provides a document-drafting checklist, a table of contents for the declaration of the condominium, and a table of contents of CC&Rs for a homeowner association, as well as a community association bylaws table of contents. These can be particularly valuable to the attorney writing documents for a new community.

Hyatt, Wayne S. Condominiums and Home Owner Associations: A Guide to the Development Process. Colorado Springs, Colo.: Shepard’s/McGraw-Hill, 1985. This work is an introduction to community associations and an explanation of their creation. “The author’s intention is to create a user’s manual which unfolds as would the job itself if the reader were sitting down to do the work necessary to create the community association” (p.2). Hyatt focuses on community association law, rather than real estate issues. He provides an excellent chapter on the transition process from developer to homeowner control and emphasizes that the transition should be a process. To indicate that the transition is a time of turning over control shows a lack of understanding regarding this process which can be harmful to its ultimate success. Hyatt specializes in representing master-planned communities and their developers and is the author of twelve books on legal issues relating to planned communities, condominium association law, and community associations.

“Judicial Review of Condominium Rulemaking.” Harvard Law Review 94 (1981): 647–67. This student note examines the problems and abuses of unrestrained condominium government, and the appropriate role of the judiciary in curtailing the condominium association’s rulemaking power. The author emphasizes that enforcing condominium restrictions is desirable. The condominium-enabling statutes provide for enforcement of restrictions, and this in turn preserves the stability of the condominium environment. “Enforcement thus fosters condominium development by attracting buyers seeking a stable, planned environment” (p.653). The creation and enforcement of arbitrary, capricious, and sometimes totalitarian rules must be controlled through judicial review.

McKenzie, Evan. Privatopia: Homeowner Associations and the Rise of Residential Private Government. New Haven, Conn.: Yale University Press, 1994. This is a comprehensive study of the political and social issues posed by the rise of common interest housing developments (CIDs) governed by homeowner associations. The author refers to homeowner associations as privatized, quasi-autonomous governments. He traces the history of CID housing from the nineteenth century to the present, and focuses on how the rise of such governing organizations is reshaping our neighborhoods. He provides an excellent chapter on the history of the CAI.

Chapter 54A of this updated multivolume set is titled “The Operation of Common Interest Communities: Condominiums, Cooperatives, Homeowner Association Developments and Time-Shares.” The author provides a legal definition and overview of the key terms used in this area of law, explanations of the primary documents, explanations of issues in the day-to-day operations of the community, and an examination of the challenges confronting common interest communities. He includes information regarding the transition from developer control; budgeting for common expenses; rules regarding pets, noise, motor vehicles, tenants, architectural controls; and association insurance.


The author provides an analysis of the growth of the residential private government phenomenon, the term used by many in the 1960s and 1970s to describe condominium and homeowner associations, and concludes by proposing “a policy rationale for preferring a private, rather than a public, law construct for resolving disputes between the residential private government and individual homeowners” (p.254). Reichman explores the advantages of living in a residential private government community and the price of those advantages—primarily the erosion of what the author sees as the basic concepts of personal liberty in terms of property rights. Paint color, window coverings, and the ability to make certain home improvements, such as constructing a fence, or even pet ownership have the potential to be limited or forbidden by the residential private government.


The American Law Institute added Chapter 6 to the Restatement of Property in 2000 to cover the rapidly growing body of community association law. The focus of this chapter is on residential rather than commercial common interest communities. “Three strands of law come together in the law governing residential common-interest communities: the law of servitudes; the law governing the forms of ownership used in the community; and the law governing the vehicle used in the community for management of commonly held property or provision of services” (vol. II, p.69). The chapter covers the powers of common interest communities, the duties and liabilities of the association and the board of directors, the governance of the community, and the relationship between the developer and the common interest community. References to statutes and digests of all relevant cases are included.


Professor Rohan, author of numerous articles and treatises on real property, condominiums, and community associations, says that this is the age of community association living. Fewer people now rent or own one-family homes. Potential homeowners prefer to buy in developments that provide significant recreational amenities. This means that they are willing to accept responsibility for the commonly held areas of the community and the covenants and restrictions that run with the land. Rohan suggests that judges should update their view of covenants
and restrictions and stop viewing them unfavorably as attempts to interfere with the right of every individual to enjoy his or her property. “[T]hey should be looked upon favorably (if not benignly) in the abstract, and enforced whenever reasonably possible” (p.14). Additionally, “in short, the time has come to bring the law of covenants abreast of the beneficial function these devices actually serve and their all-but-universal presence in modern housing arrangements” (id.). The article also provides information regarding strengthening insurance laws for community associations.

Stable explores the roots of the modern community association from feudal times to its development in present-day America. He describes the various forms of community associations and the development and growth of the CAI. The author describes the book as an intellectual and social history of community associations. He provides extensive information on the development of CAI and an excellent selective bibliography of community associations.

“Understanding Condominium Association Powers: To Govern Well, the Condominium Association Must Be Endowed with the Proper Powers.” Practical Real Estate Lawyer 19 (July 2003): 47–64.
To work well, the association must be a smoothly functioning private government. It must have the power to make decisions, enact and enforce rules, conduct association affairs, and the power to authorize the expenditure of common funds. This article focuses primarily on the association’s responsibility for managing the common elements.

This volume describes the process of designing a community association through the founding legal documents and the process of operating the association. Wolfe emphasizes the close relationship of these two elements and points out the harm that can occur when the founding documents are written in isolation and the day-to-day needs of the association are not considered. “Legal design is successful only when it anticipates the needs, dilemmas, and operation of the living community which will follow; and in turn, the community association’s governance system depends largely, for its success, on the legal structure on which it hangs” (p.vii). This is an excellent and informative resource.

Bibliographies

An excellent annotated bibliography by the librarian of the New York State Library. Breuer provides a brief overview of the development of condominium in this country and information on FHA mortgage insurance. He states his purpose for compiling the bibliography as “list[ing] all the references to condominium which I have been able to find since I first saw this term mentioned” (p.102) in 1961.

A very useful bibliography of books and articles published primarily during the first decade of condominium homeownership in the United States. Many of the listed articles review state condominium legislation published during this time. There are also a few citations to journals from other countries.
A Response to The Durham Statement Two Years Later*

Margaret A. Leary**

This response to The Durham Statement Two Years Later, published in the Winter 2011 issue of Law Library Journal, addresses that article’s call for an end to print publication of law journals and its failure to sufficiently consider the national and international actors and developments that will determine the future of digital libraries.

Two weaknesses in The Durham Statement Two Years Later: Open Access in the Law School Journal Environment1 stimulate my response to that article. One is the continuation of the Durham Statement’s call for “an end to print publication of law journals.”2 If academic law journals are worth preserving for future readers, they must be kept in paper regardless of the existence of electronic availability. The second is that the three steps called for at the end of the article do not sufficiently consider the national and international actors and developments that will determine the future of digital libraries. Law librarians should enter the mainstream rather than attempt to set up separate processes in this area in which we have no special expertise.

The Call for an End to Print Publication

A cartoon on the cover of a 2009 issue of The New Yorker shows a wrecked urban landscape, with a few flowers, a background of Manhattan-like skyscrapers across a river, and no people. In the foreground, a green-skinned spaceman—whether a returned astronaut or an extraterrestrial visitor is unclear—rests with his back to the remains of a brick wall.3 He sits amid shards of CDs, DVDs, perhaps some money, and other fragments. He looks both puzzled and pleased. From the spaceship hovering overhead, there is no sign of technology: no light, no power lines, and no communication devices. The man from outer space is reading, or at least examining, a book—the only usable object in sight. This cartoon inspired me to suggest, in a talk on the Durham Statement that I gave at the 2010 AALL Annual

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* © Margaret A. Leary, 2011.
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3. NEW YORKER, June 8 & 15, 2009 (cover).
Meeting, that the statement should be reviewed and revised with respect to its call for an end to print publication of law reviews.

§3 The Durham Statement Two Years Later does not fully address this request, so I repeat it here. A reexamination of the recommendation to cease print publication (of law reviews, or any truly important category of information) should take a long view, both backward into history and forward into future possibilities. If we believe that legal scholarship is worthy of permanent retention, we should encourage the existence and retention of paper, in addition to digital, copies. Certainly the number of paper copies produced, purchased, and preserved by libraries will go down, but to eliminate print production would be foolhardy. For the foreseeable future, print will be the best format to ensure present and future access to any given literature. Simply put, we know how to preserve paper, and we don’t know how to preserve fragile digital documents for the long term. We have acid-free paper, the means to neutralize acid paper, reliable binding methods, and libraries and archives designed to hold paper. Electronic access is far superior to paper in almost every way: e-versions are more searchable, portable, and transferable than paper. But paper is superior as a permanent storage medium.

§4 Here are the elements we should take into account:

- Research libraries, especially those that are public and have superb collections, exist to provide information and knowledge to support current and future research. This duty includes permanent retention of the most important sources of information about our history and culture.
- These libraries function as repositories of knowledge for the indefinite future, and the format of that knowledge should be able to survive the political, economic, and physical upheavals that we know have occurred in the past and are likely to occur in the future.
- Only analog formats (print or microform) can now fill that need.

§5 Harvard’s Robert Darnton has said, “Nothing preserves texts better than ink imbedded in paper . . . except texts written in parchment or carved in stone.” Print on paper is surely sturdier than the electronic on-and-off blips of ever-changing digital media.

§6 In contrast to paper, digital repositories require

- a digital format that is consistently accessible over time;


5. The article argues that print is perishable and expensive to buy and house, and that digital access is the preferred access method. Danner, Leong & Miller, supra note 1, at 46, 47, ¶¶ 24, 28. After discussing options for digital formatting (id. at 47–49, ¶¶ 29–33), issues of preserving digital information are covered (id. at 50–52, ¶¶ 37–42). The issues I outline above are not addressed.

6. ROBERT DARNTON, THE CASE FOR BOOKS 37–38 (2009). The Durham Statement Two Years Later quotes Darnton’s statement “Information has never been stable.” Danner, Leong & Miller, supra note 1, at 46, ¶ 23 (quoting DARNTON, supra, at 29). But Darnton’s point in the first chapter, which contains both quotes, is the relative instability, unreliability, and unpredictable future of the Google digitization project.
software to use the digital format;
• hardware on which to load the digital information and use the software;
• a stable Internet environment to transport the digital information;
• a steady source of electrical power, which in turn requires a stable natural environment; and
• a stable, open political environment, which values and sustains public access to information, including an infrastructure to make that possible.

¶7 The Durham Statement Two Years Later acknowledges the existence of rapid change in digital formats, software, and hardware; admits that such instability will continue; and assumes the situation can be accommodated over time, and will remain sustainable. Yet the article does not mention the requirements of a steady source of electrical power, an infrastructure to distribute both power and digital information, and the absence of natural disasters such as floods, hurricanes, earthquakes, blizzards, lightning, and other forces. Acknowledging that digital preservation is an unsolved problem, as The Durham Statement Two Years Later does, without reconsidering the wisdom of ceasing print publication, incompletely addresses my concern.

¶8 Nor does The Durham Statement Two Years Later acknowledge the ways in which both electrical power and a usable Internet—sine qua non for access to digital information—can be affected by deliberate sabotage, aging infrastructures, political instability, or outright interference with all kinds of communication, including the Internet. History is filled with examples of censorship, imprisonment, and even execution of dissenters. This approach extended to the Internet recently in Egypt, where the government shut down the network and limited cell phone access in order to disable protestors’ communication with each other.7

¶9 The difficulties that may arise in gaining access to digital information also diminish the reliability of the documents themselves. Digital repositories should ensure the intertwined features of security and authenticity. The U.S. government has only recently found a method to authenticate enacted legislation; states are still working on it.8 We must be concerned about the threats to authenticity of digitally preserved documents, not only at the production point but throughout the life of the document, whether accidental or deliberate. Think of the missed, folded, or partially obliterated pages in digitized books; think of the effect of power surges on documents in production, or in digital storage. Yes, there can be forged and altered versions of archival documents, paintings, and artwork, and Darnton summarizes famous arguments over the most authentic text for the works of Shakespeare and others.9 Contemporary instances of actual forged or altered print publications are rare, though, and have not to my knowledge occurred in the law review literature.

9. Darnton, supra note 6, at 27–32.
¶10 Claims that digital-only publishing reduces costs and lessens the use of paper (hinting that digital-only is more environmentally sustainable) should be based on careful study of all variables. I am not aware that we (publishers and consumers of academic law reviews) have worked through the economic consequences of all-digital, all-open-access publishing. Before we make a drastic change, such as ending print publication, we need to develop a realistic business model for the alternative. We will still need the work done by students, typesetters, proofreaders, and designers. We will still need space, new kinds of equipment, and more. Will the royalties from aggregators such as LexisNexis, Westlaw, and HeinOnline replace the income from subscriptions? If they do not, will law schools remain willing to subsidize the publications?

¶11 Most seriously, I am not assured that we have an accurate and complete understanding of long-term storage costs (including complete replication in alternate locations) of the requisite storage medium, shifting form as it will along the way. As Francine Berman, director of the San Diego Supercomputer Center at the University of California, a national center for high-performance computing resources, says, not only is digital data enormously fragile, degrading as it is stored, copied, and transferred across data networks, “economic sustainability [of long term storage] is the gorilla in the room.”

The Durham Statement Two Years Later does not address these concerns about selecting what will be preserved, and the cost of preserving digital information.

¶12 Nor am I sure we understand the true environmental costs of an all-digital environment. We know that paper requires trees or other plant material; we also know that computers use large amounts of scarce minerals. “One e-reader requires the extraction of 33 pounds of minerals.” Will there be pushback from environmental activists, whether among law school denizens or the broader public? Are we going down an environmentally unsustainable road?

¶13 I raise all of these questions not to argue that we should alter our course toward providing more information in digital form, but only to argue that it is much too soon to cease publishing in paper that which is most critical to an understanding of our legal system and other critical parts of our civilization.

Law Librarians Should Enter the Mainstream of Digital Preservation Efforts

¶14 The Durham Statement Two Years Later advocates three next steps for law librarians: explore alternatives for preserving legal scholarship by working in concert with other stakeholders; promote the use of common standards for formatting the files of the documents; and take the initiative to create opportunities for dialogue with law school deans, law review editors, interested faculty, and legal infor-

10. John Schwartz, In Storing 1’s and 0’s, the Question is $, N.Y. TIMES, Apr. 9, 2008, at SPG1 (quoting Francine Berman).
formation vendors on the need for concerted action regarding access to and preservation of electronically published law reviews.\textsuperscript{12}

\textsection 15 While these three steps are laudable, law librarians might also take two other steps. One is to recognize the limits of our ability, as individuals or as a profession, to affect much of what will happen in a publishing arena driven primarily by the needs of large international corporations such as Google, Thomson Reuters, Microsoft, and Wolters Kluwer. Those efforts would have high opportunity costs. Why not spend the time more directly performing our work as librarians, as authenticators of knowledge sources as we build print collections and web sites, and as the critical link between researchers and knowledge as knowledge expands exponentially?

\textsection 16 The second, more useful, additional step that law librarians might take is to selectively participate, by means of a few representatives, in the much larger national projects that are identifying the current problems, solutions, and costs of preserving digital information. Two such organizations are the Blue Ribbon Task Force on Sustainable Digital Preservation and Access,\textsuperscript{13} and the Digital Public Library long under discussion and recently announced by Harvard’s Berkman Center.\textsuperscript{14} The proposed Digital Public Library is nascent:

Planning activities will be guided by a Steering Committee of library and foundation leaders, which promises to announce a full slate of activities in early 2011. The Committee plans to bring together representatives from the educational community, public and research libraries, cultural organizations, state and local government, publishers, authors, and private industry in a series of meetings and workshops to examine strategies for improving public access to comprehensive online resources.

One meeting is already in the works: David Ferriero, Archivist of the United States of America, has offered to host a plenary meeting that will assemble stakeholders in early summer 2011. Ferriero said, “It is exciting to contemplate a future where the cultural heritage of our country is available at your fingertips. It is, therefore, important to bring together all interested parties to create a vision of that future.” Three major federal cultural institutions—Library of Congress, the National Archives, and the Smithsonian Institution—are already discussing a collaborative effort to build and make accessible a digital collection of materials from their collections.\textsuperscript{15}

\textsection 17 The Blue Ribbon Task Force’s final report identifies even more quandaries of digital preservation than those listed in \textit{The Durham Statement Two Years Later}, including the fact that digital information is growing much faster than our ability to store it, and that we don’t know what digital information we should preserve, or who should preserve it, or who should pay for it.\textsuperscript{16} The report also provides the five

\begin{itemize}
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\item \textsuperscript{12} Danner, Leong & Miller, \textit{supra} note 1, at 53–54, \textsection 45.
\item \textsuperscript{13} The Task Force’s final report was issued in February 2010. \textsc{Blue Ribbon Task Force on Sustainable Digital Pres. & Access, Sustainable Economics for a Digital Planet: Ensuring Long-Term Access to Digital Information} (Feb. 2010), available at http://brtf.sdsc.edu/biblio/BRTF_Final_Report.pdf [hereinafter \textsc{Sustainable Economics for a Digital Planet}].
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textsc{Sustainable Economics for a Digital Planet}, \textit{supra} note 13, at 10.
\end{itemize}
conditions required for sustainable digital preservation\textsuperscript{17} and the three key actions necessary for sustainability.\textsuperscript{18} Rather than struggling to figure this out alone, we law librarians should find ways to selectively participate in, and benefit from, this national effort. If we don’t, we will continue to spend time and effort creating an infrastructure to replicate what others in the profession are already doing, and we will always be at least one step behind.

\textsuperscript{18} Law librarians will best serve both current and future users of law review literature both by preserving print and by encouraging expanded digital publication and preservation of the most important legal literature.

\begin{thebibliography}{9}
\bibitem{footnote12} Id. at 12 box1.1.
\bibitem{footnote14} Id. at 14 box1.2.
\end{thebibliography}
Keeping Up with New Legal Titles*

Compiled by Creighton J. Miller, Jr.** and Annmarie Zell***

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* © Creighton J. Miller, Jr., and Annmarie Zell, 2011. The books reviewed in this issue were published in 2010. If you would like to review books for “Keeping Up with New Legal Titles,” please send an e-mail to creighton.miller@washburn.edu and annmarie.zell@nyu.edu.

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*Reviewed by Margaret A. Schilt*

¶1 Marcus Boon begins his extended meditation on the concept of copying by asking this question: “[W]hat if copying, rather than being an aberration or a mistake or a crime, is a fundamental condition or requirement for anything, human or not, to exist at all” (p.3)? With *In Praise of Copying*, Boon suggests that familiar attitudes toward copying—attitudes arising out of contemporary Western European and American approaches—are now in danger of becoming a global standard that ignores and marginalizes the very different attitudes held in pre-modern and nonwestern societies. This is certainly not the book for audiences with only a casual interest in intellectual property, but it is one well-suited for academic law or university library environments.

¶2 Using insights drawn from various folk and marginal cultures and, particularly, from Buddhism, Boon questions the very existence of an original. He submits the example of handbags that are sold as copies of Louis Vuitton bags, but are actually manufactured at night in the same factories as authentic Louis Vuitton bags, suggesting that the determination of what is truly an original is, at best, difficult. Platonic philosophy maintains that the entire world as we know it is merely an imitation of an ideal, while our modern intellectual property regimes protect not underlying ideas, but only particular, fixed expressions of those ideas—in fact, mimetic representations, or copies, of the ideas. Such observations yield the conclusion that there is really no such thing as an original. This deduction leads Boon into a discussion of essencelessness in Buddhism, the mimetic faculty in magic, late twentieth-century deconstructionism, and other philosophical ideas about copying.

¶3 According to Boon, the word “copies” comes to us from the Latin word *copia*, meaning abundance. Yet, in the modern world, we link copying not with abundance, but with degradation—a copy degrades the original rather than celebrating it. Perhaps copying is more accurately envisioned as a transformation of the original into something else. Boon points out that nothing is stable and unchanging; mimetic transformation is constant. To apply this concept at a basic, biological level, every living cell that divides creates two copies of itself. At the same time, every element and event in our world can also be said to be original. For example, while each performance of a musical work is a copy, in the sense that it reproduces the notes, words, and rhythms of a composer, the performance is also an original, in that the moment, the performer, and the music combine to form a singular, unique event. If all this is so, then why, as Boon asks, is copying wrong?
Boon argues that constant mimetic transformation—the impermanence of everything—makes people deeply uneasy and that attitudes toward copying reflect this unease. According to Boon, laws against copying arise from a scapegoat mentality; we identify some things as degraded copies so that we can be comfortable that everything else is stable and unchanging: that is, original. By defining one thing as the original and everything else that is very similar to it, but not it, as a copy, we hope to avoid being deceived and to avoid having that which we believe to be ours appropriated by others.

Boon points out that there is a long history of appropriation in artistic expression. He notes that copying other writers’ plots and texts was not considered wrong until the Romantic period. In the visual arts, appropriation is a primary tool of the artist working in montage or collage, who shapes a mashup of others’ images into a new whole, much as a hip-hop artist creates new work out of others’ sounds.

All of this is endlessly fascinating, as is In Praise of Copying. Where the book is weak is in its conclusions. Boon suggests that a solution to contemporary anxiety about copying is depropriation, a process by which the distinction between originals and copies becomes irrelevant as concepts of ownership become unimportant. In a coda to the book, Boon tells us that “contemporary struggles over IP [intellectual property] rights link up with a broad range of modern critiques of property” (p.245). He thinks that we can change our thinking about copying to see it as a practice, in the Buddhist sense, rather than as a violation of a property rights scheme. This approach might appeal to artistic (e.g., hip-hop) and primitive (e.g., folk music) subcultures, and it is attractive in an Internet-dominated world where images and ideas are readily available for everyone to play with. But Boon ignores the presence and influence of economics in the structures he describes. He offers new ways to think about what is and is not an original or a copy, but nothing about how to mediate the intellectual property world in which we actually live, where there are monetary consequences to the issues he raises. Nonetheless, Boon’s insights on copying and concepts of property do offer a broader vision of art and creativity, vividly illuminating both the opportunities that a more abundant concept of copying would offer and the absurdities that weaken the present system of intellectual property rights.


Reviewed by Emily Lawson

Title IX of the Education Amendments of 1972 protects against discrimination on the basis of sex in all educational programs and activities receiving federal funds, and yet, in the almost forty years since its passage, Title IX has become most famous for its impact on sports. In a new book, Getting in the Game: Title IX and the Women’s Sports Revolution, University of Pittsburgh law professor Deborah L. Brake offers an insightful examination of Title IX’s application to student athletics.

Brake’s previous scholarship has focused on Title IX and equality law in general, and her expertise is reflected in *Getting in the Game*. In this text, Brake provides a detailed discussion of Title IX’s legal requirements, describes the various feminist theories that underlie its provisions, and suggests concrete ideas for adjusting the law to better achieve its goal of gender equality. At the same time, Brake’s book brings to life the triumphs and tribulations associated with Title IX through powerful descriptions of the struggles of real female athletes.

¶8 *Getting in the Game* begins with an explanation of Title IX’s unique approach to equality. Instead of requiring schools to adopt gender-blind policies, the law acknowledges gender differences and accepts as the norm sports participation that is segregated by gender. This results-oriented approach has yielded a vast increase in the number of athletic opportunities for women, unquestionably Title IX’s greatest success. However, the sex-separate structure for athletics has produced instances of inequality, and Brake examines how integration rights—rights that allow female athletes to play on men’s teams—have occasionally been used to temper the drawbacks of the segregated norm. Although she ultimately supports this mix of a sex-separate structure with certain integration rights, Brake also offers suggestions for achieving a better balance between the two approaches.

¶9 In the middle section of her book, Brake addresses the so-called three-part test—the regulatory mechanism used to measure compliance with Title IX’s mandate that schools equally accommodate the athletic interests and abilities of students of both sexes. She explains why courts have repeatedly upheld the three-part test against claims that it leads to reverse discrimination against men, and she praises the test as a major impetus in the creation of additional athletic opportunities for women. However, Brake acknowledges pressing questions that surround application of the test: What activities should qualify as sports? What sports should be added to accommodate female athletes? Does Title IX as actualized through the test adequately address the interests and abilities of female athletes of color? Brake also discusses the most controversial method schools have used to comply with the three-part test—cutting men’s sports in an effort to equalize athletic opportunities across genders. She carefully explains the circumstances under which she believes courts should and should not allow such “leveling down” (p.129). She closes her analysis in this section by examining efforts to ensure equality for women athletes in “treatment and support” (p.146), as reflected in the availability of resources like equipment, facilities, and scholarships. She concludes that the commercial model under which college sports operates focuses money and resources on a few elite men’s teams, blocking Title IX from achieving significant intercollegiate success in these areas.

¶10 Brake shifts focus in her last two chapters to address topics that have received less attention from other scholars and commentators: discrimination against pregnant student athletes, retaliation for Title IX complaints, the underrepresentation of women in coaching and athletics administration, and sexual harassment of female athletes. Though Title IX has had some success attacking the first two problems, it has largely failed to combat the others. Using other antidiscrimination laws as a point of comparison, Brake proposes various adjustments to Title IX that could help strengthen protections in these areas. Her thoughtful suggestions for improving Title
IX, both in this section and throughout the book, are among the most notable contributions in Brake’s work. Readers may not agree with Brake’s specific proposals, but these suggestions have indisputable value, if only as invitations to further discourse on how the law can be enhanced to better serve female athletes.

§11 A select bibliography of resources and a thorough index follow Brake’s substantive text. Well-written and well-supported, Getting in the Game offers a unique analysis of Title IX and athletics. The book would make an excellent addition to any academic law library, and it is also well-suited to general academic libraries, especially those with collections emphasizing education or gender studies.


Reviewed by Jeff McGowan

§12 As a former practicing attorney at the local government level, I was captivated by the title of this book: All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law. I have felt both the pleasure and the disdain that come from watching judges who regularly behave politically on the bench but who always adopt the guise of complete impartiality. Thus, I started the book in eager anticipation of being swallowed up within its pages, lost in thought, focused on the intriguing dichotomy between the legal and political roles of American judges. Some of my enthusiasm was lost, however, when I discovered that author Keith J. Bybee had taken a markedly scholarly approach to his subject, producing something more akin to a heavily edited legal treatise than a captivating or practical account.

§13 Bybee introduces his topic using an illustrative case, Spargo v. New York State Commission on Judicial Conduct,2 to demonstrate the complicated interplay between political and judicial activity. As an elected town justice in New York State, Thomas Spargo allegedly engaged in various partisan activities, including participating in protests aimed at “disrupting the recount process”3 in Florida following the 2000 U.S. presidential vote. After Spargo’s subsequent election to New York’s Supreme Court, the Commission on Judicial Conduct charged him with violations of the state’s rules for judicial behavior that stemmed, in part, from his political advocacy. Spargo filed suit in federal court alleging that the New York Code of Judicial Conduct was unconstitutional, and the trial court agreed, ruling in favor of Spargo’s political activism. Spargo himself expressed some hesitation about the reach of the court’s decision, and Bybee uses this fact to demonstrate a deep-seated American ambivalence toward legal realism, a “jurisprudential philosophy that

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2. 244 F. Supp. 2d 72 (N.D.N.Y. 2003). The district court’s opinion was later vacated and the case remanded by the Second Circuit, 351 F.3d 65 (2d Cir. 2003), which held that the federal courts should abstain while a state disciplinary proceeding is pending.

3. Spargo, 244 F. Supp. 2d at 80.
calls for a frank acknowledgement of the role politics and other real-world factors play in judicial decisionmaking” (p.2).  

¶14 Part I of the book presents a detailed examination of the ambivalent status of legal realism. Here, Bybee points out that judges like Spargo simultaneously participate in democratic political processes and assert their own impartiality with regard to their judicial roles. This apparent dichotomy encourages the public to suspect judicial hypocrisy. Rather than denying the influence of politics, judges could simply acknowledge that politics plays a part in judicial decisions. As legal realists since Holmes have maintained, the “law is actually driven by politics” (p.4), and lawyers and judges bring with them to the courtroom political and ideological opinions, both conscious and subconscious. However, Bybee does not urge judges to take this approach. Instead, he suggests that the public’s perceptions of judicial hypocrisy are not inherently negative phenomena. Indeed, he believes that these perceptions “may at once undermine and underwrite the exercise of legal power” (p.33).

¶15 In part II, Bybee compares the rule of law to elements of common courtesy. Bybee submits “(1) that courtesy is a law-like set of rules that relies on the possibility of hypocrisy in order to ensure smooth social interactions, and (2) that courtesy’s reliance on hypocrisy is bound up with habit, pleasure, and the inequalities of the existing order” (p.38). Courtesy is the agreed-upon method by which members of society can interact with one another in a positive fashion despite the possibility that individual behaviors may be less than genuine. Generally, courteous behavior allows society to work within and conform to its own parameters. Bybee suggests that the rule of law shares various similarities with such a system, and argues that this understanding of courtesy can serve as an analytical model for explaining how law may also rely on the underlying possibility of hypocrisy.

¶16 In part III, Bybee links the rule of law to rules of etiquette, arguing “that the proceduralist view of law may be adapted and extended so we can think of judicial dispute management as relying on the possibility of pretense” (p.78). Certainly society desires to be both impartial and principled in its adherence to the rule of law. Yet, as with the laws of etiquette, the judicial process also relies on habit, pleasure, and influence to “confer[] status and give[] people the satisfying feeling that they deserve to be listened to, whether or not they actually do deserve to be heard” (id.). This leads Bybee to the conclusion that, despite actual or perceived judicial hypocrisy, the judicial process “suits the individuals it governs—at least if we understand these individuals to be motivated by a messy mix of principled belief and passionate demands” (p.103). Public suspicions that claims of judicial impartiality actually disguise partisan hypocrisy “do not indicate a looming crisis so much as they suggest that the process depends on a cluster of considerations that produce concerns about double dealing as part of their ordinary operation” (id.).

¶17 All Judges Are Political—Except When They Are Not successfully points out the conflicting roles that judges fill and demonstrates that these roles do not intrinsically compromise legal legitimacy. In the course of achieving this goal, Bybee uses substantive sources and unique comparisons to present intriguing ideas and theo-

ries. I recommend the book for anyone with an interest in the subject matter who does not mind a distinctly scholarly approach. The book would make a great addition to collegiate and law school libraries.


_reviewed by Elizabeth A. Greenfield_

¶18 For every law school applicant who dreams of becoming the next great litigator; for every “Big Law” summer clerk aching for an offer; for every anxious, unemployed new law school graduate dreading the bar exam and an uncertain future, there are so many questions—some asked, some yet unspoken. Where can these seekers of knowledge turn for answers in today’s unsettled legal world? Few sources for definitive answers exist; even fewer explain the changes wrought to law firms by the recession of recent years.

¶19 A new guide to the inner workings of law firms from the Law Practice Management Section of the American Bar Association (ABA), *Introduction to Law Firm Practice*, helps to fill this void. On the book’s companion web site, author Michael Downey reports that the “book was born of desperation” in 2007, when he could not find a suitable text for a class he had been asked to teach on law firm practice. He aimed to write the book at a level neither too basic nor too advanced, but sufficient to address all fundamental aspects of the law firm environment, including firm structure, management, and financial operations.

¶20 Downey has actually done much more. His book is broken into bite-size morsels, with extremely short chapters on narrowly drawn topics that leave his subject matter—often entirely foreign to the law student or new attorney—both palatable and understandable. He describes the different sizes of firms, from the very small (single-attorney practices) to the very large (firms with 3500 lawyers or more), and explains their various structures and management styles. He describes the roles performed by attorneys in the various positions and with the various titles commonly found in law firm environments. His discussion of firm personnel includes nonlawyers, among them “law librarians [who] have evolved into research specialists” (p.48). (I was pleased to read that Downey does not view the physical shrinking of law libraries as implying a concomitant diminution in the roles of firm librarians.) Importantly, Downey covers topics rarely addressed in law school, such as law firm profitability, billing models, and firm administration. Business development topics span more than one chapter, with discussions ranging from client intake to the development and handling of business from both new and existing clients. Downey’s own legal practice focuses on ethics, business, and risk management issues, and the advice in *Introduction to Law Practice* reflects his expertise in these areas, with particularly helpful sections on retainers, engagement letters, and the comingling of funds.

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¶21 One of the book’s strongest chapters, “Dealing with Mistakes,” appears near the end of the book. Everyone should read this chapter. Downey reviews the emotions that lawyers, like other people, most commonly experience after making a serious mistake—the urge to flee, to cover it up, or to blame it on someone else. None of these reactions is particularly helpful, and none will solve the inevitable problems that will flow from the mistake. Downey suggests more constructive responses that can help mitigate or at least control resulting damage to the lawyer, firm, and client.

¶22 At the risk of sounding overenthusiastic, I recommend Introduction to Law Firm Practice for pre-law programs and advisers, law school applicants, law firm recruiters, and all law firm attorneys. Nonfirm lawyers, judges, and others who sit across the courtroom or the negotiating table from firm attorneys may also want to read this book for a better understanding of a firm lawyer’s point of view. All law school and law firm libraries will want to have the book available for patrons such as these.


Reviewed by Nick Sexton

¶23 The caption to a photograph of the 1941 U.S. Supreme Court reproduced in Noah Feldman’s Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices notes that President Franklin Delano Roosevelt appointed eight of the nine Justices pictured and that he promoted the other, Harlan Fiske Stone, to Chief Justice. This alone is sufficient reason to take a close look at the evolution of Roosevelt’s Court—only George Washington put more Justices on the bench. But FDR’s Court also demands our attention due to the uniqueness of its era (a period that encompassed the Great Depression, the New Deal, and World War II) and because some of its illustrious members can be numbered “among the most important and influential justices ever to have sat on the Court” (p.432).

¶24 Scorpions, which takes its title from Alexander Bickel’s remark that “[t]he Supreme Court is nine scorpions in a bottle” (p.xiii), examines the lives and careers of four FDR-appointed justices: Hugo Black, Felix Frankfurter, William O. Douglas, and Robert Jackson. Feldman, a Harvard Law School professor, describes in clear, engaging, and accessible prose how these Justices, who all started out as collegial supporters of FDR’s New Deal, gradually broke into antagonistic factions and ultimately left indelible—and quite distinctive—marks on American jurisprudence. The resulting text is an exceptional balance of history, law, and portraiture, and its readers will gain from the book a profound understanding of the choices and circumstances that forged Black, Frankfurter, Douglas, and Jackson into great Supreme Court Justices.

6. The derivation of this remark remains uncertain; for his attribution to Bickel, Feldman cites Dennis J. Hutchinson, The Black-Jackson Feud, 1988 SUP. CT. REV. 203, 238 (reporting that Bickel made this remark on occasion to his students).
One of Feldman’s chief interests is in the theories of constitutional interpretation advanced by the various Justices. Feldman contends that “Hugo Black was the first justice to frame originalism as a definitive constitutional theory” (p.145) and that, “[i]n this sense, Black was the inventor of originalism” (id.). Frankfurter, on the other hand, believed in judicial restraint, which “would become the unofficial constitutional philosophy of . . . American liberalism” (p.32). Douglas, who harbored political ambitions outside the Court (he hoped to become FDR’s running mate and was offered a chance to be Truman’s), championed individual liberties, practicing a theory called legal realism that emphasized “the effect the Court’s decisions had in the real world, not the legal logic used to obtain it” (p.247). And Jackson, a self-professed country lawyer (“country did not imply simplicity . . . [it] meant common sense” (p.97)), “the last Supreme Court justice never to have graduated from law school” (p.46), and the recipient of several federal appointments under FDR (including both Solicitor General and Attorney General), became a practitioner of legal pragmatism: “What matters is what works in the real world, not the law on the books” (p.363).

How these four liberal soldiers of FDR’s New Deal broke ranks with one another is the most fascinating part of Feldman’s absorbing book. Having laid out his subjects’ personal backgrounds, education, and professional lives, Feldman skillfully shows how perceived or real offenses to honor (generally Black’s honor), an actual or apparent concern for politics over judicial work (specifically Jackson’s and Douglas’s political aspirations), and the gradual shift of Frankfurter’s judicial philosophy from liberal to conservative turned the Justices into “bitter enemies” (p.306). Feldman maps their enmity this way:

Frankfurter despised Douglas, whom he called one of the “two completely evil men I have ever met.” Reflecting the language of wartime, Frankfurter called Douglas, Black, and [Justice Frank] Murphy “the Axis.” One-upping Frankfurter, Douglas called him “Der Fuehrer.” The hatred between Black and Jackson ran so deep that it threatened to ruin the reputations of both men. The friendship between Frankfurter and Jackson seemed to depend more on disdain for Douglas and Black than any closer connection. Douglas and Black voted together but were not intimate friends. For them, common ground meant revulsion for Frankfurter and Jackson (p.306) (footnotes omitted).

These are hardly the respectful personal and professional relationships that the public expects of its Supreme Court Justices.

There is no question whether general academic and public libraries should acquire Scorpions—they should. This is exactly the type of book patrons of such libraries seek out: an accessible, entertaining, and informative guide to political machinations and behind-the-scenes judicial deal-making. Nor should law libraries hesitate to purchase Scorpions. Beyond being simply an engrossing read about a fascinating period of American and Supreme Court history, Feldman’s book is also a model for presenting historical and legal information to a general audience and, as such, offers a superb object lesson for law students. In Scorpions, Feldman proves that a book can cover constitutional law and the Supreme Court in a way that is both technically accurate and emotionally captivating.

**Reviewed by Kurt Meyer**

¶28 Both as founders of the continuing legal education provider Internet for Lawyers⁷ and as co-authors of numerous guides to online research for legal professionals,⁸ Carole Levitt and Mark Rosch are dedicated to training attorneys in cost-effective and efficient Internet research. They have produced their latest contribution to this goal, *Google for Lawyers: Essential Search Tips and Productivity Tools*, at the perfect time, offering a how-to manual that covers free research and productivity options just as many law firms find themselves forced to cut back on the use of expensive database systems and commercial software. The book is also one of only a few titles current enough to cover the full range of Google’s existing products and services, a set of offerings that has multiplied in recent years.

¶29 *Google for Lawyers* begins by explaining precisely why lawyers need to use the web for research. In sum, the web helps to ensure that attorneys obtain the most up-to-date information. The authors caution, however, that lawyers must always be careful consumers of online information and should take steps to ensure that web-based material is credible. To this end, one of the book’s nine appendixes provides a “Web Site Credibility Checklist” that lists questions designed to assist users in judging a site’s reliability.

¶30 In subsequent chapters, Levitt and Rosch present advice designed to help attorneys use Google for searching both the general web and specialized collections of content. They explain, for example, how to execute searches limited by file type or domain name. Following their instructions, I used advanced features I had never before noticed to track down a web site that I believed had vanished long ago. The authors also examine the benefits offered by less well-known features, such as Google Groups, a large online community that is essentially the modern day incarnation of the Usenet newsgroups so popular in the 1990s. Searching through the messages in Google Groups can be an excellent way to trace a particular individual or to gather background information on an expert witness.

¶31 *Google for Lawyers* also covers Google’s case law and law journal search functionality, features launched through the Google Scholar interface in late 2009. Levitt and Rosch describe the depth of Google’s coverage for legal materials and advise readers on the use of Google Scholar’s search functions. Among other excellent points, they note that when searching for a judicial opinion by citation, the search engine works best with *Bluebook*-compliant abbreviations. The authors also discuss Google’s rudimentary citator service and emphasize that it cannot replace KeyCite or Shepard’s.

¶32 Much of the remaining text in *Google for Lawyers* focuses on tools offered by Google that can help attorneys be more productive. Levitt and Rosch provide a

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thorough and lengthy review of Google Apps, a set of customizable cloud computing tools for businesses. Among other things, Google Apps provides applications that lawyers can use to create documents, spreadsheets, presentations, and even electronic forms. The book compares each application to analogous products that are not free and carefully analyzes the privacy and confidentiality concerns that the Google versions raise for the practicing attorney.

¶33 One especially interesting tool discussed in the book is Google Voice, a voicemail and call routing utility. Using Google Voice and a phone number provided by Google, a user can, for example, direct that all calls received during the day from personal contacts go directly to voicemail, while forwarding calls and texts from business contacts to a cell phone. Though this free service has the potential to increase lawyer productivity, Levitt and Rosch sagaciously remind their readers of the important privacy considerations associated with using a third-party system to route client calls. Other useful products discussed in the book include Google Maps, Google Earth, and Google Analytics, a tool for tracking web site visitors that lawyers can use to improve their online marketing. For each product, the authors provide helpful tips, real-life examples of how other attorneys have used the tool, and whenever relevant an analysis of pertinent confidentiality issues.

¶34 At just over 500 pages in length, Google for Lawyers includes twenty-seven substantive chapters supplemented by a table of contents, a detailed index, and nine separate appendixes, many listing cases for which web research was pivotal to the outcome. All screen shots and graphics are in black and white, but are easy to read. I recommend the book for both firm and academic law libraries. Practicing attorneys will appreciate the authors’ pragmatic advice for using Google products to save both time and money. Law students will be interested in learning more about Google’s role in their future law practices—a judgment I make based on the number of questions I received from students who simply noticed the book sitting on my desk. The information in the book should also prove valuable in legal research classes, where it can be used to help teach students to conduct proper and efficient web research.


Reviewed by David M. Turkalo

¶35 If books like Gwynne Dyer’s Climate Wars9 or the older but no less depressing The Long Emergency10 have left you with enough hope to bother trying to save our ever-degrading environment, then How Green Is My Library? is the book for you. In general, we librarians like to believe we possess the heightened state of consciousness needed to do what is right for the betterment of all (right and betterment, of course, as we perceive them). If we are correct in this, then Mulford and Himmel’s guide to good library practices with positive ecological benefits should be just what we need to spark concerted action. The authors map out a long road—

practically an Appalachian Trail—that leads, eventually, to green libraries. Lao Tzu wrote that the “journey of a thousand miles begins with a single step,” and reading this book can be our first step along the path to a greener future.

¶36 But just what is green? And how does that word relate to its frequent companion term, sustainable? Being green, the authors note early in their work, means “taking environmental issues into account when making choices,” while “being sustainable is the point at which the sum total of your choices has zero impact on your ecosystem” (p.3). Green has a terminology all its own, and one of the many helpful things that Mulford and Himmel have done in this book is to place a useful glossary at the beginning of their text rather than the end. This allows the glossary to serve its traditional role as a place to look up unfamiliar terms while also giving readers a chance to familiarize themselves with the book’s topics before getting into the meat of the text. Just reading through these terms is an education in and of itself.

¶37 In general, this is not a title for those already proficient in green. Instead, Mulford and Himmel aim their book at readers seeking more basic, general knowledge on how to make and keep their libraries environmentally friendly. The authors “do not consider [them]selves experts in the sustainable design field—nor in being green” (p.xii). This inexperience, they believe, benefits the reader because “it allowed us to ask the questions [readers] might have while reading this book, and to seek the answers without preconceived ideas that an expert might hold” (id.). The authors’ self-assessment may involve a slight overindulgence in humility. Ned A. Himmel, the retired assistant director of the San Jose Public Library, was formerly responsible for directing the operations of both a main library and seventeen branches. Sam McBane Mulford, though not a librarian, is the founder of the consulting firm Ideation Collaborative and a former architect who holds degrees from Texas A&M’s College of Environmental Design, the San Francisco Institute of Architecture, and the Advanced Management Institute of Architects and Engineers. These are hardly the qualifications, one would think, of novices, at least not in the areas of libraries and design. Regardless, the authors’ expertise or lack thereof has not yielded dense technical writing appropriate only for others already in the know, but rather clear and direct explanations that should certainly appeal to the book’s intended audience.

¶38 Of course, different readers may want to approach this book in different ways. In their introduction, Mulford and Himmel lay out “irreverent” and less than “realistic” (p.xix) reading plans appropriate for various personality types. More seriously, the authors suggest that readers “move quickly through the first three chapters” (id.), jumping to chapter 4, “How Green Do We Want to Be?” This strategy may work for those who are already sold on the green philosophy, with an organization already supportive of green efforts, and possessing a rudimentary or better understanding of the pertinent issues and vocabulary. Of course, even for these readers, the downside to this plan is that they will have effectively lopped off over eighty pages from a book that contains only 168 pages of substantive content. They will also miss out on information that is well worth perusal—even by those who already consider themselves well-informed—including some of the book’s
best explanations and its most valuable assessment tools, both of which are found within the first half of the book.

¶39 Over the course of its six chapters, *How Green Is My Library?* provides the basic information readers will need to start implementing environmentally friendly practices in their own libraries. Its suggestions range from relatively simple tasks (improving the library’s lighting and cleaning the staff microwave) to complex proposals that entail significant support from the powers that be (redeveloping a brownfield site as the location for a new library or investing staff pension funds in greener corporations). As readers are introduced to topics like graywater, drip irrigation, energy audits, and the heat island effect, they will discover a wide array of unilateral steps that their libraries can take to implement green practices. They will also learn of more advanced courses of action that call for energetic leadership to build support within the library and to develop a wider consensus with deans, managing partners, library trustees, and others.

¶40 While a lot of this information can be found elsewhere, often on the web, the authors have done librarians a great service by gathering it together and packaging it for library purposes. *How Green Is My Library?* will be a valuable reference guide for administrators in law libraries of every variety—court, firm, law school, or public. In fact, all libraries, both legal and nonlegal, can benefit from this book, and librarians from each of them can find practical information and worthwhile ideas between its covers.

¶41 Whether hopes for the planet Earth are lost, almost lost, or barely salvageable, the moral imperative is always to do that which is right, regardless of the odds of success. *How Green Is My Library?* gives librarians an important tool with which they can contribute to the future health of the environment. Unique for its application of green concepts to libraries, the book also offers extensive bibliographic references, suggestions for further reading, and an adequate index. In these tight-budget times, it would be a more comfortable purchase at $25 rather than $40. Nevertheless, libraries of all types should acquire the book, and those of us who work in libraries should seek to learn from it and to put its concepts into practice whenever possible.


Reviewed by Deborah E. Melnick

¶42 In my graduate program in information science during the mid-1990s, my coursework included a class addressing the impact of computer technology on workgroups. Although shared computing environments had not yet reached the mainstream, there was a general expectation that the impact of such enabling technologies would prove to be significant for those working in groups. Over the intervening years, we in the information industry have steadily implemented numerous shared online working environments using a variety of new technologies. So, what do we now know about the impact of such technologies upon workgroups?

¶43 In *Good Faith Collaboration: The Culture of Wikipedia*, Joseph Reagle presents evidence that can help us address this question. The book documents Reagle’s
ethnographic study of the all-volunteer, multilayered, and diverse group dedicated to the development of Wikipedia. By any measure, the Wikipedia project must be deemed more successful than all previous attempts at mass collaboration. Reagle posits that this success is directly attributable to the good faith ethos of the project’s collaborative community and is influenced by the technology chosen for the endeavor. Drawing on an extensive education and vast experience with computing, web development, and virtual communities, he offers an intimate look at an organization that consists of numerous individuals playing a variety of roles while each is engaged in the common goal of creating a universal source for all of the world’s knowledge using the wiki as an enabling technology. Reagle’s work successfully conveys the authentic voices of real Wikipedians while providing astute analysis of a cyberspace social setting with which the author is more than familiar.

¶44 There are eight chapters to Good Faith Collaboration, plus a foreword by Lawrence Lessig, a preface, bibliographic notes for each chapter (also available in an online, hypertext format from the author’s web page), and an index. The first two chapters provide background and answer basic questions such as: What is Wikipedia? What previous attempts were made to provide an open-access, universal encyclopedia? What methods did the author use to study the group engaged in creating the English-language Wikipedia? What community norms (i.e., core collaborative principles and core policies) sustain the evolution of this collective effort? What role does the specifically chosen wiki technology play? In chapter 3, which further defines and explores the characteristics of Wikipedian culture, Reagle credits elements of wiki technology and its associated work styles with influencing the project’s success, though with the caveat that it is not by technology alone that Wikipedia endures—essential group values, practices, and policies play the major role.

¶45 Chapters 4, 5, and 6 examine the effects of open content and open source on the pluralistic community and its leadership. Here, Reagle explains the inherent conflicts of values that arise in complex and diverse social units and the challenges involved in achieving consensus within these groups, especially when group membership is subject to constant change. He observes that Wikipedia policies are often incompatible with the decisions needed to address problems and that successful resolution of this intrinsic conflict can generally be attributed to fundamental attitudes held by Wikipedians.

¶46 The concluding chapters address public perceptions of Wikipedia’s value as an authoritative resource and present opinions regarding its future course and prospects for continued success. Reagle suggests the possibility that negative views of Wikipedia may represent underlying fears about the general impact of technology. He also acknowledges that the Wikipedian’s “ideals of universalism, openness, and good faith” (p.170) are more accurately described as aspirations that, though generally displayed by the subjects of his study, are also constantly in flux.

¶47 Throughout the work, Reagle weaves together his own observations with voices from the Wikipedia community, quotes from the project’s organizational
policy and guidelines, and commentary from authoritative sources, both contemporary and historical. His efforts yield a valuable analysis that portrays the interplay between the actions of workgroup participants and the open source, open content, online, and interactive technology. His analysis draws attention to subtle yet real problems and challenges, as well as risks, compromises, and solutions. It reveals the uncertainty faced by those leading the collaborative effort, describes arguments among the Wikipedia participants, and explains the mechanisms of conflict resolution used to sustain progress toward the project’s goals.

¶48 Good Faith Collaboration adds an important perspective to the growing collection of titles dedicated to Wikipedia and online communities. Reagle’s study makes an excellent contribution to our understanding both of the evolution of workgroups and technology and of the critical indicators of a group’s capacity for collaborative success. It is worthwhile reading for anyone designing, implementing, or participating in web 2.0 endeavors and for anyone looking ahead to what web 3.0 may bring. Academic librarians will want to add this title as support for curriculums associated with technology, communications, business, or information studies. Legal, government, and public librarians should also consider purchasing this work as guidance for patrons building or working within technologically based, online, multicultural communities.


Reviewed by Alicia Brillon

¶49 At first glance, a book with the title The Beauty Bias: The Injustice of Appearance in Life and Law may elicit a few raised eyebrows, if not brief chuckles. Can the author really be proposing that discrimination based on looks be taken as seriously as discrimination based on gender, race, or any other legally suspect criteria? Well-known legal scholar Deborah Rhode can, and she does in this, her latest book.

¶50 Rhode, the Ernest W. McFarland Professor of Law and director of the Center on the Legal Profession at Stanford University, begins The Beauty Bias with a preface detailing her own struggles with appearance. She describes how, as a new member of the Stanford law faculty in 1979, she tried to blend in by wearing corduroy pants and turtlenecks in a mix of neutral colors. Later, on the advice of the school’s only other female professor, she tried to set herself apart from her male colleagues and students by buying some skirts . . . in a mix of neutral colors. Only when she became chair of the ABA’s Commission on Women in the Profession was Rhode forced to become truly fashionable. Concerned about the “‘look’ [she] would project” (p.xii) at the Commission’s annual luncheon, the ABA’s public relations staff convinced her that not only her wardrobe but her hair and makeup also needed serious intervention, and she received the help of professional stylists to lift her appearance in each of these areas up to the ABA’s high standards. This comical episode—and a repeat performance at the following year’s luncheon—led Rhode to wonder why men, through their own efforts, can readily achieve the minimum standards required for acceptable presentation, while women apparently require
personal shoppers, multiple stylists, and all of the associated expense. And, more importantly, can anything be done about this state of affairs? Before our society can tackle such issues, however, we will need to recognize that there is actually a real problem and determine if it is a problem to which the law can and should respond. These tasks form the focus of Rhode’s book.

¶51 The first few chapters of The Beauty Bias examine just how much appearance truly matters. In the workplace, the less attractive often encounter greater difficulty getting hired and promoted, and are paid less when they are. Most of us recognize this instinctively, and we spare no expense in our attempts to neutralize any negative effects of bias. As the billions of dollars spent annually on diet products and cosmetics seem to demonstrate, the U.S. population is in a state of crisis about its looks. Rhode identifies four contributing factors that help explain this fixation on appearance: (1) biology, (2) consumerism, (3) technology, and (4) the media. She traces the influence of these factors on society using intriguing real-world examples that range from the proliferation of beauty salons in the nineteenth-century marketplace to the advent of celebrity endorsements to the popularity of modern-day reality television programs, like The Biggest Loser or The Swan, that present dramatic changes in physical appearance as normal and desirable.

¶52 In chapter 4, Rhode takes on the difficult issue of the impact that the feminist movement has had on women’s decisions about their personal appearance—specifically on the choice between “improving” one’s looks with make-up and other beauty aids or eschewing such efforts and choosing to “age gracefully.” She concludes that the majority of women want the freedom to decide for themselves whether they will attempt to conform to prevailing standards of beauty, without social pressure from either direction. Unfortunately, as Rhode demonstrates, we have not yet reached a point where we can realize this ideal.

¶53 Chapter 5 lays out the crux of Rhode’s argument. First, she submits that appearance-based discrimination is unjust. Among other factors, she points out that people are often stereotyped because of their appearance—the overweight, for example, are presumed lazy and incompetent. Yet, as she notes, many aspects of appearance (e.g., height, facial features) are completely beyond one’s control. Rhode insists that the law should address this kind of injustice. She presents her case in great detail, utilizing concrete examples of individuals who have challenged appearance-based employment standards in court or sued businesses for making hiring decisions on the basis of appearance.

¶54 Chapters 6 and 7 of The Beauty Bias investigate legal mechanisms for addressing appearance bias. Rhode examines the contemporary U.S. approach and its failings, comparing American law on the issue to that in other countries, some of which offer greater protections. She then proposes more rigorous antidiscrimination protections for the United States and lays out a road map for achieving them. Although Rhode acknowledges that beauty bias may not be the single most pressing of the nation’s problems, she argues that it should not be completely ignored by the law. Our society’s current response to the issue leaves significant

12. The Biggest Loser (NBC television broadcast 2004–).
13. The Swan (Fox television broadcast 2004).
room for improvement—individuals, the media, employers, and the legal system all must work to effect change.

\[55\] The Beauty Bias is an approachable book on appearance-based bias and discrimination. The text is well written, and Rhode’s use of examples is both illustrative and entertaining. Extensive footnotes and a fully functional index support an engaging analysis of the topic, making The Beauty Bias a valuable potential addition to the collection of any public, academic, or law library.


Reviewed by Virginia Lougheed

\[56\] Peter M. Tiersma’s Parchment, Paper, Pixels: Law and the Technologies of Communication is an excellent look at the evolution of written language and the effects that this process has had on our legal system. Tiersma, professor of law at Loyola Law School Los Angeles, is the author of Legal Language\[14\] and the co-author of Speaking of Crime: The Language of Criminal Justice.\[15\] Though his Parchment, Paper, Pixels is an easy read, it presents a number of provocative ideas. Tiersma organizes his presentation into seven chapters, each separated into clear segments that provide examples of how written text affects various aspects of the legal system. Following an introduction, he begins with a brief history that traces how law has progressed from oral declarations to modern-day legal texts. Subsequent chapters expand his analysis with specific discussions addressing technological transformation as it relates to wills, contracts, statutes, and judicial opinions. In each, Tiersma strives both to point out how changes in communication have affected the legal system and to offer solutions that can help alleviate some of the issues created by technology.

\[57\] Tiersma’s colorful examples place Parchment, Paper, Pixels among the most enjoyable historical works on the development of the common-law legal system. For example, his chapter on wills includes an aside covering the use in Anglo-Saxon testaments of curses “invoking eternal damnation on anyone who refuses to obey the instructions in the document” (p.51). Examples such as this are scattered throughout the book, and they help to create a clear mental picture of historical legal proceedings.

\[58\] Tiersma also provides more thought-provoking examples to illustrate the issues created by technological change. For instance, while the introduction of the printing press enabled the publication of case law at a far quicker pace, this transformation led to an unfortunate level of variation in the text of opinions. As Tiersma points out, court opinions were recorded by a number of different reporters who individually transcribed proceedings, usually with a focus on what the lawyers, not the judges, had to say. As a result, very different—sometimes conflicting—opinions were developed and distributed. Tiersma’s example tellingly fore-


shadows the problems with authentication and accuracy that the introduction of computers and the Internet means for today’s legal system.

¶59 As the title Parchment, Paper, Pixels implies, computing represents the most recent transformation in communication technology. As with the printing press, the computer and the Internet are bringing massive change to our legal system. Tiersma not only illustrates the issues such change has created, he also suggests possible solutions for the problems that accompany change. One problem that applies with particular force to online licensing is that of information overload: given the excessive length of online terms and conditions and the “casual and relatively meaningless activity” (p.107) involved in clicking on an accept button, few web site visitors have any real understanding of the licensing agreements to which they regularly consent. As one possible solution, Tiersma submits that increased use of standardized clauses and agreements could help make these contracts “easier to process and understand” (p.110).

¶60 Parchment, Paper, Pixels provides great insights into the historical changes that have affected communication technology and the ongoing changes that create problems for today’s legal professionals. Technology is always in flux, and sometimes our legal system must change to keep up. I truly enjoyed Tiersma’s book, and I recommend it for everyone connected with the field of law and for the libraries that support them, since changes in technology and the written word affect us all. I especially recommend the title for mid-career and younger professionals, readers who will most appreciate Tiersma’s analysis of issues surrounding the increasing use of computers and the Internet.
Ms. Whisner ponders a core question in answering reference queries: How can we know whether what we find is relevant to what the questioner wants? Her article provides criteria to consider and some guidelines for choosing sources in response to a query.

1 Early in the school year, one of our reference interns asked how she should decide whether an article was relevant to a professor’s question. I joked that if she could figure that out, she could skip past the master’s program and go right for a Ph.D. in information science, writing a dissertation on “aboutness.” More seriously, we talked about specifics of the question. The professor had asked for articles discussing a particular aspect of humanitarian assistance. The intern hadn’t found entire articles on the topic, but had found some articles that discussed it for a couple of paragraphs or a section. I suggested that she send those articles to the professor with an explanation in her cover memo about why she was sending them.

2 This problem of selecting sources comes up whether researchers are doing work for themselves or (like the intern) for others. It is challenging because it involves concurrent judgments in different dimensions. There’s the intern’s question: Is this article relevant? But there are also questions of quantity (do we have enough? too much?), quality (is it reliable? authoritative? current?), and personal preferences of the requester.

What’s Relevant?

3 Not long ago, an LL.M. student came to the reference office and asked for help using Westlaw. She was doing an assignment that included a long hypothetical about financial transactions among various parties, followed by a question that asked for two relevant cases discussing whether a bankruptcy creditor could pursue certain assets. The textbook hinted that it would be easy to find the cases by first finding a relevant law review article. The student had typed some words into a natural language search, which of course returned one hundred articles, but she couldn’t see how to get from there to the answer.
¶4 After a long, confused conversation, I came to see the underlying problem: she had not studied the hypothetical closely enough to put the right words into her search or to recognize a relevant article when it showed up in the search results. At base, she did not have a good sense of the question to ask. I did not think it would help her education for me to state the question or construct a search or say, “Here, this article is relevant; look at the cases it discusses.” A big part of her learning experience should be wrestling with the hypothetical. So I encouraged her to reread it and to talk it over with her classmates so that she could try to state a better question and come up with search terms.

¶5 In the courtroom, “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹ A piece of evidence does not have a permanent label saying it’s relevant or it’s not. Relevancy “exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved?”² In research, relevant sources are those that tend to answer the question you’re working on. The LL.M. student’s natural language search retrieved articles that matched the words she’d typed in (according to the proprietary algorithm that approximates relevance), but because she did not have a clear question, she couldn’t spot which of the articles could help her figure out how to advise the hypothetical client. No question, no relevant sources.

¶6 Sometimes we need to work with patrons to help them form questions from the whirl of facts and problems they face. For instance, this unhappy statement: “My ex-husband moved out of state and now expects me to drive the kids to see him like I used to do when we lived in the same town. I just don’t have the time to be driving seven hours every Saturday. He can’t really expect me to do this, can he?” might morph into: “How can I get our parenting plan modified because of changed circumstances?” Reformulating the question makes it possible to find relevant materials to address it.

¶7 Reference librarians often are presented with well-formed questions: Are there any Washington cases discussing intentional infliction of emotional distress when the plaintiff was a bystander to the accident? Could you help me find recent law review articles on humanitarian aid after natural disasters? How many dialysis centers are there in the United States? How many kidney transplants are performed annually? What studies have looked at racial disparities in Washington’s criminal justice system? We might see ambiguities in some questions, but at least we have something fairly specific in front of us. We can ask for clarification if we need it or make our best guess and tell the requester our assumptions.

¶8 But having the question handed to us only saves us the first of several steps of analysis: (1) figuring out the question; (2) picking a database (or print source) that is likely to have relevant documents; (3) constructing a search (or choosing an index term) that’s likely to retrieve relevant documents; (4) skimming the docu-

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2. Id. comment.
ments to judge which are relevant; and (5) deciding which documents to use. I have seen people struggle—and I’ve struggled myself—at each stage.

Picking a database\(^3\) and constructing a search involve informed guesswork. What would a relevant document be? What would it look like? What words would it have in it, and in what relation? The next step after running a search—the process of determining which documents are relevant—requires fresh judgment. If I feel I was awfully clever constructing the search, then it’s tempting to think that almost everything the search retrieved is relevant—and that no documents were missed by the search. But there are often surprises. What seemed like a terrific search—great terms, appropriate synonyms, perfect subject headings or key numbers—can be a bust, retrieving nothing or a lot of irrelevant documents. It’s important to look at the documents and assess not whether they satisfy the search (of course they will) but whether they actually answer the original question. When I go fishing in article databases, I often find myself skimming dozens of articles and abstracts for every few that I select. And it’s common to have to go back a step or two, trying a different database or search. My first effort might not have been so awfully clever after all. Even if it was clever, it didn’t do the job.

**Which Source to Use**

Sometimes it’s clear when a source answers a question. For instance, if I want to know the date that the jury returned its verdict in the punitive damages phase of the *Exxon Valdez* trial, here is a good source:

**Source:** Joint Opening Brief of Appellants Exxon Corporation and Exxon Shipping Company at 7–8, In re: Exxon Valdez, 239 F.3d 985 (9th Cir. 2001) (No. 99-35898), 1999 WL 33622384.

**Answer:** “The class punitive claims were then tried in district court in a three-phased trial that commenced on May 2, 1994 and continued until September 16, 1994, when the jury returned a verdict awarding the class the enormous sum of $5 billion in punitive damages.”

This brief seems like a credible source: the legal team working on this multi-billion-dollar case must have had access to the trial record and also had a strong incentive to proofread carefully.

But a relevant, reliable source is not all a researcher wants. For some reason or other, I might prefer not to cite Exxon’s brief. Maybe I don’t want to appear partisan by using one side’s brief (or maybe I am partisan and don’t want to use Exxon’s brief because of my bias).

Perhaps it would look more scholarly to cite a law review article:

**Source:** William H. Rodgers, Jr., *Growth and Form: Indian Tribes, Terrorism, and the Durability of Environmental Law*, 26 VT. L. REV. 865, 869 n.21 (2002).

**Answer:** “See In re Exxon Valdez, 229 F.3d 790, 794 (9th Cir. 2000) (“On September 16, 1994, the jury awarded punitive damages in the sum of $5 billion, at that time the largest award of its kind in history.”)”.

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3. WestlawNext reduces the importance of this step—one can search across many databases—but one would still need to choose WestlawNext over, say, Google or a print source. And it is almost always more efficient to exercise some control over the databases searched.
However, instead of citing this law review article, I would probably prefer to go back a step and use the case that it cites.

¶13 But if I’m writing for readers who are not used to finding cases, I might want to cite something that’s easier to locate. And if I’m writing for the web, I might want something that I can link to that doesn’t require a password. In Google Books I find:


Answer: “The Sept. 16 verdict, which capped a 20-week trial over the nation’s worst oil spill, was the largest punitive damage award ever.”

¶14 The ABA Journal is a good, mainstream source. But I notice that the article about the September 16 verdict didn’t appear until the December issue. So I decide to look for contemporaneous coverage in the New York Times.


Answer: “A Federal jury in Anchorage yesterday ordered the Exxon Corporation to pay $5 billion in punitive damages to about 34,000 fishermen and other Alaskans who said they were harmed by the Exxon Valdez oil spill more than five years ago.”

This source might satisfy all of my wishes—reliable, respected, and easy for my readers to find.4

¶15 If the only goal is to learn the date, you could rely on any of these sources. It was only subjective preferences about what to cite that made me bother to look at the others. In day-to-day life, these preferences are generally unspoken—we search the New York Times rather than the Washington Post or Moore’s Federal Practice rather than Federal Practice and Procedure, just because we do—but preferences are there nonetheless. When we research for other people, we make judgments—explicitly or implicitly—about their preferences. If a professor asks me the date of the Exxon Valdez verdict, I won’t give him all the newspaper and magazine articles, briefs, cases, and books that have that piece of information. I will choose one or two, perhaps using the same considerations I discussed above.

¶16 Relevance isn’t everything. In a trial, the judge may exclude relevant evidence “if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”5 And when we are conducting research, whether for ourselves or others, we likewise may stop because of these considerations. Alas, there is not a handy meter that lights up when our piling up of sources becomes a waste of time or amounts to needless presentation of cumulative evidence. Again, we need to develop and use our judgment.


The Goldilocks Issue

¶17 We all have a little Goldilocks in us. A law student working on a law review comment wants there to be some articles on the issue (so she’ll have something to work with) but not too many (so her piece would be preempted). A lawyer trying to figure out a legal problem wants to find some good explanation (say, a chapter in a deskbook or a section in a treatise) but not too much (an entire treatise) or too little (a one-page bar journal piece). An undergraduate writing a term paper wants sources that are scholarly enough to help with his analysis (and satisfy the professor) but not so long or dense that they’re unreadable. We all want results that are just right.

¶18 But the hoped for sources are not always there. The able researcher needs to think about how to reshape the question to get something to work with. If your wish for a Washington case that concerns a very specific fact pattern doesn’t come true, then what? Look for Washington cases whose fact patterns might be analogized to yours, see if there are cases from other jurisdictions with similar facts, or look for secondary sources discussing the situation. If you really wanted a two-page overview article summarizing a complex area of law but can’t find it, you might need to resign yourself to skimming longer works. Or, as in the example I opened with, if the professor asks for several law review articles on a narrow topic and all that can be found are sections of articles, then sections will have to do. If she hadn’t found the porridge that was just right, an enterprising girl like Goldilocks could have made do, heating up the porridge that was too cold or cooling the porridge that was too hot.
Many law librarians tend to identify strongly with their work setting and set themselves apart from other types of librarians. Doing this may cause us to lose sight of what we have in common, and prevent us from advocating for ourselves in the future. Ironically, such separation also prevents us from truly examining diversity.

¶1 As I write this, the academic semester is in full swing. I’m juggling preparation of materials for my legal research class, trying to hire research assistants for the library, and getting used to the new reference schedule. Walking into the library, I remember I need to contact a few faculty members to see if they can do a class observation of a library colleague, and I also need to set up a meeting with another faculty member’s research assistants to frame a long-term project that will last through the summer. This afternoon, a meeting about the legal research teaching materials will lead to my revising them for the rest of the day (and probably tomorrow as well).

¶2 At the same time, I know that somewhere not far from here, a friend of mine is likely juggling just as heavy a workload. As the head of reference at a large law firm, she’s responsible for overseeing all reference questions that come into the firm’s New York library. She could be doing anything from giving a one-on-one database tutorial to a new associate to handling a partner’s urgent request for a source to running searches in legal and financial databases. I know working beyond the end of her official day is not an uncommon occurrence and, given the reality of law firm life, on average she probably has to deal with a larger population working under tighter pressure to meet deadlines than I do.

¶3 We have known each other for years, having worked at the same place, what seems like eons ago. Since then, I’ve moved a bit further into academia while she has started working in law firms. As is normal, I think, for most librarians who know each other, we occasionally ask each other for assistance when we’re trying to find something out of our usual realm of “expertise.” She’ll ask if I can find an older document that I might have access to and I’ll solicit her advice on the best way to navigate an unfamiliar database that I know she uses all the time.

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We get together when we can, laugh, reminisce, and share “war stories” from where we work. We talk about odd reference requests and the stress of our jobs, and we almost always share our impressions of student and attorney research skills. She’s always interested in what I’m teaching and how I’m teaching it, and I’m always fascinated by the research requests from her attorneys. While some things must be kept confidential, it has always been heartening to me to realize that we share some of the same joys and frustrations on a number of topics.

I don’t think our situation is an unusual one. We are both professionals, and I respect her knowledge and the work she does tremendously and she feels the same about me. What has always been great about our relationship is that even in the infrequent times we get together, we always find a lot in common despite our very different work settings and responsibilities.

I know that friendships like ours must exist throughout the profession—but it has always been a bit of a puzzle to me why there aren’t more of them. I accept that there are some “normal” divisions between academic, private, and court librarians or technical services, reference, and digital librarians, but I’m sometimes perplexed at how difficult it is for us to interact with one another on issues that affect the profession as a whole. In a previous column, I wrote about how I tend to identify myself as “librarian” first to the outside world, but when at the AALL Annual Meeting, I’ll say I’m an “academic” librarian to differentiate where I work. Doing this creates certain images in the minds of whomever I meet, just as when someone introduces themselves to me as a law firm, court, or public librarian, I have certain ideas in my head about their job responsibilities. Unfortunately, I think that there has been an increasing tendency in the past several years to create even stronger divisions within the profession based on where we work or what we do, when in fact, finding what we all have in common would probably do more to strengthen the profession.

For example: How many of us are frustrated by the limits on pay within our positions, upset by the lack of recognition by our larger organizations, or frustrated when dealing with a vendor or a vendor’s product? Who has smiled and gritted their teeth during a particularly difficult encounter with another individual you were trying to help? Who has struggled with the realization that they’re being asked to take on additional tasks or duties with less help? These are issues that concern all of us as librarians and as a profession. Yet for some reason we seem to focus on our individual groups when discussing these issues, and find it difficult to expand beyond those self-imposed boundaries.

Part of this, I’m sure, can be attributed to the limited amount of time we spend interacting with law librarians who work in different settings. Many of us have little time to chat with our colleagues in the same city, much less other regions or throughout the nation. It’s easier, too, to share your experiences with those who are closest to you in terms of job positions and responsibilities, because they are the people you interact with for work. Even at the Annual Meeting, it’s easier to catch up with old friends you haven’t seen all year than to venture out to another group

of librarians, simply because of time constraints. And as the economy, emerging technology, and our jobs pressure us to perform more (to justify our positions or just keep afloat), it can be truly difficult to move beyond the circles we already know.

¶9 My personal opinion is that the divisions within law librarianship will likely continue in the immediate future, and even if it could change, I’m not sure what approaches would work. But I worry that adhering to our old patterns of self-division may do more to harm our profession in the long run when it comes to issues such as complaints about the discussion of the overall state of and cost of legal education.2

¶10 The discussion that continues to swirl around legal education and the way lawyers are trained is not a new one. But the recent economic downturn has led to a closer examination of both the legal education model and the ability of law school graduates to obtain employment after amassing considerable amounts of debt.3 If law librarians fail to engage and involve ourselves in these larger discussions and ignore the criticisms leveled at the legal profession, we do so at our own peril. Perhaps the economy will improve within the next few years and there will be a collective sigh of relief throughout the legal landscape as things settle down and we regain our equilibrium. Or perhaps more law firm librarians will find themselves laid off to save on costs, and academic and court librarians will be told that no new staff can be hired or that open positions are being eliminated due to budget constraints. This could lead to many of us having little choice about taking on additional duties for fear of losing our current positions.


By nature, I’m not a pessimist. Yet I’m frustrated at times—at myself, at the profession, at the legal education system—with how we limit ourselves and our discussions of what could help us by keeping to the groups we know and rarely venturing beyond them unless pushed by some external force.

I know it’s difficult for each of us to find the time to even think about larger issues like “the profession” when we deal with our day-to-day lives. But I believe thinking about these larger issues is necessary if we actually want to diversify the profession. Finding ways to interact with each other and talk about what we have in common will help us understand that while the details of our jobs may be different, the frustrations and other feelings are the same. For instance: How many of us have been irked by unexpected changes to a system or product we relied upon? Or been flabbergasted by the lack of knowledge by someone assessing our work or our value to an institution about what we do on a day-to-day basis?

This is not to say that efforts to create communication channels among various law librarian groups don’t exist, or that these channels are not working as they should. In some areas, law firm and academic law librarians are reaching out to each other to discuss what students are learning in school and trying to figure out the best way to communicate to them what they’ll need once they’re out in the real world.4

But I think that we need to think about more ways to reach out to one another to find out how our different groups operate and how we work. Academic law librarians must articulate to students the level of knowledge that’s expected of them. Law firm librarians need to understand that the traditional law school curriculum doesn’t always allow librarians to teach students formally—but that most academic law librarians still manage to find ways to teach students the basics. Both groups need to hear from court and government librarians about what other types of attorneys or members of the general public need from the law library profession.

And perhaps my most radical thought: Law librarians need to realize we are truly part of the legal profession. Not on the edge, not on the periphery of it, hovering around like an outsider. We educate and teach future lawyers; we assist them in their daily work; we are responsible, in part, for what they do and how they do it. We make sure they have the tools they need to do their job, and many times we train them on how to use those tools. We belong in the discussion about the future of legal education, and how it is shaped, because we are the ones who often help fill in the gaps of what is missing when a new attorney starts out. And we are the ones who help senior attorneys learn new methods for retrieving relevant information.

I’ve often sensed hesitancy in librarians—not only in the legal profession, but in librarianship as a whole—to embrace the concept that our work is integral to those we support. Overall, librarians in general public libraries appear to be better at articulating their mission and their purpose to the communities they serve,

4. This could occur informally, as it does in my discussions with my friend who works in a law firm library. Or it may occur more formally, in settings like “bridge the gap” programs that help law students make the transition to working in their summer placements. In these, law firm librarians and academic librarians can work together to help make the program as useful as possible to students and future practitioners.
and those that do it best usually have a vibrant base of users who support them in good times and bad. Many public libraries (including several public law libraries) seem to be better than most of us at communicating why they’re a valuable asset to their communities—through marketing, through participation in and explaining how they enrich the life of their community, and by starkly laying out the potential losses to the community if their budgets or resources are cut.

¶17 In academia, I believe librarians have been somewhat protected from the perils of continually having to justify their existence because of ABA accreditation standards that require law schools to maintain libraries (though we sometimes fail at making our faculty, deans, or even students understand why that’s the case). In some law firms, a prosperous bottom line and clients who have traditionally not questioned billing practices for legal materials may have helped libraries as well. But the current questioning of the value of the legal education system and of the manner in which law firms conduct their business implies that our own positions are likely to be more rigorously questioned in the future.

¶18 This brings me back to finding common ground among the various groups in law librarianship and to the idea of diversity within the profession. On an individual level, I know that there are librarians in every type of legal setting who prove the value of their work to their organizations every day. I am confident that there are librarians in all settings and with all types of job titles and assigned duties who share the same pressures, frustrations, and fears about how their workplaces are evolving and what their place may be in that new arena.

¶19 So what stops us from harnessing that energy into promoting our value to the legal profession? Is it our lack of time? Is it our split into our self-imposed groups along types of legal settings? Is it a general characteristic of a “service” profession that we don’t speak up—or speak to each other—to share our strength? I actually think it is probably a combination of all those factors, but that our inclination to define ourselves by our differences is a significant factor.

¶20 Ironically, I think this type of separation inhibits a real discussion of diversity and examining the root causes of it. By labeling ourselves by the type of legal setting we work in, we make the same mistake of the legal profession and legal education at large—we limit the opportunities to see what we may have in common or that the repercussions of one action may reach further than is immediately realized.

¶21 Thus, another librarian may not realize that the trouble I might have teaching a student a certain concept in legal research is perhaps related to the trouble the student might have researching in a law firm a few years from now, or that it has an impact on knowing how to articulate an issue when he gets to the county library as a solo attorney. I may not be able to see that a law firm tightening its purse strings means that certain databases or sources I teach my students might not be available in practice, or that a small public law library cannot accommodate the sudden uptick in demand for certain types of materials.

¶22 If we don’t interact with each other, we won’t necessarily be aware of these connections. The lack of interaction and the continuation of the status quo means each group faces the potential evolution of legal education and the legal profession alone, as opposed to together. Doing so will likely mean that the profession as a whole will be further separated and diluted, and it will be more difficult to make
the case that law librarians should have a place in defining the future of legal education and its impact on the practice of law.

¶23 More importantly, by not recognizing what we all have in common in the first place, we make it more difficult to accept and acknowledge the differences that diversity can bring to the profession as a whole. Without understanding that we should be united in some very basic goals—that we are professionals with expertise, that we share the same feelings of frustration over certain developments in our jobs, and that we are all important to the larger legal profession—I think there’s little chance we can ever get past that to discuss diversity.

¶24 Then again, I’ve been able to see my friend regularly and remain in contact with her even though it has been more than ten years since we worked together. Perhaps there is room for optimism after all.
The authors discuss and debate the role of conferences in the professional life of a law librarian.

¶1 Christine Sellers: The 2011 AALL Annual Meeting in Philadelphia is fast approaching. Are you going?

¶2 Phillip Gragg: Definitely! I think AALL, in particular, is a time to recharge, renew, and recenter ourselves on law libraries.

¶3 CS: I hope to be going, as I’ve gone every year since 2006. I always look forward to it for a variety of reasons: learning about new trends, networking with other law librarians, seeing what other people are doing in their libraries, seeing new vendor products, etc.

¶4 PG: I see the Annual Meeting as a chance to review what we’ve done in the past, consider the progress we’ve made in the past year, and look toward the future—and those aren’t just pleasant platitudes. To me the academic year has a definite flow, and the AALL Annual Meeting is an important part of the academic cycle.

¶5 CS: There are also the business meetings of the committees and boards, which is the only chance all year for some face-to-face time. Although they tend to be only an hour long, I find these committee meetings can set the tone of the committee for the entire year. It’s also a great opportunity to hammer out who will be doing what and when. Conference calls fill in the gaps during the rest of the year, but it’s great to put faces to names.

¶6 PG: Yes, it is a great time to put names and faces together and to see our friends and colleagues who are literally scattered all over the United States. In addition to the socializing and networking that goes on, one of the most valuable things we get out of interacting with other librarians in person is that we have set aside time to ask, “How is your library doing this?” and “How is that working for you?” I view the libraries somewhat like the fifty states—each an experimental test bed of constantly changing features and services designed to satisfy each school’s unique constituency. Of course this occurs both informally, in the bars and hallways of the convention center, and formally, in programs.
CS: I submitted a program proposal this year on behalf of the Law Library of Congress. It was my first time submitting one, even though I’ve spoken on a panel at the conference before. There will be a panel of us speaking on THOMAS, the legislative information database. This touches on what I see as another purpose of conference attendance, and that is representing your employer. I’ve always thought of it as part of my job to be the best representative of the place where I choose to work. This representation can be formal, in presentations or meeting interview candidates, or informal, when talking about a project you’re excited to work on or how your workplace may have solved a problem.

PG: When we walk out into the professional world we take with us our aspirations and personal reputation, but we also are caretakers of our employer’s message and that of the parent institution. While I always enjoy hearing what people are working on personally, those reports also let me know how the library and faculty at a particular institution work together, how much support they receive for existing services and new initiatives, and what the future of the institution looks like. It’s also an opportunity for us to consider what institutions and which people we might like to work for in the future and which places and people we’d like to avoid. I will admit to being focused on the academic experience, but I’d imagine that for court and law firm libraries there is much useful information to be gained as well.

And, even though I work in public services, the most illuminating programs I have been to are technical services oriented. (When I attended CONELL in 2007, Cornell Winston suggested that we each attend at least one program per conference outside our comfort zone, and it is a great idea.) This might simply be because these programs shine the light of knowledge on my areas of greatest ignorance, but I have always believed that librarians should be conversant in all operations of the library, or better yet, knowledgeable. I rely heavily on technical services librarians to provide our patrons with the best quality service, so I try to keep my mind in both sides of the library.

CS: I also think the social aspect of conferences can be invaluable. As Walt Crawford has said: “The chance to get together with people you only see at such conferences and to meet people in the flesh who you’ve only known via blogs, chat rooms, and other virtual means may not sell conference attendance to management, but it adds some real value to the conference experience.”1 However, going to a conference isn’t just fun and games. Crawford also emphasizes resume building, professional and personal networking, association business, learning from those who know more, teaching what you know, sharing information and ideas, getting away for perspective and recreation, and having fun.2

PG: You’ll get no argument from me there, but I would point out that how and where people achieve those goals varies from person to person. I genuinely enjoy law libraries as a profession, and I have learned as much about management and teaching over a cold pint of beer with a sage mentor as I have in programs.

2. Id.
CS: Other librarians have also taken up the question about whether it’s right to have fun at conferences. Steve Lawson declared:

The fun also gets to the question of “what am I bringing back?” There is one thing you are sure to bring back from every conference: yourself. Did the conference make you more excited, more engaged with the problems of your library, more ready to tackle the next project or challenge? Then I’d say that you brought something valuable back.

These are questions we all struggle with to some extent, especially in times of budget constraint. What benefit is my employer getting out of my attendance at a conference? I think the quote above touches on something—that the benefit is sometimes intangible and hard to quantify. It doesn’t line up in numbers on a spreadsheet.

Well, you’re apparently preaching to the choir again, because I couldn’t agree more. If a conference does nothing more than inspire and reenergize an already productive employee, then there is a true return on investment. For many of our AALL member institutions, budget-constrained times have been with us for at least two fiscal years and promise to be around for perhaps another two years. During this time, I have heard of travel being restricted in a number of ways, not always intelligently. Indeed, there are difficult decisions to make when not everyone can attend, but having a rigid set of criteria might not serve the library staff and the patrons in the most effective manner.

Let’s take a rule, for example, that in order to attend a conference, a librarian must be presenting or on a committee. A newer librarian might have a difficult time getting on a panel or may be so new to the profession as to not have been able to sign up for a committee. But this person might benefit more from attending than any of her more experienced colleagues.

I think you’re right, but I also think it’s a tough balancing act for managers to decide who will or who won’t go to conferences, if such a decision has to be made. I think there’s a greater expectation of attendance for academic law librarians. In the law firm and government libraries where I have worked, conference attendance isn’t guaranteed. It simply can’t be with budgets the way they are.

Although we’ve primarily spoken of AALL as an example, there are other conferences out there. Smaller regional conferences for law librarians, such as SEAALL (Southeastern Chapter of the American Association of Law Libraries), and other librarian conferences, such as SLA (Special Libraries Association).

Oh yes, I almost forgot about SEAALL, where you and I first met! SEAALL was in Baton Rouge in 2007, although it had originally been scheduled for 2006. After Hurricane Katrina, the city was in no condition to host, so on short notice the conference was moved to New Orleans. The conference was a success, with a good turnout of attendees.

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notice the folks in North Carolina put together what I understand was a great conference (I was still in library school at the time). One year later, SEAALL was held in Baton Rouge. I served on the Local Arrangements Committee, and while it was a lot of hard work, we also had a lot of fun. Of course the culmination of our efforts were the programs and the receptions.

¶19 Another conference that I have attended that we haven’t yet mentioned is the annual meeting of the Association of American Law Schools (AALS). AALS just happened to be down the road in New Orleans in January 2009, so I was able to attend for minimal expense. Not only did I attend sessions on anthropology law and criminal law, but I went to a very enlightening session called “Deaning: Myths and Realities.” AALS is overwhelmingly attended by law professors and deans, but there is always a strong contingent of librarians (most of whom are library directors), and AALS offers several programs addressing library issues.

¶20 I was fortunate enough to attend again this year in San Francisco, and AALS put on a full-day workshop aimed at deans and librarians. What I have found is that the conversation has a broad perspective. It’s unlikely you’ll find much discussion about the new cataloging standards or a deep analysis of patron types, but what you will hear are all the factors that weigh on the mind of a director and, even more importantly, how the library fits into the overall picture of the law school. I think academic law librarians can benefit from this level of thought and conversation, especially those who aspire toward a directorship.

¶21 My interest in law libraries was created and fostered while I was in law school by the outstanding librarians I worked with at the University of Iowa College of Law. My goal in librarianship has always been to make the law student experience a meaningful and valuable one, and an AALS conferee will find that that is often the focus of conversation. Moreover, as people move up the chain of command in any organization, they will find themselves having to address a growing number of constituencies. Law library directors in particular are responsible for the library but also serve as senior-level managers on matters important to the school, but unrelated to the library itself. AALS addresses the universe of the law school, and pulls us out of our sometimes cloistered condition.

¶22 CS: Attending AALS, which is mainly a conference for law professors, relates to discussions in the blogosphere regarding librarians going to “client” conferences. Bonnie Swoger recently wrote a blog post on “why academic librarians need to stop going to library conferences.” She points out the “disconnect between the library world and the research world” and advises librarians to pay attention to what researchers are saying, as well as to participate in the discussion.4

¶23 Your discussion of AALS shows how much law librarians can benefit from “law” conferences. Another example might be a law firm librarian attending an American Bar Association (ABA) conference in order to make connections with attorneys. Although the attorneys in a law firm are in close physical proximity to

librarians, I know from experience that there can be a line between attorneys and librarians that a conference might help to erase. I don’t think attendance at these conferences dilutes our loyalty to librarianship, but instead broadens our horizons. As I write this, I’m getting ready to head off to the ABA Midyear Meeting in Atlanta, Georgia, so I can report back on the advantages of attending an ABA conference. Would you say that if it’s a good idea for law librarians to attend the same conferences as the scholars/customers we serve, then perhaps more of us should attend AALS?

¶24 PG: I’d agree with that. There are library-specific programs, but there are plenty of other topics discussed to keep the focus broader than the law library.

¶25 CS: But then don’t we somehow get back to budgets and money and there never being enough to attend one conference, much less two? How does one decide?

¶26 PG: One answer does not fit all, but I do have one suggestion. We are always looking for ways to maximize our budgets, so I’d suggest that those library directors who are in close geographical proximity to the AALS annual conference send one or two librarians. They might even be able to expand their travel/conference budget with a special request to the dean. AALS is in Washington, D.C., next year, so there are many court, government, and law school libraries that could send their librarians for relatively little cost.

¶27 CS: Well, I think no matter which conferences people are able to go to, we both agree attendance is important, for ourselves personally, the profession, and our employer.