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Universal Citation and the American Association of Law Libraries: A White Paper*

This white paper is a collaborative endeavor of many individuals, including members of the American Association of Law Libraries and its Digital Access to Legal Information Committee (DALIC), formerly the Electronic Legal Information Access & Citation (ELIAC) Committee. First, Justice Yvonne Kauger introduces the topic by identifying the groundbreaking steps taken by the Oklahoma Supreme Court. Law librarians Carol Billings and Kathy Carlson next provide a detailed and comprehensive history of citation reform and the American Association of Law Libraries’ leadership and involvement in the issue. They also summarize the citation reform steps taken in selected jurisdictions. Finally, John Cannan, current DALIC member, provides a look to the future, identifying reasons to advance needed citation reform now.

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* Timothy L. Coggins, Chair of the Digital Access to Legal Information Committee (DALIC) (2010–2011), John Cannan, and Jennifer Laws, current DALIC members, served as the general editors of the white paper and wish to thank the current members of DALIC and the members of the earlier ELIAC committees for authoring portions of the white paper, as well as their editing advice and help.
Foreword*

Yvonne Kauger**

¶1 It is with a sense of both history and promise that I commend to you this white paper devoted to the issue of public-domain citation to the opinions of our nation’s courts. My support for accessible citation also stems from professional experience. In 1997, we at the Oklahoma Supreme Court promulgated a rule requiring that citations to decisions issued after May 1 of that year use neutral citation principles and recommending neutral citation for earlier decisions as well. Thirteen years later, our citation rule remains in effect, with the strong support of both bench and bar.1

¶2 Readers are no doubt familiar with the aphorism that necessity is the mother of invention. The adage proved true in our court, where financial necessity prompted us to initiate citation reform—our county law libraries could no longer effectively manage the costs of commercial electronic resources. Our commitment to providing access to our decisions for the bar and the public led us to consider publishing our own citable opinions.

¶3 We had other reasons for change as well. The World Wide Web was just coming into its own, and the justices believed our court should maintain a web site. To establish the site and to resolve other technical problems, we employed our first information systems director, the talented and innovative Kevin King. Together with Greg Lambert, then the court’s library and information services director, Kevin worked with me and Justice Joseph Watt to institute and implement a new case numbering system and to publish our decisions on the web. In the five years that followed, we were able not only to post all new opinions using neutral citation, but also to format and enter every earlier Oklahoma Supreme Court decision since the first ones issued in 1890. In addition, our neutrally cited collection includes the past decisions of the Oklahoma Court of Criminal Appeals and the published decisions of the Court of Civil Appeals from 1968 forward. We have also been able to create our own “citationizer” feature that lists citing references for retrieved documents and even translates reporter volume and page numbers to corresponding neutral citations.

¶4 We did not achieve these benchmarks without some costs, but neither financial outlays nor personnel burdens were excessive. We are pleased with our system and how it has been embraced by the practitioners before our bench. Nevertheless, when the editors of this paper asked me to contribute words of encouragement to judges in other jurisdictions, I hesitated to assent. While our court systems all strive to interpret the law expeditiously and impartially for their constituents, each court does so with a unique set of constraints. I do not presume to instruct other courts in the business of citation and publication. I do, however, warmly endorse neutral citation as a tool for the judiciary, practitioners, and the public to access our decisions at modest cost. The paragraph citation form, issuing from the court, ensures

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* © Yvonne Kauger, 2011.
** Justice, Oklahoma Supreme Court, Oklahoma City, Oklahoma.
that pinpoint citation is quick and easy. Because our citation format is official, we burden neither ourselves nor others with the costs of commercially published, official versions.

§5 In this time of fiscal contraction, courts and their libraries seek new ways to economize. If your jurisdiction is considering a move toward a neutral citation rule, I invite you to review this white paper and to take the matter under consideration.
Reintroducing Universal Citation

Digital Access to Legal Information Committee

§6 It has been more than fifteen years since Judy Meadows, director of the State Law Library of Montana and then president of the American Association of Law Libraries (AALL), strongly stated our association’s support for universal citation in a column introducing AALL’s Universal Citation Guide. This white paper reaffirms AALL’s support for universal citation as applied to court opinions, honors those who first articulated its benefits, and urges its adoption by courts nationwide.

§7 For democracy to flourish, citizens must have ready access to information produced by their government. Government pronouncements inform the citizens of government actions. Certain pronouncements, such as court opinions and statutes, identify the rights and duties of the populace. As a matter of policy, these pronouncements should be freely and easily accessible to the people, and practices and policies that support accessibility should be adopted. Unfortunately, current citation standards serve to limit access to government information. These standards require the reference to a book to identify individual court opinions. Furthermore, more often than not, the book is published and owned by a private company, not the government entity that produced the opinion. In the past, such practices probably made the law more accessible to the people. However, with changing technologies, such standards no longer adequately address the objective of improving access to government information. A physical book as the unit of citation no longer best meets the goals of increased access. As a result of new technologies, public entities no longer need to rely on private entities to provide effective organization of their documents. Therefore, new citation standards that do not require citation to a specific format or that do not require citation to a privately owned item should be adopted. Universal citation practices promote accessibility because they are vendor- and medium-neutral.

§8 Universal (or public-domain or neutral) citation can best be understood by comparing it with current legal citation conventions. According to current citation standards, the official versions of most court opinions are labeled according to their placement in reporters. A specific opinion is labeled with the title of the reporter series in which the opinion appears, the volume number of the reporter, and the page number on which the opinion appears. The same opinion may appear in multiple reporter series and will, therefore, have multiple labels. When an opinion is reproduced in a digital format, the database provider will include the page numbers of the corresponding print reporter. Obtaining permission to post these numbers likely means arriving at a licensing agreement with the publisher of each version.

* Digital Access to Legal Information Committee (formerly the Electronic Legal Information Access & Citation Committee): Linda Defendeifer, Chair (2008–2009); Emily M. Janoski-Haehlen, Chair (2009–2010); Timothy L. Coggins, Chair (2010–2011).
2 Judy Meadows, President’s Briefing: Citation Reform, AALL SPECTRUM, July 1998, at 13, 14.
3 An example of the difficulties that can arise for a novice trying to navigate the existing citation system appears infra in the section on citation reform in selected jurisdictions.
4 For a brief discussion of the legal issues surrounding the ownership of electronic page numbering in published opinions, see Peter W. Martin, Neutral Citation, Court Web Sites, and Access to Authoritative Case Law, 99 LAW LIBR. J. 329, 355–57, 2007 LAW LIBR. J. 19, ¶¶ 59–66.
¶9 By contrast, universal citation does not identify a specific court opinion by referencing the reporter series title and page number on which the opinion appears. It labels government decrees or pronouncements with legal force, such as court opinions, statutes, and regulations, using a uniform set of symbols. A specific pronouncement is identified by the same label, regardless of the format in which it appears. Furthermore, the label is not based on a book. In its Universal Citation Guide, AALL recommends that courts number their own opinions.\(^5\) AALL believes that the citation of each opinion should flow naturally from the year in which it was issued and its order among other opinions issued that year. So, for example, in the fictional state of AALL, the first AALL Supreme Court opinion issue in 2010 would be Jones v. Lie, 2010 AALL 1, the second, Mahmoud v. Miller, would be 2010 AALL 2, and so on. This citation format gives the reader and researcher information about the case itself (the court of origination, the year, and sequence of issuance), rather than the vehicle in which it is published. In fact, universal citation effectively decouples a judicial opinion text from its appearance in any particular publication, print or electronic.

¶10 While universal citation serves the goal of improving the accessibility of government pronouncements, it has other benefits as well. For example, the traditional form of citation is to the page on which a particular piece of text occurred. Page numbers correspond to a physical entity. In a time when most cases, statutes, regulations, and other government pronouncements are born digital (i.e., electronic), the notion of a page has little relevance. Paragraphs, though, are clearly delineated in all published formats, print and electronic. Paragraphs also provide the advantage of relative brevity, making cited material easier to find. Paragraphs, unlike pages, represent units of thought showing the span of an idea, rather than the length of a sheet of paper. As more and more organizations enter the legal publishing game, the adoption of universal citation principles clears the way for these publishers to enter the fray on an even footing. No one entity can lay claim to the citation methodology that all others have to pay to use.

¶11 In the mid-1990s, the value of universal citation seemed evident to many in the legal and government communities. AALL enthusiastically supported the principles of universal citation and penned its Universal Citation Guide\(^6\) to promote it. Similarly, the American Bar Association (ABA) issued a report favorable to universal citation.\(^7\) AALL identified eleven states that had adopted or permitted citation reform by 1998 and ten other states that were considering such a change.\(^8\)

¶12 Unfortunately, the wave of citation reform crested in 1998. Courts in Arizona, Louisiana, Maine, Mississippi, Montana, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, Wisconsin, and Wyoming, as well as Guam, the Northern Mariana Islands, and the U.S. Court of Appeals for the Sixth Circuit, adopted elements of universal citation.\(^9\)

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5. See Am. Ass’n of Law Libraries, Universal Citation Guide ¶ 58 (2d ed. 2004).
6. Id.
9. See id. at 15.
However, no jurisdictions, other than Arkansas in 2009 and Illinois in 2011,\(^\text{10}\) have moved to do so since the early 1990s. The ABA has regularly reaffirmed its support for universal citation in a resolution,\(^\text{11}\) but no other major organization has joined AALL’s efforts with additional support.

\(^\text{13}\) While past efforts to implement citation reform stalled, several recent efforts to enhance citizen access to government information have begun. The Obama administration early on expressed a commitment to transparent government and citizen participation, including access to agency information.\(^\text{12}\) In the early part of his administration, President Barack Obama wrote, “Government should be participatory. Public engagement enhances the Government’s effectiveness and improves the quality of its decisions.”\(^\text{13}\) Participation and engagement require access to accurate and citable government information.

\(^\text{14}\) In another recent development, the National Conference of Commissioners on Uniform State Laws (NCCUSL) named a Study Committee on Authentication of Online State Legal Materials at its 2008 midyear meeting to address another important aspect of public access to legal documents—the reliability of the texts themselves.\(^\text{14}\) The study committee’s report and recommendations called for the creation of a Drafting Committee for the Authentication and Preservation of State Electronic Legal Materials Act.\(^\text{15}\) The drafting committee submitted the uniform act for a first reading at the NCCUSL’s annual meeting in July 2010, and at the time of writing, a second reading of the draft uniform act is scheduled for NCCUSL’s annual meeting in July 2011.\(^\text{16}\) Authentication and citation are two sides of the public access coin. Paired with universal citation labeling, authentic texts can provide the bench, the bar, and the public with reliable, permanent texts that can be referred to in unambiguous terms so that all may locate them.

\(^\text{15}\) Commenting on decisions by New York and California not to adopt universal citation, Peter Martin analyzed the fiscal and other benefits to both states of remaining within the print reporter system of citation. He observed that New York’s contract with a commercial publisher gives the state free computer equipment and other goods, while its Law Reporting Bureau retains editorial control of texts pub-

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lished in the reports. In contrast, California receives fewer goods, but outsources editorial work to the publisher, thus saving the costs of performing that work. If states as large and influential as New York and California take such divergent positions on the importance of editorial control, what is the citizen to believe about the level of text authentication as part of the operations of the government entity that promulgates the document? In the same way, if a citizen cannot determine how to refer to a court opinion when discussing it, how is he or she to proceed convincingly in a court action?

¶16 It is the hope of AALL and others that the recent movement to enhance citizen access to information will renew interest in universal citation standards and that earlier opposition to the adoption of universal citation will diminish. The jurisdictions that have adopted their own case numbering systems still make their texts available to commercial publishers, and those publishers continue to provide opinions in print and online versions, with many valuable enhancements. But the natural constituents of the courts—citizens, lawyers, and librarians—can easily find, read, and work with the court-provided texts as a public good. Should they require more sophisticated tools, value-added commercial content is available. Every day, legal researchers use tools, such as indexes, classification systems, cross-references, analysis, and commentary, fashioned by publishers like the Bureau of National Affairs, CCH, LexisNexis, Thomson/West, and Wolters Kluwer. We do not believe the value those tools provide would be diminished if every court in the land were to begin today to follow universal citation formatting practices. Public and private sectors must work together to ensure that citizens have choice in their selection of legal materials, including robust collections of universally citable authentic legal documents.

¶17 AALL is committed to supporting universal citation. If you are a judge, bar association or nonprofit officer, law faculty member, law librarian, or member of the public interested in promoting universal citation in your own jurisdiction, we encourage you to work with us.

17. Martin, supra note 4, at 351, ¶ 48.
18. Id. at 351, ¶ 49.
AALL and the Dawn of Citation Reform*

Carol Billings** and Kathy Carlson***

¶18 That a democratic society should afford all of its citizens complete and equitable access to the laws that govern them is central to the tenets of AALL.¹⁹ Prior to the 1970s, law libraries sought to fulfill their mission by acquiring comprehensive print and microform collections and by employing competent staff to assist researchers who came in search of information. The information technology revolution offered dramatic new options for the delivery of legal information.

¶19 In 1971, the United States Department of Justice created the Justice Retrieval and Inquiry System (JURIS), a system of computer-assisted legal research tools to access records from an experimental Air Force system. Shortly thereafter, a private company, Mead Data Central, introduced the electronic legal research system LexisNexis, and soon the West Publishing Company marketed Westlaw to attorneys and the courts. Smaller publishers developed CD-ROM collections of court decisions. LexisNexis and Westlaw offered the promise of faster, wider-reaching access to legal research materials for the far-flung legal community, regardless of the user’s proximity to a law library.

¶20 Both federal and state courts, seeing the potential to save time and money, employed information technology experts to develop their own computer networks to exchange and disseminate opinions electronically. Users of electronic opinions who referred to court opinions in briefs, subsequent opinions, and other legal communications needed a standard citation method that could be understood by anyone reading their work. At the time, the only universally accepted citation standards were those that relied on the physical volumes and page numbers of printed books. Those standards, set forth by the editors of The Bluebook, mandated reference to either the official reports published by government agencies or to the volumes in the National Reporter System published by the West Publishing Company.²⁰ Both government entities and commercial publishers recognized the advantages that the digital revolution offered. However, when they sought to market subscriptions to compilations of court opinions in online and CD-ROM formats, they immediately ran up against the copyright claims of the West Publishing Company to the page numbering of opinions in its reporters.

¶21 West’s strongest competitor, LexisNexis, then owned by Mead Data Central, began to include West reporter page numbers in its electronic versions of reports to

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* © Carol Billings and Kathy Carlson, 2011. “A Vendor and Medium-Neutral Citation Events Time Line,” compiled in 1994 by Hazel L. Johnson, then AALL’s Public Relations Coordinator, greatly assisted in the reconstruction of the citation-related events between 1971 and 1994 (on file with authors).

** Director (Retired), Law Library of Louisiana, New Orleans, Louisiana.


20. At that time, the case citation rule was A UNIFORM SYSTEM OF CITATION R. 1:2 (11th ed. 1967) (“A case . . . should be cited to both the official and the West reports . . . .”). The current version is THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.3.1(b) & tbl.1 (19th ed. 2010).
render them citable under Bluebook standards. A series of lawsuits and countersuits by the two companies ended in a confidential settlement whereby Mead paid West large licensing fees to insert the numbers in its LexisNexis opinions.21 Smaller would-be publishers faced the same obstacle, because they were not part of the settlement.

¶22 Federal courts, not content to allow private publishers to limit access to their work product, began issuing opinions on electronic bulletin boards, known collectively as EDOS (Electronic Dissemination of Opinions System). To secure the advantages of interchanging court and government-generated information electronically, a broad-based consortium of groups and individuals within the legal community formed JEDDI (Judicial Electronic Data and Document Interchange) in 1990. That same year, AALL adopted a resolution supporting “Public Access to Government Information in Electronic Format.”22 Following the U.S. Supreme Court decision in Feist Publications, Inc. v. Rural Telephone Service Co., stating that a work must show creative spark and originality to warrant copyright protection,23 the Judicial Conference of the United States and Administrative Office of the U.S. Courts prepared proposals for electronic citation systems.24 Law librarian representatives of AALL contributed copyright expertise at congressional and Judicial Conference hearings on the proposals.25

¶23 After both congressional and Judicial Conference citation reform attempts failed, the Justice Department issued a Request For Proposal (RFP) to acquire database content for its JURIS system, but only the West Publishing Company met the requirements of the RFP. Advocating that the Justice Department provide for online public access to noncopyrighted materials through JURIS, both AALL and the advocacy organization Taxpayer Asserts Project petitioned Attorney General Reno on July 7, 1993, to amend the request. When West withdrew data that it had leased to JURIS since 1983, the Attorney General shut down JURIS.

¶24 In that same month, December 1993, Louisiana became the first state to adopt a public domain citation format through an order of its Supreme Court.26

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The format proposal grew out of the Taskforce on the Cost-Effective Provision of Information Resources for Louisiana Courts, appointed by Chief Justice Pascal F. Calogero, Jr. Chief Calogero, having been encouraged by the state law librarian, realized that opening the legal publishing marketplace to competition might save the courts money while improving their access to legal information. Prior to the mandatory application of the new citation format for all post-1993 opinions in July 1994, the West Publishing Company vigorously opposed the change, attempting to arouse concerns among the bar and lower courts.

¶25 Louisiana’s action focused attention on the benefits derived from facilitating the transmission and use of legal information in electronic form. In January 1994, the U.S. Court of Appeals for the Sixth Circuit initiated a one-year trial of a new nonproprietary parallel citation for electronically disseminated opinions.27 A month later, at the ABA meeting in Kansas City, the bylaws of the JEDDI Committee of the Science and Technology Section were officially adopted “to secure the advantages of electronic interchange of information for state and federal courts, agencies at all levels of government, lawyers in private practice, and other persons and organizations involved in the American judicial system . . . .”28 Other publishers of digital information asserted the right to make their products citable. On February 1, 1994, the Matthew Bender Company filed suit for a declaratory judgment in U.S. District Court in Manhattan, seeking the right to insert the page numbers of West reporters in CD-ROM publications of New York–based federal court cases. The court granted the judgment, which the Second Circuit would eventually affirm on appeal.29 That spring, the Colorado Supreme Court announced that the state’s appellate opinions would carry paragraph numbers, which could be used for pinpoint citations as an alternative to West page numbers.30

¶26 Law librarians were anxious to join the ABA’s JEDDI committee in its effort to facilitate the interchange of electronic legal information and were concerned that decentralized efforts could result in Balkanization of citation requirements. AALL assumed a leadership role in promoting uniformity of public domain citation formats. In April 1994, AALL president Kay Todd appointed the Task Force on Citation Formats, comprising law librarians, several legal publishers, and a state reporter of decisions “to consider and develop non-medium citation forms” in cooperation with other groups in the legal community.31

¶27 Bruce McConnell, chief of the Information Policy Branch of the Office of Information and Regulatory Affairs of the U.S. Office of Management and Budget, invited AALL, represented by Robert Oakley, director of the law library and professor of law at Georgetown, to a meeting to discuss issues related to government information policy, including citation systems. Other participants were the Government Information Working Group of the Information Infrastructure Task Force’s Information Policy Committee, the Department of Justice, the Library of

30. Hansen, supra note 27, at 79.
31. See The Final Report of the Task Force on Citation Formats, supra note 25, at 577.
Congress, the Administrative Office of the U.S. Courts, and the National Center for State Courts.

¶28 Meanwhile, the State Bar of Wisconsin’s Technology Resource Committee had begun studying citation reform and the possibility of establishing a digital archive of that state’s judicial opinions. The committee’s report and its recommendation of a public domain citation format were approved by the Wisconsin State Bar Board of Governors on June 22, 1994.32 Within a few months, a petition requesting adoption of a medium-neutral and vendor-neutral citation format had been sent to the Wisconsin Supreme Court. West vigorously opposed the change. Not until 1999 did the court adopt a rule implementing the new system, which required parallel citations to the *Wisconsin Reports* and West’s *North Western Reporter.*33 Nevertheless, the Wisconsin State Bar and then state law librarian Marcia Koslov deserve special recognition for creating and championing the format that has served as the elegant model for subsequent formats adopted by AALL, the ABA, and other jurisdictions: case name, year of decision, court designation, opinion number, and paragraph number—for example, *Smith v. Jones*, 1998 WI 453 ¶ 82.

¶29 The autumn of 1994 was a period of intense interest in citation reform. In September, AALL wrote to Attorney General Reno, requesting that the Department of Justice, in its RFP for a contract for computer-assisted research services, require the provision of an unenhanced compilation of court opinions and the use of a public domain citation format.34 The department issued such a request on September 27. Both the Taxpayer Assets Project and the Department of Justice sponsored meetings of publishers and other parties interested in adopting public domain citation systems. Following the issuance of a first draft of the report of the AALL Task Force on Citation Formats on September 4, and a second discussion draft on October 4, AALL’s executive board adopted and disseminated a resolution in November supporting the concept of a vendor- and medium-neutral system of citation and “free or low-cost public databases that provide access to public domain legal and law-related information.”35

¶30 The “citation war of words” that was waged in the mid-1990s between advocates for reform and supporters of the West Publishing Company’s position was heavily reported in the legal press.36 Heated arguments filled government, bar, and law librarians’ bulletin boards, Internet discussion lists, and the conference programs of law-related organizations. The controversy generated a great deal of interest throughout the legal community, and many judges and bar association

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leaders were eager to become involved in citation reform efforts or at least to find out what advantages their jurisdictions might derive. This facilitated the objective of AALL’s Task Force on Citation Formats:

- To consider and develop non-medium-dependent citation forms for legal materials;
- To work with the judiciary, the bar, the American Bar Association’s Judicial Electronic Data Interchange (ABA JEDI) committee, the Bluebook editors, and other groups to promote uniformity of citation reform; and
- To serve as both a clearinghouse for information on citation reform and a resource for jurisdictions considering citation reform.37

Throughout its deliberations, the task force corresponded and shared information with advocates for reform and with judges and bar association leaders considering involvement.

¶31 The task force completed its charge in early 1995,38 and AALL held a National Conference on Legal Information Issues in conjunction with its annual meeting in July in Pittsburgh. It was the goal of conference planners to focus the national legal community’s attention on the opportunities and challenges presented by the electronic information revolution, including issues such as citation reform. Many judges, government officials, and bar leaders participated as speakers and delegates in the conference sessions, and most of them participated in a formal introduction session and dinner with selected AALL members the night before the annual meeting began. The AALL business meetings featured vigorous debates about the task force majority’s recommendation that a public domain citation system be endorsed by the association. Dissenting statements were issued by task force members representing publishers and reporters of decisions.39

¶32 At the end of the annual meeting, AALL’s executive board voted to approve the suggested format for judicial opinions, but deferred action on a format for statutes. Because the task force had completed its work, the executive board disbanded the task force, created a new standing Committee on Citation Formats, and charged the new committee with creating a set of universal citation rules for American law.

¶33 Only a few weeks later, the ABA established its Special Committee on Citation Issues. Professor Rita Reusch, the chair of AALL’s Committee on Citation Formats, was invited to serve as liaison to the ABA committee. The ABA committee’s report, recommending that all jurisdictions adopt a medium-neutral citation format similar to the AALL and Wisconsin models, was issued in May 1996.40 It evoked a mixed response from the Conference of Chief Justices. Although the ABA committee had solicited views from all of the chief justices individually, the Conference was clearly displeased that it had not been consulted as an entity during the committee’s deliberations. Consequently, although deeming it “appropriate for state courts to plan for improvements in state citation systems that will recognize

37. The Final Report of the Task Force on Citation Formats, supra note 25, at 583.
38. Id.
40. Am. Bar Ass’n, supra note 7.
the importance of the electronic media and establish a level playing field between print and electronic reporting of state court decisions,” the Conference resolved that it was “premature to adopt any particular plan for change in citation systems before [it could] obtain reliable answers about the manner in which any changed system would operate and the costs that such a changed system would entail . . . .”

¶34 Assisted by the National Center for State Courts, the chiefs would undertake their own study. Nevertheless, in August 1996 both the Board of Governors and the House of Delegates of the ABA approved the special committee’s resolution that all jurisdictions adopt a medium-neutral citation format similar to the AALL and Wisconsin models. In January 1999, the Committee on Opinions Citation of the Conference of Chief Justices, chaired by Chief Justice Shirley Abrahamson of Wisconsin, issued its report. While the report did not include a recommendation, it set forth detailed practical information about the process of instituting a medium-neutral citation system. The advantages being enjoyed by the Oklahoma judiciary as a result of its establishment of an electronic database of opinions and adoption of a universal citation format were described favorably in the report.

¶35 Advocacy for the new universal citation format endorsed by AALL, the ABA, and Wisconsin soon spurred other states to move quickly to undertake reforms. North Dakota, whose state librarian, Ted Smith, took the initiative to encourage the Supreme Court to consider action, launched a web site offering its decisions by August 1996. The court soon mandated use of a new citation system for application on all documents filed in North Dakota courts. Their citation format was based on AALL’s model, which had already been adopted by South Dakota. North Dakota’s web site, created and maintained by Supreme Court Justice Dale Sandstrom, has set a standard for “best practices,” offering excellent search capability and a regularly expanding collection of retrospective opinions.

¶36 The other state that warrants special mention is Oklahoma. Like North Dakota’s Supreme Court, Oklahoma’s justices, led by then Chief Justice Yvonne Kauger and future Chief Justice Joseph Watt, took the bull by the horns and moved quickly to implement neutral citation. Effective May 1, 1997, their new rule encouraged use of the “official paragraph citation form” on past as well as prospective decisions. Within five years, the Oklahoma Supreme Court Network (OSCN) database, masterminded by staff members Kevin King and Greg Lambert, encompassed all Oklahoma opinions back to their beginning in 1890. All were tagged with neutral citations, thus rendering the Oklahoma legal community independent of commercial providers of the state’s opinions and other primary legal documents.

42. Am. Bar Ass’n, Proceedings for the Annual Meeting of the House of Delegates, in Am. Bar Ass’n, supra note 7, at 1, 18.
44. Id. at 11.
45. Martin, supra note 4, at 337, ¶ 14.
46. Id. at 338–40.
To this day, Oklahoma enjoys the benefits of this country’s most comprehensive legal information system provided by a state judiciary.

¶37 From 1995 forward, AALL actively encouraged other states to adopt citation reform. Following its creation that year, AALL’s Committee on Citation Formats met regularly to develop a guide for the neutral citation of all types of government-issued legal documents. Drafts of rules for judicial decisions, constitutions, statutes, and administrative regulations were published in *Law Library Journal* for review and comment by AALL members and other interested parties.47 Throughout the process, committee members communicated and consulted with others interested in citation issues, including the Conference of Chief Justices, various state courts, the ABA and state bar associations, law school legal writing instructors, and law librarians abroad. In 1999, the State Bar of Wisconsin published the AALL committee’s *Universal Citation Guide*, whose lead author was Lynn Foster, the committee chair. Drafts of guides for citing law reviews, court rules, and administrative decisions subsequently appeared in *Law Library Journal*.48 By the end of 2007, seventeen states had adopted vendor-neutral citation rules.

¶38 The question remains why other states have not acted to gain the independence of their primary documents from commercial publishers by creating digital archives and adopting neutral citations. Early opposition to public domain citation adoption had much to do with projected costs. Some of the warnings were quite daunting. One writer, dissenting from the conclusions of the AALL Task Force, wrote: “Governments cannot afford to restructure court operations, adopt costly new procedures, purchase expensive new computer equipment, hire additional staff and establish new computer databases to accommodate an untried and unproven new vendor and so-called medium neutral citation system intended to facilitate the distribution and marketing of court opinions . . . .”49 In the same vein, coauthors Bergsgaard and Desmond urged that government be kept out of the citation business, on the authority of a cost study done by Arthur Andersen & Company estimating direct costs to Wisconsin taxpayers of at least $195,000 the first year, and at least $155,000 each subsequent year, to institute a public domain citation system.50 The study posited additional, indirect costs from lost productivity because of the “imprecise nature” of a new citation format.51

¶39 However, as early as 1999, it was reported by jurisdictions that were adding sequential opinion numbers or paragraph numbers that no additional costs were associated with these activities, that the numbering of opinions and paragraphs was

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47. *The Universal Legal Citation Project: A Draft User Guide to the AALL Universal Case Citation*, 89 LAW LIBR. J. 7 (1997); *The Universal Legal Citation Project: A Draft User Guide to the AALL Universal Statutory Citation*, 90 LAW LIBR. J. 91 (1998); *The Universal Legal Citation Project: A Draft User Guide to the AALL Universal Regulatory Citation*, 90 LAW LIBR. J. 509 (1998).


49. *The Final Report of the Task Force on Citation Formats, supra* note 25, at 631 (dissenting opinion of Frederick A. Muller).


51. *Id.* at 61.
a mechanical process, and that several states had developed macros or software techniques for adding the necessary numbers and were willing to share these tools with other jurisdictions.\footnote{Conf. of Chief Justices, supra note 43, at 6.} Adopting jurisdictions generally found that they could customize citation with commonly used commercial software products. Some jurisdictions also found that adoption brought unexpected benefits in the form of price breaks on vendor subscriptions.

\footnote{Id. at 349–52, ¶¶ 45–51.} In an insightful article, Peter Martin also noted other reasons for opposition to neutral citation.\footnote{Id. at 352, ¶ 52.} A number of states, notably several large ones with complex judicial systems and numerous bar members, still judge it financially advantageous to contract with a private publisher for their “official” case reports, and publishers have provided them with perquisites to retain their business.\footnote{See id. at 362, ¶ 80.} Martin also identified “institutional resistance” and judges’ insensitivity “to the issues of cost and inconvenience pressed by the lawyers, librarians, and small publishers who favored the reform.”\footnote{See id. at 362, ¶ 80.} Major changes within the legal information marketplace have lessened pressure for reform. Some major publishers have lowered prices and offered customers advantageous flat-rate subscriptions, and a number of smaller publishers have devised favorable products and discounts to attract the practicing bar. Several state bar associations have teamed with publishers to offer online research services as a privilege of membership. Ironically, the very multiplicity of electronic case law sources accessible at reasonable prices has dampened the enthusiasm of judges and lawyers for reform.

\footnote{Id. at 357, ¶ 65.} So why should we care whether efforts move forward to establish public archives of case law and neutral citation formats for citing their contents? Martin’s Law Library Journal article supplies some answers to this question as well. With the decline of reliance on print case reports and the prevalence of computer-assisted research, it makes no sense to cling to a citation system that depends on print volume and page numbers. Commercial publishers acquire case reports from court web sites, and the necessity of inserting page breaks into “born digital” texts to avoid the risk of West’s copyright infringement claims is unnecessarily costly and time-consuming.\footnote{See id. at 362, ¶ 80.}

\footnote{Conf. of Chief Justices, supra note 43, at 6.} Unfortunately, the copyright issue has never disappeared. The U.S. Supreme Court has denied certiorari on the Second Circuit’s decisions regarding West’s copyright claims,\footnote{Id. at 357, ¶ 65.} and thus other publishers either continue to license National Reporter System pagination or exclude it completely, making their reports difficult for users to cite.\footnote{See id. at 362, ¶ 80.} Although the cost of contracting for computer-assisted research service has become less burdensome, discerning which product is best to use remains confusing even for large law firms, let alone small practitioners and libraries that serve the public. With so many versions of case reports offered by multiple publishers, who may or may not be verifying the accuracy of their texts with the
issuing courts, how is a user to know if the text before him is authentic? The risk of discrepancy is especially worrisome in instances where post release revisions have been made to a case report. §43

In short, the status quo is unacceptable. Court systems that continue to rely on commercial publishers to archive and disseminate their decisions are taking a chance on the permanence and authenticity of their recorded case law. Failure to adopt uniform citation rules that can be universally understood by anyone conducting legal research makes finding the law more difficult. The law belongs to the people. Access to the law should not be hindered either by cost or by outdated citation standards that favor particular publishers. All American appellate courts owe it to the public to disseminate their opinions without charge via easily searchable government web sites. Oklahoma and North Dakota have demonstrated that state court systems can establish and maintain complete, continuing digital archives of their case law without undue cost or burden on staff. They and numerous other states have successfully adopted public domain citation formats that judges, lawyers, court staff, and the public understand and use without difficulty. AALL eagerly anticipates continued work with its partners in the legal community to reform the way legal information is disseminated and to improve the quality of justice for all people.

59. Id. at 363, ¶ 82.
Implementing Citation Reform in Selected Jurisdictions*

Carol Billings** and Kathy Carlson***

¶44 This section presents more details about citation reform in selected jurisdictions, including citation reform history in those jurisdictions.

Louisiana

¶45 It was the goal of the creators of the vendor-neutral format to ensure fair competition in the legal publishing marketplace and to promote cost-effective access to legal information by the courts, the bar, and the public. In Louisiana, this idea was put to the test. Multiple would-be publishers of Louisiana opinions in CD-ROM format had sought to introduce their products to the legal community but were stymied by West’s copyright claims to the pagination of its reporters. Since Louisiana’s official reports ceased publication in 1972, the only method for citing a state court opinion was to refer to West’s Southern Reporter. The Louisiana Supreme Court, at the urging of Carol Billings, its librarian, surmised that allowing competing publishers to enter the market could lower prices and make legal information more affordable.

¶46 On December 17, 1993, endorsing the recommendation of a subcommittee of the Task Force on the Cost-Effective Provision of Information Resources for Louisiana Courts appointed by its chief justice, the Louisiana Supreme Court adopted a public domain citation format for citing all of the state’s post-1993 appellate decisions. On July 1, 1994, the rule, Section VIII of the General Administration Rules, became mandatory for filings in Louisiana appellate courts.61

¶47 The format adopted by the court consists of case name, docket number, court abbreviation, decision date, and slip opinion pagination for pinpoint citing. This format represented a compromise between the devising subcommittee, which advocated numbering the opinions and the paragraphs within them, and the court, which was concerned that changing procedures in clerks’ offices might incur additional costs and labor. Later efforts to amend the format met with continued resistance, and thus Louisiana’s format is unique in its reliance on docket numbers and page breaks. Nevertheless, the vendor-independent system has operated satisfactorily for fifteen years. When the Supreme Court and Courts of Appeal began posting their opinions on the Internet upon release, it was possible to cite them immediately.

¶48 The desired goal of making published decisions more affordable was met soon after the new court rule was adopted. Prior to its issuance, West and LexisNexis were the only providers of Louisiana opinions. When West had been the sole CD-ROM publisher, its price was $3500 for cases from 1945. Soon Michie and Loislaw released CD-ROM opinions, and West lowered its price significantly, thus

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60. Information in this section is based on the recollections of Carol Billings.

giving buyers a choice of three products in the range of $600 to $1200 for an annual subscription, complete with updates. Louisiana lawyers and judges eagerly embraced electronic legal research in their offices, and the Supreme Court and Courts of Appeal soon began issuing their opinions electronically, making them available and citable quickly and at no cost to anyone with Internet access.

**Montana**

¶49 Montana court personnel did not have the luxury of a long lead time to implement citation reform. State Law Librarian Judy Meadows had informal conversations with Justice James C. Nelson about adopting the universal citation format. Justice Nelson drafted a proposed order mandating reform, and the court adopted it and held public hearings within approximately two weeks. A copy of the adoption order was disseminated to interested publishers, who immediately began implementing the court’s requirements. Court support personnel were tasked with putting the order into effect. Initially, judicial assistants had trouble finding the word-processing code for adding the paragraph numbers to the opinions, but the process soon became routine. The court did not invest in new software or incur any other incremental expense to implement its system.

**New Mexico**

¶50 The New Mexico Supreme Court, after the filing of an order mandating citation reform, asked the state law library to number its opinions in the same order as they were found in the *New Mexico Reports*. Further, the court requires citation to paragraphs rather than page numbers. Paragraph numbers are inserted as the opinions are written. The library prepares a parallel table showing the official citation along with the *New Mexico Reports*, the *Pacific Reporter*, and the *Bar Bulletin* citations. Over time, the workload of posting and indexing the opinions has proven to average approximately four hours a week. It is shared by the New Mexico Compilation Commission and the court library. The New Mexico Supreme Court considers this a “no-brainer” and an obligation in order to give the public access to the law, according to current state law librarian Robert Mead.

**North Dakota**

¶51 The North Dakota Supreme Court embraced neutral citation in early 1997 by issuing an adoption order and a citation rule. In rough parallel with its implementation of neutral citation, the North Dakota Supreme Court launched a web site where it began to post its opinions. The site initially offered decisions dating back to 1993, but they now go back as far as December 1965. The court’s decisions

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62. Information in this section is based on E-mail from Judy Meadows, State Law Librarian of Montana, to Kathy Carlson (Aug. 12, 2008) (on file with authors).
63. Information in this section is based on E-mail from Robert Mead, State Law Librarian of New Mexico, to Kathy Carlson (Aug. 12, 2008) (on file with authors).
from the neutral-citation era, 1997 to present, can be retrieved with equal ease by any and all redistributors. As a consequence, even low-cost and free law sites can offer post-1996 North Dakota decisions with full citation information.

§52 North Dakota’s system allows wide dissemination of its Supreme Court opinions. Its web site is an open public resource. Because the site does not block indexing by Internet search engines, a search on Google for “Sandberg v. American Family Ins.” retrieves the decision, as does a search on that decision’s neutral citation “2006 ND 198.” The same search additionally leads the researcher to the case docket, which provides links to an audio file of the oral argument and the parties’ briefs.

Oklahoma

§53 The story of Oklahoma’s adoption of neutral citation, in the face of mounting unpaid charges for vendor legal materials, has been well recounted both by its implementers and by third parties. However, the details of implementation are less well known. According to Greg Lambert, who was the Oklahoma state law librarian, the court built its opinions database from scratch using Microsoft products, illustrating that exotic products or custom-built software are not required for self-publication. The Oklahoma experience also shows that the determination of judges and the boldness and perseverance of court administrators can revolutionize the publication of a state court’s opinions.

§54 Oklahoma Supreme Court opinions are stored on a SQL Server database. In initially populating the database, the proximity of Oklahoma City University proved fortuitous. At the inception, the court hired law students for a few hours per week to input old cases and help add current ones. The texts were authenticated by double entry. At the front end, the opinions appeared in Microsoft Word. Although the justices used WordPerfect, their versions were converted, with particular attention to footnotes and numbering to resolve differences between the two software products.

§55 Also fortuitous for Oklahoma was the new vendor Loislaw. The court worked with Loislaw to obtain its own cases back as far as 1950. It then added paragraph numbers and uploaded the texts.

§56 Thanks to court personnel, notably Greg Lambert, the state law librarian, and Kevin King, who was the MIS director for the court, as many processes as possible were automated, including the conversion from WordPerfect to Word. Eventually, the court added links within decisions to its own cases and statutes in connecting databases, using macros to find citations. King dubbed this home-grown citation system the “citationizer.” The court built an index that included older cases.

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66. Information in this section is based on Telephone Interview with Greg Lambert, Info. Serv. Dir. & Records Mgr., King & Spalding LLP, Houston, Tex. (Jan. 28, 2009) (notes on file with authors).
Utah

¶57 In Utah, which implemented its own citation form via a standing order, universal citation case numbers are assigned to the opinions by a list kept in the secretaries’ main directory. The number is assigned when the opinion is ready for final review before publication. The directory in turn is managed by the Clerk of the Supreme Court and a designated secretary. Paragraph numbers are entered by WordPerfect macros used by all of the legal secretaries.

My memory is that it was fairly simple . . . . We did have to refer many calls to the actual language of the standing order. However, the order was quite clear and easy to implement once read by those who needed it. We did have some time for a year or so when it wasn’t used by all. The courts were patient with this adjustment time until it became the practice. In addition, the Bar has always been good to help us advertise this kind [of] change with notices and publications they may do. I think these changes are best if training and advertisement of the change [are] provided to counsel and the public.

Wisconsin

¶58 Like Oklahoma, Wisconsin invested some programmer time in customizing its citation form. Once the universal citation format was adopted, the court’s IT staff made additions and changes to several internal databases that store the court’s docket data and case search engines. The costs amounted to programmers’ time to make the changes, with no new software or hardware purchases required. IT staff also created a program that both assigns and tracks case numbers. The use of paragraph numbering pre-dated the adoption of the new case numbering system.

Wyoming

¶59 Wyoming State Law Librarian Kathy Carlson approached then Chief Justice Larry Lehman with a proposal for Wyoming to act as the beta site for the Oklahoma State Courts Network (OSCN) case database to make Wyoming Supreme Court decisions from 1990 to the present freely available to the public through the Internet. However, the ability to undertake the project was conditional upon the adoption of the universal citation format, given the proprietary dispute regarding page numbering in West’s Pacific Reporter. Justice Lehman took the proposal to the Wyoming Board of Judicial Policy and Administration (the judicial branch administrative decision-making body in Wyoming), who decided to embrace the new citation format. The chief justice drafted and signed an order adopting the format.

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69. Information in this section is based on E-mail from Jessica Van Buren, State Law Librarian of Utah, to Kathy Carlson (June 23, 2008) (on file with authors).


71. E-mail from Jessica Van Buren, supra note 69 (quoting Pat Bartholomew, Clerk of the Utah Supreme Court).

72. Information in this section is based on E-mail from Jane Colwin, State Law Librarian of Wis., to Kathy Carlson (June 23, 2008) (on file with authors).

73. Information in this section is based on the recollections of Kathy Carlson.

60 Implementation was simple and straightforward. A paragraph-numbering macro was loaded onto each judicial assistant’s computer, and paragraph numbers were added as opinions were written. A log of case numbers was established in the Supreme Court Clerk’s office and posted in the court’s shared files. This process continues in effect. Immediately prior to publication, the judicial assistant accesses the number file and claims the next available case number. The law library posts the decision into the OSCN database, through which the decisions are freely accessible to all.
Whither Citation Reform?

John Cannan**

¶61 Abraham Lincoln began his “House Divided” speech, during his unsuccessful 1856 campaign for the U.S. Senate, with this proposition: “If we could first know where we are, and whither we are tending, we could then better judge what to do, and how to do it.” The same could be said for the state of vendor-neutral citation—where are we now and whither are we tending?

¶62 Unfortunately, the answer to where we are now with vendor-neutral citation is: not much further along than we were back in the mid-1990s during the citation war of words and the introduction of AALL’s Universal Citation Guide. In fact, there has been some recent backsliding. In 2009, the U.S. District Court for the District of South Dakota abandoned its form of public domain citation,76 and the U.S. Court of Appeals for the Sixth Circuit has abandoned its vendor-neutral citation requirement.77 An exception is Arkansas, where the Supreme Court adopted a new neutral citation system. For all published decisions issued between February 14, 2009, and July 1, 2009, and all decisions issued after July 1, 2009, the citation shall reference the case name, the year of the decision, the abbreviated court name, and the appellate decision number. Parallel citations to the regional reporter, Southwestern Reporter, Third Series, if available, are required. If the regional reporter citation is not available, then parallel citations to unofficial sources, including unofficial electronic databases, may be provided.78

¶63 As to whither vendor-neutral citation is tending, it appears to be in a holding pattern. But there has been at least one encouraging sign as well. Just before this article went to press, the Illinois Supreme Court announced it was implementing a new public domain citation system to go into effect in July 2011.79 The need for the system is still recognized. The ABA continues to urge state judiciaries, bar associations, academic institutions, professional organizations, and interested individuals and entities to implement vendor-neutral citation.80 AALL’s DALIC committee meets regularly to discuss the advocacy of such a system. But there have been few concrete steps in other jurisdictions toward adopting and implementing such a system.
system. Other stakeholders are looking for AALL to lead in pushing vendor-neutral citation to the next level.

¶64 In the meantime, the need for a vendor-neutral system has grown more urgent. The legal information field continues a steady transition from paper to electronic resources on all levels. Yet there is not a concurrent movement to implement a modern citation system that can accommodate digital resources and how they are used. As a result, while the information revolution has been fruitful for legal research, it has not been completely beneficial for legal information access.

¶65 The legal information access problem occurs as paper resources are increasingly being replaced with digital versions. In the past, any patron who had access to a law library had access to the information in print legal information materials. Increasingly, however, these volumes are disappearing from libraries. Digests and citators are rarely used, and many institutions no longer subscribe to them. Even the familiar sight of West reporters on law library bookshelves may be a thing of the past as they are moved into on-site or remote storage. Inevitably, money and space, the traditional challenges of any law library, necessitate the cancellation of more and more subscriptions to paper materials in favor of digital versions. Even the end of the print law review has been advocated.\(^\text{81}\) Of course, many of these materials are still available electronically. However, commercial databases are often not accessible to all library patrons as paper resources are.

¶66 This erosion of access should be countered by the emergence of freely available legal information produced by legislatures, executive agencies, and judiciaries. New information sources do present new forms of access, but their full impact is impeded by traditional citation formats.

¶67 Many jurisdictions have web sites for their own legal information, providing online versions of bills and laws. In some cases, digital copies of government documents are a parallel official form to the print versions. Some jurisdictions have stopped publishing print publications of certain government materials altogether. Maryland contemplated making its Maryland Register, the periodical for notice of the state’s executive, judicial, and legislative actions, available solely online in PDF format. This proposal was later repudiated, thanks to the efforts of local law librarians,\(^\text{82}\) but other states are leaning toward reducing print access to government information in favor of digital versions.\(^\text{83}\) All states and many federal appellate courts publish their opinions online. The federal judiciary’s Public Access to Court Electronic Records (PACER) service provides online access to most U.S. appellate, district, and bankruptcy court records and documents for a modest fee (and there has been a strong movement to make PACER materials freely available).\(^\text{84}\)


\(^\text{83}\) For example, Pennsylvania just added a definition of the term “copy” to its regulations, defining it as a “print or electronic version.” 1 Pa. Code § 1.4 (2011).

Private information entities are also making an unprecedented amount of legal information freely available. Google Scholar has a search function for federal and state case law and legal journal articles. Other free services making cases available online include Justia, Findlaw, lexisONE, Fastcase’s Public Library of the Law, and Cornell Law School’s indispensable Legal Information Institute.

Despite this wealth of information, citations to digital sources are still paper-based, and this fact ironically limits their accessibility. Current citation forms are wedded to material found in the print, usually commercially produced, volumes. They present those using the information for legal research and writing with inefficient extra steps in their work. To cite a reference in a digital source, the researcher must obtain the physical reporter volume to find the correct page in the print version. Many new information services do not provide pagination at all. While Google’s legal search contains commercial reporter pagination, it does not provide the same for official state reporters. This creates a bizarre citation situation if the cite to the reporter page is not yet available. For example, a blogger writing about recent court decisions that would eventually appear in West’s Federal Reporter has to resort to “—F.3d—” to cite to cases. While a reader could probably piece together enough information to find the case, such a citation does not promote ease of access or efficient research.

Those trying to create their own information resources face the problem in reverse. If they want to craft a citation not related to paper, they must also go to the physical reporter volume to collect the necessary information (e.g., the date the opinion was released and a docket number). Both researchers and database developers must still refer to print sources just as they are becoming less and less accessible.

In a recent article, Ian Gallacher describes how this legal research “two-step” inefficiency hampers research and the creation of new legal information resources. Gallacher uses an invaluable database such as PACER as an example of how traditional citation thwarts the innovation of free legal products. Because federal law citations are based on paper-based reporter volumes, rather than the docket numbers used in PACER, the recovery of a case from PACER necessitates the additional effort of locating the print reporter citation.

This inefficient process only works at all if there is a case in print form that can be cited. Some federal district court cases may not be published in case reporters, and therefore are particularly difficult to cite. For example, a researcher using a

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85. Ian Gallacher, Cite Unseen: How Neutral Citation and America’s Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law, 70 ALB. L. REV. 491 (2007).
86. Id. at 519 (footnote omitted).
PACER decision must use an inelegant and confusing *Bluebook* slip opinion citation. Meanwhile those with access to commercial databases will use their source’s database identifiers for their citations. This situation could create a citation Tower of Babel, with researchers citing their own information-source identifiers instead of using a single citation form.

§73 A vendor-neutral system has the potential to answer many of these challenges and can serve as a starting point for answering other questions facing the legal information community today. Vendor-neutral citation reduces the inefficiencies of the current paper-based system and liberates legal information so that it may be used more freely. The growing limitations to access disappear because decisions are identifiable as soon as they are issued and can be used from any source: government, commercial, or open access. The source is also identifiable no matter what medium is used to present the data. A researcher will have the tools from a vendor-neutral citation to locate information in any database, whether it is in PDF or HTML format. Further technological opportunities will emerge as well, because there will be one standardized format linking all opinions.

§74 If the potential of vendor-neutral citation seems far-fetched, consider how some jurisdictions that have implemented it are using it to provide free information products. Vendor-neutral citation for cases is now being used by Australian, Hong Kong, Irish, British, and Canadian courts. Because these jurisdictions use vendor-neutral citation, entities from the free access to law movement, the legal information institutes (LIIs) or private nonprofit institutions dedicated to legal information access, have been able to more easily construct databases of legal information.

§75 The Australasian Legal Information Institute (AustLII: www.austlii.edu.au), British and Irish Legal Information Institute (BAILII: www.bailii.org), Canadian Legal Information Institute (CanLII: www.canlii.org), and Hong Kong Legal Information Institute (HKLII: www.hklii.org) all have databases of case and, sometimes, statutory law. The Pacific Islands Legal Information Institute (PacLII: www.paclii.org), a “prototype system” of legal information from several South Pacific islands created by the University of the South Pacific School of Law and AustLII, has also fashioned such a database. It collects court decisions from its covered jurisdictions and assigns them vendor-neutral citations. Even better, the systematization provided by vendor-neutral citations—case name, court abbreviation, unique numerical identifier, and year of decision—has helped these LIIs create a means to search all their databases simultaneously, a single search facility found at the World Legal Information Institute (WorldLII: www.worldlii.org).

§76 Ivan Mokanov, deputy director of LexUM, an information technology company that supports CanLII, believes a broader use of vendor-neutral citation would make dissemination of freely available legal products even easier. For instance, CanLII created Reflex, an online, vendor-neutral-citation-based citator with hyperlinks to cases cited, cases relied on, related cases, and cited legislation.87 According to Mokanov, a broader use of vendor-neutral citation could make the web itself a citator. “Basically, if all cases were identified with a neutral citation, there would be no need for a citator, such as Reflex. If this was the case, all citations

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would be parsed, processed and resolved automatically at a cost which would be even more affordable for free law publishers.  

¶77 Mokanov’s point is crucial. A vendor-neutral system, such as the one in the *Universal Citation Guide*, is better suited for online information access and dissemination than its traditional paper-based forebears. Because AALL’s vendor-neutral system systematizes citation and gives each case a unique identifier, it better lends itself to computer processing and online publication. Its format resembles database identifiers and formats such as XML. Traditional citation was not designed to function outside of print materials. For example, a reporter volume and page number could refer to several court orders or opinions found on the same printed page, thus making the use of these automated processes much more difficult, if not impossible.

¶78 Vendor-neutral citation not only can spur the creation and development of legal information products, such as those pioneered by the LIIs, but also has the potential to support other digital initiatives, such as online reference and the effort to make law reviews available digitally. Paper-based citation does little to advance digital reference. A law librarian citing a page in a print reporter can do little to help a patron who does not have access to that reporter. A vendor-neutral citation reduces the need for the print reporter in that reference transaction. Furthermore, vendor-neutral citation supports other open government/open law activities such as authentication. Two principles behind authentication are that (1) government authorities should provide access to verified complete and unaltered legal information; and (2) legal information should be preserved for future use. Even if government legal information is authenticated properly, what use is it if a researcher does not have the basic tools to cite to it? It stands to reason that if state legislatures, executive authorities, and agencies want their information in electronic legal information environments they have to ensure it will be usable as well as authentic.

¶79 This is not to say that a vendor-neutral system is a silver bullet. There will still have to be a fine-tuning of any citation system. Editors of *The Bluebook*, now in its nineteenth edition, can attest to that. One item that AALL might have to grapple with soon is a deceptively simple question—what is and is not a paragraph? According to Tom Bruce from Cornell Law School’s Legal Information Institute:

This is harmful if the goal is to be able to machine process back files or indeed prospective material—it takes something that is computationally as easy as identifying two carriage returns separating a couple of chunks of text, and instead turns it into a fifth-generation artificial-intelligence project involving natural-language understanding.

¶80 Returning to the question of whither we are tending: we are at a crossroads. We can stay on the path we are on now and continue to use a paper-based citation system that is ill-suited to the modern age, or we can adhere to and continue to develop a vendor-neutral citation system that provides access to and aids the development of online legal information. The time to decide which path to take is now.

88. E-mail from Ivan Mokanov, Deputy Dir., LexUM, to author (Apr. 28, 2010) (on file with author).

89. E-mail from Tom Bruce, Research Assoc. & Dir., Legal Info. Inst., to author (Apr. 14, 2010) (on file with author).
WestlawNext, Thomson Reuters’s newest electronic research service, has now been around for over a year. Professor Wheeler shares his thoughts on how this service may impact various aspects of legal research, and suggests that further study and research are necessary to fully evaluate and understand the system.

Introduction

While there are numerous electronic legal research services and tools offered by many information vendors, Thomson Reuters’s newest Westlaw enhancement, WestlawNext, is causing law librarians and legal researchers nationwide to sit up...
and take notice. This article examines WestlawNext and attempts to identify a few possible effects that it may have on legal research. This is not an empirical study of WestlawNext; rather, it is intended to be an anecdotal discussion of my impressions of the product and its potential impact. Its purpose is to share my thoughts on this product and to provoke both a larger discussion and further research. The article first describes WestlawNext and explains some of its unique features. Second, it examines the process of performing traditional legal research and the factors important to that process. It then looks at some of the effects that WestlawNext will have on the legal research process—in particular its effect on finding esoteric content and how that could alter the practice of law, and its effect on broad searching. Next, the article discusses the role of choosing a source in the current legal research environment and explains how WestlawNext changes that role. Finally, it considers WestlawNext’s pricing and its impact. Throughout, I hope to shed light on what legal researchers and teachers of legal research should think about when attempting to use and teach WestlawNext effectively.

**What Is WestlawNext?**

WestlawNext is the latest iteration of the Westlaw legal research database service. WestlawNext was introduced in February 2010 and began rollout in the summer of 2010, and it represents a significant departure from how online legal research databases have traditionally worked. It has been described as revolutionary, ground-breaking, and as “Google for lawyers.” But there are really three features that distinguish WestlawNext from classic Westlaw. First, it has a brand-new search engine. Second, it allows users to search without having to first choose a database. Third, its pricing formula is radically different from that of classic Westlaw. Each of these distinguishing features is addressed separately below.

WestlawNext’s new search engine is called WestSearch, and WestSearch really is revolutionary. Although the secret of WestSearch is closely guarded, like the secret recipe for Coca-Cola, Kentucky Fried Chicken, or McDonald’s Special Sauce, here are some of the ingredients: WestSearch is a result, in part, of “watching hundreds of legal professionals do research and analyzing Westlaw logs.” It employs an algorithm that “automates the process of applying Key Numbers,

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4. Throughout this article I will refer to the standard web-based version of Westlaw as classic Westlaw.
KeyCite, and secondary sources . . . to find additional critical documents and then ranks them with the most important documents at the top of the results list.” The algorithm learns which documents are important or useful “from the aggregate usage of WestlawNext researchers, based on users’ ‘meaningful interactions’ with the results—when [a] user prints, emails, or KeyCites [them].” Thus, “the great results produced today improve even more over time.” The algorithm employs the collective knowledge or input of thousands of Westlaw users. My own research experiences with WestlawNext seem to support the company’s claims. I have performed numerous searches in WestlawNext, pursuing answers to what I thought were challenging research questions, and the results have been remarkable.

WestlawNext also allows users to search without having to first choose a database, while classic Westlaw does not allow users to search until they select a database. This new feature is considered by some to be “big news.” Because Westlaw has more than 40,000 databases, avoiding choosing will almost certainly save time. Users no longer “have to know where the answer is before looking for it.” They can now merely type in a search and begin searching. Once a search is completed, WestlawNext displays a faceted search result that groups the resulting hits into categories such as cases, statutes, and secondary sources, allowing researchers to jump directly to a particular type of document.

Finally, the pricing structure for WestlawNext is radically different from the one used for classic Westlaw. Under the transactional pricing scheme, classic Westlaw users are charged a set amount per search, and that amount depends on the database being searched. Larger databases typically cost more to search. However, once a search is completed, opening documents from that initial search does not carry any additional cost. WestlawNext charges researchers $60 per search and approximately $15 for each document opened within a search result.

The Process of Legal Research

There are some essential components of the legal research process that have stood the test of time. A working knowledge of legal sources and the ability to

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7. Id.
8. Id.
11. Id.
12. Id.
13. Users may choose a jurisdiction or a database before searching, but it is no longer required.
15. WESTLAWNEXT PRICING GUIDE FOR COMMERCIAL PLANS (Feb. 2010), available at http://west.thomson.com/pdf/librarian/L-356047.pdf (hereinafter WESTLAWNEXT PRICING GUIDE). This is Westlaw’s transactional billing charge; there are other pricing plans. See id.
16. Id. While the charges for viewing documents vary greatly depending on the type of document, according to this pamphlet, $15 is a conservative average for basic primary source materials.
17. Amy E. Sloan, BASIC LEGAL RESEARCH 1 (4th ed. 2009) (discussing the importance to legal research of understanding the different sources of law).
identify appropriate sources of law are two such components.\textsuperscript{18} Knowledge of the structure of U.S. law is another.\textsuperscript{19} A working knowledge of legal sources means knowing that an array of reporters, codes, indexes and finding aids, treatises, practice guides, and online systems do exist. The ability to identify appropriate sources of law is not only the ability to distinguish common law questions from statutory questions, but also the ability to choose which source is best to answer these questions. Knowledge of the structure of U.S. law means understanding courts and court levels, legislatures, administrative agencies, and all that they produce. Legal research experts have emphasized these three components as paramount for decades.\textsuperscript{20}

Choosing a Source

\textsuperscript{7} Choosing a source is one of the first steps in tackling a legal research problem.\textsuperscript{21} Traditionally, before researchers can begin either print or electronic research, they must decide which book or database to start with. This initial choice of a source shapes the entirety of the research process. It can determine if the process will be lengthier than necessary, whether false leads will be followed and dead ends encountered, whether key terms and terminology will be adequately and authoritatively defined, and ultimately whether a complete, correct, and authoritative answer will be found. The initial choice of a source is crucial.

\textsuperscript{8} The process of choosing an appropriate source is often based on some prior knowledge or experience. Frequently, law students will begin researching any legal research problem by searching for cases. This choice is based on their exposure to cases in their doctrinal law school courses.\textsuperscript{22} The issue they are researching may be controlled by a statute or by an administrative regulation. Nevertheless, their decision to search for cases first is informed both by their heavy exposure to cases and also, perhaps, by their lack of exposure to statutory law, administrative law, and secondary sources of various kinds.

\begin{footnotes}
\textsuperscript{18} Nancy P. Johnson, \textit{Best Practices: What First-Year Law Students Should Learn in a Legal Research Class}, 28 Legal Reference Services Q. 77, 80 (2009) (“For students to relate to legal research, they must know how and when to use the materials”).

\textsuperscript{19} Morris L. Cohen, \textit{How to Find the Law} 2 (7th ed. 1976) (discussing the need to understand “the organizational structure of published legal materials”).

\textsuperscript{20} For examples of books that have emphasized this throughout the past century, see, e.g., Frederick C. Hicks, \textit{Materials and Methods of Legal Research} 43–44 (1923) (stating the chief means of legal research as being law books that are broken into categories like source books, expositions of the law, compilations, and indexes); Cohen, supra note 19, at 2–4 (discussing the factors determining the methods of legal research as including knowledge of the multiplicity of sources and the characteristics of sources); J. Myron Jacobstein, Roy M. Mersky & Donald J. Dunn, \textit{Fundamentals of Legal Research} 18 (7th ed. 1998) (noting the importance of deciding which sources to use, which not to use, and the order in which to use them); Laurel Currie Oates & Anne Enquist, \textit{Just Research} 17 (2d ed. 2009) (discussing the importance of knowing what sources are available and how to find information in those sources).

\textsuperscript{21} Morris L. Cohen & Kent C. Olson, \textit{Legal Research in a Nutshell} 32 (10th ed. 2010) (discussing first steps and emphasizing that it is often wise to begin with a secondary source).

\textsuperscript{22} Robert C. Berring & Elizabeth A. Edinger, \textit{Finding the Law} 4 (12th ed. 2005) (“[M]ost of the first year of law school is spent reading and analyzing excerpts of cases as presented in case-books.”).
\end{footnotes}
An experienced legal researcher bases the initial choice of a source on her knowledge (or lack thereof) of an area of law. An attorney may know an issue is controlled by state statute and will thus begin by searching a state annotated code. A law firm librarian, familiar with the firm’s environmental law practice, might begin a search in federal regulations. A third researcher who is experienced but completely unfamiliar with the area of law he is investigating might begin with a legal encyclopedia or a search of the law journal literature. In all three cases, the choice of a source is informed by either a familiarity with the law, or knowledge of what particular legal sources can and cannot do, or both. Choosing unwisely can often result in confusion, wasted time, futile and expensive searching, and frustration.

Knowledge of Particular Sources

Having a complete and well-informed understanding of the various sources of legal information can drive the entire research process and determine its duration and success. In particular, there are a few sources, discussed below, that are commonly misunderstood or underutilized.

Knowledge of secondary sources, their authority, their role in the research process, and how they function is an important component in the legal research process. “Secondary sources are usually more straightforward and try to explain the law.” For inexperienced researchers, secondary sources can provide much needed background, explanation, and grounding in the law. Secondary sources can help a researcher achieve greater understanding about how the law works, discover idiosyncrasies or peculiarities in a particular area of law, discover exceptions to or modifications of the law, and gain insight into how the law in question is applied practically. For these reasons, secondary sources are often recommended as the starting place for legal research.

The usefulness of starting with secondary sources often seems counterintuitive to inexperienced researchers. Beginning with primary sources or the actual law seems like the more logical and direct approach. This misconception is understandable. When beginners are looking for the law, it appears to make sense to begin searching sources of primary law. Nevertheless, once researchers comprehend the shortcuts and explanations that secondary sources can offer, they will seek out secondary sources when embarking on new research projects in order to save time. Thus, cultivating and reinforcing an understanding of such sources can be quite valuable.

Knowledge of databases containing pending and proposed legislation or regulations can be useful in a completely different way. Detailed information about likely changes in the law can drive both academic and practice-oriented research in entirely new directions. It can suggest courses of further investigation, and it can also dictate the appropriate research approach. Legislation proposed or pending in one jurisdiction might prompt researchers to investigate similar legislation and its

23. See COHEN & OLSON, supra note 21, at 32.
24. Id. at 32.
25. See, e.g., COHEN & OLSON, supra note 21, at 32; Johnson, supra note 18, at 93.
effects in other jurisdictions. Proposed or pending regulations governing pollution control might prompt detailed scientific inquiries involving news and other sources that are not, strictly speaking, legal sources. Having an awareness of the availability and usefulness of sources containing pending or proposed law can be essential in certain fields.

¶14 These two examples, secondary sources and sources of proposed or pending law, illustrate why many legal research experts conclude that knowledge of sources and the ability to identify appropriate sources are essential to the legal research process.

Knowledge of the Structure of U.S. Law

¶15 Knowledge of the structure of U.S. law and U.S. legal institutions both informs the legal research process and is reinforced by it. Researchers who can identify the three branches of government (legislative, executive, and judicial), the types of documents that flow from each branch, when and where these documents are published, which publications are official, and how to find these documents clearly have an advantage when beginning a legal research project. A researcher may be clear that she is looking for a case, but unless she knows which jurisdiction and which court level is appropriate, her research will be more involved. A researcher who is clear that he is looking for a statute will become confused unless he knows something about jurisdictions, the differences between codes and session laws, and how (and when) statutes are updated. Additionally, doing research using both codified and uncodified versions of legislative acts and using cases from different court levels and jurisdictions helps to reinforce the structure of U.S. legal information to a researcher. Having to choose between and among sources is itself instructive.

What Are the Effects of WestlawNext on Legal Research?

The Algorithm’s Crowdsourcing Effect on Finding Esoteric Content

¶16 WestlawNext is a powerful legal research tool that the company claims produces very accurate results. Researchers throughout the legal community are praising the results they get from WestlawNext. Nevertheless, there are likely to be particular types of results that are more difficult to find using WestlawNext because of its crowdsourcing attributes.


¶17 “Crowdsourcing had its genesis in the open source movement in software,” and that movement revealed several fundamental truths:29

[L]abor can often be organized more efficiently in the context of community than it can in the context of a corporation. The best person to do a job is the one who most wants to do that job; and the best people to evaluate their performance are their friends and peers who...will enthusiastically pitch in to improve the final product, simply for the sheer pleasure of helping one another...30

These concepts have been applied in various contexts, including wiki creation (e.g., Wikipedia) and web searching (e.g., Google). Thomson Reuters has now applied these concepts to legal information retrieval with WestSearch.

¶18 WestlawNext capitalizes on the wisdom of its users by “monitoring key actions after the search results are returned. WestSearch takes actions like ‘print’, ‘save’, ‘folder’, and ‘view’ that a searcher performs and logs that information for future reference.”31 Actions from previous searches, which have been logged and stored in the WestSearch knowledge base, help to inform and influence future search results. This collective information from the “crowd” of Westlaw users “potentially rank[s] items higher or lower in the results list” for each WestlawNext search.32 Law student data, and perhaps all academic account data, are not used to inform the WestSearch algorithm.33

¶19 So, what does this mean for the average legal researcher? Most of the time, the vetting of results via a crowdsourcing algorithm will produce a result that is desirable and useful for a researcher. Why is that the case? It is because “diverse groups of problem solvers—groups of people with diverse tools—consistently outperform[] groups of the best and the brightest.”34 A group with functional diversity displaying “differences in how people represent problems and how they go about solving them” always “outperform[s] homogeneous groups” as well as “the best individual agents.”35 This concept is called the “Diversity Trumps Ability Theorem.”36 When this theorem is applied to legal research, years of search results gleaned from unrelated, functionally diverse Westlaw users should understandably yield better results than any single Westlaw researcher.37

29. Id. at 8.
30. Id.
32. Id.
33. See Greg Lambert, WestlawNext—Some Issues Answered, 3 GEEKS AND A LAW BLOG (Feb. 15, 2010, 10:23 A.M.), http://www.geeklawblog.com/2010/02/westlawnext-some-issues-answered.html (reprinting a response from Anne Ellis, senior director of librarian relations at Thomson Reuters, indicating that law student research is not a part of the WestSearch algorithm).
36. See HOwE, supra note 28, at 132.
However, there are certainly times when researchers are looking to find the stone left unturned, the less popular result, the most esoteric tidbit of legal information, or the item that has not been viewed, printed, saved, or put in folders by members of the crowd. In fact, particularly in the academic environment, it is often the case that the obscure or less popular results are exactly what are needed. Often academics are doing research to advance their scholarly agendas for publication. It is important in academia to write about unique ideas or concepts, or to approach a topic from a different point of view, because the most popular or most used information has probably already been written about. Legal scholars, therefore, often look for legal oddities, unfamiliar concepts, breaking news, and rulings or decisions that are different from the current state of the law. Legal scholars and creative thinkers also write about changing the law or the effects of proposed changes. The desired results for these sorts of research inquiries may not fall within the collection of results considered useful by the masses. WestlawNext’s search algorithm may rank seldom-viewed documents lower than frequently viewed documents, which may require the user to scroll down significantly to locate such items. Perhaps these esoteric items will not display at all. This phenomenon of less popular results getting buried or potentially not appearing at all is worthy of examination.

To test this idea, I ran the following search in WestlawNext in an attempt to discover whether or not it is lawful to use deadly force to defend a motor vehicle in the state of Georgia: **deadly force defend motor vehicle Georgia.** I did not limit


39. *See Bernard Schwartz, Main Currents in American Legal Thought* 566 (1993) (“It is the ‘academic scribbler,’ more than the judge, who is setting the themes for the developing law.”).

40. It is unclear whether results that have never been viewed or printed will appear in a WestSearch result. As of March 17, 2011, no one at Thomson Reuters seemed able to answer this question. E.g., Interview with Mark Schwartz, Dir. of Librarian Relations, West/Thomson Reuters, in San Francisco, Calif. (Oct. 15, 2010) (stating that he was unsure whether less viewed content would disappear or become more difficult to retrieve); E-mail from Mark Cygnet, West Academic Acct. Manager, to author (Feb. 22, 2011, 4:22 P.M. PST) (on file with author) (“The serious question, of course, is whether WestSearch systematically makes certain types of materials less-likely to be retrieved because of how it weighs printing or downloading in its relevance determination. We certainly hope not, but it’s important that the question be raised.”). The answer is likely to depend on how relevant the result is and whether a key number captures the desired concept. Yet since WestSearch relevance is partly determined by number of views and prints, the logic behind answering this question becomes circular.

41. On March 18, 2011, I had a telephone conversation with Dinyar Mehta, director of WestlawNext, during which he insisted that documents that have never been interacted with will continue to appear in WestlawNext search results. E-mail from Dinyar Mehta, Dir., WestlawNext, to author (Mar. 21, 2011, 9:43 A.M. PST) (on file with author) (“Documents that have never been viewed or printed by customers will still appear in WestSearch results in general. Whether they appear for a particular query and how they are ranked will depend on all of the factors considered by WestSearch.”).

42. To answer this question you need to read several statutory sections, including Ga. Code Ann. §§ 16–3–23, 16–3–23.1, 16–3–24, 16.3.24.1 (2007). However, after reading them all, it is § 16–3–24.1 that ultimately defines the term “habitation” to include motor vehicles in a way that answers the question.
the search in any way before running it; I just typed in the search terms and clicked “search.” The statutory section statute I was looking for did not appear in the initial documents displayed in the overview list of results.

¶22 I then chose to view all fifty-four of the statutes that were retrieved, to see if the statutory section I wanted was in the top few listed. It appeared ninth on the list of statutory sections retrieved, and I had to scroll almost halfway through the documents displayed before I found it.43 While this might not seem onerous to some, requiring researchers to scroll down far below the initial three documents displayed makes the desired information far less likely to be discovered.44 Because of WestlawNext’s renown for accuracy, inexperienced users will click and open documents at the top of the results list. Given the deterrent effect of charging for opening each document, these researchers will likely feel that they’ve overspent and cannot continue to open documents for cost reasons, thus making it even more likely that they will not see the correct answer.45

¶23 It is interesting to note that the identical search run in classic Westlaw’s state statutes database (ST-ANN-ALL) using a natural language search yields only slightly worse results. The desired statutory section appears tenth among the results using natural language searching.46 This suggests that, especially for statutory searching, WestlawNext is almost identical to regular natural language searching and therefore probably not worth the additional cost.

¶24 Let us look next at an example involving law journals. Suppose that I am looking for an article that I read a few months ago, which discusses how researchers don’t really read information on the web; they actually skim.47 I recall reading about this concept in a law journal, but I cannot recall the title, author, or other identifying information about the article. To try to find the article using WestlawNext, I typed in the search: researchers don’t read they scan the web. Again I did not limit my sources at all; I just typed in the search and began searching. The article did not appear among the initial thirteen documents displayed on the overview results screen. I then limited the publication type to law reviews and journals. The article I was looking for did not appear among the fifteen law review and journal results returned. In fact, most of the articles I found did not address the issue at all.

¶25 Next, I tried running the identical search on WestlawNext, but limited my search to the law reviews and journals (JLR) database. WestlawNext returned 6666

43. All of the searches and search results discussed in this paper were run in December 2010. Due to the dynamic nature of WestSearch, my colleagues have noticed that search results sometimes change over time.

44. JEFF JOHNSON, GUI BLOOPERS: DON’TS AND DO’S FOR SOFTWARE DEVELOPERS AND WEB DESIGNERS 360 (2000) (“Web users in fact do not scroll down much and often assume that what is visible without scrolling is all that is there.”).

45. See infra ¶ 54.

46. The search “deadly force” & defend & “motor vehicle” & Georgia, when run in the state statutes database (ST-ANN-ALL) using terms and connectors searching, yielded seventy two results, none of which were the desired statutory section. This is a novice Boolean search that an inexperienced researcher might run. Experienced researchers could construct a better Boolean search (or would start with a secondary source).

results. The article I was seeking appeared seventeenth on the list, again requiring significant scrolling beyond the five displayed without scrolling. Interestingly, when I ran a natural language search using classic Westlaw and the exact same search terms, the desired article appeared as the fourth result and required no scrolling. This result suggests, perhaps, that too few researchers have run searches for this concept and found the article I remembered. Whatever the cause, WestlawNext failed to deliver.

¶26 The potential for content to become more difficult to access is greater for documents other than cases. This is true because of the incorporation of key numbers and KeyCite into the WestSearch algorithm. I have run numerous searches (far too many to detail here), and I have not yet discovered an instance where relevant and important cases that share a particular topic and key number fail to display within a search result designed to retrieve the issue covered by said topic and key number.48 Thus the examples I focus on here involve statutes and secondary sources. Nevertheless, given the research on the variability of KeyCite results,49 and the newness of WestlawNext, the issue of relevant cases becoming buried is one that can only be clarified by future research and study.

¶27 This issue of potentially buried content is one that will certainly need further discussion, research, and testing. Empirical research about the continuing accessibility of obscure or little-used content, and research about how best to find this content using WestlawNext, will be the only useful way to answer these questions.

Law-Changing Effects

¶28 Suppose that online legal information systems like WestlawNext are the wave of the future. Suppose also that the other large legal information vendors follow suit and create WestlawNext-like systems for searching legal content.50 A cache of irretrievable legal information could result in a couple of problems. First, documents without meaningful interactions may not appear at all. Second, if such documents do appear, they may appear so far down in a citation list that most researchers (especially inexperienced ones) will never scroll down far enough to open them.51

¶29 If legal researchers are unable to find unpopular or less used tidbits of legal information, this has the potential to change the law. If the applicable legal precedent is unfindable and therefore unusable, hasn’t the law been effectively changed? Existing but less popular legal precedents could effectively become invisible. Rarely used but valid laws, doctrines, or arguments might fade into nonexistence. The unfindable could practically cease to exist. This phenomenon might have serious

48. A detailed discussion of headnotes, topics, and key numbers in WestlawNext is beyond the scope of this article. Indeed, this could be the subject of an entire article and certainly warrants further study.


50. Just before this piece went to press, LexisNexis rolled out its next-generation system, Lexis Advance, to law librarians, with a promised availability date for law students and faculty of fall 2011.
and detrimental effects on legal scholarship. New and emerging ideas are what legal academic writing is all about. While it is true that not all new ideas are obscure, many of them are. These obscure ideas might never be uncovered, examined, and expounded upon if irretrievable. The result would be to limit the possibilities of legal writing, to limit the reach of creative thinking about the law, to narrow the range of alternative legal perceptions, to close the door to the unknown. Alternative views of the law or of the possibilities of the law would never be exposed.

Effects on the Practice of Law

¶30 “Legal research is a cornerstone of the legal process and the development of the law . . . .”51 Both are fueled by research results. Research on the current law, research on the law in other jurisdictions, research on trends in the law, and research on proposed or pending law are what the practice of law is built upon. “The legal publication universe is at the core of American law.”52 Therefore, what would the above-mentioned limitations on legal research mean to the practice of law? First, since lawyers practicing in certain areas of law frequently rely on academic articles for clarification and explanation of the law,53 their understanding of the law would be narrowed. Second, creative lawyering would be stifled. Not only would creative lawyers be unable to find cutting-edge legal documents, the academic articles on which they rely for new and creative ideas would be similarly limited. The expansion of the law and the evolution of legal theory could therefore be slowed, if not brought to a standstill. The law is an organic and evolving entity that relies on original argument and research to advance. If the novel and peripheral are hidden, advancement will be slower and more incremental.

¶31 Combating this phenomenon of disappearing esoteric information will require specialized legal research strategies and training. The strategies necessary to combat this phenomenon will likely develop over time as researchers work more with WestlawNext. One approach might be to use Boolean commands that force the search engine to return results containing particular words or word combinations. For example, the commands “atleast,” “and not,” “allcaps,” and “singular” can be employed to require the return of documents with certain quantities of words and excluding other words and word forms. This is nothing new to most

advanced researchers. However, WestlawNext may require researchers to use these types of commands more often. It is also unclear to what extent WestlawNext obeys Boolean commands, because a WestlawNext Boolean search is still subject to WestSearch and its incorporation of key numbers, meaningful interactions, and other factors that affect search results and rankings.\footnote{Dinyar Mehta, director of WestlawNext, disagrees with me on this point. He says that WestlawNext obeys Boolean commands and that to trigger Boolean searching you must use the Advanced Search template; enter a term expander, proximity connector, or document field; or use the “Advanced:” command. E-mail from Dinyar Mehta, supra note 41. Researchers who enter only search terms and the and or or connectors into the global search box will not trigger Boolean searching. In my experience, few researchers other than librarians use advanced search features, specialized commands like “Advanced:,” or anything other than the and or or connectors. Moreover, my limited side-by-side tests of identical Boolean searches run in classic Westlaw and WestlawNext have sometimes returned slightly different results.} Another approach to finding esoteric information might be the use of particular sources or tools like the American Law Reports (A.L.R.), KeyCite, and the West Key Number System.

**Broad Searching and When to Focus: The Changing Norm**

¶32 Part of the beauty of electronic legal research is its ability to retrieve the broadest possible grouping of relevant results.\footnote{See Kuh, supra note 51, at 247–49 (discussing how electronic searching yields broader and more numerous results than print).} Electronic researchers find more information and are exposed to more and different cases and other documents.\footnote{Id. at 249.} After decades of using and refining legal research approaches and techniques, librarians and other experienced researchers have developed strategies for dealing with the wealth of information gathered through electronic searching. One of the preferred strategies for doing electronic legal research is to begin searching broadly and then to focus once you find results that begin to look useful. This strategy or norm is widely recommended by legal research experts.\footnote{See, e.g., Sloan, supra note 17, at 291–92; Patrick Meyer, Law Firm Legal Research Requirements for New Attorneys, 101 LAW LIBR. J. 297, 312, 2009 LAW LIBR. J. 17, ¶ 48.} Broad searches allow a researcher to take advantage of the power of electronic searching by gathering more results than were ever previously possible in print. Some of these results will undoubtedly be irrelevant, tangential, or only marginally related. Nevertheless, exposure to the broad results is a benefit in and of itself.

¶33 WestlawNext changes this norm significantly. The nature and beauty of WestlawNext is that researchers don’t have to think about broad versus narrow searching. It simplifies the process by allowing users to simply throw in search terms and, in most cases, get very accurate and relevant results.\footnote{Id. at 249.} Texts on legal research have already begun to acknowledge that “WestlawNext[] changes several of the basic features of searching.”\footnote{Cohen & Olson, supra note 21, at 18.} This reality changes how we will both approach and teach legal research.

¶34 Starting research with a broad search serves a couple of important purposes. First, starting broadly helps unfamiliar researchers discover the landscape of the desired area of law by exposing them to a large spectrum of relevant docu-
ments. It helps researchers become familiar with a particular area of law and its norms and precedents. It acquaints them with existing terms of art, provides a historical perspective by exposing them to leading cases and other primary sources of law, and gives them a sense of whether or not multiple aspects or facets exist that may be useful. Researching broadly helps researchers locate new sources, arguments, or lines of reasoning.

§35 Second, starting broadly allows a researcher to focus on a particular topic or facet of the research only after getting a sense of the quantity of materials that exist. It lets researchers pinpoint specific aspects of their research with the knowledge that they are not missing things. She has seen the forest, so she can now focus on a particular type of tree.

§36 Retrieving an initially focused WestlawNext result will require researchers to rethink how they approach research. WestlawNext does not afford researchers the luxury of sifting through or focusing on a large and wide-ranging set of search results. It has no mechanism for executing an initially broad search. Even attempts to broaden searching through using broader or more expansive search terms will not yield a truly broad search result because the algorithm of WestSearch prevents it. More than a decade ago, Berring warned of the dangers of relinquishing control over searching to automated search algorithms. He wrote that “the whole point of these systems is to work automatically. . . . In this [automated] environment one accepts the search results as being the best available information.” The WestSearch algorithm is designed to narrow or focus even the broadest of searches, and control over the scope of searches is beyond the user’s control.

§37 To test this theory I ran the search: abortion trimester constitutional in WestlawNext. My intention was to find cases dealing with the constitutionality of abortion, cases grappling with the same issues as Roe v. Wade. I did not limit the search in any way before running it; I just typed in the search terms and clicked “search.” My results included 317 cases. As one would expect, the cases were all on point. In fact, Roe v. Wade was the very first case listed, indicating that it was considered the most relevant. All of the 317 cases dealt with the constitutionality of abortion and the timing measured in trimesters. When I ran the exact same search in the ALLCASES database using natural language in classic Westlaw, I retrieved 804 cases. Classic Westlaw retrieved over two and a half times more cases than WestlawNext. This example illustrates the point that classic Westlaw allows broader searching and retrieves a larger sampling of cases than WestlawNext. This is true when the broadest possible search terms are used. WestlawNext offers various means by which researchers can narrow their search results via the “filters” and

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60. Running broad searches, even “custom digest” searches using topics and key numbers, will not guarantee that a researcher has retrieved everything or that all of the materials retrieved are relevant. See Mart, supra note 49 (discussing the relevance and completeness of electronic legal research results on Westlaw and LexisNexis).


63. My WestlawNext search was intentionally broad and was not limited or narrowed by proximity connectors or any other narrowing strategies.
“views” displayed on the left side of the screen. However, there are no built-in tools for expanding search results.

¶38 This example is significant because, as suggested earlier, cases that are not directly on point may often prove useful to the researcher. Researchers may want to browse through a larger set of cases that are related but, at first glance, not directly relevant. In the example above, classic Westlaw results included the recent case of Burton v. State.64 Burton is a case about whether a pregnant woman who refuses treatment can be forced by the state “to submit to any medical treatment deemed necessary . . . including detention in the hospital for enforcement of bed rest, administration of intra-venous medications, and anticipated surgical delivery . . . .”65 The case discusses the issues of determining fetus viability and of trimesters.66 A researcher interested in cases that grapple with many of the same issues as Roe might very well be interested in reading the Burton case. However, Burton does not appear in the 317 results retrieved by WestlawNext. Moreover, when I limited the same search to Florida, I retrieved only twenty-six cases, but again Burton was not one of them. The legal researcher using WestlawNext and doing broad searching will be exposed not only to fewer cases, but also to a far narrower range of related content. Different tools and strategies will be needed by researchers to expand on results, to broaden the scope of research and to get a view of the forest after having examined only a small cluster of trees.

¶39 Experienced researchers have ways of expanding the scope of their research when they are forced to begin with a specialized kernel of knowledge, such as a specific case or statute. These strategies for expanding research scope will need to be honed and more widely relied on by researchers. Research expansion strategies will also need to be emphasized when teaching legal research to law students and other inexperienced researchers.

¶40 One strategy for expanding the scope of legal research is to use a citator service like KeyCite. KeyCite is designed to give you both analysis and links to all of the documents that cite to your original authority. Theoretically, by using the citing references to a case or by using headnotes to do a key number search, one should be able to expand one’s research results. The citing references retrieved from KeyCite could then be used to expand the scope of research beyond the original focused result retrieved using WestlawNext. However, even this strategy has limits. A recent study that compared results from headnote searches using KeyCite and Shepard’s revealed not only that the two systems yield different results, but also that both systems yield incomplete results.67

¶41 There is another problem with using KeyCite to expand narrow research, especially for case law retrieved from WestlawNext. WestlawNext’s algorithm, WestSearch, incorporates both KeyCite and West’s topics and key numbers into its

64. 39 So. 3d 263 (Fla. Dist. Ct. App. 2010).
65. Id. at 264.
66. Id. at 268 (Berger, J. dissenting).
67. Mart, supra note 49, at 249, ¶ 53 (“The lack of a significant overlap for cases in the result sets for KeyCite and Shepard’s illustrates an essential problem of algorithmic searching: no one algorithm will give you all of the relevant results.”).
searching. Therefore, theoretically, search results from WestlawNext should yield cases with the same relevant headnote or headnotes or that have been cited by these cases. If that is in fact true, then employing KeyCite to expand search results would either be fruitless or redundant. Yet, the examples above demonstrate that WestSearch definitely does not retrieve every single case that is relevant. Moreover, if a case cannot be found, it will not be cited to, and it will therefore not appear in later KeyCite reports. Needless to say, further research is necessary to determine the usefulness of KeyCite in expanding WestlawNext search results.

§42 Other strategies for expanding focused or anecdotal research results include searching law reviews and journals, treatises, legal encyclopedias, and A.L.R. The power of secondary sources to expand research or to reveal additional primary source material is no secret. However, searching secondary sources using WestlawNext may not yield the same expanse of secondary documents. It is likely, therefore, to produce a more limited set of citations to primary authority than classic Westlaw. Again, this is because of WestlawNext’s design. It is designed to produce a limited set of very focused, and mostly very accurate, results. It was not designed to produce everything. Librarians and other researchers will have to continue to work on strategies for expanding research results using WestlawNext.

§43 Due to the newness of WestlawNext, the effects of many of the variables in play here are still unknown. Follow-up in the form of empirical studies or other research about WestlawNext results is really the only way to accurately gauge the narrowness of initial results and the effectiveness of techniques to expand on those results.

Not Choosing a Database or Source

§44 The fact that WestlawNext does not require researchers to choose a database or a source before searching will have a number of effects, not all of them negative. One such effect is that researchers will be pointed toward and gain exposure to previously unknown sources, databases, and documents. Once a search is run in WestlawNext, results are categorized on the left side of the screen. There are general categories for types of sources like cases, statutes, regulations, administrative decisions, trial court orders, secondary sources, briefs, pleadings and motions, expert testimony, jury verdicts and settlements, pending and proposed legislation, and pending and proposed regulations. Within each category, sources are broken down even further into subcategories like publication type and publication name.

§45 For example, when I ran a general search in WestlawNext and clicked on the category “secondary sources,” the general category of secondary sources was subdivided into publication types like A.L.R., 50 State Surveys Regulations, 50 State Surveys Statutes, CLE and Seminar Materials, and Law Reviews and Journals. The general category of secondary sources is also further subdivided into publication names like American Jurisprudence 2d, C.J.S., Wright & Miller, and Florida Jurisprudence. The result is that researchers are exposed to numerous types of pub-

68. Hane, supra note 6.
lications and to numerous titles that they may never have otherwise discovered. Teachers of legal research will need to focus much more on examining and evaluating sources when using WestlawNext. On the other hand, time previously spent teaching Boolean and other search strategies using classic Westlaw may not be necessary as these concepts become less important to search results.

¶46 The potential downside to not having to choose a database or source prior to searching is that a researcher’s knowledge of particular sources is not reinforced in the same way. When researchers search an electronic database without first stopping to think about what they want to search or where and how they are intending to search, their knowledge of the structure of law is also eroded. Simply put, researchers don’t know what they are searching if they do not have to choose a source first, and researchers using WestlawNext don’t really need to know what they are searching. All they have to do is type and click.

¶47 In the past, analyzing facts, making determinations about jurisdiction, and thinking about other legal aspects related to the facts were all steps that had to be taken before searching either traditional legal research databases or print sources. Pondering these issues while using both print and electronic resources prepares students and other researchers to tackle research projects in the real world “where the availability of legal sources will vary depending on the type and size of the practice or workplace.” With WestlawNext, researchers do not have to think about their legal questions and ponder whether they are likely to be controlled by statute, common law, or regulation. Without having to ponder those questions, researchers do not develop a sense of which types of documents are best to consider, given their unique facts and circumstances.

¶48 Novice researchers are likely to wade through cases first even when that approach is not justified. WestlawNext researchers do not even have to think about jurisdictional questions, which in some instances could be disastrous. WestlawNext allows researchers to simply throw in search terms and to consider what they are getting later. The inherent need for reflection, analysis, and assessment that formerly built and reinforced knowledge of sources and the structure of law is eliminated with WestlawNext.

¶49 Experienced researchers develop specialized strategies over time for searching particular types of documents. A search constructed for the purpose of finding case information will often differ from a search constructed to find statutory or regulatory information. Researchers structure searches differently to account for the ways different materials are organized. Judicial opinions are written in narrative or explanatory prose, and they are usually organized in paragraphs. Statutes are most commonly organized in outline form with sections and subsections that range in length from one sentence to several paragraphs.

¶50 Thus, choices about proximity between search terms or search concepts vary depending on the source being searched. For example, with cases it is common to search using the “within paragraph” (w/p) or the “within sentence” (w/s) Boolean connector. With statutes, because spacing between sections varies, para-

70. Johnson, supra note 18, at 79.
71. Id.
graphs can be only one sentence long, and sentences often contain only one concept or term. Therefore, the “within number” (w/n) Boolean connector is more often used with statutory searching. This is just one example, but it illustrates one way that search strategy can differ when searching different sources. Researchers who never have to choose a source may never develop this and other source-specific search strategies. Researchers with poor or underdeveloped searching skills may end up wasting money and time.  

§51 Finally, the practice of not choosing a source before searching increases the risk of retrieving non-authoritative or extraneous documents. Knowledge of the concepts of authority and precedent is important to the research process. Having to choose databases containing sources that are authoritative or that have precedent value guarantees the value of documents retrieved.

§52 While it is true that WestlawNext does a great job of identifying categories, subcategories, and even the publication types and names from which documents come, researchers may still become confused. Novice researchers or researchers unfamiliar with an area of law may just begin opening the first documents displayed without regard to the sources from which they come. Researchers who do not know how to evaluate the appropriateness of a source in relation to the information sought will waste time or become confused. Such researchers may spend time reading cases when the issue in question is controlled by administrative regulations. Or they might spend time reading a brief on an issue that is controlled by statute. Such confusion is far more likely to occur when researchers can skip the step of choosing a source and thereby never develop a sense of source appropriateness.

Pricing

§53 The way that WestlawNext is priced for nonacademic users is likely to significantly impact the way that research is conducted among practicing lawyers, judges, and other legal professionals. In February 2010, Thomson Reuters published a pamphlet, WestlawNext Pricing Guide for Commercial Plans. This pricing guide confirms that WestlawNext costs a researcher $60 per search for running or editing a search. That document also summarizes what it calls “Chargeable Events,” and it lists per-minute and transactional charges that users will incur for

72. See id. at 86.
73. Id. at 81.
74. There are three basic pricing models for nonacademic users of classic Westlaw: transactional, hourly, and WestPro, and many firms have a hybrid of two or more of these models. I only consider how WestlawNext changes transactional pricing. Pricing plans using other pricing models will impact user choices differently. See Westlaw Quick Reference Guide: Westlaw Pricing for Plan 1 Subscribers (Apr. 2006) available at http://west.thomson.com/documentation/westlaw/wlawdoc/billing/wlplan1.pdf (listing pricing options for “private plan subscribers”).
76. Dinyar Mehta, director of WestlawNext, points out that with transactional pricing, the $60 or more charge per search is included in a customer’s subscription, implying that it is therefore meaningless. E-mail from Dinyar Mehta, supra note 41. However, I have spoken with numerous law firm librarians who point out that these per search charges are used when billing clients. The fact that clients’ bills reflect these per search charges makes them inherently significant and noteworthy.
opening various types of documents, for example: cases ($13.00); state statutes, court rules, and regulations ($16.00); federal statutes, court rules, and regulations ($25.00); secondary sources (journals and law reviews, practice guides, and jury instructions) ($30.00); premium secondary sources (A.L.R., C.J.S., American Jurisprudence 2d) ($46.00); Fifty-State Surveys ($250.00); trial court filings (pleadings, motions, memoranda, and court orders) ($75.00); or New York Times ($36.00). KeyCite is also a chargeable event costing $7.00 per citation.77

¶54 Initiating the practice of charging a fee for each opened document will discourage researchers from opening and reading documents. It will cause researchers to examine fewer documents and discover less information. WestlawNext’s new pricing structure creates a strong economic disincentive for researchers to open and peruse numerous documents. Opening, skimming, and even reading portions of numerous documents was, in the past, the norm for thorough, thoughtful, and careful researchers. Classic Westlaw encouraged that type of research behavior by not charging researchers a fee for each opened document. Experienced researchers have come to rely on their ability to examine portions of the documents they gather. Moreover, examining and reading documents is one of the leading ways that attorneys and other researchers gather information.78 Pricing structures like WestlawNext’s, which discourage the practice of opening and reading multiple documents during the research process, will surely result in less thorough and less productive research.

Conclusion

¶55 WestlawNext will certainly change the landscape for both legal researchers and teachers of legal research. Its new search algorithm, WestSearch, is a powerful tool that returns more focused results. The new display of search results may offer researchers increased exposure to more sources and titles. However, there are aspects of this product with potentially negative effects. Searching without having to choose a database eliminates the mechanism by which researchers learn about and reinforce their knowledge of sources. WestSearch’s seemingly unalterable ability to return very focused results has the potential to bury or hide documents. WestlawNext’s new transactional pricing scheme will also affect how practitioners search and what they ultimately find. It would be a mistake, though, to use these and other possible effects to demonize or disparage the product. Instead, researchers and teachers of legal research should use these observations as a springboard to developing effective ways to use this powerful and innovative legal research tool. Further research and empirical studies of WestlawNext are necessary to assess its strengths and weaknesses accurately.

¶56 Like any other legal information product, WestlawNext is designed to do certain things amazingly well. It is up to users, and particularly law librarian

78. See Michael J. Lynch, An Impossible Task but Everybody Has to Do It—Teaching Legal Research in Law Schools, 89 Law Libr. J. 415, 417–18 & n.4 (1997) (discussing the necessity for researchers to read and sometimes reread cases and other materials to gain a true understanding of the law).
experts, to develop strategies for using this product in ways that will best benefit our organizations. Law librarians and other researchers need to be aware of both the strengths and weaknesses of WestlawNext in order to craft thoughtful and innovative strategies for its use and also for teaching these strategies to the next generation of legal researchers. Teachers of legal research will undoubtedly need to teach both classic Westlaw and WestlawNext differently. Attention will need to be paid to the differing techniques necessary to retrieve desirable results from each system.

§57 More than two decades ago, Robert Berring, speaking of electronic databases, wrote:

The danger of the high-end products is that each step in the research process that is carried out automatically by the front end system, is a step taken away from the purview of the researcher. Each decision that is built into the system makes the human who is doing the search one level further removed from the process.79

Berring’s words should serve as a reminder to librarians and teachers of legal research. We must strive to understand as much of the research process as possible, even the steps carried out by online algorithms, so that we can develop and teach effective strategies for achieving our research goals.

A Different Question of Open Access: Is There a Public Access Right to Academic Libraries in the United States and Canada?*

Amy Kaufman**

Providing public access to libraries is a public service, but is it a right? This paper explores participation in depository programs, public university status, and public funding as possible bases for this right. It examines relevant cases and finds that courts respect the right of academic libraries to determine their own policies.

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Introduction

¶1 The massive John P. Robarts Library at the University of Toronto has inspired intense reactions from generations of students. With its concrete façade, it has been likened to a peacock or called “Fort Book” and has been praised or derided as brutalist architecture.¹ Its most controversial moment, however, came before it even opened, in the early 1970s. The original plan to restrict the use of Robarts Library to graduate students and faculty at the university led to clashes between students and university administrators, and, eventually, to sit-ins and confrontations with police. The controversy also played out in local newspapers. Library administrators argued that restricted access was the only way to preserve the collection and properly serve primary users. Undergraduate students contended that they needed the same access as the rest of the university population.

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Members of the public observed that it was public money that was building this goldmine of a library in the middle of the city, so why shouldn’t they have access, too? By the time Robarts Library opened in 1973, the university community had come to an agreement, which will be discussed later. But the issue that started this controversy remains: Who has the right to use a university library?

¶2 Many papers deal with community use of academic libraries. A number relate their authors’ experiences as academic librarians dealing with public users. Other papers are surveys of universities’ policies regarding public use of their libraries. These papers point to two general conclusions. First, there are compelling arguments not only for admitting but also for excluding the public; second, academic libraries admit or exclude the public based on their individual circumstances, such as budget, staffing level, and location, that is, whether the sheer number of people in the community using the academic library threatens to overwhelm the primary patrons the library has been created to serve.

¶3 A number of the articles discuss a right of taxpayers to use facilities they have helped to fund or simply speak of universities as public institutions that the public has a right to use. Other articles assert that the right stems from a library’s participation in a government depository program. Some distinguish private university libraries by stating that there is no public right to use them. Still others talk about the right of the students and faculty of the university to be served adequately by their library, even if it means the exclusion of other users. Exploring these claims, particularly in case law, could shed more light on the question of whether there is a right of public access. When these conflicting rights are claimed, which prevails?

Public Access to Academic Libraries: The Claimed Right

¶4 There are three main, often overlapping, reasons cited for claiming a right of public access to academic libraries:

1. An academic library’s participation in its government’s depository program creates a public right of access.2
2. The public nature of public universities creates a right of public access to the university library. This may also be framed as a taxpayer’s right to use services partially or substantially funded by taxes.3
3. In a democratic state, academic libraries, which possess some of the greatest resources in the land, are required to be open to the public so people may educate themselves to become informed and active citizens.4

4. See, e.g., Pettinato, supra note 2.
§5 This third reason raises ethical issues that have been discussed in the library literature and addressed in statements such as the American Library Association’s (ALA) Library Bill of Rights. For example, in its interpretation of article V, “A person’s right to use a library should not be denied or abridged because of origin, age, background, or views,” the ALA grounds this right in a democracy’s requirement of an informed citizenry.

§6 This article analyzes the legal aspects of the question of a public access right, focusing on the first two reasons given. It explores how and when these legal arguments about public access are raised and how courts have responded in both the United States and Canada.

The Effect of Depository Services Programs

§7 The governments of both the United States and Canada have depository services programs, which allow for academic libraries to be designated either full or partial depositories. In return for receiving government documents free of charge, the libraries assume a number of responsibilities. In both countries, this means providing members of the public with access to those government documents.

American Libraries and the Federal Depository Library Program

§8 In the United States, the public access requirement of the Federal Depository Library Program (FDLP) is enshrined in the U.S. Code. The law also gives the Superintendent of Documents the power to remove a library from the FDLP if it violates this requirement. In 1993, the Superintendent of Documents wrote that, under the law, a depository library must provide access to the depository materials that is “comparable to access to the rest of the collection . . . . Documents should be available to users whenever the library is open and depository reference coverage must be comparable to that for the rest of the collection.” Any library imposing restrictions on access faced probation, and ultimately termination, from the FDLP.

§9 This interpretation of the public access requirement has been disputed. At least in the experiences of the University of Michigan Law Library and Golden Gate University, an academic law library may deviate from completely unrestricted access and still retain depository status. For example, in the 1980s, the University

8. Id. § 1909.
of Michigan Law Library introduced a policy to restrict access to most patrons outside the core group of law students and faculty; these patrons were interviewed to determine whether they would be granted access and which level of pass they would be given.\(^{12}\) As of 1993, the University of Michigan’s law library had been inspected twice since implementing this policy and its “Service to the General Public” had still been rated “excellent.”\(^{13}\) Nonetheless, a number of law libraries in the United States have opted out of depository status for various reasons,\(^{14}\) one being so that they can be free to restrict public access to materials.

\(^{10}\) This was the case for Suffolk University in Boston. In 1999 the law library (as part of the law school) was relocated to a “more traveled and urban” part of the city.\(^{15}\) A new security system included the requirement that library users present identity cards to enter the building and use the elevator to gain access to the law library.\(^{16}\) After considering many options, and noting the many other partial depository libraries in the area, the law library determined it could no longer provide the unrestricted access mandated by the FDLP and withdrew from the program.\(^{17}\)

\(^{11}\) Yale’s law library also considered withdrawing from the FDLP in 1995.\(^{18}\) One of its librarians consulted with librarians from other law libraries and found that, while few libraries had actually withdrawn, a number of them wished to withdraw.\(^{19}\) One frequently cited reason was that “[m]andatory public access to the federal documents collection may be inconsistent with the library’s access policy, which is the result of a careful balancing of security concerns and the desire to make the collection accessible to all researchers.”\(^{20}\) Countering this was the belief that “[t]he library benefits from interaction with the local community members and associations that use the depository collection.”\(^{21}\) Tammy R. Pettinato, a legal reference librarian, has described how this “social capital” created by the FDLP benefits both the community and the law library through the interaction between the two groups.\(^{22}\)

\(^{12}\) In the United States, the emphasis on public access to academic law libraries can change depending on whether the library is in a private or public university.\(^{23}\) Suffolk University, which left the FDLP, is private, as is Yale University, which considered leaving. Librarians at Golden Gate University’s law library, which restricted public access without leaving the depository program, noted that: “While

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12. For a full description of the screening process, see Snow, supra note 11, at 386–87.
13. Leary, supra note 10, at 418.
14. Pettinato, supra note 2, at 708, ¶ 35.
15. McKenzie et al., supra note 2, at 282.
16. Id.
17. Id. at 283.
19. Id. at 133–34.
20. Id. at 136.
21. Id. at 137.
law libraries in publicly funded institutions often face the same problems as those in private schools, privately supported law libraries have fewer hurdles in the way of instituting cost recovery systems and excluding or controlling user groups.²⁴

¶13 Between 1998 and 2001, there was a net loss of forty-two libraries to the FDLP, fifteen of which were academic libraries, primarily from private colleges.²⁵

The authors of a study of those fifteen academic libraries noted that at the same time the private academic libraries were withdrawing from the FDLP, the four new academic libraries that joined the program were from public universities.²⁶

The respondents from this new group agreed that one of the main reasons they joined was "[t]o contribute to the public good by providing government information to support an informed citizenry."²⁷ The authors concluded that the public/private divide was attributable to the public universities’ broader mission to support their larger communities.²⁸

¶14 However, this belief that public universities have a higher obligation than private universities to provide public access may not be backed up in the law. Courts have been deferential to individual libraries’ policies when determining the obligations of depository libraries—in cases against the libraries at Tulane (private), Loyola New Orleans (private), and Temple (public), the courts reached similar conclusions about how depository status affected public access rights, regardless of a university’s public or private status.

¶15 Tulane’s law library restricts public access at certain times of the day: access is restricted to affiliated patrons weekdays after 9 p.m. and all day on weekends. During the times of restricted access, members of the public are provided with a phone number to call in order to get access to government documents.²⁹

While one member of the public sometimes obtained access to the collection during restricted hours, he alleged that on four occasions he was denied access, and this eventually led to a court case. When he did get access during restricted hours, “he was questioned as to what he was working on and why he was coming to the library.”³⁰

The court found his claim lacked “an arguable basis in law or fact” and dismissed it as frivolous.³¹ The court held that both the questioning during times of restricted access—to determine if he needed to make use of the government documents—and the occasional denial of access during those times reserved for affiliated users were “minimal restrictions on [the plaintiff’s] access to the federal government publications” and “do not violate any provisions” of the depository program.³²

¶16 In the Loyola case, a campus police officer asked a member of the public who had been banned from the campus to leave the library. The plaintiff, the same

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²⁴. Carter & Pagel, supra note 11, at 244.
²⁶. Id. at 418.
²⁷. Id.
²⁸. Id. at 419.
³⁰. Id.
³¹. Id.
³². Id.
person (using an alias) as in the Tulane case, then claimed that he had been denied access to a depository library. About Loyola, the court said, “the statute [about depository library obligations] allows private libraries the ability to restrict access to the premises despite their status as federal depository libraries.”³³ The court denied the plaintiff’s motion for leave to file the complaint.

¶17 The Temple case had slightly different facts. While members of the public can use Temple’s law library at most times of the year, the library restricts public access during exams, and posts a note to this effect. Michael Downing, a member of the public with a library card for the Temple law library, asked to use it during exams. The request was denied. When Downing returned some days later, still during exam period, and was again denied access, he refused to leave and was eventually arrested. He was charged with defiant trespass and disorderly conduct.³⁴ A lower court found that Downing had a valid defense to the charges—that he had a legal right to use the library because it was open to the public.³⁵ The appellate court rejected this contention:

The fact that Temple, or its School of Law, serves a quasi-public service, or that the Commonwealth has designated the University as part of its System of Higher Education . . . or that the Commonwealth funds the University does not alter its character as a private educational institution. Its property is essentially private property.³⁶

The court pointed out that members of the public could only use the law library if they asked for and received a library pass, which was still revocable by the law library. It was because the law library had a practice of placing some restrictions on public access that it could lawfully exclude the public completely at various times, particularly during exams.³⁷ The court found that any public access right was trumped by “the student body’s paramount right to use the law library facilities maintained, in part from their tuition, and operated for their education.”³⁸ The decision to close the library to the public during exam periods was therefore “the exercise of the regulatory authority by the Law School over its facilities with which the courts cannot interfere.”³⁹

¶18 The fact that Temple University was also a depository library did not change its “private nature” in the eyes of the court.⁴⁰ It found no evidence that Downing was denied access to government materials but stated that even if Downing had requested government documents, it would have been possible for them to have been made available “at another place or time without him having to enter the law library during exam period.”⁴¹

¶19 Temple law library’s restricted access policies were again challenged in a later case, in which a member of the public argued that Temple’s depository status

³⁵ Id. at 793–94.
³⁶ Id. at 794.
³⁷ Id. at 794–95.
³⁸ Id. at 795.
³⁹ Id.
⁴⁰ Id.
⁴¹ Id.
meant he was entitled to unrestricted access to the law library. Here again, the
court recognized Temple’s right to restrict access in order to serve its primary user
group. Restricted access policies for members of the public were not “an unreason-
able interpretation of the ‘free use’ language” in the depository law. The court
observed, “If Congress wished to transform law libraries into general access librar-
ies it would have said so.”

¶20 In each of these cases, the courts had to determine the nature of obligations
that flow from an academic library’s acquiring depository status. In all of them, the
court held that a library’s depository status did not create an unfettered public right
of access. All three of these academic libraries placed some access restrictions on
their collections. Nonetheless, the courts stated that a library could restrict access
in these ways without violating the law.

Canadian Libraries and the Canadian Depository Services Program

¶21 The obligations of Canadian libraries in the Canadian federal government’s
Depository Services Program (DSP) are not identical to those of American libraries
under the FDLP. Unlike the American system, Canada’s DSP began as an order-in-
council and has been embodied in directives and memoranda of understanding,
rather than in a statute. Any university library that participates in the Canadian
DSP still has a responsibility to provide public access to the materials received
through the program. However, the requirement for selective depository libraries,
which form the vast majority of depository libraries, is that they must be “open to
the public at least 20 hours a week . . . .” Neither the Quick Reference Guide for
Depository Libraries nor the Depository Services Agreement that depository
libraries sign specifies how many hours a full depository library must be open to
the public, though the agreement does spell out public access requirements in more
general terms.

¶22 In the literature, Canadian academic libraries, unlike American academic
libraries, do not report strains caused by providing public access to depository
materials, and there are few discussions of Canadian libraries considering giving up
depository status. Bruno Gnassi, former head of the DSP, also found it difficult to

43. Id. at *5.
44. Id.
45. Vivienne Monty, Due North: Issues in Access to Government Information, A View from Canada,
23 J. Gov’t Inf. 491, 492 (1996).
48. Agreement Between Publishing and Depository Services . . . and [The Library], Concerning
the Provision of Canadian Government Publications and Other Related Services to the Library (n.d.) (on file at Queen’s University Library System).
find data to determine whether Canadian libraries are withdrawing from the DSP.\textsuperscript{49} In 2004 he wrote that he had found anecdotal evidence that some libraries were considering withdrawing from the program, but did not identify particular institutions and concluded that the number that might have left the program would be small.\textsuperscript{50} At least as reflected in library literature, then, it appears that librarians in the Canadian depository program are not concerned about the current level of public access. The fact that any library can be a partial depository as long as it allows public access for twenty hours per week also appears to give libraries leeway—if they want it—to partially limit public access and still retain depository status.

### Access to Public and Private University Libraries

\textsuperscript{23} The first argument—that depository libraries are bound to provide public access—assumes that the library has made a choice: in exchange for the benefit of receiving government publications for free, it agrees to provide public access. The flip side is that if a library no longer wants to provide public access, it can give up depository status and be free of the obligation.

\textsuperscript{24} The second argument does not see public access as one side of an optional bargain with government—it sees public access as a right that goes to the very nature of the library. The distinction is not between libraries that have opted in or opted out of a depository program, but between libraries that receive government funding and those that do not. An academic library in a public university, then, has an obligation to provide public access built right into its bricks.

\textsuperscript{25} One of the most dramatic manifestations of this belief was the protest surrounding the building of the John P. Robarts Library at the University of Toronto in the early 1970s, mentioned at the beginning of this article. It was originally intended to be a research library where only faculty members and graduate students would be allowed into the stacks to browse the books.\textsuperscript{51} Under the proposed plan, most undergraduates would only be allowed to borrow books by requesting them from a librarian. To the university librarian, Robert H. Blackburn, this was a compromise between the strict rules of prominent libraries in Europe, which allowed no browsing at all, and the then current policy at the University of Toronto, which had relaxed access to the point of letting in all university students as well as paying members of the public.\textsuperscript{52} Now that the university was to build one of the foremost research collections in the country, there were new considerations:

Books in a research library are no longer simply books, expendable commodities replaced or substituted for as easily as cans of soup on a grocer’s shelf, or volumes in a bookshop; they are scarce or unique items built carefully into a complex structure of knowledge in which each one serves a particular purpose.\textsuperscript{53}

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\textsuperscript{49} Bruno Gnassi, \textit{The Depository Services Program: Where Does It Go from Here? The Depository Proposition Revisited}, DOCUMENTS TO THE PEOPLE, Fall 2004, at 15, 17.

\textsuperscript{50} Id.

\textsuperscript{51} All-Night Protest Set in U of T Library Plan, TORONTO STAR, Feb. 4, 1972, at 35.


\textsuperscript{53} Id. at 228.
The purpose of a policy that restricted some patrons’ access would be to preserve the collection’s ability to serve scholars. Other libraries on campus would fill the role of providing duplicate copies of materials and easy access for undergraduates.\(^{54}\)

In 1972, to protest the exclusion of undergraduate students and the public, students staged sit-ins that were broken up by police.\(^{55}\) The *Toronto Star* reported that these demonstrators, “backed by at least 8,000 of the 32,000 students, are demanding full privileges for all students and the general public because public money is paying for the building.”\(^{56}\) In his history of the University of Toronto libraries, Blackburn took issue with being portrayed as simply wanting to exclude people. The students’ campaign invited the sympathy and support of nearly all readers, egalitarian or not, who knew the obvious and immediate value of browsing at a bookshelf and who did not have to weigh that against the needs of future generations of scholars. It left to me and a few others the more difficult task of promoting interest in the long-range and less understood value of prudent management of a resource as rare and fragile as the collection of a large research library.\(^{57}\)

In the year that followed, students, faculty, librarians, faculty from other schools, and members of the public debated whether an expensive new university library should be able to restrict access, and if so, who could be restricted. At the same time, a Toronto judge granted an absolute discharge to two students who had assaulted police during one of the sit-ins. *The Globe and Mail* reported that the judge “did not find the zeal [the students] showed in pursuing an ideal to be bad.”\(^{58}\) By the summer of 1973, when Robarts Library opened, all university students could have access to the stacks.\(^{59}\) If members of the public wanted a book, they could request it, it would be retrieved by library staff, and they could then read it in the reading room.\(^{60}\) There had been a victory for access for the undergraduate students, but members of the public did not gain unrestricted access.

There is no doubt that there is a public demand for the kind of specialized library collections found in academic libraries. Urban academic libraries have strong collections that “attract large numbers of external library users who are not considered in funding formulas driven by student enrolment figures.”\(^{61}\) Common responses to this situation in times of budget cuts are to impose fees or to close the

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54. *Id.* at 229.
57. BLACKBURN, supra note 52, at 233.
59. Ryan, supra note 1.
library to external users. One study of eighteen urban, publicly funded American academic libraries found that policies regarding external users varied greatly.

¶30 On the other hand, small communities may also rely on their academic libraries. In fact, one author has argued that academic libraries in small communities are more important to their local populations than academic libraries in large communities, as larger communities can support public libraries that fulfill their needs. Furthermore, the history of small universities—that they “have often grown up out of the local community”—may create obligations for the university. There is probably always a role for academic libraries to play in the surrounding community, whether large or small, but there are also legitimate reasons for academic libraries to restrict public access. The next section describes what happens when those restrictions are challenged.

Public Access to American Academic Libraries

¶31 An emeritus professor living in New York City once expressed his frustration at the fact that the city’s most comprehensive library collections, particularly in law, were located in private universities that restricted public access. Werner Cohn noted that Columbia, New York University, and Fordham had all moved to restrict public access. He argued that despite their status as private universities, it was unacceptable that they were restricting “citizens’ abilities to inform themselves about their government, culture, and society.” Cohn cited ways in which the public funded these private universities: the universities’ exemptions from various taxes, the fact that donations to the universities were tax-deductible, government grants to the universities, and grants to the university libraries themselves. A judge made a similar point about Princeton University in a court case and ultimately found, on other grounds, that the university had interfered with a nonstudent’s right to freedom of expression on the campus of the private university.

¶32 It is often argued—or assumed—that private universities, because they are not relying on state funding like their public counterparts, are free to exclude from their grounds, including their libraries, people who are not affiliated with the university. The claim that because the universities are not supported by the public, there is no obligation to provide public access, can be disputed, as it was by Cohn. The claim has also been denied, as in the Princeton case. But the question of whether the status of a university should determine whether there is a right of public access remains complex.

¶33 If there is no general rule that private universities can exclude members of the public, neither does public funding guarantee public access to public university

62. Id. at 28.
63. See id. at 29–31.
65. Id.
67. Id. at 182.
68. Id.
facilities. The U.S. Supreme Court has observed, in a case about First Amendment rights on campus, that

[a] university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university’s mission is education, and decisions of this Court have never denied a university’s authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. We have not held, for example, that a campus must make all of its facilities equally available to students and nonstudents alike, or that a university must grant free access to all of its grounds or buildings. 70

¶34 In a number of cases where nonstudents have challenged criminal trespassing charges issued to them on a university campus, state courts have affirmed this principle. In Bader v. State, Michael Bader was charged with criminal trespass for being in areas designated for student use at the University of Texas at Austin, a public university. The Texas Court of Appeals dismissed his argument that he had a right to be on campus, stating that public universities have the right to restrict public access to areas of the university.71 Bader’s location when he was charged was an academic center that “houses a library, offices, and a computer lab. These are not traditional public forums, such as a public street or park.”72 To allow Bader’s argument that a member of the public cannot trespass on university property because it is public property “would deprive the State of its ability to maintain public property for its intended purposes . . . ”73 Even though the university might be public property, the state could designate some public property for particular purposes.

¶35 In another case, a man was charged with trespassing at a public university in Ohio after preaching and refusing to leave. The Court of Appeals of Ohio affirmed that the university had a right to limit public access to parts of the university and upheld the charge.74 The public may have a right to enter parts of a campus for certain purposes, particularly to exercise the rights of freedom of speech or freedom of assembly, if the university has traditionally allowed these activities in a certain place, but the principle that publicly funded universities can lawfully exclude the public from parts of their campuses has been affirmed in these state court decisions.

¶36 Courts have also found that if private universities open themselves up sufficiently to the public, they will then assume certain obligations, such as ensuring members of the public can exercise rights to free speech and assembly.75 To a Pennsylvania appellate court, the presence of a depository library on the campus of a privately funded college was one indication that the college was in some ways open to the public.76 When private colleges do not regularly invite the public, they can exclude the public much more easily.77

72. Id. at 605 n.5.
73. Id. at 608.
There are a number of trespassing cases dealing specifically with the rights of members of the public to use university libraries. In *Scott v. Northwestern University School of Law*, the court held:

A private university library is not a place of public accommodations. The university library is inextricably tied to the university’s academic program. That the university permits public access to the library at various times of the year does not change its essential character as a library for the faculty and students of the university.  

Another case involved an undergraduate student, Charged with disorderly conduct for his behavior at the law library at his university, who argued that he had a constitutional right to use the law library. The judge didn’t agree, finding that barring the student from the library was “an objectively reasonable response and thus not in violation of the First Amendment.” The judge cited U.S. Supreme Court precedents, including *Widmar v. Vincent*, finding that the university can restrict public access to university facilities.  

Public Access to Canadian Academic Libraries

Perhaps because Canadians tend to think of their universities as public institutions, and therefore presumptively open to the public, they have not considered questions of access to the same extent as Americans, whose academic culture includes private institutions along with public ones. However, the distinction of public versus private in Canada may not be straightforward either. As Lazar Sarna and Noah Sarna observe:

Most Canadian universities are not operated by the government but by private corporations, most of which are non-profit. While incorporated by royal charter or under statute, they do not fall under government management. However, most private universities are government funded, some up to 80 per cent of their operating budget.  

Furthermore, the landscape in Canada is changing: provinces in Canada, particularly British Columbia, are beginning to allow private universities, such as Trinity Western University and Quest University.

One study of two private universities in western Canada distinguished public universities from private ones in terms of “philosophy and beliefs, . . . mission, governance, financing, academic framework, faculty and students, and community standards.” The author concluded that “[g]eneralizations about ‘private’ universities versus ‘public’ universities can easily be misleading . . . The private-public policy issue might be better viewed as a matter of degree.” Nonetheless, the fact that many Canadian universities considered public are not quite as public as

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80. Id.
83. Id. at 9.
84. Id. at 77.
often assumed, and the emergence of private universities that may not be completely private after all, suggests that a university’s public or private status cannot be the only factor in determining a public right of access to its library.

¶ 41 The Supreme Court of Canada has addressed the complex nature of Canadian universities. In 1979, when a former student challenged his forced withdrawal from the University of Regina, the Court had to decide what sort of power it had over the university. The majority observed that:

The Act incorporates a university and does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by statute and subsidized by public funds may in a sense be regarded as a public service entrusted with the responsibility of insuring the higher education of a large number of citizens . . . its immediate and direct responsibility extends primarily to its present members . . . 85

¶ 42 In a more recent case, McKinney v. University of Guelph, eight professors and a librarian argued that their universities’ mandatory retirement policies violated their equality rights under the Charter of Rights and Freedoms.86 The Charter only applies to government action; in order for this group to succeed in its challenge, the Supreme Court had to find that the universities were part of government. The Supreme Court rejected this argument, stating:

The government . . . has no legal power to control the universities even if it wished to do so. Though the universities, like other private organizations, are subject to government regulations and in large measure depend on government funds, they manage their own affairs and allocate these funds, as well as those from tuition, endowment funds and other sources.87

In declining to apply American jurisprudence on the subject, the majority noted: “Nor is there reason to consider the American authorities on state universities; Canadian universities . . . are private entities.”88

¶ 43 Beyond the statements from the Supreme Court, there do not appear to be many cases on public access to Canadian universities, much less to Canadian academic libraries. A number of cases on other matters show that universities regularly remove unaffiliated members of the public from campus, sometimes informally with a warning and sometimes with trespassing charges.89

¶ 44 A New Brunswick judge was unsympathetic to a professor who chose to protest the introduction of a university-wide photo-identification system at the library.90 After the implementation of the system, people who wanted to borrow books from the library had to present their photo ID cards. One evening, the defendant, an assistant professor of physics, led a group of students to take books

87. Id. at 273.
88. Id. at 274–75.
from the shelves, ask to sign them out, and refuse to produce their photo IDs, which meant they could not take out the books. They repeated this procedure until there were more than 250 books on the circulation desk. The only way to get the group to stop was to close the library altogether. The defendant repeated his protest the next day, and a few days later the president of the University of New Brunswick (UNB) suspended him. 91 The president also applied for an injunction to keep the defendant from returning to the campus, which is how the action arose. In granting the injunction, the judge stated that once the defendant had been suspended, he would be trespassing if he returned to UNB land. Disrupting the library as he did, the defendant had struck at the heart of the university’s ability to function normally. 92

¶45 In another case, an Ontario court, in its determination of where striking workers were permitted to picket, described the campus of Queen’s University as “buildings and property that are privately owned by Queen’s University as well as municipally owned public streets and sidewalks.” 93 The court then had to decide if areas proposed for picketing, while privately owned, could be considered areas normally accessible by the public. After analyzing the bylaws governing the buildings, the judge concluded:

I am satisfied that the public does not normally have access to Queen’s University campus, since only certain members of the public, that being students registered at Queen’s, faculty, staff, guests and alumni have the right to remain and use the facilities. Others may be removed from the campus and have been removed by the university security staff. 94

¶46 In a 2007 case, an alumnus of the University of Toronto tried to attend a campus event, which he mistakenly believed was open to the public. He was barred from entry, and in the ensuing scuffle was arrested and charged with trespassing. He sued the university for his injuries. Though the judge was critical of how the university had handled the situation, the plaintiff was unsuccessful in his claim. “The University grounds and buildings are private property. As such the University is entitled to decide who is allowed to remain on the premises,” 95 observed the judge, who further agreed that it was the university’s right to bar the plaintiff from the campus. 96

¶47 This case law suggests that courts do not see publicly funded universities as public property; rather, the public may use university facilities as the university permits. While very little of the Canadian case law specifically addresses whether there is a public right of access to university libraries, as part of university property they do not appear to be subject to a general public right of access.

91. Id. at 114–16.
92. Id. at 120.
93. Queen’s Univ., 28 C.P.C. 3d at ¶ 5.
94. Id. at ¶ 19.
96. Id. at ¶ 15.
Conclusion

¶48 From this review of jurisprudence, it appears the courts have not found a public access right to academic libraries based on the status of the university or the amount of public funding it receives. They are more interested in examining the reason the public access right is claimed. When the reason for access is to consult library materials—which has been the central question in this article—factors such as participation in a depository program, funding models, traditional use, and library policies can all be relevant. When the purpose includes doing something that could be considered protected speech or expression, the question becomes much more complex and may allow public access that would not otherwise be permitted.

¶49 The shift to electronic resources adds another dimension to the question of public access. On the one hand, open access databases of books and articles, many of which are provided by academic libraries, dramatically increase public access to academic libraries’ holdings. On the other hand, when academic libraries purchase e-resources, they are often licensed exclusively for a university’s faculty, staff, and students. This diminishes what is available to members of the public. As more resources become available only electronically, there will be an even greater challenge for academic libraries who wish to provide meaningful public access to their materials.

¶50 There is no doubt that providing access to the public is a public service, but there does not appear to be a general public access right. The case law seems to suggest that, rather than deciding public access policies based solely on considerations of the public or private nature of their universities, the amount of public funding received, or their library’s depository status, librarians can consider the individual characteristics of their own universities—the university’s mission, their patrons’ needs, their financial circumstances, and the place they see for their academic library in the larger community.
Task Mastery in Legal Research Instruction*

Matthew C. Cordon**

This article’s overriding message is that law students can come closer to mastering the skill of legal research in law school than any other skill. While a number of means might accomplish this goal, the training method suggested focuses on a goal orientation of task mastery.

Introduction

I have taught an advanced legal research course twenty-five times over the past eleven years. During the first class period for each of those twenty-five classes, I have told students that during law school they can come closer to mastering the skill of legal research than any other legal skill. I still believe this statement. Nevertheless, much of the literature focused on legal research skills of summer associates and newer law graduates contradicts what I tell my students. For years, commentators have concluded that law students simply lack basic research skills necessary for law practice.1 Writers have long lamented the decline or simple absence of these research skills,2 which in part precipitated a change in teaching methods at many law schools.3 Most first-year legal research instruction now occurs in first-year legal research and writing courses, with the general satisfaction about the quality of instruction varying by the discipline of the critic.4

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1. See, e.g., Donald J. Dunn, Why Legal Research Skills Declined, or When Two Rights Make a Wrong, 85 LAW LBR. J. 49, 49–52 (1993).

2. See, e.g., Robin K. Mills, Legal Research Instruction in Law Schools, the State of the Art or, Why Law School Graduates Do Not Know How to Find the Law, 70 LAW LBR. J. 343 (1977).


4. In 1996, Shapo and Kunz argued:

We do not agree with the proposition that students learn less research than they did in some former—but unspecified—“golden age” of research instruction. Although they may spend fewer hours in the classroom listening (more or less carefully) to lectures on legal research sources, their retention of legal research information and methodology is better than it was 20 years ago because they are reading better-written textbooks, working better-designed exercises, and learning these research skills in the context of writing skills and assignments.

Id. at 80.
Nobody doubts that legal research is a skill that permeates nearly all other legal skills. Not only does the 1992 MacCrate Report, issued by the American Bar Association Task Force on Law Schools and the Profession, include legal research as a fundamental lawyering skill, but legal research has also been said to be the only skill included therein that supports the nine other fundamental lawyering skills. The MacCrate Report was certainly not the first instance where legal research has been included as an important skill or competency. However, legal research has rarely been treated so distinctly in relation to other legal skills. The MacCrate Report was followed more than a decade later by the publication of a report from the Carnegie Foundation for the Advancement of Teaching, and Best Practices for Legal Education: A Vision and a Road Map, produced by the Clinical Legal Education Association. These three reports have been described as the trilogy that constitutes the “legal education reform canon.”

Since the MacCrate Report’s issuance, a rather staggering number of authors have addressed techniques and methods for teaching legal research classes. Still, commentators such as Paul Callister have called for “new attitudes toward scholarship” regarding legal research pedagogy. Recent efforts by groups of leading legal research educators have led to widely distributed statements on legal research education, and a signature pedagogy for legal research education. These efforts by scholars and professionals clearly indicate that effective legal research instruction in law schools is not a lost cause, yet the profession still needs to construct the

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7. See, e.g., Comment, Frank R. Strong, Pedagogical Implications of Inventorying Legal Capacities, 3 J. LEGAL EDUC. 555, 556, 558 (1951) (listing legal research as one of the technical skills necessary to “act like a lawyer” as opposed to thinking like a lawyer).
8. See id. at 558 (describing legal research in terms of the “capacity for effective use of legal and related materials” without discussing the relationship of legal research to any other dialectical or technical skills).
10. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).
12. For a lengthy summary and list of resources focusing on legal research, see Bowman, supra note 6, and authorities cited therein. In 2009, Legal Reference Services Quarterly devoted an entire volume to articles about teaching legal research.
bridge between the pedagogical theories in this area and the many and varied methods employed to teach the relevant subject matter.\textsuperscript{15}

\textsuperscript{\S}4 Many researchers in the field of educational psychology have focused their attention on the motivational and performance consequences of different systems of instruction.\textsuperscript{16} Several of these studies have focused on the goal of task mastery as a learning structure.\textsuperscript{17} Task mastery is an individualistic motivational system in which “there is an independence of goals, that is, whether the goal (or reward) is attained by one student is not dependent upon another student's achieving the goal.”\textsuperscript{18} This research certainly has relevance to the topic of legal research instruction,\textsuperscript{19} but the concept of task mastery might also relate to mastering the individual tasks that make up the process of legal research—for instance, selection of sources appropriate to answer a legal question, the use of proper finding tools (either in computer-assisted legal research or through print sources), the development of search strategies, and cross-checking sources to ensure accuracy and thoroughness.\textsuperscript{20}

\textsuperscript{\S}5 This article’s overriding theme is that what I tell my students—that they can come closer to mastering the skill of legal research in law school than any other skill—is accurate. While a number of means might accomplish this goal, the method suggested here incorporates a goal orientation of task mastery.

### Qualities of Effective Legal Researchers

\textsuperscript{\S}6 Even seasoned advanced legal research instructors might wonder just what an advanced legal researcher is. In this context, I am reminded of a fairly straightforward research project a summer clerk once had. A senior attorney delegated to this student a project focused on the Texas Pattern Jury Charges. The attorney thought that the charge contained an error and wanted the student to conduct research to find authority to support that argument. Part of the problem thus focused on whether a Texas court would presume that the pattern jury charge was correct as written.

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15. See Callister, supra note 13, at 191, \textsuperscript{\S}1 (noting that “[w]hile the literature in our field boasts considerable description of various methods for teaching legal research, noticeably absent is any theory drawn from leading pedagogues or educational theorists, particularly from outside of law and librarianship”).


19. For a piece on the role of motivation in legal research instruction, see Kris Gilliland, Motivational Perspective on First-Year Legal Research Instruction, 28 LEGAL REFERENCE SERVICES Q. 63 (2009).

20. See MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS 189 (2d ed. 2008).
What skills would an advanced legal researcher display in solving this problem? Consider the knowledge and abilities that might be necessary or otherwise help to solve this problem from a research perspective:

- Physical location of a copy of the *Texas Pattern Jury Charges*
- Ability to use the index of the *Texas Pattern Jury Charges*
- Knowledge of how the charges are organized, how the comments relate to the charges, and so forth
- Knowledge that the *Texas Pattern Jury Charges* are drafted by a committee of the State Bar of Texas and are relied upon heavily by the bench and bar
- Knowledge that *Texas Pattern Jury Charges* are available in print and CD-ROM but not on Westlaw or LexisNexis
- Knowledge that there is a practice-oriented treatise focusing exclusively on jury instructions in Texas civil litigation
- Knowledge that this question might be addressed directly in another practice-oriented treatise
- Knowledge of which practice-oriented litigation sources are available on Westlaw or LexisNexis
- Appreciation of the costs associated with using Westlaw or LexisNexis databases to obtain the information that might be readily available in a print format

I would suggest that all of this knowledge would have helped the student to solve the problem more efficiently and effectively. However, it is not at all clear that the knowledge helpful or needed to solve this problem falls within widely accepted opinions of what constitute core research competencies:

- The MacCrate Report does not directly address jury instructions as part of its coverage of the fundamentals of litigation and alternative dispute resolution.
- A report produced by the Research Instruction Caucus of the American Association of Law Libraries in 1997 provided a lengthy description of the legal research skills and values identified in the MacCrate Report. Jury instructions were the very last item mentioned in the report.

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21. The *Texas Pattern Jury Charges* are arranged in a numbering system that does not use section symbols. Thus, citations to these charges include references to that system rather than sections. See *The Greenbook: Texas Rules of Form* § 18.4 (12th ed. 2010). This can cause some confusion.


23. The research for the question focused on an error in the charge is relatively straightforward, as one of the more popular litigation treatises addresses the possibility of error in the *Texas Pattern Jury Charges*. See William V. Dorsaneo III, *Texas Litigation Guide* § 122.04(1) (2011). This source provides citations to Texas Supreme Court decisions that have addressed errors in these jury charges. See, e.g., Ford Motor Co. v. Ledesma, 242 S.W.3d 32, 41–44 (Tex. 2007).

24. See *Am. Bar Ass’n*, supra note 5, at 194 (listing the skills and processes a lawyer needs to know for effectively conducting a trial but not mentioning jury instructions as a specific item).


27. *Id.* at 106–08.
• A Texas practitioner may think it is self-evident that any Texas lawyer would know what the *Texas Pattern Jury Charges* are and how they are used. However, even if this were true, it is not universally accepted that the ability to conduct state-specific research is a core research competency, especially for law students.28

§9 The ability to perform legal research undoubtedly requires knowledge and information about the tools used in the process. Substantive knowledge about Texas jury charges likewise clearly would have helped the researcher in this process.29 The fact is, though, that the experts in legal research—law librarians—are rarely experts in a field of substantive law, but this lack of expertise seldom hinders their ability to perform legal research tasks. In the problem described above, my own ability to help the student to accomplish the research task had less to do with my training as a lawyer and far more to do with my familiarity with the resources. Even without extensive knowledge of all of these sources, if the student simply knew what the *Texas Pattern Jury Charges* were, she could still be in a position where she could conduct the research both efficiently and effectively, assuming that she also had other basic research skills.

§10 The treatise *Litigating Tort Cases* includes a list of habits possessed by highly effective researchers.30 The discussion in this treatise is interesting not only because of this list of habits, described below, but also because the authors focus their discussion on those who need to delegate research tasks.31 The authors explain:

Effective delegation of analytic legal research projects requires an ability to identify attorneys who can perform high quality work at a reasonable cost. Top research attorneys typically develop and nurture certain habits that turn the potential for outstanding legal analysis into the ability to consistently produce high quality, cost-effective work products.

The . . . seven habits combine to produce first-rate legal research, analysis, and writing.32

**Habit 1: Practice Makes Perfect**33

§11 Just as lawyers are becoming proficient at legal research and writing, they start devoting more time to other tasks. “As a result, only a small percentage of lawyers continue to perform sufficient research, as part of their daily professional lives, to achieve and maintain a high degree of research, writing proficiency, and efficient use of research technology.”34 Newer attorneys, though, should expect to spend a higher percentage of time on research projects. This further supports the conclusion that newer attorneys should focus more attention on these skills as law

30. 1 *LITIGATING TORT CASES* § 4:10 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2010).
31. *Id.*
32. *Id.* at 4-16.
33. All seven habits listed here are adapted from *id.* § 4:10.
34. *Id.* at 4-16. The authors suggest that those delegating research tasks should “[d]etermine the level of experience of [the] research attorney or research firm, measured in terms of years and by a count of high-quality, effective research projects completed.” Managers should “[a]sk for sample work product, examples of successful work, and references from clients with similar matters.”
students even if these are not skills that lawyers will necessarily use throughout their careers.

Habit 2: Being Curious, Confident, Creative, and Competitive

¶ 12 This habit is rather self-explanatory, but it demonstrates that some intangible qualities can affect the ability to conduct research. As the authors of this treatise note, “Confident researchers attack an issue with an inner conviction that they will find supporting authority, which makes them more likely to succeed at finding it. That same confidence extends to being accurate in their conviction that no supporting authority is available after conducting extensive research.”

Likewise, effective research sometimes requires the researcher to make difficult analogies—to “think outside the box,” which requires curiosity and creativity.

Moreover, what often drives an effective researcher is knowledge that she has something to lose (the case, the motion, etc.) if her research efforts fail.

Habit 3: Using Effective Strategies and Seeing the Big Picture

¶ 13 The ability to devise and implement an effective research strategy is without question one of the more important abilities of an effective legal researcher. The MacCrate Report, for instance, treats this as a distinct research skill, complete with several subpoints focusing on this skill.

In the MacCrate Report, a lawyer’s “[u]nderstanding of the [p]rocess of [d]evising and [i]mplementing a [c]oherent and [e]ffective [r]esearch [d]esign” includes the following abilities:

- Formulating issues for research;
- “Identifying the full range of search strategies that could be used . . . as well as alternatives to research”;
- Evaluating search strategies and choosing a research design; and
- Implementing a research design.

Habit 4: Covering the Details

¶ 14 As a general matter, an effective researcher pays close attention to detail. The authors of Litigating Tort Cases note that examples of a “wide range of essential activities” in a polished brief or memo may include

- Accurately synthesizing the facts;
- Distinguishing adverse authority (rather than ignoring it); and
- Thoroughly updating all cited cases.

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35. Id. (emphasis omitted).
36. See id. at 4-16 to 4-17.
37. See id.
38. Am. Bar Ass’n, supra note 5, at 160–63.
39. Id. at 160–62.
40. Litigating Tort Cases, supra note 30, ¶ 4:10, at 4-17.
Habit 5: Passion for Knowledge, Writing, Advocacy, and Technology

¶15 The research tools that were so standard for many years are constantly evolving. Westlaw and LexisNexis will continually undergo significant changes, which will require legal researchers to adapt. Highly effective legal researchers will embrace this new technology and use the technology to make themselves even more efficient and effective.41

Habit 6: Cost-Consciousness

¶16 Firm librarians frequently point out that one skill new associates should possess is the ability to conduct cost-efficient legal research.42 This is often introduced in the context of decisions about whether to use online or print sources,43 but it often also affects the scope of the research conducted. The authors note:

Highly effective legal researchers are intensely aware of the time and budget constraints of each project. Severely limited budgets require extra creativity, so research experts develop an intuition for when and how to cut corners reasonably. For example, if a budget is severely limited, research might be confined to the annotated statutes without additional case law research beyond those that appear as annotations. Another example of cutting corners reasonably is not to research for persuasive authority from sister jurisdictions, or to confine that research to the information available in treatises.44

Habit 7: Savvy Use of Sources

¶17 Skilled and experienced researchers are often on the lookout for new resources. Even when a source may not be helpful for one project, the researcher can often add resources to his repertoire simply by making a mental note of a source. When the appropriate time comes, the researcher can tap into a variety of resources that can help solve the problem, even when the researcher may not have had occasion to use those sources in the past.45

¶18 In the example posed at the beginning of this section, the student may not have needed to display all of these attributes. The student followed the instructions of the supervisor who assigned the research, so there may or may not have been room for the student to show creativity. Nevertheless, many of the other habits would almost certainly have helped in that process as well as in future research projects. The student would undoubtedly learn more about the Texas Pattern Jury Charges during this project, and so any future research focusing on these charges would likely be more efficient. The student likewise might learn that the problem was not one where “jumping onto Westlaw” to start running searches was the best

41. The authors of Litigating Tort Cases refer to WestCiteLink, KeyCite, and WestCheck as examples of “new research tools” that effective researchers may have embraced. Litigating Tort Cases, supra note 30, § 4:10, at 4-18. These are clearly outdated references.
43. See id at 3.
44. Litigating Tort Cases, supra note 30, § 4:10, at 4-18.
45. See id. at 4-19.
strategy. In fact, online systems may have been of limited use to solve the problem.

¶19 Ideally, legal research instruction can simulate these types of problems, allowing an instructor to instill habits such as the ones listed above, as well as others. A challenge is to provide a simulation that allows the student to fully appreciate the context in which the problem arises. Some might suggest that this is exactly why a process-oriented approach to legal research instruction is superior to the more traditional bibliographic method of instruction.46 Conversely, had the student received detailed instruction about such resources as the Texas Pattern Jury Charges and the Texas Litigation Guide, and if the student was also able to engage in case law research competently, the student could solve this problem just as effectively as if she had learned the information in a process-oriented approach. Either method of instruction can be effective, but I would suggest that neither is as effective as what the student teaches herself during the actual research process.47

Legal Research Tasks Are Often Mechanical in Nature

¶20 Bob Berring has suggested that the methods of publishing case law and of establishing West’s Digest System allowed research skills to become “fungible as research became a mechanical process.”48 Others have disagreed. Barbara Bintliff comments that Berring’s characterization of this as a mechanical process is incorrect in the sense that the researcher must have knowledge and understanding of the law before being able to use the digest system effectively.49 She quotes Frederick Charles Hicks in support of her argument: “It is a mistake to speak of any of the processes of finding the law as mechanical processes, for one has not truly found the law until one understands it, and this requires a knowledge of substantive law which comes only with the passage of time and much experience.”50 The MacCrate Report likewise treats legal research as something “far more than a mechanical examination of texts; the formulation and implementation of a research design are analyzed as processes which require a number of complex conceptual skills.”51

46. For a detailed commentary on these approaches, see Paul Douglas Callister, Beyond Training: Law Librarianship’s Quest for the Pedagogy of Legal Research Education, 95 LAW LBR. J. 7, 2003 LAW LBR. J. 1.

47. Several authors have discussed the role of metacognition in the context of legal research instruction and legal education in general. Kristina Niedringhaus noted that “[a] student with metacognitive awareness will have knowledge about how she thinks and be able to control her learning. The knowledge about how she thinks would include knowledge about learning preferences, strengths, weaknesses, what knowledge needs to be gained, and the best way to acquire that knowledge.” Kristina L. Niedringhaus, Teaching Better Research Skills by Teaching Metacognitive Ability, 18 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 113, 113 (2010) (footnote omitted). For further discussion of metacognition, see Callister, supra note 13, at 210–12, ¶¶ 39–41; Anthony S. Niedwiecki, Lawyers and Learning: A Metacognitive Approach to Legal Education, 13 WIDENER L. REV. 33 (2006).


49. Bintliff, supra note 29, at 258, ¶ 36.

50. Id. (quoting FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 17 (1923)).

51. AM. BAR ASS’N, supra note 5, at 163.
Focusing so much attention on the complexity of legal research can often shift focus away from the training of students to be able to use this skill. Students are frequently frustrated while learning how to conduct research because of the apparent complexity of the process. When students hear the message that legal research is so intricate that it will take years to master, it hardly provides incentive for them to take the time to master the skill. Moreover, students habitually attempt to develop legal research skills by adding to their existing knowledge of research sources and processes, which may include the likes of Google and Wikipedia. Learning the steps in the research process, including the important steps of updating authorities to ensure their validity, does not always fit nicely into these knowledge bases. This is by no means a new problem, given that legal research instructors have struggled with incorporation of computer-assisted legal research since the systems first became available to law students.

Several authors have noted that the transformation of legal information into digital formats has completely altered the way that legal researchers seek information. Berring commented in 1994 that digital information would cause the legal research universe to collapse. Most of this universe was based on the West Digest System, which created the hierarchical structure that not only established the basic means of organization of case law, but also “remade the structure of legal thinking . . .”. Actually locating the information was mechanical and could be “self-taught by a bright person” because all that the researcher needed to locate case law was the correct topic and key number. The destruction of the digest as the focal point of organization led to “crisis in legal information.”

More recent commentary has focused on the need for a paradigm shift away from the digest system, which has been criticized for a number of reasons, including its slow growth, the propensity of its editors to make errors, and being too “cumbersome and difficult to use.” Lee Peoples noted that even though a survey of his students showed that they were more effective using print digests, they nevertheless “are not likely to adopt this resource as their tool of choice.” Bintliff has advocated for the development of new textbooks that focus on new paradigms in the field of law, replacing the digest system. Given that this dialogue has continued

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52. See Bintliff, supra note 29, at 259, ¶ 40.
53. Articles about this topic have appeared for the last twenty years or more. See, e.g., Jackson H. Mumey, Transforming Our Thinking: Responding to the Gap Between LRW Pedagogy and Knowledge-Based Systems, in Expert Views on Improving the Quality of Legal Research Education in the United States 1 (1991).
55. Id. at 21.
56. Id. at 20.
57. Id. at 25.
58. Id. at 27.
60. Peoples, supra note 59, at 674, ¶ 33.
for so long, though, one should not expect new paradigms and systems of organization to develop anytime soon. It is possible that the next generation of Westlaw and LexisNexis will change some of this landscape, given that the new systems rely less on the database-specific and hierarchical structures of the traditional systems. As People’s survey showed, however, the promise that a system is less cumbersome and difficult to learn does not mean that the system will necessarily be more effective or more cost-efficient.

¶24 The demise of the digest system may mean that the law lacks a universal method of organization, but this hardly means that the law lacks structure. The subject matter of statutes may vary significantly between jurisdictions and subjects within a jurisdiction, but the information is still highly structured in systems of titles, chapters, subchapters, sections, and so forth. When a statute applies to a legal problem—which is so frequently the case in modern practice—an annotated code is generally a superior source for locating case law and authorities such as related statutes, administrative regulations, legislative history, and secondary sources. A number of types of secondary sources, such as legal encyclopedias and many form books, are organized using systems of topics and sections similar to the basic organization of the digest system. This system may not be universal, but it is a relatively common system of organization.

¶25 Developing a clear understanding of how these various authorities are organized can make important legal research tasks more mechanical in nature. Students often have as much or more trouble with mechanical steps as they do with running full-text searches trying to locate case law. Indexes to legislative codes take into account both the structure of the law and the actual statutory terms used. In a full-text search, a researcher may or may not know the precise terms used, and without the precise terms, searches on more advanced systems such as Westlaw and LexisNexis typically will be ineffective. Moreover, even something as relatively straightforward as finding a statute by popular title can be difficult. For example, a Westlaw user who tries to find the Texas Code Construction Act by entering “code construction act” as a terms and connectors search in the TX-ST database will see a result of 1200 documents. The online researcher would have to run a more precise search or rely on a field restriction to find the chapter containing this act more efficiently.62 The better practice is often to rely on an old-fashioned index or table.

¶26 Legal research instructors can identify those tasks that are more along the lines of step-by-step, mechanical processes. In fact, one of the keys to becoming a highly efficient legal researcher is to master these steps, which often have little or nothing to do with the researcher’s knowledge and understanding of the underlying law.63 For instance, students clerking in Texas might have to locate legislative history in efforts to construe statutes. Students typically express dismay that they are not sure what they need to find, or that they have difficulty accessing the information efficiently on Westlaw or LexisNexis. The reality is that compiling legislative history in Texas is a straightforward, step-by-step process, where the complexity

62. Many other statutory sections refer to this act, which is the reason for the large number of results. Entering a search with the field restriction PR (prelim) yields a more precise result.

63. But see Bintliff, supra note 29, at 258, ¶ 36.
often only depends on the date of the bill that is the focus of the research. Though documentation produced during the federal legislative process is considerably more complex, a number of tools are available that render the process mainly about mechanical retrieval.

\(\text{\S}27\) Other research tasks may be more or less mechanical for different reasons. Research in administrative law is often difficult because of the technical language used in administrative regulations. A researcher may improve the search, however, by focusing on the agency that issued the regulation before looking for references to a specific regulation’s subject matter. Moreover, knowledge of the basic system of organization of regulations—parts, subparts, and sections in the *Code of Federal Regulations*, for example—can also help the researcher understand how to search for a regulation more effectively. Finding the subject matter in the index may still be challenging, but knowing the mechanics of using the index and the code should aid in the process.

\(\text{\S}28\) Of course, finding documents is rather pointless if the researcher is unable to use the documents. Discussion of the rules of statutory construction, or even of the relative weight of the types of legislative history documents, may be more interesting than the retrieval steps. Likewise, understanding the entire administrative structure is something outside the scope of nearly any legal research course. However, an understanding of the nature of a legal authority is likewise rather useless if the researcher cannot find the document.

\(\text{\S}29\) Berring has commented that in the past, legal research instruction could afford to be shoddy because the digest system rendered the process mechanical. Bright students could show other bright students the proper steps, and students could teach themselves from that point forward. However, a focus on teaching students to teach themselves does not mean that research instruction needs to return to these days of old. Suggesting that legal research courses need to focus more on mechanical processes may appear to be a step in the wrong direction, but I believe this instruction is necessary to allow students to become efficient researchers. The mechanics are part of the skills training process, and like skills training in other contexts, students need not only exposure to and familiarity with the tasks (i.e., the steps in the process), but also enough repetition so that they are in a position to master those tasks.

### Achievement Goals and Systems of Student Motivation

\(\text{\S}30\) The Carnegie Report was especially critical of the legal academy’s primary means of assessment—the single final examination at the end of a term. This practice “holds a privileged, virtually iconic place in legal education,” and many

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64. See Brandon D. QuaRes & Matthew C. CordOn, Researching Texas Law 146–54 (2d ed. 2008).
66. See id.
67. Sullivan et al., *supra* note 9, at 162–64.
68. *Id.* at 164.
schools are deeply committed to the continued use of this system of assessment. The competitive atmosphere that is ubiquitous in most law schools is made even more intense by the practice of grading these exams on a curve. By grading on the curve, the system ensures that only a certain percentage of students can succeed, and this success is relative to how many other able students are in a particular class. The Carnegie Report authors concluded that: “Without the significant balance provided by other kinds of motivation, especially the desire to hone one’s craft and serve clients responsibly that the practical and the ethical-social apprenticeships emphasize, we fear that much of the pedagogical effort of law professors may be producing less result that [sic] one would wish.”

Although much of the criticism of assessment in law schools has focused on the use of the examination in doctrinal courses, assessment and evaluation in other types of courses have also been criticized. In both simulation-based classes and clinics, the grades are often based on the subjective opinions of a single teacher, and this assessment may not come until the end of a term. The authors of Best Practices for Legal Education note:

In simulation-based courses, the primary and sometimes sole method of assessment is for a single teacher to observe a student performing a limited number of lawyering tasks. Sometimes, self- or peer-evaluation is also used. Frequently, students are given a grade on every performance, often without any opportunity to receive formative feedback before the summative assessment and without any opportunity to continue practicing until the appropriate level of proficiency is achieved. For that matter, almost no effort has been made to describe appropriate levels of proficiency.

These authors reached a rather predicable conclusion—that current assessment practices at law schools are “abominable.”

The Best Practices report agrees with the conclusion reached by Judith Wegner, Senior Carnegie Scholar:

A better assessment system would find ways to stimulate student reflection on future professional paths, strengths and weaknesses and guide students toward relevant learning opportunities; provide incentives that lead students to take more active responsibility for their own learning as they undertake increasingly sophisticated work throughout students’ law school careers; and document information that would attest to graduates’ professional capabilities while assisting employers in making efficient and informed hiring decisions.

The authors of Best Practices acknowledge that practices in legal research and writing classes may exempt assessment in these courses from the abominable category. This is not without irony, given that legal research and writing instruc-

69. Id. at 165.
70. Id. at 163.
71. See id.
72. Id. at 163–64.
73. See STUCKEY ET AL., supra note 10, at 238.
74. Id.
75. Id. at 239.
76. Id. (quoting Judith Wegner, Thinking like a Lawyer About Law School Assessment 63 (2003) (unpublished manuscript)).
77. Id.
tors have traditionally had to fight to ensure that the courses have a significant place in law school curricula. The nature of writing courses invites more constant feedback, as students continually work on drafts and redrafts of written work product. Legal writing instructors may also be more likely to conduct the type of criteria-referenced assessments that are preferred over the traditional norm-referenced assessments at the heart of an evaluation system based on a curve.\(^{78}\)

§34 Instructors of stand-alone legal research classes—especially advanced legal research classes—have developed a variety of means to assess student skill development.\(^{79}\) Methods include homework assignments and quizzes, research exercises, observation and dialogue, peer assessment, and evaluations at the end of the term through the use of tools such as pathfinders and examinations.\(^{80}\) The value of the various assessment tools may be debated, but use of these tools has become rather standard, especially in the advanced courses.\(^{81}\) Legal research instructors are perhaps less prone than doctrinal faculty to succumb to pressures of conforming to traditional models of teaching and assessment.\(^{82}\) Although schools may expect librarians (and legal writing faculty as well) to publish, the value system that applies to doctrinal faculty does not apply in the same manner to those teaching legal research courses.\(^{83}\) As a general matter, law schools are unlikely to reward professors for developing innovations in teaching or for experiencing success in having students achieve learning objectives.\(^{84}\) Without the pressures for conformity, legal research instructors are probably more likely to try to find ways to innovate.\(^{85}\)

§35 Legal research courses should seek to achieve a number of goals, and different learning structures and goal orientations can affect student motivation,\(^{86}\) student performance,\(^{87}\) cognitive engagement,\(^{88}\) and teacher motivation.\(^{89}\) What can be difficult in legal research and other skills classes is providing assessment and evaluation within an environment that focuses so heavily on norm-reference assessments. Most

78. See id. at 243.
79. For a summary of various means of assessment in legal research courses, see Simon Canick, Legal Research Assessment, 28 LEGAL REFERENCE SERVICES Q. 201 (2009).
80. Id. at 206–12.
81. See id. at 212–13.
83. See id. at 361 (noting that law-school economics make teaching innovations difficult to implement because of large class sizes).
84. Id. at 360 & n.43.
85. This is not to suggest, though, that use of various assessment tools means that legal research instructors are using the best teaching methods available. Surveys have shown, for instance, that the vast majority of advanced legal research instructors use a classroom lecture format, which is not considered to be the most effective means of engaging students. See Wright, supra note 13, at 310 (citing Ann Hemmens, Advanced Legal Research Courses: A Survey of ABA-Accredited Schools, 94 LAW LIBR. J. 209, 229, 2002 LAW LIBR. J. 17, ¶ 51)). See also Stuckey et al., supra note 10, at 231–34 (summarizing strengths and weaknesses of lecture format and providing tips for alleviating the problems with this format).
86. Covington & Omelich, supra note 17, at 1038.
87. Id.
89. Ames & Ames, supra note 18, at 545.
truly individualistic learning structures that incorporate criterion-referenced standards allow students to achieve desired goals if the students are willing to put forth the desired level of effort and strive for certain standards of excellence.\footnote{Covington & Omelich, supra note 17, at 1039.} To the extent that a law school expects a certain model of grade distribution—even in skills classes—providing this assessment may be difficult or impossible, given that the grade curve ensures that only a certain percentage of students can reach a certain level of achievement. To the extent that research classes are not bound (formally or perhaps informally) by such a curve, individualistic learning and goal structures can and should improve both student motivation and performance.

¶36 Educational psychologists refer to a goal structure as something that “defines which goals students are to accomplish, how students are to be evaluated, and how students are to relate to each other and to the task.”\footnote{Ames & Ames, supra note 18, at 535.} A number of researchers have compared goal structures that are competitive in nature, cooperative in nature, and individualistic in nature.\footnote{Id. at 535–36.} Most law schools use a competitive structure in which “students work against each other such that the probability of one student achieving a goal or reward is reduced by the presence of capable others.”\footnote{Id. at 536.} By comparison, a cooperative structure incorporates a situation where “the probability of one student receiving a reward is enhanced by the presence of capable others.”\footnote{Id.} With an individualistic structure, there is “a fusing of the person with the demands of the task such that participating in the task itself becomes the goal.”\footnote{Id.}

¶37 The authors of \textit{Best Practices in Legal Education} recommend implementation of cooperative goal structures.\footnote{Stuckey et al., supra note 10, at 119.} According to studies cited in that report, “cooperative learning produces higher achievement, more positive relationships among students, and psychologically healthier students than competitive or individualistic learning.”\footnote{Id. at 120 (quoting Gerald F. Hess, \textit{Head and Hearts: The Teaching and Learning Environment in Law School}, 52 J. LEGAL EDUC. 75, 85 (2002)).} In a cooperative system, a goal is shared by a set of individuals.\footnote{Ames & Ames, supra note 18, at 539.} The authors of \textit{Best Practices} note:

Engaging pairs or teams of students in activities such as group projects, presentations, papers, study groups, peer tutoring, peer teaching, and peer evaluation can improve learning. “Learning is enhanced when it is more like a team effort than a solo race. Good learning, like good work, is collaborative and social, not competitive and isolated. Working with others often increases involvement in learning. Sharing one’s ideas and responding to others’ reactions improves thinking and deepens understanding.”\footnote{Stuckey et al., supra note 10, at 120 (quoting \textit{The Seven Principles in Action} 23 (Susan Rickey Hatfield ed., 1995)).}
Providing opportunities for students to collaborate is certainly a worthy goal, but for a distinct skill such as legal research, assessing an individual’s skill can be difficult when an instructor evaluates a group’s effort and performance rather than that of an individual. It may be that the group dynamic resolves concern about individual abilities within a group (that is, the stronger members of the group may demand more of the weaker), but assessing performance has to be based on the efforts of the group as a whole rather than any individual. Researchers suggest that students themselves will engage in a self-group comparison, but individualized assessment still becomes difficult in a truly cooperative system.\textsuperscript{101}

§38 Individualistic goal structures can have competitive aspects to them.\textsuperscript{102} For instance, the use of external standards can result in goals that are similar to those related to interpersonal competition.\textsuperscript{103} Other individualistic motivational systems are noncompetitive in nature.\textsuperscript{104} Carole Ames and Russell Ames have summarized such a noncompetitive system:

Central to a noncompetitive conception of individualized structures is an involvement in mastering the task. Such an orientation has been intended when individuals have been encouraged to try their best, provided with multiple opportunities for improvement, asked to monitor or evaluate their own progress, or asked to establish goals that exceed their past performance. A noncompetitive individualistic structure, then, differs from a competitive structure in that in the former, students are focused on the task, and effort or trying is perceived as the route to mastering the task. Students are not focused on questioning their ability, and the underlying assumption is that “I can if I try.”\textsuperscript{105}

§39 The goal of this type of noncompetitive individualized structure is to foster a task-mastery motivational system, with mastery indicating that the individual has gained ability through the use of effort.\textsuperscript{106} In this type of system, a student who is required to apply effort to complete a task does not demonstrate a lack of ability, because the goals are more focused on prior achievements rather than a comparison with others.\textsuperscript{107} Other researchers have concluded that task-oriented structures promote several factors that are believed “to initiate and sustain task involvement, persistence, and improved performance.”\textsuperscript{108} In competitive structures, by comparison, students tend to focus on ability in terms of their performances in relation to others.\textsuperscript{109} Goal orientations may be similarly divided into performance goals (norm-referenced and competitive) and mastery goals (criterion-referenced and

\begin{enumerate}
\item[100.] Ames & Ames, supra note 18, at 539.
\item[101.] I generally give my advanced legal research students the freedom to work individually or collaboratively on assignments.
\item[102.] Ames & Ames, supra note 18, at 538.
\item[103.] Id.
\item[104.] Id.
\item[105.] Id. at 538–39 (citations omitted).
\item[106.] Id. at 539.
\item[107.] Id. Much of this research has focused on children, but studies focused on college-level learning have found similar results. See, e.g., Covington & Omelich, supra note 17, at 1041 (looking at systems of motivation in a study of college-level psychology students).
\item[108.] Id. at 1047.
\item[109.] Ames & Ames, supra note 18, at 537.
\end{enumerate}
more individualistic). Table 1 is based on a table provided by Carole Ames and Jennifer Archer demonstrating the differences between these goal orientations.

Table 1
Comparison Between Mastery Goal and Performance Goal Orientations

<table>
<thead>
<tr>
<th>Climate Dimensions</th>
<th>Mastery Goal</th>
<th>Performance Goal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Success is defined as . . .</td>
<td>Improvement, progress</td>
<td>High grades, high normative performance</td>
</tr>
<tr>
<td>Course places value on . .</td>
<td>Effort/learning</td>
<td>Normatively high ability</td>
</tr>
<tr>
<td>Reasons for student satisfaction are . .</td>
<td>Working hard, challenge</td>
<td>Doing better than others</td>
</tr>
<tr>
<td>Instructor is oriented toward . .</td>
<td>How students are learning</td>
<td>How students are performing</td>
</tr>
<tr>
<td>Students view errors/mistakes as . .</td>
<td>Part of learning</td>
<td>Anxiety eliciting</td>
</tr>
<tr>
<td>Students focus attention on . .</td>
<td>Process of learning</td>
<td>Own performance relative to others</td>
</tr>
<tr>
<td>Reasons for student effort .</td>
<td>Learning something new</td>
<td>High grades, performing better than others</td>
</tr>
<tr>
<td>Instructors base evaluation criteria on .</td>
<td>Progress (individualistic)</td>
<td>Normative (compared with other students)</td>
</tr>
</tbody>
</table>

¶40 The task-mastery motivational system and mastery-goal orientation can create a learning environment more suitable for a legal research course than the competitive, norm-based environment that is so common in the legal academy. On the other hand, the context of the instruction would also significantly affect the decision to use either system. For example, a first-year student who lacks the context for legal research as a distinct skill does not have a prior achievement level on which to base a self-assessment. Conversely, an upper-level student has much better context for this self-assessment, even though members of a class will enter the course with varying levels of ability. Accordingly, the application of these different achievement goals and systems of motivation probably varies depending on the type of legal research course in which the principles are applied.

Application of Task Mastery to a Legal Research Course

¶41 I have previously written about the content of my advanced legal research course, and much of the current content is the same as it was in 2003. The course

110. Ames & Archer, supra note 17, at 260.
111. Id. at 261 tbl.1.
112. Berring and others argue that “[s]ince the rest of the first year consists of traditional courses taught out of casebooks and readers, the research course lacks any context in the first year.” ROBERT C. BERRING & ELIZABETH EDINGER, FINDING THE LAW 5 (12th ed. 2005). Others disagree. See Shapo & Kunz, supra note 3, at 78.
113. Matthew C. Cordon, Beyond Mere Competency: Advanced Legal Research in a Practice-Oriented Curriculum, 55 BAYLOR L. REV. 1 (2003). Though some of my observations summarized here apply to a basic first-year legal research and writing class as well, the goal orientation in those courses necessarily differs from the stand-alone, upper-level research course.
focuses intentionally and directly on the skills identified in the MacCrate Report, with significant emphasis on state-specific materials. What the course particularly stresses is the nature of legal rules and institutions, which is the first research skill covered in the MacCrate Report. What I have learned in teaching the course many times is that most students simply lack interest in gaining knowledge about legal information unless there is a clear application that they can associate with the discussion. Students typically enroll in the class to be able to perform legal research better and more quickly, and though discussion of the nature of authority can help in that regard, lectures about legal authority did little to accomplish the goals of the course unless I could assign a task that could put that knowledge to immediate use.

§42 The course’s goal orientation has evolved over time to focus much more heavily on task mastery. On the first day of class, I assign students a research project and give them a certain amount of time (usually three hours) to complete it. The students’ performance on this assignment serves as a benchmark for students to gauge their progress during the course. In a task-mastery motivational system, students are not judged in terms of how they relate to one another, so it is important to stress that student performance on this benchmark assignment will not be judged in relation to other students.

§43 On the first day of class, students also learn of the course’s goals—for each student to improve his or her research ability by 300% in all respects. This means that students should be familiar with and capable of using three times the number of legal resources at the end of the quarter compared with the beginning; students should be able to find three times the amount of information at the end of the quarter compared with the beginning; students at the end of the quarter should be able to find the information they are able to find at the beginning of the term in a third of the amount of time; and students should be able to improve their accuracy in finding materials threefold. Reactions to these instructions tend to vary, given that students have different skill levels and different levels of confidence as they enter the class. I often have to provide numerous reassurances that the students’ skill levels at the beginning and end of the quarter will not be evaluated based on a comparison of others. In a law school that tends to be highly competitive in nature, sometimes those reassurances are still not enough.

§44 To build student skills, the course incorporates several general goals and components, including the following.

Familiarity

§45 Students should have exposure to a broad range of legal resources. This is often the main focus of first-year legal research instruction, and it remains a focus in advanced legal research. It would be ideal if students had and could retain in-depth knowledge of all the sources covered, but just being aware that a source is available is often helpful in itself.

114. AM. BAR ASS’N, supra note 5, at 157.
Repetition

¶46 Familiarity with resources alone is not enough to develop solid research skills, especially with regard to more mechanical processes. The course requires students to repeat processes several times for different types of tasks, such as compiling legislative histories or using KeyCite or Shepard’s for research purposes.

Rigor and Challenge

¶47 Students are not likely to accelerate their skill development during a short period of time unless the assignments are rigorous and challenging. This is especially important in research focusing on case law, because students tend to retain certain levels of ability from the first-year course but need to improve their speed and accuracy in finding relevant cases. The rigor and challenge in the case law context may result from students’ having to solve a difficult problem, or it may result from their having to identify a certain number of the most relevant cases from hundreds of possible cases.

Diligence, Patience, and Organization

¶48 In addition to the good habits discussed earlier, good researchers are also diligent in completing tasks and do not lose their patience when they encounter a difficult problem. Moreover, researchers need to remain organized throughout a problem, using appropriate means to keep track of the authority they have discovered. Students will often comment that they tend to print the same case multiple times or print cases without knowing why some of those cases are especially relevant. The course can alleviate problems like this by encouraging improvement in overall organization during the research process.

Significant Increase in Confidence

¶49 Many students enroll in advanced legal research because they are not confident in the skill they attained as first-year students. Even when students complete a research task properly, they are not always sure they did so using the most effective means. By being required to complete tasks using several different approaches and to evaluate how effective those options are, students should gain confidence in what they are doing. They will likewise become more confident as their speed, accuracy, and overall effectiveness improve.

Conclusion

¶50 Employing mastery orientation as a goal means that all students should have the opportunity to succeed. Assessment of skill development can be difficult, especially when most students submit what amounts to the same answers (meaning research results submitted in proper citation form and sometimes information provided about those resources). It can also be a challenge to define or describe “success” when students are being judged principally by their skill development. However, when students properly focus their attention on skill progression throughout the course, I am capable of assessing their improvement based on their
description of this progress in their research logs. Moreover, the practice of keeping the research log to identify research strategies, articulate the steps in the research process, and engage in self-evaluation significantly increases the likelihood that a student retains the knowledge about the research process. By knowing that they can succeed in the course by putting forth sufficient effort, students are more likely to provide honest self-assessments.

¶51 My statement to students—that during law school they can come closer to mastering the skill of legal research than any other skill—cannot rest on this course alone. Experiential opportunities will significantly affect skill development, though the actual experience may vary from student to student and from school to school. My institution focuses heavily on simulation models, and students often have research opportunities during these simulations. Students in clinical programs and writing courses have additional research opportunities within the curriculum. Of course, students also have numerous external opportunities for skill development in summer clerkships and internships, work on law journals, work as research assistants, and so forth.

¶52 Legal research courses provide opportunities for instructors to “prepar[e] [students] for the demands of professional work” in the context of a distinct skill by training students “to think, to perform, and to conduct themselves as professionals.” By emphasizing that students should focus their attention on the process of learning and building their skills, we allow students to see the relationship between research skill development and other areas of development. Students with an appreciation for their ability to develop strong research skills during law school should be motivated to accelerate their development in this area, and the incorporation of an appropriate goal orientation of a research course can significantly help students to accomplish this successfully.

115. Sullivan et al., supra note 9, at 27.
Should You Use a Textbook to Teach Legal Research?*

Nancy P. Johnson**

Legal research professors have struggled with the question of assigning and using a text in class. Because there are many excellent legal research texts available, instructors may feel their students need the safety net of a printed textbook. For professors who decide to use a textbook, this article includes reviews of selected current legal research texts. On the other hand, professors may believe that many students do not read their legal research texts and prefer teaching without a textbook. Instead, they may use a series of web sites, PowerPoint slides, tutorials, podcasts, and electronic texts. The article discusses student reaction to a legal research course at Georgia State University College of Law that does not use a textbook.

Introduction

1 Throughout the years, many great law librarians have authored legal research texts, including Frederick Hicks,1 Miles Price,2 William Roalfe,3 Myron Jacobstein,4 Roy Mersky,5 Morris Cohen,6 Bob Berring,7 and Kent Olson.8 Beginning in the 1980s, attorneys joined the legal research text market with non-traditional approaches to the topic.9 In addition, legal writing instructors devised new approaches to legal research training and wrote a number of texts.10 The late

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* © Nancy P. Johnson, 2011. An earlier draft of this article was presented at the Conference on Legal Information: Scholarship and Teaching, held at the University of Colorado Law School on July 8–10, 2010, as part of its Boulder Summer Conference Series, and was enriched by the feedback I received. I thank Barbara Bintliff for her work organizing the conference and guiding the discussion.

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1. See, e.g., Frederick C. Hicks, Materials and Methods of Legal Research (1923).
2. See, e.g., Miles O. Price & Harry Bitner, Effective Legal Research (1953).
5. See, e.g., id.
8. See, e.g., Kent C. Olson, Legal Information: How to Find It, How to Use It (1999); Kent C. Olson, Principles of Legal Research (2009).
9. For example, of the authors of books reviewed infra, Stephen Elias is an attorney.
10. For example, of the authors of books reviewed infra, Oates, Enquist, Sloan, and Kunz are current or former legal writing professors.
1980s brought an impassioned exchange between librarians Bob Berring and Kathleen Vanden Heuvel and lawyers Christopher Wren and Jill Wren on the teaching of legal research by using the bibliographic approach versus the “process-oriented” one. According to the Wrens, the bibliographic approach is tied to the role of librarians in teaching research and authoring textbooks while the “process approach” uses real problems. The Wrens authored two editions of their book, *The Legal Research Manual*, but it has not been updated since 1986. Today, law librarians and legal writing instructors continue to debate the optimal way to teach legal research by utilizing the best materials available.

This article begins with a brief discussion of the history of legal research texts. Following this, it considers why some legal research professors do not use a textbook. For a variety of reasons, professors of many disciplines, including legal research, have recently started questioning whether to assign a textbook at all. Included in this discussion are the pros and cons of developing one’s own teaching materials. Other professors firmly believe in the value of a legal research text and have good pedagogical reasons for assigning and using a text in their courses. Thus, at the end of the article, I list and review a number of the leading texts that can be used in legal research courses.

As in other disciplines, legal research professors usually give some thought to using a text versus using their own materials. Professors usually make a text selection that best suits their syllabus, including length of the course, integration with other courses, and personal preferences (or prejudices). Legal research professors usually make independent decisions in choosing a textbook, unless there is a directive by a more senior professor.

**A Brief History of Legal Research Textbooks**

Several writers have documented the history and evolution of the casebook. However, legal research textbooks are not casebooks; rather, they are hornbooks, nutshells, or legal treatises. Steve Barkan’s review of the second edition of

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14. The terms “professor” and “legal research professor” as used in this article include all instructors who teach legal research even though they have a number of different titles.

Jacobstein and Mersky’s *Fundamentals of Legal Research* describes the history of authoring and publishing legal research textbooks. It begins with the first West Publishing Company text on the subject, *Brief Making and the Use of Law Books*, written in 1906. Barkan explains that law book publishers, rather than the law schools, deserve the credit for creating an interest in the formal study of the use of law books. He also discusses iconic works, including the various editions of *Fundamentals of Legal Research*, beginning with the 1956 edition by Ervin Pollack. According to Barkan, there is a “gestalt to legal research that is difficult to capture” in books on legal research. When writing a legal research text, the author needs to synthesize the relevant conceptual systems:

First, the nature of the relationship between the law and its resources requires that some of the substance of the law and the nature of the legal system be grasped before the bibliography of the law can be comprehended. Second, the functional unity of legal bibliography requires that resources be considered in relation to each other. And, third, the interdependency of the analytic, searching, and applications aspects of research suggests that each should be viewed in the context of the others.

The history of writing legal research texts would not be complete without a discussion of the works of Frederick C. Hicks. He is widely recognized as having established the standard for the legal research texts of today. In his works, Hicks described sets of books, but he also taught research as a process. Hicks defined legal research as “the summation of all those processes by which legal material is found, digested, arranged, tested, and compared.”

**Choosing Not to Use a Legal Research Textbook**

Because skills courses lend themselves to more innovation than traditional doctrinal courses, legal research instructors may prefer teaching without a textbook. When studying about finding the law, the “point-and-click” generation may prefer a series of websites, PowerPoint slides, tutorials, podcasts, and instructional

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21. *Id.* (footnotes omitted).
22. See Stacy Etheredge, Frederick C. Hicks: The Dean of Law Librarians, 98 Law Libr. J. 349, 2006 LAW LIBR. J. 18, for a recent biographical sketch of Hicks and his importance to law librarianship.
24. Hicks, supra note 1, at 29.
electronic texts. E-textbooks match the way that students study and access their media, so an e-textbook may provide them with a better experience.\textsuperscript{25}

\textsuperscript{25} Even with many excellent options available, professors admit that many first-year students do not read the assigned legal research texts on an ongoing basis. One 2004 study of students in psychology courses found that about thirty percent of the students read the assigned text before class, whereas around seventy percent of them read the text before the exam.\textsuperscript{26} These percentages are most likely also applicable to the majority of legal research courses. From a law student’s perspective, reading a legal research text for a low-credit course competes with reading cases in contracts, torts, and other substantive law courses. It is not surprising that first-year law students focus on courses that demand more of their attention and yield more credit.

\textsuperscript{26} Some professors choose library course reserves as one mechanism to help them deal with requiring a textbook.\textsuperscript{27} Others find that sending students to legal research texts on reserve shelves is not a better option than requiring them to purchase a textbook. Most librarians know that nonrequired texts are rarely requested when on reserve.

\textsuperscript{27} Concerns about textbook affordability dominate conversations about the future of the textbook.\textsuperscript{28} The student Public Interest Research Groups (student PIRGs) have been at the forefront of raising awareness about textbook affordability since 2003.\textsuperscript{29} A study they conducted found that a new edition cost twelve percent more than a new copy of a previous edition and forty-five percent more than a used copy of a previous edition.\textsuperscript{30} One author wrote that a typical first-year law student, who uses some of the more popular texts, could spend up to $1000 just for casebooks, even without the supplementary materials.\textsuperscript{31}

\textsuperscript{28} Georgia State University’s first-year law students were asked in a fall 2010 survey\textsuperscript{32} to estimate how much money they spent on law textbooks for that semester. The price range varied, with the highest number (32.3\%) stating that they

\textsuperscript{29} See Joan Catherine Bohl, Generations X and Y in Law School: Practical Strategies for Teaching the “MTV/Google” Generation, 54 Loy. L. Rev. 775, 777 (2008) (exploring “the characteristics members of the Generations X and Y exhibit as those characteristics relate to their experience in law school”).

\textsuperscript{30} Michael A. Clump et al., The Extent to Which Psychology Students Read Textbooks: A Multiple Class Analysis of Reading Across the Psychology Curriculum, 31 J. INSTRUCTIONAL PSYCHOL. 227, 229 (2004).

\textsuperscript{31} Anne Christie et al., Student Strategies for Coping with Textbook Costs and the Role of Library Course Reserves, 9 PORTAL: LIBR. & ACAD. 491, 491 (2009).


\textsuperscript{36} The survey is discussed in more detail in the next section.
spent between $300 and $400, and 30% stating that they spent between $700 and $800. Several students who had a full course load stated that they spent more than $1000 for one semester. Although legal research textbooks cost less than casebooks, which have a list price of approximately $150 to $175 each, they still cost between $35 and $88. Textbooks are an expensive part of obtaining a law degree.

¶11 It has been said that the textbook market does not operate according to the same economic principles as a normal consumer market. First, the consumers (i.e., students) do not select the product, and the people choosing the product (i.e., the faculty) do not purchase the product. Therefore, price is removed from the purchasing decision, giving the producer (i.e., publishers) disproportionate market power to set high prices.

¶12 In 2005, a Government Accountability Office report entitled College Textbooks: Enhanced Offerings Appear to Drive Recent Price Increases indicated that, in addition to the sharp rise in the prices of textbooks, specific concerns have arisen about the so-called “bundling” of supplements with textbooks into a single package. This practice may “limit students’ ability to reduce their costs by purchasing less expensive used books and choosing which, if any, supplements they want to purchase.”

¶13 Given the unusual economic principles of the textbook market, it is not surprising that the subject of textbook affordability has entered the political arena. In 2008, Congress passed the Higher Education Opportunity Act, which stated that publishers would have to be clear, in all promotional materials, about their textbooks’ wholesale prices, the copyright dates of previous editions, summaries of substantial content revisions, and other formats in which products are available. The act states: “the Secretary shall not promulgate regulations with respect to this section.” Therefore, the language of the law stands on its own.

¶14 In an attempt to make college more affordable, a bill entitled “The Open College Textbook Act of 2010” was proposed in 2010. Although the bill raised more policy issues than it resolved, it attempted to make college more affordable. The proposed legislation addressed open licensing in relation to textbooks, including a related college affordability law.

38. Id. § 1015b(i).
¶15 In 2009, the student PIRGs conducted a study of opinion on new technologies among 1133 students. The results show that students were initially interested in e-readers, but they became less interested upon learning of their costs. As an interesting note, seventy percent of those surveyed would prefer to read textbooks in print, rather than on a computer, if cost were not a factor. And, if cost were not a concern, approximately thirty percent of the students said that they would pay extra to have both print and digital versions of their textbooks.

¶16 The Workshop on the Future of the Legal Course Book, held at the Seattle University School of Law on September 27, 2008, brought scholars together to discuss the future of electronic law books. The various sessions focused on the print casebook and its electronic alternatives. Both professors and publishers explored the alternatives to the traditional law school text. In addition to addressing the high costs of textbooks, professors want more flexibility, such as the ability to add their own information to the text and provide links. However, the conversion to electronic casebooks continues to present challenges. Inherent in the discussion are concerns about copyright and the ability to protect electronic casebooks from piracy. Although users will soon be able to highlight and write notes in online books, these features are not yet widely available. Law publishers such as Thomson/West, Aspen Publishing Company, and LexisNexis have been slow to enter the e-publishing arena, although all legal publishers are moving in that direction. In 2007, West launched its first electronic casebook and is now investing in an interactive casebook series. LexisNexis is offering e-books, and Carolina Academic Press is publishing casebooks in electronic format. Aspen also offers its Studydesk software and TeachingLaw.com.

¶17 There is also the issue of students with visual disabilities being unable to use e-book readers. In January 2010, the Justice Department reached an agreement with several universities regarding the use of the e-book reader in a classroom setting. The e-reader, which was part of a pilot program, is not yet fully accessible to vision-impaired students. Although the e-reader can convert book text into synthesized speech, audio playback is not offered for its menu and navigational controls.

41. Id. at 4.
42. Id. at 5.
Because the e-book reader is not fully accessible to visually impaired students, four colleges agreed to stop promoting them to students.48

¶18 The benefits of digital textbooks are numerous: they are potentially cheaper, better for the environment, weigh less, can be updated more easily, are effortlessly searched, and will soon allow users to annotate the digital text. Authors of legal research textbooks, who realize that technology’s growth outpaces the speed of their print publications, could easily update and correct information in electronic versions.

¶19 Additionally, professors can customize web-based materials to the number of weeks for which a legal research course is taught. Nothing elicits student complaints more than assigning a book and using only a small part of it. Digital materials can also be tailored to meet local legal interests. Customized legal research sources are extremely useful because most legal research courses must cover state-specific material and many students practice in the same state as their law school.

¶20 In the early 1990s, Ronald Staudt was one of the first professors to experiment with electronic casebooks.49 Staudt used HyperPad and a product he called Computer Law on Disk. In a 2009 article, Staudt continued to question why the electronic casebook concept did not take off.50

¶21 Open access to information has been a hot topic for debate among librarians, professors, and publishers over the last few years. The growth of this movement is partially in response to the high cost of many scholarly journals.51 Open access ensures long-term free access to articles. One author explains that open-access scholarly information has three advantages over the traditional publishers’ approach: “(1) free electronic access to the materials, (2) the chance for individuals to access, copy, and even change the materials in electronic form, and (3) the chance to collaborate with others outside the constraints of a commercial and/or copyright-protected regime.”52 One example of the open access movement in law is The Open Access Law Program. This is “part of the Science Commons Publishing Project, which . . . is working to support open access to scholarly research in a wide range of disciplines including agriculture, entomology, biology, anthropology, and now law.”53

¶22 In the Legal Education Commons, which provides a variety of educational materials, law professors and librarians can exchange and access teaching resources under open Creative Commons licenses. Georgia State University College of Law’s Patrick Wiseman—“inspired by CALI’s eLangdell and Legal Education Commons projects, dismayed by the evisceration of the cases in the latest edition of what had hitherto been [his] favorite constitutional law casebook, and empowered by the . . . repository of United States Supreme court opinions . . . decided that the time had come to go all online with [his] constitutional law courses.”

¶23 Another professor, Robert Laurence, described his positive experience of creating a course book by downloading the material to a web page using LexisNexis. He used links to cases and statutes as well as his own annotations on those materials. Laurence was so happy with his online casebook experience that he thinks regular casebooks are “toast.”

Teaching Legal Research Without a Textbook

¶24 At Georgia State University College of Law, legal research professors prepare their own materials for the first-year legal research course. First-year students are required to take the one-credit, pass/fail course that is offered in the fall semester. Additionally, 1L students are required to take a two-semester graded Research, Writing, and Advocacy (RWA) course. The librarian professors use Westlaw TWEN or LexisNexis Blackboard and share the same syllabus. Using screen grabs and illustrations from texts, we post self-authored “chapters.” Additionally, we post PowerPoint slides and citations to other materials. We also include a chapter on Georgia legal research, which is essential to our course. CALI legal research lessons are assigned to supplement traditional readings and assignments. By using the custom polling feature or clicker technology, we give weekly quizzes to reinforce what was taught the previous week.

¶25 In fall 2010, we examined whether students were receptive to our use of web-based materials, rather than a legal research textbook. Specifically, we were interested in quantifying students’ impressions and opinions on learning legal research without a textbook. The survey is included infra as the appendix. All survey results are on file with the author.
All students in the first-year legal research course were asked to volunteer to participate in the survey after they signed the appropriate informed consent forms. Students submitted their responses anonymously through SurveyMonkey. The survey, which had a 55% response rate, included twenty questions. A few of those were open-ended questions, but most were multiple choice with an option to comment. The demographics of the 2010 entering class at Georgia State University College of Law indicate that the average respondent age is twenty-eight. Among all age groups, those respondents who were twenty to thirty years old were most likely to respond (72% response rate).

The survey aimed to determine the level of the students’ technology skills and experience, and 95% stated that they had a good grasp of electronic databases for finding information. Fortunately, 65% did not have any technology difficulties accessing the materials. For those who had problems (25%), they cited slow response time as the primary challenge. (The remaining 10% did not answer this question.) Many of the students (38%) had had previous “textbookless” experiences during undergraduate or graduate studies, which probably influenced their comfort level in working with the material. Their comments about those previous experiences were quite positive: “It was amazing. My instructor was not bound by a textbook, we saved money, and it provided a wonderful customized experience.”

Next, students were asked to rate the web material’s layout. Course web sites contained background readings from texts and other sources, PowerPoint slides, and links to CALI lessons. For the week devoted to Georgia legal research, the instructors provided books and articles on Georgia legal research and legislative history. Students overwhelmingly (74%) responded that the background readings were appropriately detailed. When asked if the PowerPoint slides emphasized important points of the course materials, students had mixed responses despite the question’s ninety percent positive response rate. One stated, “The PowerPoint slides had no explaining text in many of the slides so you were left trying to figure out what the diagrams were trying to convey.” Even when students thought the slides contained adequate information, some felt that the material would have been better learned by traditional assignments.

When asked if the CALI lessons, which students prefer to use to review and reinforce the material, provided a deeper understanding of the topic, forty-two percent of the students responded that they did not use them. Of those students who used the CALI lessons on an ongoing basis, many gave favorable responses: “The CALI lessons are amazing—they really forced you to learn. I would have forgotten most of the stuff if I hadn’t used CALI,” and “[the lessons were] better after the class to reinforce, rather than before.”

Two of the most important questions for evaluating the effectiveness of teaching without a textbook consisted of determining what the students liked and disliked about the virtual textbook for the course. We designed these open-ended questions to solicit frank feedback and we received fifty-seven responses to what they liked and thirty-one responses to what they disliked. Students most commonly liked the cost savings of not having to purchase a book for the course and the ability to access the materials from any location. Some students commented on the digital format’s “green” character and noted that digital materials removed “the unneces-
sary information that would be in a larger textbook.” On the negative side, the comments did not fall into easily recognized categories, and comments included several complaints about organization: “While it was nice not to have a large textbook to carry around, I prefer the use of an actual book in terms of organization,” “I can’t stand virtual textbooks. I print the material to read and take notes on it directly during class anyway,” and “Although I read all of the available information in preparation for class, I’m not sure how valuable it is as a reference guide.”

¶31 Very few students (10%) preferred reading lengthy passages on a computer screen, while an overwhelming percentage (74%) printed out the material and read it on paper; the remainder stated they had “no preference.” Having seventy-four percent of students printing the digital material negates our “green” approach to providing digital information.

¶32 The students were asked to estimate how much money they spent on textbooks for the fall semester, excluding study aids. The responses were split between $300 to $400 (32%) and $700 to $800 (30%), which can be partly explained by the fact that part-time students spend less because they take fewer courses.

¶33 Students were asked if, assuming that cost was not a factor, they would prefer a print textbook, web-based materials, or a combination of the two. The most frequent response (45%) was for a combination of the print textbook and web materials, with web-based materials alone receiving 36% and the print textbook alone 19%. One thoughtful response to this question suggested that the hybrid model reflected changing professional practices: “I don’t think you can rule out cost, but even so, I feel reading information on a computer screen is more in line with practicing law in the near future.” A summer 2010 survey conducted by student PIRGs of 1428 students from ten campuses found that students are split between print and digital formats, with a large majority preferring print, and that a combination of print and electronic may be best for some students.60

¶34 The last question in our survey, which was also the most frequently answered, asked if students would prefer to use a textbook on an e-reader. Sixty-six percent responded “No.” Although most students answered negatively, the students who answered positively were outspoken. Some interesting comments were “Assuming that you could highlight and make notations on a reader, I think that would be a great option,” “I like having books, but if I could keep it on an iPad it would be very useful (versus having tons of books at home that I cannot bring anywhere),” and “Absolutely! If our textbooks were available on e-readers, we wouldn’t have lockers, rolling luggage, and backaches!”

¶35 Without diminishing the importance and value of a good legal research textbook as a resource, the survey sought to examine the necessity of the textbook, and the feedback on the approach of not using a textbook proved valuable. Students responded that they were grateful for not having to buy yet another book and that the material was easily accessible from any computer.

60. Nicole Allen & the Student PIRGs, A Cover to Cover Solution: How Open Textbooks Are the Path to Textbook Affordability 9 (Sept. 2010), available at http://www.studentpirgs.org/textbooks-reports/a-cover-to-cover-solution.
When preparing materials using Westlaw’s TWEN, LexisNexis’s Blackboard, or a web site, professors should be prepared to spend an enormous amount of time writing about legal research sources, compiling PowerPoint presentations, or gathering instructional web sites. Dividing the workload among a number of legal research instructors, when possible, is recommended.

Choosing to Use a Textbook

Many professors value a textbook as a teaching resource, although they recognize that students need the expertise and enthusiasm of an instructor in the legal research classroom to complement the text. Many students value the safety net of a printed textbook and the positive pedagogical practice of engaging with the text by “writing in the margins.” For many students, the idea of reading words on a screen is not as appealing as reading a printed page. These facts will most likely change as more so-called “digital natives” progress into law school and as e-book reader technology improves.

An entire body of literature exists on the value and use of textbooks. In fact, the term “textbook pedagogy” is used to discuss research on the classroom use of textbooks and learning materials. Considering that classroom time is usually limited to one or two hours per week, textbooks can fill in the gaps in content that professors cannot cover in class. Texts can also act as a reference guide when students have a specific question about a book or a database. Textbooks are particularly valuable for inexperienced teachers, since texts keep them on track. The authors of these books are experts who understand the structure of legal research and know how to organize it in a pedagogically effective manner.

Most students learn visually and are uncomfortable having nothing to read. Learning theorists have demonstrated that people vary in the manner in which they absorb, process, and recall what they are taught. Of the three types of learners—aural, experiential, and visual—aural learners, those who learn by hearing, constitute thirty percent of the general population. Aural learners benefit from class lectures and from discussion of class materials in study groups or in oral presentations, and they would prefer to learn through CDs or by reading their notes aloud. Kinesthetic or experiential learners, about five percent of the population, learn

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61. See Laurence, supra note 56, at 8 (describing the time commitment required to prepare his electronic course materials).
63. Richard Warner et al., Teaching Law with Computers, 24 RUTGERS COMPUTER & TECH. L.J. 107, 133 (1998) (discussing a study of Chicago-Kent’s E-LEARN program by Peter Martin, which found that the majority of students did not read the relevant material on the computer, but preferred the print version).
64. This term is taken from the title of John Palfrey & Urs Gasser, Born Digital: Understanding the First Generation of Digital Natives (2008).
65. See, e.g., Richard Walker & Mike Horsley, Textbook Pedagogy: A Sociocultural Analysis of Effective Teaching and Learning, in EFFECTIVE SCHOOLS 105 (Dennis M. McInerney et al. eds., 2006).
from doing and touching. They excel in clinical work, moot court, and role-playing exercises. Visual learners, also called read/write learners, constitute nearly sixty-five percent of the population and need to see what they are learning through textbooks or other visual materials. Applying these results to law students, the greatest percentage of law students are therefore visual learners. They enjoy the comfort of a textbook, in addition to outline summaries, diagrams, tables, columns, and time lines. Visual learners may also benefit from the enhanced learning experience of an electronic format as well as from video files. In addition, a fourth learning style labeled “multimodal” applies to those students who learn readily in several of the above modes. Some say that multimodal learners make up as much as sixty percent of the population.67

¶40 In the survey of Georgia State University College of Law students, we asked if they were aural, experiential, or visual learners. The highest percentage of students (72%) responded that they were experiential, with visual ranking a close second (62%). Because legal research is a hands-on course, it makes sense that a high percentage of students responded that they are experiential learners. Students may also have checked several categories because the question asked the respondents to “check all that applies.”

¶41 A very interesting study of legal research and writing courses at St. John’s University School of Law found that law students were diverse in their learning styles, and encouraged law professors to use a diagnostic assessment of their classes so that they could teach to various learning styles.68 Because testing may not be possible in a large course, the authors suggested using a combination of instructional methods and materials to reach the majority of learners.

¶42 Although some professors enjoy compiling their own teaching materials, one author suggests that there are three primary obstacles to compiling course materials: a lack of motivation, a lack of manageability, and copyright concerns.69 Copyright concerns present real difficulties for compiling teaching materials. Copyright protections limit the use of law review articles, restatements, and other commentary so that authors might have to use exclusively noncopyrighted documents.

¶43 Additionally, law professors may lack the motivation to contribute to an open access project, since there would be no remuneration for such work. However, many professors do not write texts for the royalties.70 Some professors would even


be willing to exchange royalties for readers. And though students do not have to spend cash on a text for this type of material, they must still pay for printing. If the law school pays for printing, then the lack of a textbook would cause the law school to absorb additional costs for student printing.

44 One striking difference exists between a doctrinal textbook and a legal research textbook. Many doctrinal textbooks and casebooks have no value as a treatise. Casebooks, with their limited shelf lives, become office decorations. However, legal research textbooks maintain their value even after students become lawyers, partly because good indexes turn a legal research textbook into a very usable reference source.

45 Several legal research texts include tailored accompanying materials, which can include assignments, PowerPoint slides, and test banks. Amy Sloan’s book, *Basic Legal Research: Tools and Strategies*, includes quizzes and exercises delivered either in a workbook or online with assessment reports via the TeachingLaw.com platform. The assignment book *Legal Research Exercises* can complement any legal research textbook, and experts designed assignments in Barkan, Mersky, and Dunn’s *Assignments to Fundamentals of Legal Research and Legal Research Illustrated* to supplement the textbook’s information. The most recent edition of *The Process of Legal Research* includes extensive, well-researched problem sets on a CD included with the book. *Just Research* also offers a CD workbook to accompany the textbook.

46 Once a professor decides to use a textbook, the next step is to review and select a text from available choices. In addition to the reviews included in this article, there are a number of other sources legal research professors can use when selecting a textbook.

47 In 2001, Joan Shear and Kelly Browne asked subscribers of the LAW-LIB and LEGWRI-L discussion lists which legal texts they used and why, and the findings are reported under the description of each book reviewed in their article. In 2006, three members of the AALL Reader Services SIS (RIPS-SIS)—Lynn Murray, Marc Silverman, and Christopher Vallandingham—created an annotated bibliography of legal research texts. It is a useful guide for those selecting an appropriate

76. *Steven M. Barkan, Roy M. Mersky & Donald J. Dunn, Assignments to Fundamentals of Legal Research and Legal Research Illustrated* (9th ed. 2009).
legal research text. At the 2001 American Association of Law Libraries’ annual meeting, there was a panel discussion on legal research texts.\textsuperscript{81} And in a 2000 survey about advanced legal research courses, Ann Hemmens found that seventy-four percent of responding schools stated that a textbook was either required or recommended.\textsuperscript{82} There were two clear favorites: \textit{Fundamentals of Legal Research} and \textit{Finding the Law}.\textsuperscript{83}

\section*{Reviews of Selected Legal Research Texts}

\textsuperscript{¶}48 Because there are many excellent legal research texts available, I was unable to review all of them; I chose to concentrate on the more popular books.\textsuperscript{84} To present a variety of writing styles and audiences, I explored the texts’ different approaches to finding the law as seen through the eyes of their authors—law librarians, legal writing instructors, and attorneys. In my reviews, I used the following criteria, which were listed by Richard Danner in his article \textit{Reading Legal Research}:\textsuperscript{85}

1. Illustrations are necessary. One of the main practices in teaching legal research is holding a book and saying, “This is the Supreme Court Reporter.” Students need to look at sample pages while you are discussing a title.
2. Authors should write the book “with its audience in mind, understanding that the first-year law student needs a ready means to grasp the basics of legal research before having to locate the materials for a first writing assignment.”\textsuperscript{86}
3. The book should be organized into chapters that can be assigned out of order to accommodate a variety of syllabi.
4. The book should also be “usable as a reference source for students.”\textsuperscript{87} It should have a comprehensive index.

\begin{itemize}
\item \textsuperscript{81} “Teaching Roles and Realities: Choosing the Legal Research Text That’s Right for You,” presentation at the Annual Meeting of the American Association of Law Libraries, Minneapolis, Minn., July 14, 2001 (the moderator, Kelly Browne, created the program in a “talk show” format, offering advice on what to look for when choosing a text).
\item \textsuperscript{82} Ann Hemmens, \textit{Advanced Legal Research Courses: A Survey of ABA-Accredited Law Schools}, 94 LAW LIBR. J. 209, 228, 2002 LAw libR. J. 17, ¶ 49.
\item \textsuperscript{83} \textit{Id.} at 228 tbl.10.
\item \textsuperscript{84} In general, a popular textbook is one that has stood the test of time and one the publisher continues to publish in new editions. Of course, the author’s reputation, cost, and readability also play a part in making a textbook popular. Some of the excellent, current textbooks not reviewed here are ROBERT C. BERLING & ELIZABETH A. EDINGER, \textit{LEGAL RESEARCH SURVIVAL MANUAL} (2002); DEBORAH E. BOUCHOUX, \textit{LEGAL RESEARCH EXPLAINED} (2d ed. 2010); \textit{SPECIALIZED LEGAL RESEARCH} (Penny A. Hazelton ed., 2010); MARCI B. HOFFMAN & ROBERT C. BERLING, \textit{INTERNATIONAL LEGAL RESEARCH IN A NUTSHELL} (2008); J. PAUL LOMIO ET AL., \textit{LEGAL RESEARCH METHODS IN A MODERN WORLD} (3d ed. 2011); RUTH ANN MCKINNEY ET AL., \textit{LEGAL RESEARCH: A PRACTICAL GUIDE AND SELF-INSTRUCTIONAL WORKBOOK} (5th ed. 2008); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, \textit{LEGAL RESEARCH METHODS} (2d ed. 2009); NADIA E. NEIZDEL, \textit{LEGAL REASONING, RESEARCH, AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS} (2d \textit{Id.}, at 5.
\item \textsuperscript{85} Richard A. Danner, \textit{From the Editor: Reading Legal Research}, 79 LAW. LIBR. J. 1, 5–6 (1987).
\item \textsuperscript{86} \textit{Id.} at 5.
\item \textsuperscript{87} \textit{Id.} at 6.
\end{itemize}

¶49 For a law librarian, the title of this book is equally as captivating as a statement made early on in chapter 1: “You must know that you have looked for the law in all the right places” (p.1). Blog reviewers professed their overwhelming support, and one reviewer stated, “I never came across a textbook I would require my students to buy for my Advanced Legal Research course until now.”  

A suggestion was that if the authors “delete[d] ‘advanced’ in the subtitle . . . [the book] would be the greatest contribution to improving 1L research and writing programs in living memory.”

¶50 While other legal research texts dance around audience identification, this book clearly defines its audience as advanced legal research students. The book focuses on culling only the information that researchers need, rather than referencing any single publication. It begins with statutes, and the authors state: “The first step in deciding legal obligations and rights is to determine whether there is a statute that governs the situation” (p.14).

¶51 Because the book is directed at advanced legal research students, the authors describe the sources in more depth than others do. For example, there are excellent discussions of the distinctions between different code indexes, identifying and accessing congressional committee hearings, the nuances of using journal indexes to search for articles, and a thorough explanation of the C.F.R. The text is for those researchers who have already mastered “the nuts and bolts of legal information” and takes a problem-solving approach to answering legal research questions.

¶52 Oddly enough, the book does not include illustrations, and the authors never mention screen grabs or sample pages. However, the tables provide URLs, sample searches, and some bibliographic information, and the index is detailed and useful. Humor is hard to come by in a legal research text, but the authors have a refreshing writing style that holds the reader’s attention. For example, in a discussion of when to stop researching case law, the authors use the analogy of being at a cocktail party (p.125).

¶53 Every law librarian should use this text in teaching and daily reference work, and even seasoned researchers will glean gems of information from it. If professors supplemented the text with sample pages and screen grabs, it would work well in any advanced legal research course. Because the authors also cover foreign and international legal research, professors could incorporate this text into a course covering those topics.

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¶54 As stated in its preface, this book is designed for students new to legal research. Despite this claim, the book’s main strength is as a text for law librarians and upper-class students, rather than for new law students. As one legal research professor stated about the 1998 edition, it “provide[s] . . . fodder for lecture notes and additional background.”90 The RIPS-SIS annotated bibliography states that the eighth edition of the text “[c]ontains more material than necessary for an introductory course and, because of that, it may seem intimidating for a first-year law student . . . .”91 The ninth edition of this work includes revised versions of all chapters in the eighth edition, plus a new chapter introducing forms and processes of legal research.

¶55 Each chapter is written by an experienced law librarian, so it is not surprising that they target the law librarian audience by including a history of various titles. For example, a detailed footnote explains the scope of the years covered in *West’s Federal Practice Digest*, 3d and 4th series—a level of detail any law librarian would welcome.92 As evidenced by the number of footnotes, the book draws from a wide variety of materials. It is a great reference work on legal research with a comprehensive index.

¶56 The book’s unique features include a glossary of terms used in legal research, a table of legal abbreviations, guides to legal research in states and territories of the United States, as well as information on legal citation form, international and U.K. legal research, and federal tax research. Illustrations use boxes to highlight sources. Because of its broad survey of topics, this text would work wonderfully if it were an electronic text from which professors could choose the chapters appropriate for their advanced courses.


¶57 This edition is the sole work of Kent C. Olson; however, “the book remains [Morris Cohen’s] in both content and spirit” (p.vii). An integrated approach to print and electronic sources intentionally pervades most of this text, as this is what shapes the actual practice of modern legal research. The book presents legal materials in an order that beginning researchers will find intuitive. It begins with secondary materials before discussing case law, constitutions, and statutes. The final two chapters introduce research in international and foreign law. As one of the few texts that cover international and foreign law, the book includes materials suitable for an advanced legal research course.93 The unique appendixes include sources for state appellate court cases, state research guides, and topical loose-leaf and electronic services. A chapter on reference resources is useful to librarians but likely, and unfortunately, ignored by law students.

91. Murray, Silverman & Vallandingham, *supra* note 80, at [3].
Legal Research in a Nutshell’s companion web site provides an updated set of links to all sites mentioned in the book. Few illustrations from printed materials appear in the book, and the print in the facsimiles of resources is very small and almost impossible to read. Additionally, the screen grabs are printed sideways and are difficult to read. Although the visuals detract from the readability of this pocket-sized book, they are strategically placed at the end of each chapter so students can avoid them.

As with other books in the Nutshell series, this Nutshell crams a lot of information into a small book. The chapters are brief—about thirty pages per chapter—but thorough.


If Amazon reviews were an indication of the popularity of a book, Elias’s work would be the winner, with numerous reviews giving the book five stars. Some of the most-common terms used to describe it are “user-friendly,” “excellent resource,” and “straightforward.” Since 1971, Nolo’s goal has been simple: to make America’s legal system accessible to everyone. However, this legal research book is not for John Q. Public, but more for a paralegal student, a library science student, or, in part, a first-year law student.

The book adheres to its mission as stated in the introduction—to serve “as your map (or in modern parlance, your GPS locator)” (p.1). It covers the basics of the law; where to find legal resources; how to frame a legal issue; and how to find, use, and validate legal resources. It begins with a brief description of what law is, the sources of law, state versus federal law, and the court system. The author describes the sources clearly and the text is easy to follow.

The book does a good job of explaining free research web sites, and the author sprinkles the text with tips and warnings. The next hundred pages are a glossary of legal jargon, and it would have been helpful for the author to include a legal research glossary similar to the one available on Nolo’s web site.

The chapter on identifying legal issues is particularly useful for new law students, because the ability to identify issues is the key to successfully using indexes. According to the author, the easiest way to identify issues is to note all the major words used and then list their synonyms. Law students often miss the important step of narrowing their issue before researching, and this can help solve that problem.


¶64 In what Aspen Publishers calls “a continual best seller,” the five faculty members and librarians who authored this book describe legal research as a process and introduce hypothetical research problems while holding bibliographical detail to a minimum. The authors also lead students to a meaningful understanding of the what and why of legal research such as, “What Is an Agency Decision and Why Would You Research Agency Decisions?” Information on legal authority is presented on a need-to-know basis, and each type of authority is described through current best practices. In this edition, each authority has a separate template; the case law template includes the issue, citation information, search and find, and next steps. The number of illustrations enhances the text.

¶65 After an excellent overview of legal research, the authors discuss secondary materials, which some legal research professors feel is the best starting point for a text. The authors attempt to make the process of researching the law easier by starting with the commentary and then proceeding to one or more types of law.

¶66 The introductory chapter focuses on an assessment of the strengths and weaknesses of print and electronic media. By integrating both print and electronic media in the text, the authors can and do focus on the “dominant mode” of research for each source. The authors later provide guidance on when and how to choose between print and electronic media. This edition also includes expanded coverage of online sources other than LexisNexis and Westlaw.

¶67 The strength of this book is its extensive, clear illustrations and examples. Reprints of sample pages and screenshots from various sources are not always illustrated sideways, allowing the student to maneuver easily through the book. Many of the illustrations consist of entire pages from books and complete screenshots, making it unnecessary for professors to hold up the book in class.

¶68 Due to the book’s first-year law student audience, the authors do not cover foreign and international materials. However, professors will be pleased to see coverage of legal ethics.

¶69 The RIPS-SIS annotated bibliography recommends the book for advanced legal research courses. It questions whether, even with the reduction of some technical details, the information still may be too much for a first-year legal research course. The detailed index makes the book a great reference tool. In response to students’ questions about the correct way to cite sources, this book covers the *ALWD Citation Manual* as well as *The Bluebook*.


¶70 According to its authors, *Just Research* breaks with tradition in two ways: the book is organized around issues, rather than sources, and it emphasizes the use


99. Murray, Silverman & Vallandingham, supra note 80, at [9].
of free web sources such as Google and fee-based electronic sources such as Westlaw and LexisNexis.

¶71 This is indeed a different type of legal research text. For professors who are more accustomed to a discussion of sources, this text is not suitable. On the other hand, it may speak to new legal research students, because each chapter describes how to research a particular type of issue. This book would work very well for an electronic research course. The text explains the process of legal research, shows students how the same process applies to dissimilar problems, and describes how to apply the same process in law practice.

¶72 Numerous screen captures punctuate the chapters, and although most legal research books have too few screen grabs and visuals, this book contains too many. In addition, the authors leave something to be desired in their discussion of sources. According to the RIPS-SIS annotated bibliography, “The authors’ descriptions of primary and secondary sources are at best fragmented and woefully incomplete.”

¶73 Some of the chapters would work well in an advanced legal research course, especially those about researching corporations, medical information, and product information. The text goes beyond the basics by showing students how to research issues governed by court rules and local law and how to locate reliable information.

¶74 Many research professors stress the importance of a research log, and this is one of the few books that discusses research plans. One student wrote of this feature: “The biggest takeaway point from the book and the most useful nugget of wisdom is to develop a research plan ahead of time. . . . The book presents a number of excellent roadmaps for categorizing, planning and implementing legal research.”


¶75 This is the long-awaited successor to the 1989 classic, Finding the Law. According to Olson’s preface, this book began as a long-overdue revision of How to Find the Law, a work that was first published in 1931. It is part of Thomson/West’s Concise Handbook Series, which attempts to offer a lower-priced alternative to the traditional, hardbound hornbook. Principles of Legal Research provides a discussion of print and online materials, including free and subscription online resources, and covers over eight hundred print and online resources.

¶76 To avoid the entire “process versus bibliographic” discussion, the author explains that the book, in its unusual presentation, does not prescribe a single path for learning about legal information. For example, discussions of the legislative, executive, and judiciary branches follow a chapter on constitutional law research. Secondary and reference sources follow the primary sources, because, as Olson explains, “secondary sources are often the easiest place to begin research, but to

100. Id. at [4].
102. BERRING & EDINGER, supra note 7.
understand them you need to know something about the primary sources they discuss” (p.v). Enough said on that topic. The first twelve chapters focus on research in U.S. law, while the final two chapters provide a brief, forty-six-page treatment of international and foreign legal research.

¶77 Instead of screenshots, the illustrations in the book are based on print sources and online PDFs. Olson explains that a browser window makes a relatively poor book illustration, but, to make up for this shortcoming, he provides references to hundreds of web sites that are linked from the University of Virginia Law Library web site.

¶78 The appendix lists treatises and services by subject and could be very useful to a law student who is unaware of the wealth of resources in treatises.

¶79 In this well-written text, the number of footnotes adds to the depth of information about each source. Although not explicitly defined, the audience is clearly librarians and upper-level researchers in need of a manual for legal research. The author draws in bibliophilic readers with numerous citations to both print and online sources, and the text’s depth of knowledge demonstrates that the author is a very experienced legal scholar and authoritative source.


¶80 Amy Sloan’s text provides a pleasing balance of print and electronic sources. Each chapter contains subparts addressing the source in its print and electronic formats, with corresponding descriptions of how to conduct research in each. An entire chapter is devoted to the description of electronic research techniques and contains a useful discussion on deciding between print and electronic sources.

¶81 The first edition of Sloan’s book received multiple recommendations from legal research professors. Proponents of Sloan’s text praised its “quality of writing, organization, and illustrations. They favored the book’s conciseness, stating that it did not overwhelm the reader with too much detail . . .”

¶82 The book is well written, and first-year law students should easily grasp its material. According to the author, the text does more than explain the bibliographic features of various research sources—it also provides instruction in research as a process. The book includes an overview of research sources and the research process as well as a framework for creating a research plan. The topic of weight and hierarchy of authority, a challenging one for first-year students, is covered in the introduction.

¶83 The strength of Sloan’s book is her clear sample pages, screenshots, and diagrams, which further highlight the key features of a page or screen. Helpful to new researchers are chapter-end research checklists summarizing the research pro-

103. For more on this debate, see Donald J. Dunn, Why We Should Teach Primary Materials First, 8 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 10 (1999); Hazelton, supra note 98.


105. See Shear & Browne, supra note 79, at 23.

106. Id.
cess. The RIPS-SIS reviewers recommend this text for introductory legal research courses.\textsuperscript{107}

\S 84 Chapters begin with an overview of the type of authority discussed and an explanation of both the print and electronic research processes. Following the discussion of the research process, students have access to the greatly sought-after information on citation format. Additionally, the text discusses cost considerations when using electronic sources. An appendix of selected Internet research resources includes free and fee-based web sites.

\S 85 The companion web site includes study materials, practice exercises, and quizzes.\textsuperscript{108} Additionally, professors can access their syllabi, download assignments, and upload finished work and can incorporate all course communications and assignments into the web site.

### Conclusion

\S 86 In the legal field, there are three types of textbooks: the traditional print textbook, digital textbooks available on commercial publishers’ web sites, and, less commonly available, textbooks under a Creative Commons\textsuperscript{109} or other open license. Additionally, many legal research professors use CALI lessons, online tutoring systems,\textsuperscript{110} and podcasts\textsuperscript{111} in place of printed or digital textbooks.

\S 87 Legal research professors can and should experiment with digital textbooks, using links to web sites and allowing students to interact with the material in a way that the traditional textbook does not permit. In no way should textbooks be discarded. Instead, they should be used as one possible resource. In fact, legal research textbooks are invaluable to legal research professors in presenting differing views of particular sources. A traditional textbook is usually ideal for a course where content remains uniform over time. Digital texts are suitable where technology renders traditional textbook options obsolete. This is the case for legal research instruction.

\S 88 Digital textbooks and web-based materials are indeed game changers. But student opinion on digital textbooks is still divided. On the pro side, the cost of textbooks is driving students to consider alternatives to purchasing books. In addition to cost, students are familiar with the options that technology provides for personalized access to information and accessibility anytime, anywhere. On the con side, students do not like to read text on a screen and insist on printing out the materials for easy reading and annotating. In our course, the instructors drew a line in the sand and developed web content. However, as seen from our survey, although the students are grateful not to purchase another expensive law book, they prefer a mix of digital and print materials. For teaching legal research, the instructors feel

\begin{itemize}
  \item [107.] Murray, Silverman & Vallandingham, \textit{supra} note 80, at [2].
  \item [108.] \textsc{TeachingLaw.com}, http://teachinglaw.com (includes Diana Donahoe’s \textit{Legal Research and Writing} and Amy Sloan’s \textit{Basic Legal Research}) (last visited Apr. 23, 2011).
  \item [109.] See \textsc{Creative Commons}, http://creativecommons.org (last visited Apr. 30, 2011).
  \item [110.] Hackerson, \textit{supra} note 58.
  \item [111.] See Diane Murley, \textit{Podcasts and Podcasting for Law Librarians}, 99 \textsc{Law Libr.} J. 675, 679, 2007 \textsc{Law Libr.} J. 40, \S 20 (discussing possible use of podcasting in legal research courses).
\end{itemize}
that the benefits of electronic materials far outweigh the disadvantages because they make it much easier to update links and screen grabs and to add new research sources. And although I am personally a big fan of digital textbooks, I still appreciate a well-written and well-researched legal research textbook. While unfortunately very few law students value such textbooks, professors and librarians continue to appreciate the pedagogical features found in these works.

¶89 As law librarians discuss the pedagogy of legal research, they should continue to include instructional materials in the discussion. Fortunately, these discussions have begun and will continue over the next few years, thanks to such conferences as the Boulder Conference on Legal Research Education.112 In addition to discussions on learning styles and instructional materials, we should include questioning strategies, print versus online sources, learning goals, and instructional materials. The future of legal research instruction can only be helped by these discussions.

112. Such discussions took place at the first and second Conference on Legal Research Information: Scholarship and Teaching at the University of Colorado Law School in Boulder, Colorado, in July 2009 and July 2010. The purpose of the 2010 conference was to continue to foster legal information scholarship and instruction in accord with the Boulder Statement on Legal Research Education (June 22, 2009), available at http://www.colorado.edu/law/events/legalResearchEducation.pdf.
Appendix

Student Survey on Teaching Legal Research Without a Textbook

The purpose of this study is to determine the effectiveness of instructor-written materials in your Legal Research course. Materials are currently available on either TWEN or LEXIS web courses. We will ask you questions on the format and layout of the items on the web pages. We will also ask questions about the background readings, PowerPoint slides, and CALI lessons. You will be asked to state what you liked and disliked about the “virtual textbook.”

Professors and librarians remain concerned about textbook affordability; therefore, there are a few questions on the costs of law textbooks. The benefits of digital textbooks are numerous, but there are pros and cons of both printed and digital textbooks. We are also interested in emerging technology in the textbook market.

If you choose to participate in this study, you will complete the online survey that includes questions about the effectiveness of the materials. The survey should take ten minutes to complete. Any information that is obtained in connection with this survey will remain completely anonymous and no participant will be individually identified. Your participation in this study is voluntary. You may withdraw at any time without penalty.

Thank you for the valuable help that you are providing by participating in this research study.

First, we are going to ask about your technology skills and experience.

1. What are your technology skills? Check all that apply.

   ___ I have designed a web page
   ___ I have used electronic databases for finding information
   ___ I use the basic Google search
   ___ Other (please specify)

2. Do you use Westlaw TWEN or LexisNexis WebCourse for your Legal Research course?

   ___ Westlaw TWEN
   ___ LexisNexis WebCourse

3. Describe any technology problems you had accessing the materials for your Legal Research course. Check all that apply.

   ___ Problems with passwords
   ___ Slow response time
   ___ No problems
   ___ Other (please specify)
4. In undergrad or graduate courses, have you taken courses that relied solely on the material available over the Internet (web courses, etc.)? In other words, you did NOT use a textbook for the course.

__ Yes
__ No

If yes, please comment on the experience.

5. What is your age?

__ 20–30
__ 31–40
__ over 40

Now we are going to ask you about your experience with your Legal Research web pages.

6. Who is your Legal Research professor?

7. List items included on your Legal Research web site. Check all that apply.

__ Background readings
__ PowerPoint slides
__ References to CALI lessons
__ Other material

8. What items were not included on the Legal Research website that would have been helpful?

9. Rate the layout of the items on the web pages.

__ Always made sense
__ Somewhat made sense
__ Never made sense

10. Describe the background readings.

__ Appropriately detailed
__ Not sufficiently detailed
__ Never read them
11. The PowerPoint slides emphasized the important points of the course materials.

___ True
___ False

Comments:

12. CALI lessons gave me a deeper understanding of the topic.

___ True
___ False
___ Did not use the CALI lessons

Comments:

13. Tell us what you liked about the “virtual textbook” for Legal Research.

14. Tell us what you disliked about the “virtual textbook” for Legal Research.

Just a few questions on your learning style.

15. The literature states there are three or four types of learners: aural, experiential, and visual or a mix of the three. Aural learners learn by hearing. Experiential learners learn from doing. Visual learners need to see what they are learning. Which learning styles are you? Check all that apply.

___ Aural—hearing: CDs or read their notes aloud
___ Experiential—doing: clinical or role-playing
___ Visual—need a textbook or other visual material

16. Do you prefer to read lengthy readings on a computer screen or print out the material and read it in paper?

___ Prefer to read lengthy readings on screen
___ Print out the material and read it in paper
___ No preference
**Information on cost of textbooks and digital textbooks.**

We are concerned about textbook affordability; therefore, there are a few questions on the cost of textbooks. We also realize the marketplace is changing and one question investigates whether these new alternatives are desirable.

17. **Estimate how much money you spent on law textbooks this semester. Do not include study aids (i.e., exclude Understanding series, Gilbert’s, etc.).**

- __ $0–$300
- __ $300–$400
- __ $500–$600
- __ $700–$800
- __ No idea
- __ Other (please specify)

18. **Which of the following best describes your behavior when enrolled in any course?**

- __ I always read the assigned portions of the text
- __ I sometimes read the assigned portions of the text
- __ I rarely read the assigned portions of the text
- __ I never read the assigned portions of the text
- __ Other (please specify)

19. **Assuming cost is not a factor, which of the following options would you prefer for a Legal Research textbook?**

- __ Print textbook
- __ Web course
- __ A combination of print textbook and web course
- __ Other (please specify)

20. **Would you prefer a textbook for any course on an e-reader, such as Kindle, iPad, Nook, etc.?**

- __ Yes
- __ No

Please explain your choice:
Technology Management Trends in Law Schools*

Carol Watson** and Larry Reeves***

This article discusses the role of librarians in law school technology management and analyzes technology staffing survey results for 2002, 2006, and 2010. While survey results indicate a trend toward establishing separate information technology departments within law schools, librarians are and will continue to be actively involved in law school technology.

Introduction

Technology in law schools has exploded over the past two decades. Once exclusively the domain of the law library, technology now permeates every law school department and every endeavor of legal education. Technology has challenged not only the way law schools are managed but also the traditional paradigm of law school pedagogy. All of this growth raises the question of how best to manage technology in law schools. Historically, technology in law schools was more often than not managed by the law library director.¹ This model of technology management made sense because the technology was located almost exclusively in the law library. But does this model of librarian-as-technology-manager still make sense in today’s law school? Or has technology expanded to the point that it has

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* © Carol Watson and Larry Reeves, 2011.
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*** Associate Director, George Mason University Law Library, Arlington, Virginia.
¹ Janice C. Griffith, The Dean’s Role in Managing Technology, 33 U. Tol. L. Rev. 67, 74 (2001) (“In the past, technology functions frequently fell under the direction of the dean or the law librarian. Today, a trend is developing to employ an IT director who reports to the dean and manages technology throughout the law school. . . . Placing technology under one director facilitates integration in the use of technology throughout the law school.”).
outgrown the law library? The latest in a series of technology surveys conducted by the University of Georgia (UGA) Law Library seeks to shed light on this question. Information was collected from law schools around the country on how technology in law schools is managed, and what, if any, trends in technology management can be gleaned from the survey results. The UGA information technology (IT) staffing survey has been collected annually since 1999. For purposes of this article, snapshots of data at four-year intervals (2002, 2006, and 2010) were analyzed. While not conclusive, the survey does suggest a trend away from technology management by the library director and toward technology management by a separate technology department within the law school.

Defining Technology

¶2 To provide context for the discussion of technology in law schools, it is important to define what technology is. ABA Standard 704 requires that “a law school shall have the technological capacities that are adequate for both its current program of legal education and for program changes anticipated in the immediate future.” Stephen Burnett has noted that the framework of technology services every law school provides includes communications infrastructure, classroom technology, the school’s website, multimedia and video services, help desk support, and administrative systems.

¶3 Burnett defines the communications infrastructure as “e-mail, high-speed Internet access, a local area network with print and file service, and telephone support.” He says classroom technology should include “smart podiums that allow instructors to operate all of the functionality of the classroom from a touch screen panel,” and that it can include technology such as “projectors and screens, digital video cameras, videoconferencing equipment, microphones, lighting, VCR, DVD and CD-ROM equipment.” Also, “every seat [may be] equipped with Ethernet

2. See Mary Kay Kane, Technology and the Law School Librarian of the Twenty-first Century, 95 LAW LIBR. J. 427, 429–30, 2003 LAW LIBR. J. 31, ¶ 10 (“In many law schools, the librarian has been wearing two hats, heading the effort to build the research collection (whether books or technological resources) and overseeing the school’s technology developments outside the library, including classroom and other teaching technology, and word processing and other support for faculty, journals, administrative staff, etc. Obviously in that environment, the emphasis is on technology development, with the library as just one piece of the puzzle. The model has its tensions and problems, and in some instances . . . is not viable at all because the need for administrative technology (e.g., records, admissions, fiscal, etc.) is too great to blend both positions.”).

3. AM. BAR ASS’N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2010–2011 STANDARDS FOR APPROVAL OF LAW SCHOOLS 46, available at http://www.americanbar.org/groups/legal_education/resources/standards.html. Interpretation 704 provides that: “Adequate technological capacity shall include: (1) sufficient and up-to-date hardware and software resources and infrastructure to support the teaching, scholarship, research, service and administrative needs of the school; (2) sufficient staff support and space for staff operations; (3) sufficient financial resources to adopt and maintain new technology as appropriate.” Id.


5. Id.
access and power as well as [having] wireless access throughout the building.”\textsuperscript{6} Law schools are unique in that they may have courtrooms in addition to classrooms. Courtroom technology may include the technology traditionally found in classrooms, although the recording and conferencing equipment may be more sophisticated and software may allow for annotation of documents that display on wall-mounted flat-screen televisions. There may be computers, video screens, and audio equipment at the plaintiff’s and defendant’s tables as well as at the judge’s bench and the witness stand.

\textsuperscript{¶4} The demand for videoconferencing technologies has increased among law schools, particularly as law schools search for ways to reduce costs. For example, many law schools are experimenting with distance education. There is a greater need for support of videoconferencing software tools such as GoToMeeting, WebEx, and Elluminate for both daily business and training webinars. There has also been an increase in demand for streaming of conference presentations to the web.\textsuperscript{7}

\textsuperscript{¶5} In addition to instructional technology, IT staffs generally provide some level of support for student laptops, particularly when it comes to the wireless network, and for law school exams. It is now quite common for law students to take their exams on laptops using software designed specifically for that purpose. Installation and maintenance of that software, as well as instruction in its use, must be supported. Support for law student laptops may include both traditional PC models and Apple models, which have been increasing in popularity among students, driving demand for support.\textsuperscript{8} In fact, the average law school technology user has become so tech savvy that there is often demand for support for web applications such as Skype as well as hardware such as smartphones (BlackBerry, iPhone, Android), iPads, and webcams.

\textsuperscript{¶6} Hardware outside of the classroom may include office equipment such as computers (desktops, laptops), printers, copiers, scanners, and fax machines—all of which are essential to the daily functioning of the law school. In addition to providing faculty and staff with standard office software, IT staff must support e-mail, Internet browsers and their peripheral add-ons, and a wide variety of tools that are now needed as faculty explore new types of scholarship and support staff assume new administrative tasks. Also, faculty and staff expect remote access to resources and work data when they are not on campus.

\textsuperscript{¶7} Administrative systems and other software applications make the hardware useful to the various departments of a law school. Software may be standard issue (e.g., Microsoft Office suite) or it may be customized (e.g., a special admissions modeling system). As empirical research has assumed a more prominent role...

\textsuperscript{6.} Id.

\textsuperscript{7.} See generally Catherine Arcabascio, \textit{The Use of Video-Conferencing Technology in Legal Education: A Practical Guide}, 6 Va. J. L. & Tech. 5 (2001), http://www.vjolt.net/vol6/issue1/v6i1a05-Arcabascio.html (discussing technology that can be used for distance education).

within legal scholarship, law schools have purchased statistical software that must be supported. Intranets and collaboration tools such as SharePoint, Google Docs, and Zoho have also become increasingly important as faculty engage in more collaborative, interdisciplinary scholarship.

§8 The web site includes the law school as well as the law library web sites, which are likely integrated with the university web site. The web site will require management of both design and content:

Most law school web sites have grown to the point where a webmaster must be employed to manage and design how information is displayed. As more and more law school applications become web enabled, management of the web site requires attention to ensure connectivity among all of the users who access the site over the Internet. The webmaster must ensure the development of the web site in a manner that conveys information to all law school constituencies. Because a law school’s web site serves a marketing function, the webmaster must be skilled in design and communication. Further, the webmaster must possess the communication skills that will enable her to coordinate with every sector of the law school community.

§9 The web site may be managed through a content management system (CMS), which may be either closed- or open-source, allowing for a greater degree of customization. The degree of independence in web site content and design varies greatly, with some universities requiring uniformity of design and content management and others allowing for greater control by the law school and law library. Each department within the law school is likely to have its own web page and is likely to have some degree of control over the content through the CMS. The library’s web site will likely include an information portal for access to electronic databases as well as an online catalog.

Technology Staff

§10 Support from IT staff is required at every level, from network support to classroom technology support, including audio and video recording and conferencing, to support of the physical hardware as well as software applications and administrative systems. Most law schools have some level of technology support from in-house staff, but may also receive additional support from a university technology department.

Once the network goes down, law school professors, administrators, and staff members become non-functional. Greater dependence upon technology accentuates the importance of its reliability. Without adequate staff support to maintain the law school’s hardware, a law school cannot operate.

Technology support must extend beyond the purchase and maintenance of hardware. Professors, students, librarians, and staff members need software assistance as well. Staff support must be available to train users in software applications and to troubleshoot problems caused by software glitches.

Staff support for the use of technology in the classroom is also critical.

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12. Id. at 73.
¶11 As technology has become more pervasive in law schools, information security has also become an issue of great concern. Since many law schools operate as a microcosm of their parent institutions, they often process a large store of sensitive data such as grades, social security and credit card numbers, medical records, and alumni donor information. Maintaining protection of sensitive data can be very time-consuming for IT staff, given that exposure of sensitive data can be devastating for an institution. IT staff must be knowledgeable about federal and state data security legal protection requirements of the Family Educational Rights and Privacy Act of 1974, the Gramm-Leach-Bliley Act of 1999 and the Health Insurance Portability and Accountability Act (HIPAA). At the same time, they must keep their arsenal of security tools current and their knowledge of intrusion tactics sharply honed.

History of Technology in Law Schools

The systematic implementation of digital information came to law first. Part of law’s leadership in the realm of digital information can be explained by simple economics. The legal profession is large and it presents a desirable demographic for any enterprise to draw upon. More than that, law was uniquely ready to accept the advantages of digitized information. Using the Digest System, with its deep, layered indexing, prepared legal researchers for online systems that employed Boolean search parameters. Legal researchers were already trained to look deep into a volume and to use headnote tags to navigate among sources.

¶12 Librarians have also historically been early adopters of technology, and so it makes sense that some of the first instances of technology in law schools occurred in the law library. Technology in the law library dates back to the 1950s, with the introduction of microfilm and microfiche.

Although microfilm and microfiche don’t seem like technology today, just think of the impact this application of scientific knowledge had on law libraries—microformats have made it possible for newer law libraries to fill in their collections with important works that are no longer in print, and for law libraries with limited space to provide access to a richer collection.

¶13 Technology in the law library quickly grew to include the online catalog, integrated library systems, and computer-assisted legal research. As the AALL Special Committee Report, Toward a Renaissance in Law Librarianship, describes:

It all began in the mid-1970s with the introduction of computer-assisted legal research systems and online cataloging services. Soon after the advent of CALR and OCLC, academic and other large law libraries began automating their internal operations, in some cases through OCLC’s online system and in others through turnkey systems, either autonomous or as part of a main library system. Now, public catalogs, serial records, acquisitions, circulation, and financial accounts are automated in most law libraries of sufficient size for this to be cost effective. Simultaneously with the introduction of internal automation, most law libraries contracted with online bibliographic services to provide various nonlaw indexes and other reference sources. By the early 1980s avant-garde librarians were experimenting with microcomputers, student computer labs (in academic libraries), and CD-ROMs. Now all three are commonplace in law libraries. Finally, the information highway in the form of the Internet has been routed through most law libraries. Electronic mail is now pervasive and web home pages are fast becoming so.19

¶14 Law libraries were also the first to develop web pages, often having a web presence long before law school web sites existed. Law librarians were often the first to experiment with technology such as networking CD-ROMs or taking responsibility for publishing court decisions online. Librarians have long been experts at preservation of born-digital materials,20 and have been leaders in implementing institutional repositories. Recently, law libraries have strongly supported open access for legal materials by promoting the Durham Statement.21

¶15 The law library, in an effort to support access to and instruction in computer-assisted legal research, as well as to provide resources for tasks such as word processing and printing, began building computer labs. The wireless network, combined with ubiquitous laptops (and laptop requirements for students at some schools), has decreased demand for computer lab space.22 However, demand for instructional space for computer-assisted legal research has increased.23 As an extension of the services provided by the computer lab, law libraries began offering printing services, either supported by library staff or by university staff, or contracting with an outside vendor.

¶16 LexisNexis and Westlaw revolutionized the legal publishing industry. Legal practitioners and scholars were conducting full-text searching long before those in other academic disciplines or professions. As legal publishing has increasingly

22. Dan J. Freehling, Symposium on the Future of Law Libraries: An Introduction, in The Future of Law Libraries, supra note 4, at 1, 4 (“It wasn’t too many years ago that we all scrambled to find space to create computer labs to be used by staff as online training facilities and by students for online research and word processing. The need for online training facilities is arguably more important today than ever but many libraries have already started converting their word-processing labs to other uses. Notebook computers combined with wireless networks are quickly making the student research and word-processing functions in computer labs redundant.”).
23. See Penny A. Hazelton, Configuration of the Law Library of the Future, in The Future of Law Libraries, supra note 4, at 44, 51 (“[N]ew legal databases and innovations in search techniques will require law schools to continue to provide training opportunities. Electronic classrooms can be located anywhere in a law school building, but since much of the training is handled by librarians, it would make sense to locate these spaces in or near the library.”).
become digitized, libraries have struggled with how best to connect library patrons with the legal information they are seeking. Libraries have experimented with a number of different platforms including information portals, federated searching, and next-generation discovery systems. Federated searching allows library patrons to search across several databases from a single, simple search interface rather than visiting each database separately and having to learn the nuances of each database’s interface. Building upon the concept of streamlining user interfaces, next-generation discovery systems allow the user to seamlessly discover library materials without using sophisticated search strategies. As the number of access points for digital legal information has increased, law librarians have been at the forefront of providing effective and meaningful access to disparate systems that are still in their infancy.

¶17 The transition of legal publishing from print to electronic format has revolutionized the way we access legal information. In March 2001, Bob Oakley, then the president of AALL, appointed a special committee charged with “consider[ing] the implications of electronic publishing for the future of law libraries and to prepare a report examining the issues and outlining different scenarios or models to describe the law library of the future.” The scenario describing a virtual law library of the future that this committee presented is today quickly becoming a reality. But even a virtual library takes up space and requires support.

¶18 As technology expanded outside of the law library and into other law school departments such as admissions, records, and career services, the technology infrastructure became more complex. Suddenly law librarians found themselves man-


26. Future of Law Libraries in the Digital Age Special Committee, AM. ASS’N OF LAW LIBRARIES, http://www.aallnet.org/Archived/Leadership-Governance/Committees/Past-Committees/futureoflaw.html. See also BEYOND THE BOUNDARIES: REPORT OF THE SPECIAL COMMITTEE ON THE FUTURE OF LAW LIBRARIES IN THE DIGITAL AGE 8–9 (2002) (“The virtual law library ‘collection’ is based on the principle of access rather than ownership. The collection development policy states that print will be acquired only when materials are not available in electronic form. The law library’s legal information portal provides cross-platform access to a universe of digital resources, selected and organized utilizing values of coherence, relevance, currency, authority, stability and permanence. . . . The virtual collection includes all primary domestic, foreign and international legal texts; and secondary materials such as e-treatises, e-journals, unpublished materials such as scholarly discussion, images and sound (court proceedings, appellate arguments). Retrospective collections are premised on digital initiatives and collaborations.”).

27. See Hazelton, supra note 23, at 47 (“[E]ven in a completely digital legal information world, the law library would need servers to provide access to and printing capability for all electronic resources. If, in this all-digital world, the law library wants to archive and preserve at least some of the digital content, more hardware and software would be needed to create, store, and access this content.”).

28. See Donald J. Polden, Planning and Decision-Making for Law School Information Technology, 18 SANTA CLARA COMPUTER & HIGH TECH. L.J. 259, 261 (2002) (“IT systems can . . . promote the administration of the law school by facilitating class scheduling, recruiting and matriculating students, and developing institutional discourse . . . . These systems can further improve the delivery of professional services to law students and alumni, for example in the areas of student and law firm career services.”).
aging not only information systems, but telecommunication networks that required highly specialized staff for support. Conflicts arose between library and technology staffs.29 The division of labor between library and technology staffs could be described as the difference between content and connectivity.30 Content and connectivity are not mutually exclusive, and in fact, for all practical purposes one is useless without the other.31

¶19 Technology in the classroom also became more pervasive. Law faculty, historically slow to adopt new instructional technologies,32 have in recent years become more open to the use of technology to enhance classroom learning,33 increasing the demand for educational technology hardware and support.

Technology Management Structure

¶20 As technology expanded outside of the law library into every department of the law school and into the law school classroom, deans began to reconsider the technology management structure within the law school.34 Traditionally, four types of management structures have been used within law schools. Technology has been either (1) solely the province of law libraries, (2) managed by separate law school IT departments, (3) under a hybrid model of library and law school support, or (4) primarily provided by the university. However, as evidenced by the comments in the UGA IT Staffing Survey, the management structure is often not clearly delineated within law schools. In an effort to identify trends in law school technology management, we examined the results of the UGA Law Library’s annual survey of IT staffing and its changes over time.

¶21 The most important aspect of technology management is to be certain that technology services are thoughtfully planned and support the strategic mission of the law school. The culture of each law school varies significantly, so a management structure used by one law school may not be suitable for another institution. The

29. See Marc Eichen, Oil and Water? Can IT and Library Staffs Work as One?, in The Future of Law Libraries, supra note 4, at 58, 61 (“[M]ost librarians are both more content focused and more oriented to providing good user service. Many IT professionals like to manage systems, but . . . few want to deal with either system users or the content on these systems. Many librarians would agree that IT professionals have a competence in managing the maintenance and upgrade of IT systems. Many librarians see this sort of systems management as a necessary, but not a very interesting, part of their job.”).
30. See id. at 66.
31. During the past decade, many general academic libraries agreed with this principle and merged campus library and technology services, but these mergers have not been easy. See Andrea L. Foster, Strains and Joys Color Mergers Between Libraries and Tech Units, Chronicle Higher Educ., Jan. 18, 2008, at A1.
34. See Polden, supra note 28, at 273 (“For many law schools . . . the traditional decision-making and governance structures are not appropriately designed for the rapidly changing world of IT. New structures must be designed, implemented, and funded to support the law school’s investment in technology.”).
question of technology management structure is not unique to the law school environment. Academic institutions as a whole are still struggling to find the right mix of centralized and decentralized reporting structures. Indeed the role of CIOs at academic institutions is also in flux; for example, should the CIO be a direct report to the academic institution’s top leader or to one of the operating officers?²³

³² Taking a closer look at the law school environment, are there distinct advantages to consolidating management of technology within the law library? The law library has often been at the forefront of legal technology developments, and as a result, many law school administrators are comfortable discussing technology issues with law library directors. Also, it is efficient to place technology staff members within the library reporting structure. This is particularly effective at institutions seeking to reduce the number of direct reports to the law school dean. Oftentimes, the dean does not have time to consider the details of running technology any more than the dean has time to micromanage the complexities of the library. The library director may be well-positioned to summarize the details of technology and make technology projects comprehensible to the administration. The library director can use his professional credibility to serve as an advocate or champion for technology with the administration.

³³ However, managing technology for the entire law school requires a substantially different mindset from managing technology for the library. Suddenly, the library director must consider the needs of the various administrative departments as well as the foundation of the information infrastructure. This broad consideration can help the library become more integrated with the various law school departments, but it is a substantially different focus from the traditional responsibilities of the library. For example, in addition to considering the normal dilemmas of daily library operations, librarians must contemplate varied issues such as using technology to recruit prospective students, assisting the registrar and student affairs office with academic requirements, helping development officers automate their fund-raising tasks, and innumerable other strategies that are mission-critical for a successful law school.

Survey Methodology

³⁴ Ann Puckett, former director of the UGA Law Library, began surveying law libraries annually about IT staffing in August 1998. Originally, she received responses from only fifty-nine libraries in response to her posting on the law library directors’ listserv. She followed up by mailing individual letters to library directors who did not respond to the listserv query. By 2000, the number of responses had increased to 157 libraries. From 1999 until 2006, data were gathered regarding the number of FTE employees, whether they were assigned to the library or law school, the number of FTE faculty and students, and the titles of IT supervisors. In 2006, Puckett updated the survey questions to include the number of supported workstations and laptops and IT budget information.

35. See Jeffrey R. Young, College 2.0: The Incredible Shrinking CIO, CHRONICLE HIGHER EDUC. (May 9, 2010), http://chronicle.com/article/College-20-The-Incredible/65442/.
¶25 In 2010, Carol Watson, current director of the UGA Law Library, updated Ann Puckett’s survey in order to identify trends in law school IT staffing. The 2010 survey was posted to both the Teknoids and law library director listservs. Respondents from 148 law schools completed the survey. In addition to asking questions about which department is responsible for IT implementation, Watson adapted the Educause survey model to request information on the types of responsibilities that each school managed.  

Survey Results

¶26 In order to identify trends in technology management, we examined the data in four-year intervals: 2002, 2006, and 2010. In 2002, the law library was substantially more responsible for IT than it was in 2010. In 2002, fifty-nine law library directors indicated they were responsible for IT, as compared to thirty-seven in 2010. Conversely, in 2002, only thirty institutions indicated that they had separate law school IT departments solely responsible for technology. The number of separate law school IT departments solely responsible for IT doubled to sixty-one by 2010.

¶27 In 2006, responsibility for IT was evenly split among the law school, the law library, or a combination of the two departments (see figure 1). Among law libraries, forty-one indicated they were responsible for IT support for the law school. Survey respondents indicated that forty-two IT departments were solely within the law school. And finally, forty-eight IT departments were split between the law school and law library. Combining law libraries with sole responsibility and schools with split departments, eighty-nine law libraries had some sort of responsibility for IT support. When asking which department is responsible for IT, Puckett gave libraries the option of choosing “a combination of the above.” In figure 1, those answers were discarded. Only clearly defined roles are included in the results there.

¶28 By 2010, responsibility for IT support shifted in favor of a separate law school department. However, overall IT is still somewhat evenly divided between the law school and law library. Of 148 survey respondents, sixty law schools administer IT support through the law school as compared with forty-two in 2006. The number of libraries with sole responsibility for IT support remained about the same. In the 2006 survey, forty-one libraries were solely responsible for IT support as compared to the 2010 survey, where thirty-seven respondents said libraries solely administer law school IT. In 2010, fewer schools split responsibility between the library and the law school. In the 2010 survey, forty-one schools split responsibilities as compared with forty-eight schools in 2006. In conclusion, libraries with sole responsibility for IT remained about the same. Law schools with sole responsibility slightly increased while law schools with split departments decreased.

37. The surveys from 2002, 2006, and 2010 are included as appendixes. All survey results are on file with the authors.
Overall, in 2010, seventy-eight libraries have some type of responsibility for IT, a decrease of eleven libraries since 2006.

¶29 Although hard numbers often appeal to higher administration, the number of staff and which department is responsible for IT does not paint the whole picture. It is also important to know the specific responsibilities that law school IT are undertaking. Consequently, the 2010 survey was designed to capture more qualitative information about the types of technology services offered within law schools in addition to gathering data about the number of staff members.

¶30 The results of the 2010 survey indicate that law libraries are primarily responsible for library systems and photocopiers. Responsibilities for end-user training are fairly evenly divided between the law school and law library. Survey results showed that libraries are involved in web services, instructional technology, and some end-user/help desk support. On the other hand, law school departments are clearly primarily responsible for administrative systems, IT security, and network infrastructure (see figure 2). These results are not surprising considering that law librarians, and librarians as a whole, tend to emphasize instruction, information delivery, and customer service.

Figure 1. Law School IT Management Models
Conclusion

Ultimately, the law library will remain relevant and essential to the legal academy whether or not the law librarian manages law school technology. In the words of Bob Berring,

the soul of law libraries consists of law librarians.

. . . Librarians have long played the role of the intermediary between information and the person who needed it. It was the librarian who explained how to use the card catalog, how to find the desired information, where to find the needed book, and how to use and understand it once it was in hand.

. . .

The librarian, the living vital bridge between information and the user is still there and will remain there.38

Furthermore, the law library will continue to be a central gathering place for intellectual activity in the law school.39

There is no doubt that the law library is inextricably bound to technology, and this role will continue to evolve in the future. Although the survey results indicate a trend toward establishing separate law school IT departments, it is also quite clear that librarians are still very actively involved in many aspects of technology.

38. Berring, supra note 17, at 1402–03.
Law librarians must understand complex technologies in order to evaluate the effectiveness and capabilities of information discovery, preservation, and delivery tools. One of the primary functions of the law library is to support the instructional and scholarly mission of the law school. Technology is an essential component of instruction and scholarship. Whether faculty members are using technology to conduct research or for instruction, they inevitably rely upon librarians to assist them in their endeavors. Regardless of which management structure is in place at law schools, librarians will continue to use, evaluate, and experiment with technology in all aspects of their daily work.
Appendix A

2002 Questionnaire

Question 1—How many employee hours, expressed in FTEs, does the law library devote to support of computing functions?
Include: software and hardware maintenance and troubleshooting; teaching and training on use of electronic resources; supervising computer labs and other electronic facilities; researching and planning for new or upgraded electronic resources; web page development and maintenance; scanning and imaging operations; network printing; administering magnetic or smart card programs; developing electronic services. Do not include: answering reference questions about electronic resources; using computers to perform routine duties like cataloging, reference, or word processing.

Question 2—Please provide the same information for the law school.

Question 3—Which statement is most true in your law school?

__ a. All computing staff report to the director of the law library.
__ b. All computing staff report to a separate department head independent of the law library.
__ c. The law library and the law school maintain separate computing staffs.
__ d. Other (please explain)

If you checked either a or b above, please indicate the full title of the person to whom all computing staff report: ________________

Question 4—Please note whether employees are full-time permanent or part-time/student employees.

Question 5—How many FTE J.D. students and how many FT faculty does the law school have?

Question 6—Titles of Computing Services Administrators
Appendix B

2006 Questionnaire

1. How many employee hours, expressed in FTEs, does the law library devote to support of computing functions?

2. How many employee hours, expressed in FTEs, does the law school devote to support of computing functions?

3. Do the FTE figures in the above questions include educational technology support?
   Y__ N__

4. Which statement is most true in your law school?
   __ a. All computing is administered through the law library.
   __ b. All computing is administered through the law school.
   __ c. Law library and law school computing are administered through two separate departments within the law school.
   __ d. All computing is administered through a university department.
   __ e. All computing is outsourced to a vendor (not the university).
   __ f. Some combination of the above choices (please explain).

5. Approximately how many workstations and laptops does the computing services staff manage? ______________

6. What is (are) the title(s) of the person(s) who supervise(s) computing services?

7. What is (are) the title(s) of the person(s) to whom the employee(s) in Question 6 report(s)?

8. Does the computing services department have a separate budget?
   Y__ N__

9. If the answer to Question 8 was yes, how much is the budget?
   $____________

10. Does the figure in Question 9 include personnel costs as well as equipment?
    Y__ N__
Appendix C

2010 Survey

1. [Demographic Information]

2. Which statement is most true in your law school?
   
   __ a. All computing is administered through the law library.
   __ b. All computing is administered through the law school.
   __ c. Law library and law school computing are administered through two separate departments within the law school.
   __ d. All computing is administered through a university department.
   __ e. All computing is outsourced to a vendor (not the university).

3. Approximately how many FTEs do the law school and law library devote to IT support?

4. Who performs the following IT functions at your law school? (Law School, Law Library, N/A)
   
   - ADMINISTRATIVE SYSTEMS. Examples include: human resources, career services, registration, admissions
   - DESKTOP COMPUTING. Examples include: help desk and other user support services, end-user hardware and software support
   - DISTANCE EDUCATION
   - END-USER TRAINING
   - ENTERPRISE INFRASTRUCTURE AND SERVICES, IDENTITY MANAGEMENT. Examples include: portals, email
   - INSTRUCTIONAL TECHNOLOGY. Examples include: classroom equipment, course management systems
   - IT ADMINISTRATION AND PLANNING. Examples include: financial planning, IT communications, IT personnel management, IT facilities planning and management
   - IT SECURITY. Examples include: firewall management, incident response, vulnerability analysis
   - LIBRARY SYSTEMS
   - MULTIMEDIA/AUDIOVISUAL SERVICES
   - NETWORK INFRASTRUCTURE AND SERVICES. Examples include: wireless network, campus data network, remote access
   - PHOTOCOPIER SERVICES
   - PRINT SERVICES
   - TELEPHONE SERVICES
   - WEB SERVICES. Examples include: programming, content design and management, web server support
5. What is the title of the highest ranking technology administrator at your law school?

6. What is the title of the individual that your highest ranking technology administrator reports to?
Editing Justinian’s *Corpus*: A Study of the Paul Krueger Archive*

John Hessler**

In the Law Library of Congress, there exists an archive of materials consisting of the notebooks, manuscripts, and fragmentary jottings relating to the Corpus Juris Civilis, produced by the nineteenth-century philologist and historian of Roman law Paul Krueger, that has gone uninventoryed and unstudied for more than eighty years. A preliminary survey of these writings has shown that the archive contains materials relating to Krueger’s work on the Corpus of Justinian that detail his working methods and his collations of important medieval manuscripts relating to the Corpus. The archive also contains many unpublished commentaries and lectures on other seminal classical legal texts. Mr. Hessler provides an overview of this important archive and discusses its place in the history of Roman law and classical philology.

¶1 The compilation of Roman law that was originally brought together by the Byzantine Emperor Justinian I (ca. 482–565) and that is now known as the *Corpus Juris Civilis* (CJC), is certainly the most important and influential collection of civil and secular law that has come down to us from antiquity. This collection of legal texts, which in the sixth century gathered together in one place nearly the entire history of surviving Roman law, has been seen by many modern scholars as the seed from which sprouted all later Western systems of jurisprudence. These systems derive from the long centuries of theoretical study and commentary on the CJC that took place from the early Middle Ages through the nineteenth century.¹

* © John Hessler, 2011. I would like to thank Dr. Meredith Shedd-Driskel, Law Curator at the Library of Congress, for showing me the Krueger Archive in the vault of the Law Library. Most of the scholarly work that I have accomplished at the Library of Congress has come about through serendipitous encounters with unknown collections, and it is these moments of real discovery that make it such an exciting place to work. I would also like to thank Professor Charles Radding of the University of Michigan for his enthusiasm and support when I told him about the rediscovery of the Paul Krueger archive and for lending me his microfilm copies of the manuscripts that make up the *Corpus* of Justinian. Both the microfilm and Radding and Ciaralli’s published studies of the medieval tradition of the *Corpus* have shortened my research time considerably. Dr. Timothy Kearley, of the University of Wyoming Law School, read an early version of the paper and offered helpful comments on its scope. I must also thank the librarians and archivists at the Ecoles Nationale des Chartes in Paris, whose gentle guidance in my work on the difficult language of Roman land charters prepared me well for the problems of the Krueger archive. Finally, I must express my gratitude to Professor Okko Behrends, whose lectures on Roman law first showed me that history begins with legal structures, no matter what their form.

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¹ There are many studies of the historical importance of the CJC from a historical and legal perspective. The classic *Historical Introduction to the Study of Roman Law* is still one of the best introductions to the sources of the CJC. H.F. Jolowicz & Barry Nicholas, *Historical Introduction to the Study of Roman Law* 478–515 (3d ed. 1972).
The works that make up the CJC occupy an extraordinary place not only in the history of law, but also in the history of classical scholarship, especially in the lesser known corners of that field relating to the transmission and editing of manuscripts. The CJC, having received a great deal of attention from medieval scribes, Renaissance humanists, and modern commentators from the seventeenth century to the present, can be seen as a primary example of how classical works of a practical and less literary nature were transmitted and altered from antiquity through the early modern period. In a critical study of the CJC and its role in the history of modern jurisprudence, Stephan Kuttner has emphasized not only its primary historical importance, but also the part that medieval transmission and commentary played in its reception by later scholars. Kuttner, when considering the effect of the CJC on the long history of law in the West, wrote, “Medieval philosophy would have blossomed . . . even if Aristotle’s Posterior Analytics had never been found. But it is unthinkable that a science of law could have taken shape in the medieval West without the rediscovery of Justinian’s Corpus, about 1070 A.D.”

The most important critical edition of the Latin text of the CJC was produced by the great Roman historian Theodor Mommsen (1807–1903) with the assistance of a younger philologist, Paul Krueger (1840–1926). Mommsen’s and Krueger’s editions of the texts that make up the various parts of the CJC are still in use today, almost a century and a half after their first publication, and there is no indication that they will be replaced anytime soon. Since their publication, each of these editions has been quoted and used in almost all of the scholarship regarding the history and foundations of Roman law, and they form the basis for the modern English, German, and French translations.

In the Law Library of Congress, there is an archive of materials, consisting of the notebooks, manuscripts, and fragmentary jottings from the library of Paul Krueger, that for more than eighty years has gone uninventoried and unstudied. The archive contains materials relating to Krueger’s work on the Corpus of Justinian, detailing his working methods and his collations of important medieval manuscripts relating to the CJC. The importance of this archive to the history of the text of the CJC cannot be overestimated, considering that there are so few surviving archives of the working material from nineteenth-century scholars engaged in the new forms of textual philology from this critical period in its history. One of Krueger’s notebooks from the archive is shown in figure 1.

Mommsen and Krueger’s text of the CJC, which was published in parts from the early 1860s though the late 1870s, was the first to employ the new methods of scholarship and analysis developed by the German classicist Karl Lachmann.
Lachmann’s methods placed the study of medieval manuscripts on a more analytical foundation and provided a more systematic way to create recensions and stemmata, which show the history of a manuscript’s transmission through time. The Krueger archive is a case study in the applications of these new methods, and details how significant the textual and theoretical decisions he made were in the formation of the actual critical editions.

¶6 It is well known that the CJC is composed of four parts: the Digest, the Code, the Institutes, and the Nouvelles. During the 1860s, while Paul Krueger aided Theodor Mommsen in the production of the edition of the Digest, he also worked on critical editions of the Institutes and the Code. In 1867, when he was just twenty-seven years old, Krueger published both a new edition of the Institutes and the Kritik, a comprehensive study of the Code that would form the basis for his edition of the work, published in 1877.

¶7 In his early work, exemplified by the Kritik, Krueger relied heavily on scholarly materials gathered by previous investigators. Krueger did not have the independent financial wealth of many scholars of the period, and had to rely on the work of others, especially as to the content of many medieval manuscripts, because he simply lacked the funds to travel outside of Germany. This situation would continue until 1868, when he received a travel stipend from the influential journal Savigny-Stiftung. Because of this, we can conveniently divide Krueger’s work on

5. Lachmann’s method is described infra ¶¶ 13–16. Although the details have changed, mostly due to the advent of computers, Lachmann’s method is still alive and well in classical and medieval philology. See, e.g., Michael P. Weitzman, The Evolution of Manuscript Traditions, 150 J. ROYAL STATISTICAL SOC’Y (ser. A) 287 (1987).

6. For more information on Lachmann’s work, see SEBASTIANO TIMPANARO, THE GENESIS OF LACHTMANN’S METHOD (Glen W. Most ed. & trans., 2005).

7. The archive also contains some of Krueger’s drawings and photographic reproductions of important manuscripts.

8. JOLOWICZ & NICHOLAS, supra note 1, at 479.

9. Besides his edition of the Institutes in 1867, Krueger published a classic study of the glosses on the most important manuscript from Turin. Paul Krueger, Die Turiner Institutionenglosse, 7 ZEITSCHRIFT FÜR RECHTSGESCHICHTE 44 (1868).

10. PAUL KRUEGER, KRITIK DES JUSTINIANSCHE CODEX (Berlin, Weidmann 1867).

11. PAUL KRUEGER, CODEX IUSTINIANUS (Berlin, Weidmann 1877).


Figure 1. Example of Krueger’s Notebooks
the CJC into two periods, before and after 1868. Much of what Krueger did in the early period of his work would be revised when he actually had the chance to travel and to look firsthand at many of the medieval manuscripts that he used in his development of the recension of the CJC. Many of these changes in Krueger’s ideas are clearly visible in the notes from the archive that are described here.

¶8 Krueger’s sources for much of his early work on the medieval manuscripts that make up the CJC are often thought to begin with the work of Karl Friedrich von Savigny (1797–1861), whose multivolume History of the Roman Law During the Middle Ages was one of the first modern studies of the CJC to bring together the threads of past scholarship.13 Savigny, who wrote several very influential studies on Roman law, is often thought of by modern historians as the founder of critical historical studies on Roman law.14 The main tenets of that critical approach to legal scholarship are simply stated as the assumption that all legal traditions are dynamic and that they necessarily change over time. It is therefore important to the interpretation of any body of law to understand its history and the social constructions that brought it about.

¶9 More important to Krueger than the work of Savigny however, was that of a group of scholars led by Eduard Schrader at the University of Tübingen. Schrader and his collaborators collated and dated more than a hundred manuscripts of the Institutes using paleographic methods that are very different from those in use today.15 In the early nineteenth century, when Schrader was working, the study of paleography was still dominated by an older classificatory system that was more of a catalog bringing together all known forms of Latin handwriting than a true chronological tool useful for dating manuscripts.16 This type of paleographical cataloging reached its pinnacle in the mid-eighteenth century in works like the Nouveau Traite de Diplomatique written by the Benedictines Dom Toussain and Dom Tassin.17 According to Bernhard Bischoff, paleography remained an isolated and classificatory discipline well into the nineteenth century, with changes taking place only after the invention of photography and the widespread use of mechanical means to reproduce facsimiles of actual manuscripts.18 One of the things we can see in Krueger’s archive is how his later work, unlike his earliest endeavors, is supported by manuscript reproductions, many early examples of which still survive in the archive (see figure 2).

15. Most important, Krueger seems to have relied on the work of Schrader, whose Prodromus Corporis Juris Civilis was the most important study accomplished on the text until that time. PRODROMUS CORPORIS JURIS CIVILIS A SCHRADERO, CLOSSIO, TAFELIO (Berlin, Riemer 1823). Professor Charles Radding believes that there must have been an archive of materials in Tübingen from Schrader that Krueger used in his early work. E-mail from Charles Radding, Prof. of History, Mich. State Univ., to author (Oct. 29, 2010) (on file with author).
17. Id. at 1.
18. Id.
§10 Krueger’s reliance on Schrader’s dating is borne out in his *Kritik* of 1867, which was published before he could travel and before he could examine the originals of the manuscripts. The heavy annotations found in several of Krueger’s personal copies of the published version of the *Kritik* showed that he continually revisited the text and made changes to it based on the new research that he accomplished on the medieval manuscripts of the *Code* after the *Kritik*’s publication.

§11 In relying on Schrader’s work and that of other scholars in his earliest manuscript collations and dating, Krueger was dependent on a type of classical scholarship and philology that would soon fade, as newer techniques were adopted in the later half of the nineteenth century. In his 1832 edition of the *Institutes*, for example, Schrader used early manuscripts in a way that is very different from how modern scholarship would approach something as complex as the CJC. During the copying and recopying of manuscripts by medieval scribes, errors and varying readings are introduced into the copied text. This situation presents an editor trying to create a modern edition of an ancient work such as the CJC with a series of decisions that must be made in relation to the possible reconstruction of the original. When reconstructing something as complex as a work of classical or medieval law, it is important to know which of the variations found in the different manuscripts were introduced at a later date and to be able to decide which reading of the manuscripts most closely resembles the original author’s intent.

§12 In the late-eighteenth and early nineteenth centuries, Karl Lachmann and others developed analytical methods for handling errors in manuscript traditions using the concept of *recensio* to build stemmata that showed the genealogical connections and relationships between the surviving manuscripts of a particular work. In the case of the *Institutes*, Schrader simply used the most common reading found in the greatest number of manuscripts. This process has the effect of introducing more errors into the text, as it assumes that the most common reading is the correct one, something Lachmann would show is not necessarily the case.

 Krueger, in his earliest work on the CJC relied a great deal on the dating produced

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by Schrader, and therefore some of his early editorial decisions are today known to be based on false reasoning.\textsuperscript{24}

\textsuperscript{13} Lachmann’s methods were of a very different nature from those used by classical philologists before him. His method is inherently genealogical, and tries to standardize a procedure for editing texts from multiple manuscripts that does not require the editor to use subjective judgment. To develop this method, Lachmann divided the process of textual criticism into two parts, \textit{emendation} and \textit{recensio}.

\textit{Emendation}, simply put, is the process of correcting and adding information to manuscripts based on an editor’s best guess or reasoning.\textsuperscript{26} The technique was well-known and practiced among Renaissance humanist scholars, and its application led to many errors creeping into the first printed editions of many classical texts.\textsuperscript{27}

\textsuperscript{14} Most humanists of the late Middle Ages and Renaissance, when comparing the different historical manuscripts of a particular work, tended to rely quite heavily on the most recent one, primarily because these were more common and easier to read.\textsuperscript{28} In practical terms, this meant that these scholars settled on a standard text, or “vulgate,” which was only rarely changed through comparison with older manuscripts.\textsuperscript{29} These early Renaissance editors recognized two types of changes that could occur through the use of \textit{emendation}: “\textit{emendatio ope codicum} [emendation with the help of manuscripts] and \textit{emendatio ope ingenii} [emendation with the help of native wit] . . .”\textsuperscript{30}

\textsuperscript{15} Lachmann, in developing the method of \textit{recensio}, would change how manuscript traditions were established by giving an editor the tools to find how the earliest manuscripts are related to later ones through the comparison of what are called common errors. This process, if applied correctly and under the right conditions, allowed scholars to establish how a particular work evolved chronologically, and it identified the most important and authoritative manuscripts that should be relied on more heavily in the preparation of a critical edition.

\textsuperscript{16} In developing techniques like \textit{recensio}, Lachmann was attempting to give a scientific veneer to the practice of manuscript comparison, and this technique has continued to develop even today, with the use of computers.\textsuperscript{31} How far a formal method can be pushed into classical philology has been controversial within the small academic world of manuscript studies.\textsuperscript{32} On the one hand, there are classical

\begin{itemize}
\item \textsuperscript{24} Radding & Ciaralli, \textit{supra} note 12, at 14.
\item \textsuperscript{25} Timpanaro, \textit{supra} note 6, at 43. Timpanaro makes the point that many other philologists of the period contributed to the development of this method of textual criticism. I here credit only Lachmann for simplicity.
\item \textsuperscript{26} See id. at 46.
\item \textsuperscript{27} See id. at 45.
\item \textsuperscript{28} \textit{Id}.
\item \textsuperscript{29} \textit{Id}.
\item \textsuperscript{30} \textit{Id}, at 46.
\item \textsuperscript{32} For a cultural history of philology in Germany during the time of Mommsen and Krueger, see James I. Porter, \textit{Nietzsche and the Philology of the Future} (2000).
\end{itemize}
scholars such as Pasquali\textsuperscript{33} and Timpanaro,\textsuperscript{34} who insist that because there is an infinite diversity in the way errors could accumulate in a manuscript, it is probably impossible to develop a truly objective editorial method. On the other hand, one can find scholars like Maas\textsuperscript{35} and Greg\textsuperscript{36} applying real mathematical and combinatorial algorithms to the problem.

¶17 As mentioned earlier, Krueger and Mommsen were the first scholars to use Lachmann’s methods in their editing of the manuscripts of the CJC. This is borne out in many of the details that we can extract by looking closely at Krueger’s later work on the \textit{Code} and some of the notes he left behind in his archive. In Krueger’s editorial works we can see a blending of new and old methods of textual editing, especially in his work on the \textit{Code} and in his preparatory study of the text found in the \textit{Kritik}. The \textit{Code} of Justinian, unlike some of the other parts of the CJC, presents the scholar with complex problems that are much different from those found in more continuous and less fragmentary texts. Most of the earliest manuscripts that Krueger studied in relation to the \textit{Code} (Pistoia MS. C 106,\textsuperscript{37} Darmstadt MS. 2000,\textsuperscript{38} and Paris MS. Lat 4516\textsuperscript{39}) show an extremely dense system of glosses and a complex pattern of cross-outs, erasures, and recopying that he thought took place over many centuries and were in many different hands.\textsuperscript{40} Those who have studied the manuscript tradition of the \textit{Code} from a modern perspective echo Krueger’s difficulties, and conclude that all of these additions and subtractions from the text produced a manuscript recension of enormous complexity.\textsuperscript{41} According to Radding and Ciaralli’s study of the same manuscripts, Krueger was the first scholar to recognize the historical complexity of the \textit{Code} and was the first to attempt to sort out the difficulties.\textsuperscript{42}

¶18 The complexity of a particular manuscript tradition comes from a wide variety of sources, and it is in many ways dependent on certain assumptions that scholars hold about the process of the making of copies by medieval scribes. The errors introduced into copied manuscripts are not simply due to mechanical errors such as misspellings or omissions that accumulate as time goes by. A scribe may find errors in the exemplar that he is copying from and try to fix them. These corrections may produce a better copy than the one he is working from, or it may simply introduce further errors into the manuscript. Besides simple errors, there can be more complex mistakes that come from a scribe having copied from more than one exemplar. When a scribe noticed a variation in one of his exemplars, he might introduce that variant into his new copy by making a correction or by plac-

\textsuperscript{33} See Georgio Pasquali, \textit{Storia della Tradizione e Critica del Testo} (1934).
\textsuperscript{34} See Glenn W. Most, Editor’s Introduction, in Timpanaro, \textit{supra} note 6, at 15.
\textsuperscript{35} Paul Maas, \textit{Textual Criticism} (Barbara Flower trans., 1958).
\textsuperscript{36} W.W. Greg, \textit{The Calculus of Variants} (1927). Greg’s work is probably the most formal and takes its starting point from the concept of a logical ancestor relation developed in Alfred North Whitehead & Bertrand Russell, \textit{Principia Mathematica} (1910–13).
\textsuperscript{37} Held in the collection of the Archivo Capitolare, Modena, Italy.
\textsuperscript{38} Held in the collection of Universitäts- und Landesbibliothek, Darmstadt, Germany.
\textsuperscript{39} Held in the manuscript division of the Bibliotheque Nationale de France, Paris, France.
\textsuperscript{40} See Radding & Ciaralli, \textit{supra} note 12, at 133.
\textsuperscript{41} See id.
\textsuperscript{42} Id.
ing a note in the margin of the manuscript or by writing it in between the lines. The scribe might also provide commentary on the text in the form of glosses. This type of confluence of readings is known to manuscript historians as contamination and is of a very different nature from simple mechanical errors.

¶ 19 According to Lachmann’s method, when the errors are simple and not due to contamination, the relationship of the copies to the exemplars can be represented by a series of diverging lines that group manuscripts containing the same groups of errors together. Figure 3 expresses the fact that B and C were copied from A, and D and E from B. These different branches are developed by looking for common errors in the manuscripts that have been transmitted through time.

¶ 20 But if the scribe of E, for example, had decided to combine readings from B and C (as shown in figure 4), this would create a very different type of textual relationship and the stemmata would need to be constructed using converging lines. Contaminated manuscripts present a modern editor with a web of difficulties that are not easily handled using Lachmann’s or any other editorial method.

¶ 21 In the case of Justinian’s Code, all of these types of errors, from the simple to very complex contaminations, are found in a manuscript tradition that dates chronologically from the tenth to the fifteenth centuries, and it is into this morass of textual problems that Krueger found himself wandering. In sorting out the problems in this tradition, Krueger would argue that the manuscripts of the Code used in the medieval universities did not represent an unbroken line of transmission, but rather resulted from a long process in which the Code was shortened to a selection of constitutions and laws, and then later re-expanded as omitted laws were re-inserted into the text. This shortened version of the text Krueger termed the Epitome Codicis. This Epitome formed the core of the text of the Code, and its reconstruction was the locus of much of Krueger’s work on this part of the CJC.

![Figure 3. Diverging Manuscripts](image1)

![Figure 4. Converging Manuscripts](image2)

45. Id.
46. Figures 3 and 4 are taken from id.
47. Radding & Ciaralli, supra note 12, at 135–37.
48. Id. at 15.
Examining a series of manuscripts from Berlin, combined with earlier scholars’ accounts of other manuscripts and the earliest printed editions, Krueger isolated two distinct phenomena—“the lack of consistency from one manuscript to another in the order with which the constitutions were presented; and the numerous cases in which constitutions originally omitted from manuscripts were copied into the margins.”

¶22 Krueger, having relied on earlier dating of many of the most important manuscripts, would make several errors in establishing the correct recension of the manuscripts. Because he assumed, based on the incorrect dates placed on the earliest manuscripts by other scholars, that the annotations and glosses he found took place over centuries, some of his conclusions on how the Code of Justinian changed are now known to be wrong. Instead of the earliest manuscripts being separated in time by centuries, as Krueger thought, we now know them to be separated by only decades and to be very closely related. These types of errors are windows into Krueger’s thinking about manuscript dating and transmission, and more broadly, into the theoretical underpinnings of nineteenth-century work on manuscript recension.

¶23 Within the notebooks found in Krueger’s archive there are a series of studies and comparisons of some of the oldest manuscripts used in his reconstruction of the Code. His notes on these manuscripts have been particularly difficult to sort out and are an area of ongoing research. A good example of the problems encountered when trying to sort out this material can be seen in his notes on the Darmstadt manuscript 2000, which dates from the eleventh century.

¶24 The Darmstadt manuscript was written by two different scribes and shares a common ancestor with Paris Lat. 4516. The page shown in figure 5, which is one of many that consider the problems associated with this manuscript, shows Krueger beginning the process of grouping manuscripts according to shared readings, the first step in applying Lachmann’s common error method. Because this is one of the
most important manuscripts relating to the Code, he spent a great deal of time working through the text and also made a complete lexicon of notations to help him sort out the complex system of abbreviations used by the scribes.

¶25 Precise dating of early manuscripts was critical to Krueger’s textual reconstructions, and, as a consequence, there is a great deal of material in the archive on paleographic comparison. Krueger was very careful, especially in his later work, in trying to sort out the complexities of the paleography in the earliest manuscripts of the CJC, and he experimented with a number of different techniques. There are many pages of comparison between Krueger’s findings and those of the earlier scholars he had previously relied upon. Throughout the archive, one comes upon page after page of paleographic sketches showing how he tried to identify and date manuscripts and fragments relating to the CJC and other legal texts from the Middle Ages (see figure 6). The interaction between his use of older scholarship and his own later investigations is critical to understanding Krueger’s philological methodology, is clearly borne out in the archive, and represents an area that requires future research.

¶26 There are many other examples of Krueger’s corrections, and his continual reworking of previous readings. An important one comes directly from his work on Paris manuscript 4516, which is in the Bibliotheque Nationale de France. Krueger, who was trying to fill in gaps in the text of the Code, compared it with another manuscript, known as Pistoia manuscript C 106. The Pistoia manuscript forms the real core of Krueger’s edition and is a very complex piece of writing, being the work of no fewer than eight scribes. The manuscript also has extensive additions, with many laws and constitutions of emperors being added to it at a later date. The Paris manuscript, in contrast, is much simpler, and has a more orderly arrangement, because both its main text and the additional glosses it has in its margins are the work of a single hand. Krueger in his notes, and later in his printed edition of the Code, describes the Paris text as a twin of the other, but because the two manuscripts did not entirely agree in their content, he concluded that their similarity was due to their having a common archetype or sub-archetype. Krueger

52. Krueger, supra note 11, at xvii–xviii. See also Radding & Ciaralli, supra note 12, at 148.
therefore formed what is known as a bipartite stemmata and used the Paris manuscript to directly fill in gaps in Book 8 and Book 9 of the *Code* that were present in the Pistoia manuscript. 53 This decision had an important effect on the content of the text and is one of many decisions of this type that any editor of a complicated classical textual tradition must make when trying to form a reconstructed edition. We now know, however, that these two important early manuscripts are dated much closer in time than Krueger thought, and that they are nearly identical in their content. 54 This fact alters Krueger’s stemmata, and although he took their agreement on specific passages as an indicator of the authenticity of his theoretical chronology and recension, any future editor of the *Code* will need to look more closely. Krueger reworked his notes for the Paris manuscript many times, and the notes on this particular manuscript are extremely hard to interpret, as they contain many layers of cross-outs, annotations, and reworkings.

§27 Most of the manuscripts of the *Code* that Krueger worked with were purely in Latin and had had the Greek laws that they originally held removed from them during the early Middle Ages. In Justinian’s original text, there were many Greek laws that were key components to the structure of the *Code*. 55 To replace the critical Greek parts of the text Krueger worked from some of the most difficult and fragmentary evidence that was available. One of Krueger’s most penetrating studies of a hybrid Greek and Latin text from the Eastern law tradition comes from the notes in his archive entitled *Die Sinai-Scholien zu Ulpinas libri ad Sabinum*. In this study, he explored the origin of a fragmentary collection of notes (scholia) written about the jurist Ulpian’s *libri ad Sabinum*. This group of fragmentary scholia was found as part of the binding of a book in the monastery of Mount Sinai in 1880, and unfortunately has since been lost. 56 The text of the notes, which is written in Greek, cites the *Codex Theodosianus*, and, according to Krueger’s jottings from his study of the fragments found in the archive, he believed them to be the product of a law school and most likely to have originated in Beirut.

§28 Krueger’s notes from his study of these scholia are very significant, especially considering that the original manuscript has since been lost. The scholia themselves detail an important innovation in the study of Roman law in the eastern empire when the number of students who were capable of reading Latin diminished in the fifth century. The students of Roman law in the time just before Justinian, which is when these fragments date from, began the study of any Roman law text by using what was called in Greek an index. 57 These indexes were basically translations and paraphrases of important texts into Greek that also included read-

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54. RADDING & CIARALLI, supra note 12, at 148.
55. See id. at 133.
56. See JOLOWICZ & NICHOLAS, supra note 1, at 459.
ing tools, such as definitions of technical and specialized terms, explanations of archaic language and phraseology, and glosses that would highlight parallels in other important texts of law.\textsuperscript{58} The \textit{Sinai-Scholia} that Krueger set out to study and that his notes refer to are these types of commentary or schoolbooks.

\textsuperscript{29} Of all the notes in Krueger’s archive, these are among the most interesting, as they give us insight into how students learned law in the eastern empire at important law schools in cities like Beirut and Constantinople. When reading the fragments, one is immediately struck by the fact that they contain phrases such as “learn this,” “skip this,” “important,” and “be sure to mark this,” that are absent from most texts on Roman law. The fragments have an oral quality about them, as if they are the actual lecture notes from a law school professor of the fifth century,\textsuperscript{59} something Krueger notes explicitly.

\textsuperscript{30} In the process of collating manuscripts, Krueger made many drawings that show in detail his interpretations of some of the most complicated textual traditions in the history of Roman law. Many of his drawings and notes on some very fragmentary sources survive in the archive and describe why he chose particular readings. The fragmentary remains of classical texts that Krueger worked on, such as the Berlin Fragments of Aemilius Papinianus, who was one of the most prolific of the Roman jurists,\textsuperscript{60} are some of the most difficult documents for historians to understand. The methods that editors and philologists use in the attempt to study these types of fragments are full of assumptions and wild speculations that, while trying to narrate a true but hidden history, often shed more light on the cultural and historiographical assumptions made by the philologists themselves.\textsuperscript{61} The drawings and reconstructions of fragmentary texts like the ones shown in figures 7 and 8 yield particularly vivid images of Krueger’s working methods.

\textsuperscript{31} Besides the notes on manuscript collation, the Krueger archive contains other important works by him that were long thought lost. One of the most central to his overall work as an historical jurist is a group of lectures on the history of Roman law. Krueger’s lectures, entitled by him \textit{Romische Rechtsgeschichte}, comprise more than a thousand pages of manuscript and are written in both German and Latin. The subjects of Krueger’s lectures span the entire history of Roman law. In the lectures, he divided the subject into four distinct periods, each corresponding to a major shift in the structure of Roman law, from its origin in the Twelve Tablets to the later reception of Justinian’s \textit{Corpus}. Krueger appears to have delivered these lectures many times over a period of many years and annotated them continually. One can trace the development of the lectures through later marginal notes and through the dates that he added to the verso of the manuscript’s pages each time he made a change. These lectures are extremely significant artifacts for the study of the development of the historiography of Roman law—they are the fruits of the life’s work of a scholar who read and analyzed more of the original manuscript material relating to that development than anyone before or since.

\textsuperscript{58} See id.
\textsuperscript{59} See id. at 275.
\textsuperscript{60} See Jolowicz & Nicholas, \textit{supra} note 1, at 391.
There are many other works and lectures contained in the Krueger archive whose importance awaits further study. One of them is a several-hundred-page-long commentary on Marcus Tullius Cicero’s oration Pro Roscio Comoedo. The oration is one of Cicero’s most complex, and the points of Roman law and the historical circumstances that brought it about are not well understood by scholars even today.\(^\text{62}\) Other works include a series of lectures by Krueger on the Roman law of obligations. This is another area of difficulty in the history of Roman law because laws regarding obligation were not part of the original foundation of Roman law, and most of what we know about the subject was added in an ad hoc fashion in order to fill gaps in contractual statutes.\(^\text{63}\)

In this brief survey and description, I have tried to outline the importance of the Paul Krueger archive and to give some hint regarding the type of research that remains from a historical and archival perspective. The Corpus of Justinian can, in many respects, be seen as the perfect philological object. The manuscript tradition on which it is based is complex, and it is a product of the various social histories that formed it. In this sense, the Krueger archive is not only a reflection on the

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62. For the still unresolved problems with this oration see John Henry Freese, Cicero: The Speeches 266–73 (1930).

63. See Jolowicz & Nicholas, supra note 1, at 271.
history of Roman law, but also on the various histories of interpretation and scholarship that have formed our modern notions of the subject.

¶34 This historical reflection on how scholarship affects our notions of the past, especially the reconstruction of the classical past, is something that Paul Krueger might not have recognized, but it is something that his contemporary and philosophical colleague Friedrich Nietzsche reflected upon deeply. It was in this spirit that Nietzsche wrote in his essay *On Homer and Classical Philology*, “*philosophia facta est quae philologia fuit.*” (What was once philology has now been made into philosophy).64 The Paul Krueger archive is one of the few surviving examples of the notebooks, jottings, and manuscripts from an important nineteenth-century classical scholar and, as this survey has shown, will provide modern scholars not only with a window into how an important critical edition of a key text in legal history came into being, but also into how our ideas, ideologies, and scholarly methods formed many of our current notions of Roman law and how they developed during a critical period in its historiography.

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Keeping Up with New Legal Titles*

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

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In his new book, *American Property: A History of How, Why, and What We Own*, UCLA law professor Stuart Banner analyzes how the idea of property has changed over the course of American history. As Banner demonstrates, the question of what can be owned is a fundamental concept that has been central to the development of this country. Property in its most basic form—the ownership of land—played a pivotal role in our history, determining even, at one point, who had the right to vote. Indeed, the structure of our Constitution rests, in part, on rights to property, as evidenced by the prohibition on government takings without just compensation. By tracing the evolution of society’s “understandings of property” (p.3), Banner offers critical new insight into the American law and history that are so deeply interwoven with the notion of property.

Early America derived its first conceptions of property from the system then existing in England, though the principles were soon adjusted to meet the needs of the new country. Under English law, all land was granted by the crown. No one but the king could own land outright, and a current possessor held only an interest in the land. English law parsed the various kinds of interests so finely that, according to Banner, few attorneys today would recognize the distinctions. The law in the newly formed United States quickly dispensed with this entire scheme; as one early Connecticut judge explained, “the title of our lands is free, clear and absolute” (p.5).\(^1\) Other forms of English property, such as rights in public offices and rights in tithes, quickly vanished from the American system as well.

Over time, the law also came to embrace new types of property. Such changes often involved a shift in mindset on the part of the legal system and society at large. The term *intellectual property*, for instance, generally referred in the eighteenth century to “the sum of knowledge possessed by a person or a society” (p.23) not, as it does today, to “legally enforceable rights in products of the mind” (*id.*). Though

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\(^1\) Quoting 1 Jesse Root, *Reports of Cases Adjudged in the Superior Court and Supreme Court of Errors*, at xxxix (1798).
both the Constitution and the contemporary English system recognized patents and copyrights, ownership of other “products of the mind” evolved later. Specific adaptations were often sparked by necessity in the wake of technological and social change. Trademarks, for example, were not considered property until a purported proliferation in counterfeit marks hit during the mid-nineteenth century. Acceptance of this concept grew over the course of the next half century, accompanying an explosion in the size of American businesses and the markets that they served.

4 Ideas about the very nature of property also changed over time, with “profound implications” (pp.58–59) for the law. Banner submits that one key development in this process was the shift from seeing property as merely “a thing a person own[s]” (p.57) to conceiving of it as the “assemblage of rights a person ha[s] over a thing” (id.). Following this shift, one’s property no longer consisted, for instance, of the land one owned, but rather of the rights one had over that land, rights to do such things as use it, protect it, or dispose of it. Although this conception of property as a bundle of rights predates the eighteenth century, it became a popular legal doctrine late in the nineteenth century, a development Banner connects to the political climate of the era. Envisioning property as a bundle of rights produced antiregulatory consequences under both the Takings and Due Process Clauses, with various courts striking down government actions that restricted any of the rights in the bundle.

5 Not surprisingly, technological innovation has often triggered dramatic changes in the application of property rights. One of Banner’s more intriguing chapters charts the changing property status of the news. Early American newspapers routinely copied and republished stories found in other papers, as the news was generally considered “common property” (p.73). The introduction of the telegraph, however, brought drastic increases in the speed and geographic coverage of news transmission, leading to intense competition and a concentrated lobbying effort to gain copyright protection for the factual information that comprised the news. Led by the Associated Press, this campaign ultimately failed, but the courts stepped in to give newspapers “a kind of [limited] property right enforceable only against competitors” (p.88). Similar chapters chronicle the development of music as property following the invention of sound recording, the history of rights to one’s image and celebrity, twentieth-century issues involving the ownership of wavelengths for radio transmission, and controversies over biological property rights spawned by technological advances like the mapping of the human genome. Even the notion of owning a home has changed in response to technological and social adaptations. The concept of owning a condominium, for instance, is a recent development completely foreign to the real property law existing in previous centuries. Similarly, our use of land has changed radically with time and circumstances, transforming the law in areas like nuisance and zoning.

6 Banner’s final chapters deal with some of the current issues that will determine the future of property law. Increasingly, property is becoming “a tool for protecting the environment” (p.258). Pollution credits, for example, can be seen as property rights providing the legal authorization to pollute. Property rights also remain important as a check on government power. The public rancor arising in
response to the Supreme Court’s 2005 decision in *Kelo v. City of New London*,\(^2\) combined with a surprisingly strong dissent in the case, may even show a new societal focus on the purpose behind government condemnation of property. Meanwhile, the role of technology in shaping understandings of property continues. Digital technologies make copying ever easier and less expensive, a process that seems to be weakening or eliminating the protections of copyright.

¶7 Throughout *American Property*, Banner employs an engaging, informative, and approachable writing style that makes his book easy to read even when he presents complicated legal concepts or detailed court cases. By devoting each individual chapter to a discrete topic or concept and providing extensive footnotes, Banner has created a work that will prove particularly useful for historical research. Both property scholars and legal historians will find a great deal of interest in the book. Academic law libraries that serve these constituencies will want to add *American Property* to their collections.

**Dayan, Colin. The Law Is a White Dog: How Legal Rituals Make and Unmake Persons.**

*Reviewed by Edwin J. Greenlee*

¶8 Interdisciplinary scholar Colin Dayan’s most recent book, *The Law Is a White Dog: How Legal Rituals Make and Unmake Persons*, presents a postmodern blend of anthropology, social critique, and legal history that deconstructs the Enlightenment rationality generally associated with law. Dayan examines some of the ways in which the mechanisms of our legal system perpetuate “violence and oppression” (p. xvii) alongside progress and modernity. Going beyond traditional histories and examinations of the law, her book explores how larger socio-legal processes, like marginalization, the creation of social outcasts, and the justification of brutal penal practices, shape our present-day society. Dayan, who serves simultaneously as anthropologist, social critic, and poet, depicts the darker side of American society and the often repressive character of our law.

¶9 *The Law Is a White Dog* addresses a variety of different topics in support of one common theme—illustrating how the idiosyncratic reasoning of law treats some individuals as virtual chattels condemned to subaltern statuses that are established and defined through comparison with a class of “normal” persons. In her preface, Dayan sets out the perspective that guides her approach to this theme: “What I aim to do in this book is to question the spirit of law” (p.xiii). Emphasizing a nonrational, almost religious character to the law, she continues:

Practices of law, I argue, become interchangeable with rituals of belief. . . .

. . . . As with other rituals of remembrance and reenactment, both spirit possession and the legal idiom transmit traditions in a particularly historical way. But the meaning of civil life must be reconsidered when played out under the eye of the law. The cadavers, ghosts, and spirits that motivate this book originate in the life of chattels that have been passed around, injured or consumed. This making of perishables, consumed by use, recalls the somber intelligence of ritual and the resistance of those who have suffered (p. xiv).

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2. 545 U.S. 469 (2005) (holding that the taking of private land for private parties as part of an economic redevelopment plan constituted “public use” under the Takings Clause).
¶10 The specific practices of law that Dayan discusses in *The Law Is a White Dog* are fascinating in themselves, but take on critical importance because they influence the shape of contemporary government, which affects us all. The legal fictions historically used by the apparatus of government to relegate some individuals to a less-than-human status also serve to normalize violent means of social control that can develop, at the extremes, into the abuses seen at Guantanamo, the treatment of enemy combatants in the war on terror, or the curtailment of basic human rights within our nation’s prisons.

¶11 Dayan works out her complex ideas and analyses across the seven chapters that make up her book. She focuses on the social construction of slaves as chattel, the callous punishment of felons, and the dehumanizing treatment of those identified as terrorists. In the final chapter, Dayan extends her analysis of how the law addresses those at the outer margins of society to examine how we treat our companion animals. She demonstrates that the development of animal law is most fruitfully read in light of historically changing understandings of what it means to be human and fully enfranchised as a participant in society.

¶12 Written by an author well known for previous interdisciplinary work in cultural studies and law, this book is a must-have for both general academic libraries and academic law libraries. The writing is crisp, and the way in which Dayan assembles a wide array of topics that are rarely grouped together is thought-provoking and engaging. The book addresses important social questions and reveals the subtle ways that idiosyncratic legal reasoning works to rationalize harsh social processes. Dayan’s deconstruction highlights the law as a key mechanism for social control, rather than a narrow area of professional discourse or an administrative or procedural system that touches only a small segment of society. Ultimately, *The Law Is a White Dog* will prove valuable for anyone who seeks a comprehensive, critical understanding of our society and the role played in it by the law.


Reviewed by Suzanne Corriell

¶13 Joan DelFattore, a University of Delaware professor of English and legal studies, is an expert on the American educational system whose previous writings include books on textbook censorship3 and religion in public schools.4 In her latest book, *Knowledge in the Making: Academic Freedom and Free Speech in America’s Schools and Universities*, DelFattore explores the history of academic freedom in America and scrutinizes the case law that defines the rights of universities, school boards, educators, and students. Throughout her book, DelFattore advocates for a vision of American education that aspires to the quotation from John Milton with which she opens: “Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but

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knowledge in the making” (p.vi).\(^5\) Ultimately, she maintains, schools at all levels must welcome and encourage opinion and debate if American education is to succeed both in teaching its students “to think for themselves” and in “provid[ing] . . . access to those materials [that students] need if they are to think intelligently” (p.213).\(^6\)

¶14 Rather than focusing exclusively on either universities or elementary and secondary schools, DelFattore carefully analyzes academic freedom at all levels of instruction. She demonstrates the basic administrative and structural differences between K–12 and higher education, and explains the distinct legal protections afforded to various governing bodies, administrators, educators, and students. She also presents a brief history of the American Association of University Professors (AAUP) that depicts the birth of academic freedom and describes the evolution of the concept over the course of the past century. Nor does DelFattore shy away from confronting more contentious issues like prejudice, sexuality, and politics in American schools. Indeed, her book specifically covers speech codes, reading lists, evolution, creationism, intelligent design, homosexuality, and ideological bias. Whenever applicable, DelFattore relies on the details of actual court cases to illustrate the historical and ongoing trends that help shape her topics.

¶15 Later chapters in Knowledge in the Making focus primarily on Garcetti v. Ceballos,\(^7\) a critical Supreme Court case addressing First Amendment speech protections—or the lack thereof—for government employees. In Garcetti, the Court ruled that because Ceballos, a deputy district attorney, made certain statements pursuant to his position as a public employee, rather than as a private citizen, his speech did not warrant First Amendment protection. The Garcetti majority specifically noted that it would not necessarily apply the same reasoning in an academic setting. Using this caveat as a springboard, DelFattore proceeds to examine various pre- and post-Garcetti legal decisions. Several of these cases were still on appeal at the time the book was written, and personally, not knowing the final outcome heightened my interest and suspense. I found myself eagerly turning to the Internet to read the final opinions and learn how the stories ended.

¶16 Adhering to the very principles she advocates for American education, DelFattore presents conflicting opinions and balanced information, leaving her readers to think for themselves and draw their own conclusions. Yet her discussions of the cases force readers to imagine what public education would be like if majority rule alone were to dictate what can be said or taught in American classrooms. Some may well argue that DelFattore writes with a liberal bias, but I found her perspective on most topics to be decidedly neutral, though peppered by a sense of humor that will resonate with many in academia. The civility with which she approaches controversial subjects helps demonstrate for her readers how respectful discourse and debate can generate a healthier American educational system.

\(^7\) 547 U.S. 410 (2006).
Although DelFattore’s writing is geared toward legal scholars and an academic environment, educators at all levels should seriously consider reading *Knowledge in the Making*. Students may also appreciate it as an excellent introduction to education law and academic freedom. All academic libraries, including law school libraries, should add the title to their collections.


Reviewed by Karen E. Kalnins

Whether called the American Civil War, the War Between the States, or even the War of Northern Aggression, the four-year conflict that engulfed our nation during the mid-nineteenth century has inspired countless movies and books, both fictional and nonfictional. One significant new addition to the list is Arthur T. Downey’s *Civil War Lawyers: Constitutional Questions, Courtroom Dramas, and the Men Behind Them*. Instead of revisiting the battlefield encounters and military personalities that fill many Civil War offerings, Downey’s work focuses on the jurisprudence of the times and the lawyers and judges who crafted it. This decidedly different slant highlights the significance of both the rule of law and the legal profession during times of war. This is the unique contribution made by *Civil War Lawyers*, and it owes much to the narrowness of Downey’s subject matter. The book is not an all-encompassing compendium, but it does provide a detailed and valuable examination of the lawyers, judges, and notable cases that helped to mold one of the defining periods in American history.

The organization of *Civil War Lawyers* is generally straightforward and offers easy access to the book’s content for both casual readers and those researching specific information. An introduction provides a basic primer on the Civil War era, and successive chapters cover topics connected either to specific cases or broader themes: the “Prologue” to war, *Dred Scott*, the trial of John Brown, “Secession,” *Ex Parte Merryman*, “The War at Sea,” “Ending Slavery,” and “The Revenge Trials.” While the chapters progress chronologically, Downey obviously addresses only a limited selection of potential topics; presumably, he chose the most interesting or controversial cases and issues. Three appendixes, extensive endnotes, and a comprehensive index support the eight substantive chapters. The appendixes include a collection of short biographies on individual lawyers, a brief analysis of the intersecting relationships among notable attorneys, and a chronology of Civil War events. The index contains an extensive listing of keywords and topics, and it includes page references to material appearing both in the main text and the endnotes.

In terms of content, each chapter in *Civil War Lawyers* offers succinct but highly readable summaries of complicated topics, arranged in discrete sections and divided by clear headings. A number of photographs, paintings, and similar illus-

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trations enliven the historical accounts and broaden the book’s perspective. Throughout the text, special boxes labeled “continuing debate” explain issues that still cause controversy today. Downey is a lawyer, not a historian, but he obviously thought carefully about this work and researched it thoroughly. He relies on and cites a wide variety of both legal and historical source material in support of his propositions, including books, speeches, articles, treaties, cases, statutes, and the U.S. Constitution. When he analyzes court cases, he presents the historical and political context, introduces the parties, describes events inside the courtroom, and explains the various judicial opinions and their consequences.

¶21 The main strength of Civil War Lawyers lies in its depth rather than its breadth. By carefully scrutinizing Civil War attorneys and the parts they played in the decisions that shaped the era, Downey supplies a unique perspective on the law and legal profession during this chaotic period in U.S. history. The book is most appropriate for academic libraries or for other settings frequented by those with a particular interest in history. It might also be valuable as an addition to special collections dedicated to the history of U.S. law.


Reviewed by Melinda J. Kent

¶22 Using DNA evidence, the Innocence Project has exonerated 269 wrongfully convicted prisoners since 1992. In Convicting the Innocent: Where Criminal Prosecutions Go Wrong, University of Virginia law professor Brandon Garrett analyzes trial records for the first 250 of these exonerees. This analysis provides a lens that Garrett uses to discern basic weaknesses in our criminal justice system and to highlight opportunities for reform.

¶23 Garrett’s close analysis of trial record data forms the essential core of his book. Most chapters discuss certain, specific flaws that the analysis identifies in a significant number of cases. Chapters 2 through 5 focus on investigative and evidentiary issues, with chapters devoted to false confessions, mistaken eyewitness identification, flawed forensic evidence, and erroneous testimony by jailhouse informants. Chapters 6 through 8 address trial and post-conviction processes that block defendants from successfully asserting their innocence. In the final chapter, Garrett reviews various reforms adopted by federal and state governments in response to DNA exonerations, and he forcefully advocates for widespread implementation of changes to the criminal justice system.

¶24 Throughout the text, Garrett tries to balance the dry, academic weight of his data with compelling accounts of individual Innocence Project cases. Each chapter opens by presenting the story of one such case. These narratives anchor Garrett’s discussions both of the data drawn from the trial records and of relevant legal and social science research. Several chapters that were originally published as law review articles retain a distinctly academic tone, and the data analysis occasionally over-

whelms Garrett’s themes. For the most part, however, the story eventually returns to the people behind the numbers. In one moving section, Garrett quotes several professions of innocence made at trial by exonerees. Knowing that each person subsequently lost years of his or her life to unjust imprisonment makes this chapter particularly poignant.

¶25 Innocence Project exonerations stem from cases that are representative of our criminal justice system in many ways, but atypical in others, and Garrett clearly describes both characteristics. As he persuasively argues, these cases offer a “unique window into causes of error” (p.272) that plague our system in general. As the use of DNA testing in criminal investigations expands, exonerations on the basis of DNA evidence should become less common. Absent reform, however, the systemic problems identified by Garrett will continue to infect our criminal justice system and to yield additional false convictions in cases for which no DNA evidence is available.

¶26 Convicting the Innocent is well organized and indexed and will prove useful to criminal justice researchers. Although it does not contain a bibliography, each chapter includes extensive endnotes. The book’s clear, topical organization will facilitate research, especially for those interested in specific, narrow aspects of the overall subject. A brief appendix summarizes the book’s data and the author’s methodology; further appendix material summarizing and cross-referencing the stories of individual exonerees would have been useful since the book relies heavily on these accounts. The limits of the appendix, however, are more than outweighed by the book’s companion web site,11 which offers additional tables, detailed supporting data, and excerpts from trial documents that support each individual chapter in the book. Between the book and the web site, Garrett has produced a work of serious scholarship that will appeal to casual readers as well as academic researchers. Thus, it is recommended for both public and academic libraries.


Reviewed by Julie Graves Krishnaswami

¶27 What if you could take a course in legal writing taught by some of the greatest appellate lawyers of our time? Instead of the tired aphorisms that seem to frame so many legal writing lectures, like be concise, avoid legalese, and use topic sentences, this master class would likely focus on deconstructing and modeling the practical techniques that made its teachers so successful in the first place. This is exactly what author Ross Guberman does in Point Made: How to Write like the Nation’s Top Advocates. Guberman is a skilled law school writing instructor and the owner-operator of Legal Writing Pro, a company that conducts writing workshops for practicing attorneys. Point Made, his debut book, avoids the clichéd presentations that often frustrate new legal writers, outlining instead clear and succinct writing techniques that can be easily imitated by students and practitioners alike.

Guberman mined data from hundreds of legal briefs to formulate fifty brief-writing techniques. Many of these are commonplace practices regularly covered in standard writing and appellate advocacy texts or in recent books and law review articles. Yet what makes Point Made original and effective is the presentation Guberman uses to demystify his information. To demonstrate basic writing guidelines—give the court a reason to care, contextualize unfavorable facts, argue in the alternative, or use block quotes sparingly—he supplies short excerpts from actual briefs submitted in some of the most compelling cases in recent history. While typical legal writing texts include only intermittent examples from hypothetical or lackluster litigation, here every principle is illustrated with an example from at least one brief, and Guberman draws each example from popular or influential cases like Brown v. Board of Education, Gratz v. Bollinger, and Regents of the University of California v. Bakke. Likewise, the briefs relied on for illustrations are written by some of the country’s most influential appellate advocates and legal thinkers, including Jamie Gorelick, Eric Holder, Walter Dellinger, Lawrence Lessig, Maureen Mahoney, President Barack Obama, Kathleen Sullivan, and Laurence Tribe. Several excerpts even come from briefs drafted by current members of the Supreme Court; Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Elena Kagan are all represented.

The book addresses the legal brief systematically, employing a straightforward five-part arrangement that covers theme, facts, arguments, language, and closing. Each part provides a concise explanation of various techniques followed by the examples from actual briefs. Part 1, “The Theme,” covers presenting the case’s who, what, when, where, why, and how; using numbered lists appropriately; telling the court why it should rule in your favor; and inoculating the court against an adversary’s faulty arguments. Part 2, “The Tale,” focuses on recitation of the facts. Part 3, “The Meat,” explains how to craft well-reasoned arguments that capture the judges’ attention through the proper use of headings and subheadings, structured sections, analogies, techniques for distinguishing cases, parentheticals, block quotes, and footnotes. Part 4, “The Words,” describes how to write punchier, more persuasive prose using effective sentence structure, punctuation, and flow. The final part, “The Close,” suggests techniques for getting the last word with a strong and effective conclusion.

Guberman demonstrates his expertise as a skilled legal writing teacher throughout the book by deploying convincing evidence in support of pragmatic advice. One of his appendixes contains twenty short but effective quotations from sitting judges and justices to underscore his claim that the legal writing truisms in the book really do sway the decisions of courts across the state and federal judiciary. The advice Guberman offers is eminently practical, often teaching readers to transform common but poorly implemented writing techniques, like bulleted lists or block quotes, into powerful and persuasive elements. The book also provides convenient tools that legal writers can return to and consult as needed, such as a two-

page list of transition words and phrases. Even more helpful is an appendix containing annotated examples of legal writing with before and after comparisons that demonstrate the proper use of the techniques described in the text.

¶31 Guberman omits discussion of some foundational aspects of legal writing, like outlining an argument or dealing with unfavorable facts. This does not detract from the book’s general utility, but does make Point Made a poor choice as a stand-alone legal writing textbook. Instead, writers may find this text most useful to review at the point of need—immediately before editing a piece of persuasive writing. The book’s index and an appendix listing the fifty individual writing techniques will both prove useful for these purposes. Also, just by reading the book, lawyers and legal writers at all stages of their careers can cull from Guberman’s advice valuable lessons that are easy to remember and simple to apply. For these reasons, Point Made would make an excellent addition to any law school, law firm, court, or academic library collection.


Reviewed by Karin Johnsrud

¶32 An estimated 100 million people of all ages and nationalities spend hours playing, fighting, and socializing in virtual worlds like Second Life, World of Warcraft, and Club Penguin. As the popularity and complexity of virtual worlds continues to grow, the proper application of law to such online environments has become a topic of increasing importance. Because I do not participate myself, I found these concepts completely foreign until I discovered Virtual Justice: The New Laws of Online Worlds from Rutgers School of Law–Camden professor Greg Lastowka. Reading Lastowka’s book was an eye-opening experience that revealed the complexity of online interactions and the amount of law needed to regulate relationships existing only in virtual worlds.

¶33 Lastowka opens his analysis with an introduction that compares three very different castles: historic Cardiff Castle in Wales; Disney World’s famous Cinderella Castle; and Dagger Isle Castle, a virtual location from the Internet game Ultima Online. The point of this comparison is that each castle holds a specific status under law and is governed by its own set of legal rules. In 2003, however, Dagger Isle Castle was offered for sale on eBay, confusing the delineation of distinct types of castles and leading Lastowka to wonder what real-world legal implications, if any, might result from actual ownership of this virtual property. This question becomes a recurring theme that flows through the remainder of the book’s discussion.

¶34 The first few chapters of Virtual Justice explore background concepts that help shape the application of law to virtual worlds. In chapter 1, Lastowka uses examples drawn from real cases to spark basic questions about the interaction between law and online environments: Can a company terminate a user’s account and take his or her virtual assets without obligation or liability? Is stealing and reselling a piece of virtual property punishable under criminal law? What should happen when users violate the terms of service that apply to a virtual world? Next,
chapter 2 defines virtual worlds as “persistent, interactive, simulated social places where users employ avatars” (p.31) and traces the development of these component concepts from pre-Internet forms, through early text-based games, to their present-day incarnations. Following a discussion of the technology behind contemporary virtual worlds, chapter 3 distinguishes three principal categories of virtual world—massively multiplayer online role-playing games (MMPORGs), social worlds, and kids’ worlds—each aimed at a different user group and presenting different implications for the application of law. In chapter 4, Lastowka presents aviation law and Internet law as examples that demonstrate how the law can and does adapt to new technologies, precedent that justifies the treatment of virtual worlds as another new arena for the development of law.

¶35 Each subsequent chapter deals with a key legal topic and its application to virtual worlds. In chapter 5, which examines jurisdictional issues, Lastowka addresses the possibility of treating cyberspace as its own, separate jurisdiction. In the process, he examines the role that contract law and terms of service agreements play in governing disputes between the owners and users of virtual worlds. He also analyzes potential legal effects stemming from the internally established community rules that apply in particular worlds. Chapter 6 analyzes virtual worlds as games, a category consisting of “special social settings where separate rules apply” (p.105). Generally, these separate rules will be respected by courts and used to govern the disputes that arise between players of a game. Chapter 7 discusses property law, investigating which theory of ownership should apply to virtual property. Lastowka’s focus here is on domain names, the theft of virtual items, and other conflicts over the ownership of virtual property. Chapter 8 addresses hacking and demonstrates that the computer code underlying a virtual world performs a function similar to that of law—structuring and governing the interactions that occur within the world. The final chapter considers the intellectual property implications of virtual worlds, exploring questions surrounding user-generated content, the use of macros to circumvent intentional design limitations, and potential liability for users’ violations of third-party copyrights.

¶36 Given the continuing proliferation of virtual worlds, the need for a body of law to govern these environments is becoming critical. At least three additional books addressing the application of law to virtual worlds were published in 2010,15 providing further evidence that this is a timely and increasingly relevant topic. Virtual Justice is well written and easy to understand with extensive endnotes and a detailed index, all of which make the book particularly helpful as an introduction to this important subject area. Also, the flow of the book as it moves from chapter to chapter yields an interesting and enjoyable read. Virtual Justice will prove a valuable addition to the collections of all academic law libraries and of those firm libraries that support practitioners working in the areas of law discussed in the book.

15. See Angela Adrian, Law and Order in Virtual Worlds (2010); Computer Games and Virtual Worlds (Ross A. Dannenberg et al. eds., 2010); Andrew Sparrow, The Law of Virtual Worlds and Internet Social Networks (2010).

Reviewed by Arlene I. Fletcher

¶ 37 At a time when seemingly everyone uses Facebook and *The Social Network*\(^\text{16}\) wins multiple Academy Awards, a book exploring friendship and the law represents a timely new addition to the canon of legal theory. In *Friend v. Friend: The Transformation of Friendship—and What the Law Has to Do with It*, Professor Ethan J. Leib from the University of California Hastings College of the Law uses Facebook, social networking, and the evolving landscape of contemporary friendship as backdrops for an engaging and important analysis of the law’s place in governing and encouraging friendships. Ultimately, Leib argues that the law should place a higher value on friendship and that society should advance policies that bolster and strengthen the relationships between friends.

¶ 38 Leib begins *Friend v. Friend* with chapters describing the defining characteristics of friendship and establishing why the relationship should implicate the law. While Leib acknowledges that details differ across culture, gender, and class, he universally identifies friendship as a voluntary and intimate relationship marked by solidarity, trust, exclusivity, reciprocity in affection, mutual assistance, and warmth. The institution of friendship provides numerous benefits for both individuals and society at large, a fact that forms the cornerstone of Leib’s contention that friendship should matter to the law. Friends influence our personal identity, confirm our sense of social worth, offer comfort in trying times, and motivate us to try new and exciting things. Friendships in the workplace boost morale and create synergies. At a societal level, friends take care of one another, create networks that support volunteerism, and help individuals better integrate into the community.

¶ 39 Despite the obvious value provided by friends, though, Leib’s assertion that the law should promote and facilitate friendship can sometimes be difficult to swallow, particularly in the context of specific proposals. For example, Lieb presents “friendship registries” as one possibility for establishing precisely who qualifies as an individual’s legally recognized friends, an idea that seems more than a bit far-fetched. As he readily admits, these theories require inserting the law into personal relationships that belong to a traditionally private sphere, and this is not necessarily an appealing proposition.

¶ 40 Leib emphasizes, however, that the law has long been entrenched in purportedly private spheres—in particular, the sphere of family life. Indeed, his strongest case for recognizing friendship as a legal construct relies on an analogy between family members and friends. Leib points to research indicating that many people place a higher significance on their relationships with friends than on those with family members, and he reminds us that the traditional family unit is becoming less typical every day. Evolving attitudes regarding what constitutes a family, particularly the modern notion that one’s closest friends are family, suggest that privileges the law extends to family members should also apply to friends. Such

\(^{16}\) *The Social Network* (Columbia Pictures 2010).
privileges might include the opportunity to use medical leave to care for sick friends or a legal right to refuse to testify against a particularly close friend.

¶41 The second half of Friend v. Friend seeks to establish a framework for addressing some basic questions of law connected to friendship. Leib argues that legal punishments and liabilities should be adjusted to account for disputes between friends. He contends that friendships resemble fiduciary relationships (e.g., attorney-client or doctor-patient) and involve implied duties of confidentiality that are highly susceptible to abuse. The law, Leib suggests, should protect friendships much as it does fiduciary relationships, imposing punitive measures on those who breach the confidence or abuse the trust of a friend for personal gain.

¶42 Leib’s tone in the book occasionally veers toward the pedantic, and law theory geeks will take particular pleasure in his chapter on contracts and friendships. The introduction to relational contract theory found in the chapter feels particularly dense. Leib uses this section to present friendship as a better model for relational contract theory than marriage, the more traditional choice, and this tangent feels rather out of place within the wider thesis of the text. Yet, a related point is quite valuable: the duties of contractual partners mirror those of friends, so contract theory may be able to help delineate the obligations of friendship.

¶43 I personally find it difficult to ignore the intuition that creating a recognized legal institution out of friendship would dissolve the very informality that makes friendships enchanting. When Leib suggests the law should demand the same duties of friends as it does of fiduciaries or contract partners, the voice in my head argues back, “But I don’t want to treat my friends like patients, clients, or business partners!” Still, whether or not Leib convinces you that the law should play a significant role in friendship, Friend v. Friend is a fascinating and well-researched text that will undoubtedly spark lively discussion among law students and casual legal theorists alike. The book certainly belongs in any academic law library, and other libraries with strong legal theory collections should also consider its purchase. With seven well-organized chapters, a robust index, and extensive notes, Friend v. Friend succinctly introduces a valuable new way of thinking about friendship and the law.


Reviewed by Margaret H. McDermott

¶44 Is our current system for appointing federal judges broken? Has it become disconnected from the process that the framers had in mind? In Judicial Appointments and Democratic Controls, political scientist and former Congressional Research Service analyst Mitchel Sollenberger says no. Rather, he contends that various procedural modifications—statutory judicial qualifications, senatorial hearings and investigations, even the use of the filibuster—reflect a vision of the “shared responsibility for making judicial appointments” (p.3) that the framers intended the political branches of government to exercise. For Sollenberger, these procedures are manifestations of democratic controls (“republican and structural safeguards . . . rooted in the Constitution . . . that guide the judicial appointment
process” (pp.4–5)) that are necessary and even “crucial to protecting liberty” (p.13). This defense is in sharp contrast to proposals from critics of the current system, like Richard Davis, whose suggested reforms would modify the process by minimizing the role played by Congress. To make his case, Sollenberger scrutinizes our constitutional and political history and carefully documents the development of the judicial appointments process. He believes that tracing the “ebb and flow of presidential power” (p.3) reveals that the current system’s application of democratic controls largely realizes the framers’ original intentions for “[a] balanced system of government” (p.4).

Judicial Appointments and Democratic Controls presents a logical and systematic examination of the appointments process. In chapter 1, Sollenberger provides a clear explanation of the distinctions between Article III and non–Article III judges and a well-written history of major legislative initiatives that have altered the structure of the federal courts—everything from the Judiciary Act of 1789 through twentieth-century enactments. Chapter 2 considers the text and history of the Constitution, discussing the judicial appointments clause, the recess appointments clause, and the ineligibility clause. Chapter 3 explores the development of various statutory qualifications for judicial appointees, a phenomenon that represents an “important aspect of democratic controls” (p.51) and has improved the “operation of the federal courts” (id.), according to Sollenberger. Chapters 4, 5, and 6 track the confirmation process from pre-nomination decisions made by both the executive and legislative branches to the Senate Judiciary Committee’s role in screening candidates to debate and final action on the floor of the Senate. Sollenberger’s two concluding chapters challenge various proposals for reforming the judicial appointment process and critique efforts that would weaken democratic controls.

This book will prove valuable in various academic environments. College faculty will want to consider it as an extremely readable choice for undergraduate classes in constitutional law, the system of checks and balances, or the inner workings of Congress. The text can also support law school seminars analyzing the judicial appointments process or the relationship between the president and Congress. Students at all levels will like the concise summaries that conclude each chapter. Sollenberger relies heavily on a wide variety of primary sources to make his case, and researchers will find ample footnotes with a wealth of citations to The Federalist, court opinions, the Statutes at Large, the Congressional Record, and the papers of numerous presidents, justices, and legislators. Researchers will also benefit from tables in chapters 5 and 6 that compile useful data on confirmation activities and from five appendixes reproducing examples of documents used in the nominations process. Those who want to perform more in-depth research will appreciate the table of cases and a seventeen-page bibliography containing refer-

17. See Richard Davis, Electing Justice 170–72, 171 (2005) (proposing that the public vote for federal judges from a slate of presidential nominees, a process that limits the Senate’s role to “scrutinizing . . . nominees, holding public hearings, and . . . issuing recommendations for or against . . . each of the candidates”).
ences to government documents, books, articles, and a list of major research collections.

¶47 Although the present book is less descriptive than some similar titles, it provides a particularly compelling and well-researched argument. Sollenberger has done extensive previous work in this area, a fact that lends further credibility and support to his thesis. Judicial Appointments and Democratic Controls will make a welcome addition to all general academic and law school library collections.


Reviewed by Todd T. Ito

¶48 Cultivating Conscience: How Good Laws Make Good People is a timely work, arriving at a moment when many are struggling to understand the ramifications of the rise of economic theory, a system that now exerts a powerful influence over multiple academic fields and the public policy realm. Within the past decade, economics has penetrated even the New York Times best-sellers list, as exemplified by the surprise 2005 hit Freakonomics. In her new book, UCLA law professor Lynn Stout challenges the dominant economic interpretation of human behavior—the so-called homo economicus model that focuses on the rational pursuit of self-interest and wealth maximization—and proposes an alternative approach that places more emphasis on conscience. Other scholars have already demonstrated that the homo economicus model is inaccurate or, at best, incomplete; as Dan Ariely maintains, people are actually “predictably irrational.” Stout’s argument proceeds from this premise to demonstrate that we not only sometimes fail to act rationally, but also often engage in “unselfish prosocial behavior” (p.12), which meets Stout’s definition for conscience.

¶49 To make her case, Stout relies on recent research in social psychology, behavioral economics, and evolutionary biology designed to test how human subjects act when their self-interest conflicts with the interests of others. Her review of results from hundreds of individual experiments indicates that subjects placed in such positions frequently acted unselfishly. Most intriguing, behavioral scientists have been able to manipulate certain, specific variables to effect dramatic increases in subjects’ prosocial behavior. Stout identifies three social variables that seem most critical in shaping unselfish behavior: “(1) instructions from authority; (2) beliefs about others’ prosocial behavior; and (3) the magnitude of the benefit to others” (p.99). Since subjects in the experiments often switched between selfish and unselfish behavior (what Stout calls the “Jekyll/Hyde syndrome” (p.21)), she advocates

that lawmakers manipulate these social cues to encourage unselfish, prosocial behavior whenever possible.

¶50 The “emerging science of . . . prosocial behavior” (p.9) outlined by Stout calls into question the traditional, economic claim that the best way to manipulate human behavior is through the use of punishments and rewards, or incentives. The use of incentives, Stout argues, effectively undermines the three major social influences she has identified. First, offering a material incentive to accomplish a goal “sends the unspoken signal that selfish behavior is both expected and appropriate” (p.251). Furthermore, “[i]t suggests that others in the same situation are [also] behaving selfishly” (id.). Finally, incentives imply that selfishness itself—choices made in expectation of the promised rewards—must benefit others, since society chooses to encourage such behavior. A current example of problematic incentivization is the move to link merit pay for teachers to student performance on standardized tests. When such a system was adopted in Georgia, authorities found pervasive evidence of teachers improperly manipulating their students’ answer sheets. Stout, whose specialty is corporate law, also points to numerous examples of incentives in the financial sector that induce excessive risk-taking and even fraud, behaviors that contributed to the financial crisis of 2008. As Stout directly states: “[I]f we want people to be good, we must not tempt them to be bad. And over-reliance on material incentives almost always leads to temptation” (p.251).

¶51 Though critical of incentives, Stout does not suggest complete abandonment of the homo economicus model. Indeed, many of the studies she cites demonstrate that self-interest plays a stark role in human behavior: the higher the costs of unselfish action, the lower the incidence of prosocial behavior. Rather, Stout wants policymakers to moderate their use of incentives with a more considered approach that takes proper account of conscience. For example, Stout claims that tort law implicitly recognizes and relies on the existence of personal conscience. Since the moral rules that guide human behavior may not constrain corporations, Stout submits that corporations should not be treated like natural persons, but should instead be subject to a separate regime of tort rules.

¶52 In her introductory chapter, Stout asserts that the “phenomenon of conscience . . . should interest anyone who studies or cares about the human condition” (p.17), and the potential readership for her book is indeed quite broad. Clearly, Stout wants to reach a large audience—including, perhaps, some of those who flocked to Freakonomics—and her accessible and relatively straightforward writing style will likely appeal to a range of readers. In her final three chapters, Stout analyzes the role conscience plays in specific areas of law (torts, contracts, and criminal law), and this arrangement will make it easy for those with a more narrow, topical focus to skip directly to a relevant substantive chapter after reading preliminary sections of the book. On the whole, Cultivating Conscience is thoroughly researched and makes a compelling and thought-provoking case for scholars and policymakers to pay more attention to the role conscience plays in our society. It is highly recommended for academic libraries and for any other libraries serving patrons interested in law, economics, cognitive science, or public policy.
Law students and lawyers, like the rest of us, need to find information for their everyday lives. Ms. Whisner outlines ways that law students can use research to help them find jobs or decide what type of legal career they want to pursue.

¶1 Law students and lawyers, like the rest of us, need to find information for their everyday lives. Although research classes focus on helping them develop the skills to write memos, briefs, and seminar papers, their everyday research can also benefit from instruction—or at least a few tips. I like to remind students that research is not just for class or work assignments: it can make their lives better. I’m speaking lightly when I make that claim but, really, wouldn’t finding good information about potential employers or career paths make a student’s life at least a little better?

¶2 I was thinking about law students’ need to research career information—their most pressing everyday research need—when I came across a research project on my own campus. Project Information Literacy is studying the research habits of college students at colleges and universities across the United States, and the project’s latest paper is about how college students conduct everyday life research. This is just the topic I wanted to write about, looking at a population that’s only a few years behind law students.

¶3 The undergraduates interviewed discussed a number of information needs unrelated to class: “Could a recent tick bite cause Lyme disease? What news is being reported in the hometown newspaper? What does a diagnosis of breast cancer mean for the patient? What is the starting salary for civil engineers? What are the values of a certain religious group?”

¶4 Some everyday questions had big consequences—for instance, the purchase of an expensive product. Or, as one student explained, the preparation of food: “If you’re just writing a paper for class, it reflects on your knowledge, skills, abilities and ethics. If you’re curing a ham, the knowledge, skills, ability and discernment


3. Id.
you use actually affect your health and your life. Big difference.” That student, aware of the importance of the research task, consulted blogs, an online cookbook, and the County Extension Office. Like that student, others also used many different sources—Google and Wikipedia, as we’d expect of this wired generation, but also friends, family, classmates, and instructors (although only fourteen percent used librarians). Surprisingly (to both the researchers and to me), forty percent of the undergraduates used online research databases, such as JSTOR, EBSCO, or ProQuest, for everyday life research.

Two-thirds of the undergraduates in the sample reported looking for information about work or career (e.g., job openings, salary ranges) within the last six months. Since many of the students in the study are early in their education—only forty percent were seniors—I assume that many are not thinking as intensely about their careers as law students do. We would be likely to see close to a hundred percent of law students looking for something related to jobs and careers in any six-month period.

Law students have a variety of career-related information needs, almost from the start. What do lawyers do? Do I want to apply for an externship? What kind? What experiences do I want to have? Which judge might be good to work for? Can I find a summer job? What employers hire first-year students? How can I learn more about practice areas? What sort of practice would fit with my interests, skills, and strengths? Is there much difference among big firms? Between big firms and medium firms? What classes should I take to develop the skills needed in the type of practice I plan to pursue? How can I best prepare myself for an in-house job in five or ten years? How can I learn more about the attorneys who will be interviewing me tomorrow? How can I find out about public interest fellowships? How can I make some connections in the city where I want to practice?

Like the undergraduates in the study, law students are probably heavy users of Google. And why not? If you want to find a law firm’s web site, Google is terrific. It’s even pretty good for more general searches. I tried typing in career advice law students and found some helpful material in the first page of results. And it’s easy to try variants, such as criminal defense careers or in-house counsel career path. In fact, after trying these searches, I think I’ll start encouraging law students to play around with them.

4. Id.
5. Id. fig.2.
6. Id.
7. Id. fig.1.
8. Id. tbl.1.
9. When I was an undergraduate, I had only vague thoughts about my career—even though in my last year of college I worked at the university’s placement office and was surrounded by people talking about career planning!
§8 Not only can the Google search lead to some worthwhile pages, but those pages in turn can lead to more resources. For instance, searching for **in-house career path** leads to an interview with a successful lawyer on the JD Bliss blog.\(^{11}\) The latest post on the blog is from 2009, but keep browsing posts anyway. The Categories list in the left sidebar links to posts tagged as Attorney Career Success Stories, Career News, and Career Resources—all good possibilities for browsing. And the right sidebar links to dozens of blogs that have more on careers, work-life balance, solo practice, and so on. That one search can be the start of a lot of productive browsing. 

§9 There are few law students who couldn’t come up with this sort of basic searching and browsing on their own. The only hurdle would be thinking to search in the first place. Where I think law students can use some pointers is in going beyond this basic search-and-browse approach. I think of the forty percent of undergraduates in the study who used online research databases in their everyday research, and I wonder what portion of law students would say the same. My guess is that a good number of law students use LexisNexis or Westlaw for some career searching, given that they use those systems so frequently and the vendor representatives sometimes train students how to use them for job hunting. I suspect, though, that many of the law students could use even these familiar systems more effectively. My evidence is anecdotal—a conversation with a law student who doesn’t know how to find the Martindale-Hubbell files in LexisNexis, or an e-mail message from a career counselor who says that a student asked her how to find graduates from our law school in another city. To help students use the directories on LexisNexis and Westlaw, I created a guide with sample searches.\(^{12}\) 

§10 Directories on LexisNexis and Westlaw are just a start. There are also free online directories—from bar associations as well as from commercial providers such as Martindale.com, Findlaw.com, Nolo.com, and Avvo.com. For the public service sector, there are searchable organization directories within PSLawNet.\(^{13}\) 

§11 And then there are news stories about lawyers, firms, cases, and legal developments. Because I use news databases in LexisNexis and Westlaw and those licensed by our university library, I am often surprised at the law students who use only Google News. They are sometimes just as surprised to learn how many news sources are available in our commercial services, with all the accompanying bells and whistles (search features, downloading, and printing options). Within LexisNexis and Westlaw, students can also research firms, attorneys, or organizations by searching for cases, dockets, or jury verdicts. These searches are probably

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within the skill level of most law students, but the students might not think to try them.

¶12 Library and online resources can also be helpful to students when exploring the bigger picture. To learn more about what lawyers do and care about, a student could skim the state or local bar journal where she hopes to practice. National sources, such as the ABA Journal or the National Law Journal, would also expose the student to a range of types of practice and legal issues.

¶13 If a student thinks he would like to specialize in some topical area (such as bankruptcy, tax, or criminal law), it might be a good idea to start following a newsletter in that area (say, one of the many from BNA) to keep up with new developments. Another way to learn about a field is to follow one or more blogs by practitioners. One advantage of blogs over newsletters is that the posts are generally very short. Even an overburdened law student can skim a couple of paragraphs here and there. Following newsletters or blogs will help the student decide whether the area really is interesting to him.

¶14 Sometimes outside reading can also keep students’ spirits up. I recently talked to two students who said they liked looking at blogs because it connected them, in the midst of first-year required classes, with what they’re really interested in—the reason they came to law school.14

¶15 Reading bar journals, blogs, newsletters, and so on will also help students learn about the profession—either in a subject area or a geographic area (or both). They will be able to recognize names of prominent lawyers. They might be able to impress interviewers by bringing up a cutting-edge issue. And what interviewer wouldn’t like to hear a candidate say, “I always enjoy your column in the county bar newsletter”?

¶16 “Research” can (and should) include talking to career coaches, family, friends, classmates, professors, attorneys in the school’s mentor program, and others. Online and print research can provide a range of information, but personal conversations are probably the only way to garner subjective, but important, observations such as:

- “A couple of associates I’ve talked to at firm X say that they don’t get much guidance or support there.”
- “I’ve known attorney Y for years and respect her tremendously.”
- “Attorney Z is really smart but unorganized. You could learn a lot working with him, but you’d need to work around that—make sure you get him to review your drafts in time to meet court deadlines.”
- “Knowing you, I think you might like practice in a smaller city, like Yakima or Bellingham. Let me put you in touch with my friend, Terry, who moved from Seattle to Wenatchee and loves it there.”

Even here, our research skills can help. There isn’t a database that gets students directly to these pointed observations, but research can help them find some people to talk to about their concerns.

¶17 It’s worth noting that learning to research career-related questions is particularly important for students who don’t come to law school with extensive professional networks. Every school will have some law students who grew up with lawyers—parents, family friends, neighbors, and so on. They have a head start on networking. But some students not only lack lawyers in the family, they also did not grow up in affluent neighborhoods where they babysat lawyers’ children or were in Scout troops led by lawyers. They won’t hear law firm gossip or professional advice over Thanksgiving dinner, so learning about the profession in other ways matters more. This is not to say that the more privileged students won’t benefit from research: of course they will. If a student’s parents are big-firm lawyers and the student wants to be a public defender, for instance, or the student’s family is in New York and the student wants to be on the West Coast, then the student needs to do just as much research to develop knowledge and connections.

¶18 Law students need to find a lot of information related to their career development. Like undergraduates, they already have research skills and habits, which most likely involve using the web and personal contacts. But it’s likely that their skills are not as good as they could be, and they are missing sources that could help them make important decisions. Beyond a simple Google search (perhaps followed by browsing a site), they could use directories to find people to network with, employers to apply to, and more. They could also use news and legal databases to learn more about employers. And, stepping back a bit, they could follow journals, newsletters, and blogs to learn more about the profession and particular practice areas. Research can make their lives better.
Thinking about Technology . . .

Watson, Answer Me This: Will You Make Librarians Obsolete or Can I Use Free and Open Source Software and Cloud Computing to Ensure a Bright Future?

Darla W. Jackson**

In February 2011, Watson, IBM’s “smart” computer, defeated two former Jeopardy champions. While the application of the technology may support some legal research functions, the current state of the technology probably will not allow Watson to replace law librarians in the near future. Yet, given the economic realities of our firms and institutions, librarians do need to consider technologies that may reduce the considerable cost associated with discovering and maintaining access to legal information. Free and open source software and systems and cloud-based initiatives may provide innovative approaches librarians should consider.

Watson, IBM’s “question and answer” computer, recently defeated two human Jeopardy champions. Watson’s success has led to questions about whether the technology behind it could be used to perform tasks previously completed by humans. The tasks are not unique to any one field and, in fact, include a number of fields traditionally classified as professional, including medicine and law.

Despite the success of Watson, a review of the physical and technology support requirements of Watson makes it clear that librarian positions are not in immediate jeopardy (pardon the pun):

IBM used 200 million pages of content stored on 4 terabytes of disk space, as much as 16 terabytes of memory . . ., about 2,800 processor cores and approximately 6 million logic rules to determine the best answers. Watson took up 10 server racks, each with 10 IBM Power 750 servers and two large refrigeration units all of which was housed in its own room on IBM’s Yorktown Heights campus.

* © Darla W. Jackson, 2011.

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1. Ian Paul, IBM Watson Wins Jeopardy, Humans Rally Back, TODAY @ PC WORLD (Feb. 17, 2011, 5:13 a.m.), http://www.pcworld.com/article/219900/ibm_watson_wins_jeopardy_humans_rally_back.html (“As IBM has said on several occasions, the goal was not to create a self-aware super computer that can run amok such as HAL 9000 from 2001: A Space Odyssey or Skynet from The Terminator. But a question and answer machine like the ship computer in Star Trek: The Next Generation.”).


Based on the current rate of technological advancement, some have speculated that in fifteen to twenty years Watson programming will be able to work on a laptop. But cost projections for when Watson will first become available, a few years from now, are approximately three million dollars. A modified Watson program, designed to work more slowly and to review less information, might come at a significantly reduced rate of $300,000.

Additionally, although Watson’s performance on Jeopardy may have resulted in a “victory,” a review of the challenge illustrates that Watson did not operate without error. As one blog pointed out, there were several issues with Watson’s functional abilities:

When sentence structures become complex, or the question is asking contestants to consider two indirectly related factors or ideas, Watson tends to get confused. His confidence drops and his reaction times slow.

. . . . IBM programmers didn’t think Watson would ever have an issue with using the same incorrect response or wrong response structure as a contestant answering before him. Well he ran into the problem twice last night . . . .

Further, Robert C. Weber of IBM’s description of Watson indicates there will be a continuing need for professionals experienced in content management:

With the technology underlying Watson, called Deep QA, you could have a vast, self-contained database loaded with all of the internal and external information related to your daily tasks . . . . Pose a question and, in milliseconds, Deep QA can analyze hundreds of millions of pages of content and mine them for facts and conclusions . . . .

An experienced professional will have to be involved in selecting this content for Watson to mine and in ensuring that it remains current. Aren’t those key competencies of law librarians? Also, the law does not lend itself to a simple right or
wrong answer; rather, in most legal systems, questions about the reasoning and authority for a position are essential. If Watson were limited to producing a final simple answer, its application in law might be in question. However, according to Dr. David Ferrucci, of IBM’s T.J. Watson Research Center: “In addition to [a] set of top answers [Watson produces] evidence profiles that will help humans make decisions over large bodies of content . . . [W]ithout Watson technology, they just get a list of a million documents and they stop reading after the top five.”10 Even so, Weber acknowledges, “Deep QA won’t ever replace attorneys; after all, the essence of good lawyering is mature and sound reasoning, and there’s simply no way a machine can match the knowledge and ability to reason to a smart, well-educated and deeply experienced human being.”11 The same could be said about law librarians.

¶5 Given that, at least in the near future, law librarians probably don’t have to worry about being made obsolete by Watson-like technology, can we become complacent about our ability to efficiently meet the information needs of our employers? Certainly not. So, perhaps we should begin to consider some alternatives to the costly software and systems that we currently use. Free and open source software and systems and cloud technology may be alternatives worthy of consideration.

### What Are Free and Open Source Software and Systems?

¶6 While free software and open source software are terms often used interchangeably or designated together as FOSS, those who developed the ideas see an important distinction between these terms. Richard Stallman, who initiated the GNU Project that ultimately was responsible for the development of the Linux operating system, insists on using the term free software. Stallman objects to the open source movement, in part because of the willingness of those on the open source side to allow for the mixing of proprietary products and open source software, which he feels undermines the idea of software freedom.12 Unlike freeware, open source software is copyrighted and may be distributed with license terms that ensure the continued availability of source code.13

¶7 There are obviously similarities between free and open source software: “With Free and Open Source Software, you pay no licensing fees, updates are discretionary not obligatory, updates do not cost you anything, maintenance is provided free of charge, and you are always at liberty to change, abandon, reject or accept whatever digital upgrades you like.”14 For what has been described as open source integrated library system (ILS) software, differing business models have been used. Some open source ILS software, such as Evergreen, has been developed

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13. *Id.* at 3.

by communities of libraries and “can be accessed and adapted by others. . . . [T]he open source ILS software is free for libraries to download, use and modify.”\textsuperscript{15} However, OPALS (Open Source Automated Library System) provides a model where the library does not pay for the software but pays an annual subscription fee to use the software and for support.\textsuperscript{16} The OPALS model is sometimes referred to as Software as a Service (SaaS). LibLime, which provides support for the Koha open source ILS, and Equinox, which provides support to the Evergreen open source ILS, have adapted the SaaS model.\textsuperscript{17}

### Cloud Computing and Open Source in Legal Organizations

\textsuperscript{8} Cloud computing following a SaaS model is gradually becoming more popular in legal organizations.\textsuperscript{18} Firms and other legal organizations are increasingly relying on cloud providers for web conferencing, case management, and electronic discovery.\textsuperscript{19} While cloud computing was available in the 1990s, it has only been in the past few years, with the advent of improvements in technology, that performance issues have been overcome and cloud computing has become a viable and cost-effective option.\textsuperscript{20} Yet experts advise caution when considering cloud computing. Continued access to data, “privacy, confidentiality, and jurisdictional and regulatory issues” and customer service are all issues of concern.\textsuperscript{21}

\textsuperscript{9} Use of open source software in law offices is also garnering support.\textsuperscript{22} One article suggested using open source software and paying programmers to maintain and customize it for specific firms and attorneys.\textsuperscript{23} This model has some similarities to the SaaS model described above. Under both models, while the firm or

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\textsuperscript{16} Id.

\textsuperscript{17} Karen A. Coombs & Amanda J. Hollister, Open Source Web Applications for Libraries 7 (2010).

\textsuperscript{18} Sixteen percent of those responding to the ABA’s 2009 Legal Technology Survey reported using online software services. This is an increase of three percent over the 2008 ABA survey. Dennis Kennedy, Working in the Cloud: Tips on Success with Online Software Services, A.B.A. J., Aug. 2009, at 31, 31–32.

\textsuperscript{19} Id. at 32.

\textsuperscript{20} See Larry Port, ASP vs. SaaS: Fun with Acronyms or a Sweeping Technological Shift?, Peer to Peer, June 2009, at 54, 54–55.

\textsuperscript{21} Kennedy, supra note 18, at 32.

\textsuperscript{22} Dennis Kennedy, Free Can Be Good: Add Open Source to Software Considerations, A.B.A. J., Mar. 2011, at 34, 34. It is interesting that the ABA Legal Technology Survey inquires about use of SaaS but does not, with very limited exception, request responses detailing use of open source resources. An inquiry to the ABA Legal Resource Technology Center disclosed that the “only question . . . asked in the 2011 survey that . . . touches on open source is ‘Which type of operating system does your primary computer use,’ and one of the options is Linux.” E-mail from Stephen Stine, Research Specialist, ABA Legal Tech. Resource Ctr., to author (Apr. 26, 2011) (on file with author). This year’s ABA Tech Show did include a program by Rodney Dowell and Dennis Kennedy entitled “The Open Source Powered Law Firm.” The slideshow is available at http://www.americanbar.org/content/dam/aba/events/law_practice_management/ts2011_the_opensource_powered_law_firm.authcheckdam .pdf.

\textsuperscript{23} See Reisler & Tsiang, supra note 14, at 36.
attorney must dedicate some financial resources to the technology, those financial resources are not allocated to licensing. Additionally, even with the cost of programmer services for open source software, there are likely to be cost savings:

The cost savings lie in the absence of licensing fees, the availability of help 24/7 from a worldwide network of FOSS programmers, the ease with which programmers can “pop open the hood” of your software to diagnose and repair problems, the greater security, confidentiality and protection FOSS provides from digital evil-doers, and the frequent no-cost upgrades. FOSS also bends over backward to achieve backward compatibility with pre-existing software and hardware. So if a system has worked well for you in the past, then the FOSS world will not force you to upgrade.24

¶10 Indeed, some suggest that cost savings is actually the reason firm technology departments have resisted open source software. Reduced budgets for technology might in turn diminish the power of the technology department in organizational politics.25 While this may be true in some firms, it is certainly not a rule without exception. Law firms are using open source resources for tasks ranging from basic PDF creation26 to bandwidth monitoring and security scans.27 There is even an open source software peer group of legal technology professionals organized by the members of the International Legal Technology Association, which serves as a resource for IT staff looking to adopt open source solutions.28 Even so, there are some obstacles to using open source software in firms, for example, the absence of indemnification provisions that are required by some firms.29

¶11 Lack of education in technology for law students and lawyers may also be an obstacle. The lack of skills-based and practice-oriented courses, including technology support for practice, is often lamented by law students.30 Law librarians, who are traditionally engaged in teaching legal research, a skills-based course, can also become more involved in offering increased instruction regarding law office management issues, including technology.31

24. Id.
25. See Jason Mark Andersen, Comment to Open Source in Law Firms—Unimaginable or Brilliant?, 3 GEEKS AND A LAW BLOG (July 8, 2009, 3:19 P.M.), http://www.geeklawblog.com/2009/07/open-source-in-law-firms-unimaginable.html (saying a number of IT experts told the author that “the IT department’s power base depends on the size of its budget, so IT leaders will oppose an approach that reduces the budget and thereby reduces this power”).
26. Mark Manoukian, Breaking the Shackles: Creative Solutions with Open Source, PEER TO PEER, June 2009, at 43, 44.
28. See id.
29. Manoukian, supra note 26, at 47.
30. E.g., “As a law student I don’t really have much to contribute to that because, to be honest, we’re not really taught about the practical aspects of working in the legal profession . . . . [I]t’s hard for a law student to grasp exactly how—and how much—an open source approach to the legal profession could benefit lawyers.” Alan Bunbury, comment to Luis Villa, A Community of FOSS Lawyers?, OPENSOURCE.COM (Mar. 31, 2010), http://opensource.com/law/10/3/community-lawyers.
Open Source in Law Libraries

¶12 Unlike some attorneys, law librarians often have either formal education or on-the-job training involving technology and, as suggested above, may provide instruction to students on technology used in legal practice.32 As is evident to all law librarians, our positions increasingly involve technology. In the academic environment, it is not unusual for the director of the law library to also serve as the director of the information technology department.33

¶13 Many librarians consider the operation of the integrated library system (ILS) as their most prominent technology-related issue. “The ILS is probably the most critical technology component of a library. And, it can be one of the more expensive components of a library.”34 Yet, historically librarians have been reluctant to consider alternatives to the proprietary ILS. Victoria Szymczak describes the situation as follows: “[T]here seems to be a real reluctance to critically evaluate the sacred ILS. These vendors, unlike the Wexis’s of the world, seem to get a free pass when [librarians] talk about service, cost and transparency.”35 Nonetheless, in 2009–2010, circumstances, particularly economic conditions, led law librarians to become increasingly interested in learning about open source alternatives to costly proprietary ILS products. This growing interest was evidenced by inclusion of programs on the topic at several law librarian conferences.36 The attention to and interest in open source products followed, somewhat belatedly, the lead of nonlaw libraries, which, by 2009, had adopted open source systems to the extent that such systems were classified as a “routine option.”37 One reason law libraries may not have been among the early adopters of open source systems, including Evergreen, was the delay in development of particular modules. Specifically, delay in the development of a serials module was often a source of concern. Early adopters of open source ILS, such as Evergreen, had to find workarounds to overcome the challenges associated with integrating open source software with proprietary resources designed to assist in the discovery of electronic periodicals. Additional challenges in incorporating print serials also had to be overcome.38
Despite the challenges of implementing open source systems, the providers of proprietary systems were aware of the growing demand by librarians to exercise additional customization and control over an ILS. Proprietary product providers responded with initiatives offering a more open approach. For example, in 2008 Ex Libris launched its Open Platform Program, “which emphasizes the APIs [application programming interfaces] available in each of its products and provides a space for libraries to collaborate and share code and ideas.” Ex Libris also began supporting EL Commons, a repository for code developed by its library customers.

**Cloud Computing in Law Libraries**

Even with these attempts by the suppliers of proprietary ILS products, librarians aware of the costly nature of those products continue to seek more economical alternatives. Recently, attention seems to have shifted from FOSS ILS alternatives to cloud-based solutions. The current buzz in cloud computing for libraries focuses on OCLC’s Web-Scale Management Services (WMS). As described by Marshall Breeding, “WMS combines the functionality already available in WorldCat for cataloging, resource sharing, and discovery with the capability to perform circulation, acquisitions, and license management, thereby obviating the need for the library to operate an integrated library system.” Thus, it is not surprising that when David Rapp of Library Journal asked ten executives in the ILS industry about the “single most compelling factor that will have an impact on ILSs and the industry in the future,” OCLC’s Andrew Pace said it would be cloud computing. But there have already been some objections and challenges to OCLC’s cloud-based WMS. Just as with open source ILS systems, during initial development certain functionalities, including acquisitions and serials modules, are not yet available. In addition to other challenges, there is a pending suit claiming OCLC’s involvement and advantages in providing such services is a result of action in violation of antitrust laws. Further, in April 2011, outages in Amazon’s hosting services resulted in the unavailability of other web sites and caused some to question moving their computing services to the cloud. Academic law libraries became intensely aware of the possible difficulties with cloud-based services when the CALI web site was unavailable for more than a day due to Amazon’s difficulties.

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43. Jack Ammerman, the associate university librarian for Boston University, provides a thorough summary of the current status of WMS as well as an explanation of key terms involved. Jack Ammerman, Report on OCLC Web-Scale Management Services (WMS) (unpublished paper, Dec. 6, 2010), *available at* http://dcommon.bu.edu/xmlui/bitstream/handle/2144/1386/OCLC-WMS.doc?sequence=1. Ammerman also discusses OCLC’s projection that it can reduce cost by thirty to forty percent as compared to a “standard ILS.” *Id.* at [3].
46. The suggested alternative was to direct students to the older option of accessing CALI lessons via the CALI DVDs distributed to law schools each year. Austin Groothuis, *Sorry About That . . .*, CALI (Apr. 22, 2011, 11:42 a.m.), http://www.cali.org/blog/2011/04/22/sorry-about.
¶17 No one technology is the answer for every legal environment, but as adaptable professionals, we must continue to consider the opportunities that may be created by rapid technological advancement. It has already been suggested that the work process efficiencies that could result from OCLC’s fully developed WMS could be used to justify support staff reductions in traditional library service areas.\(^{47}\) Perhaps we should instead be focusing on the opportunities the increased efficiencies could create. Technology may create opportunities to work collaboratively on developing new technological applications,\(^{48}\) expand current services for patrons, or become involved in new digitization projects. We need to be ready to seize these opportunities.

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47. See, e.g., “Library Management Services in the Clouds: More Reality Than Dream Program: Discussion,” presentation at the Am. Library Ass’n Midwinter Meeting (Dec. 9, 2010), http://media suite.multicastmedia.com/player.php?p=fauhu86m (question of Bonnie Juergens, Amigos Library Services, regarding efficiencies and staff reductions; question is at approximately 4.5 minutes).

48. One of the marketed features of OCLC’s WMS and related systems is that it will provide “a place for [sharing] library-developed, third-party and OCLC applications.” This allows participating libraries to “go to the application gallery, locate applications or services of interest and then easily ‘plug them into’ your OCLC service or other external applications.” The Features of Web Scale, OCLC, http://www.oclc.org/webscale/features.htm (last visited May 9, 2011).
Tribute to Earl C. Borgeson

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Memoir and Appreciation for Earl C. Borgeson (1922–2010)*

¶1 Earl Charles Borgeson, former director of the law libraries at Harvard and Southern Methodist University (SMU), past president of the American Association of Law Libraries (AALL), and a recipient of AALL’s Marian Gould Gallagher Distinguished Service Award, died on December 25, 2010, at the age of eighty-eight, in Sudbury, Massachusetts. His passing was a great loss not only to his family, including his children Bobi and Steven (a third child, Geoffrey, as well as his beloved wife of sixty-one years, Barbara, predeceased him), nine grandchildren, and two great grandchildren, but also to those he considered his second family, the members of the law library profession. For although Earl retired from his final full-time professional position in 1988, he remained an avid AALL member and staunch supporter of law librarians until the day he died.

¶2 Earl Borgeson was born on December 2, 1922, to Hjalmar Nicarnor and Doris Danielson Borgeson of Boyd, Minnesota. He was an Eagle Scout as a youth and he graduated from North High School in Minneapolis. He was the first of his family to attend college, matriculating at the University of Minnesota at the age of eighteen in 1940. Like so many of his generation, however, his college education was interrupted by World War II. He served in the U.S. Navy in the Philippines, a country he loved and to which he would return many years later when he served as a consultant on Asian law libraries for the American Bar Foundation. After the war, he returned to the University of Minnesota, where he earned a B.S.L. degree in 1947, followed by an LL.B degree from the university’s law school in 1949.

¶3 Although Earl’s résumé lists his first law library position as that of an assistant reference librarian at the Los Angeles County Law Library, beginning in 1950, his connection with the profession actually began ten years earlier when he was just an eighteen-year-old undergraduate. As he related in a 1999 article in Law Library Journal:

[1]In September 1940, I was sent to do some typing at the law library of the University of Minnesota. My first contact was with Miss Caroline Brede—my supervisor, but soon to become my first mentor. The years that followed in college, the United States Navy, and law school established our friendship and [paved the way for her to offer me] . . . subtle career guidance [about] . . . completing law school and . . . [becoming] aware of a parallel career as a law librarian . . . [At Minnesota], I was led through just about every support staff job one could envision in a major law library; I was also briefed as to the rationale of what I was doing and how each piece fit together with others.1

* © Frank G. Houdek, 2011.
¶4 In 1949, as he neared the completion of his law degree, Earl heeded the advice of Brede and began giving serious consideration to making librarianship his life’s work.

I looked hard at career opportunities and concluded that an investigation of the potentials of law librarianship was in order. A series of letters of inquiry went out . . . . One reply was a four-page letter from Carroll Moreland, Librarian at the University of Pennsylvania Law School. He provided me a detailed analysis of what a law librarian was, what a law library was, what each could be, and what commitment and preparation a career in law librarianship called for. Only a thoroughly committed law librarian could have presented that profile; only a true mentor could have thusly opened a relationship that would last a lifetime.²

Those fortunate enough to have known or worked with him will recognize this systematic investigation as characteristic of Earl’s approach to any problem or new venture. He specialized in thoroughly researching all aspects of the problem, which inevitably resulted in well-reasoned memoranda and meticulously compiled lists, often written in a tight scrawl that challenged a reader hoping to decipher them. It would be a treasure indeed if one could somehow uncover the delineation of “pros and cons” that he almost certainly prepared as he worked through this particular problem, determining what career path to follow.

¶5 In any case, after earning his law degree and being admitted to the practice of law in Minnesota in 1949, Earl made the choice to seek a career in law libraries. He entered the law librarianship program run by Marian Gould Gallagher at the University of Washington, then and now the premier training ground for law librarians. As one writer who interviewed Earl in 1989 stated, “[Borgeson was] . . . the [UW] class of 1950.”³

¶6 Earl himself described his Washington experience in a 1996 piece in Law Library Journal:

Barbara . . . , our brand-new daughter [Bobi], and I arrived in Seattle late in June of 1949. After settling into temporary quarters, I reported to the law library, only to find Marian away (at an AALL meeting, I believe), leaving Betty LeBus, who had just completed Marian’s course and was her Assistant Librarian, in charge and fully instructed. She was most cordial and helpful, and thus began a lifelong professional and personal friendship that . . . we both cherish.

The year was spent in class, working in the law library, helping with the Current Index to Legal Periodicals . . . , and also helping Marian plan the local arrangements for the AALL Meeting scheduled for Seattle in 1950. Meetings, errands, phone calls, drafting letters, and participating in organizing that great event—oh, we did it all. What an experience! What an introduction to AALL and to law librarianship.⁴

Earl never forgot the assistance that Gallagher provided to him, not just in the beginning but really throughout his career.

[Marian Gallagher] was the charming, energetic young professional lady I expected to find when I decided to accept admission to her Program. . . . She ran the Program in an organized yet casual way, expecting each student to be a self-starter, lawyer-like in their

². Id.
analysis and comprehensive in their data-gathering and accurate, imaginative and rational conclusions.

I think that Marian was a splendid role model for me—she constantly elevated "law library operation" issues to a dimension of national, even international, application and understanding. She was always ready to become involved with efforts to understand and improve the professional image of the law librarian.  

\[\text{¶}\] He earned a B.S.L.L. degree from the University of Washington in 1950—the second individual, after Betty LeBus in 1948, to graduate from the program under Gallagher’s direction—and moved on to what became a two-year stint as a reference librarian at the Los Angeles County Law Library. In 1952, Earl moved across the country to join the staff of the Harvard Law School Library as its assistant law librarian and to work and learn under the legendary Arthur Pulling, who had been director at the University of Minnesota for thirty years before coming to Harvard in 1942. But by 1954, just two short years later, Earl was elevated from assistant to become the director of the Harvard Law Library.

\[\text{¶}\] Just to be clear, by the age of thirty-two, four years into his professional career, Earl Borgeson had reached the pinnacle of his chosen profession, directing the largest law library in the world outside of the Library of Congress. Today that scenario would be impossible, and it was improbable even then. But in 1953, Pulling had reached the mandatory retirement age—he was sixty-five years old—and suddenly there was an opening. Earl was made acting director and, a year later, the "acting" designation was removed after he proved to Dean Erwin Griswold that he could handle the job. Which he did, brilliantly, for the next sixteen years.

\[\text{¶}\] Of the many important initiatives that Earl fostered during his years at Harvard, perhaps the one that stands out the most was the development of Current Legal Bibliography, a serial publication that listed all of the "books, documents, essays in collections of all types, and substantial journal articles received by the Harvard Law School Library," and its annual cumulation, the Annual Legal Bibliography, which was published from 1961 to 1981. Earl saw that Harvard, because of the depth and breadth of its holdings and the skill and knowledge of its personnel, could serve as a de facto national law library. In announcing the creation of the Annual, he noted that "a library must project itself into the community it is equipped to serve." Through the Annual, he sought to extend the reach of Harvard’s rich legal collections—the inaugural volume in 1961 announced “all items listed are available for use in the Harvard Law School Library, and if this is not convenient, they may be charged on interlibrary loan or reproduced, at cost, within

6. Caroline Brede, In Memory of Arthur C. Pulling, 57 LAW LIBR. J. 66, 66 (1964). Apparently, Pulling wasn't quite ready to retire, since he immediately accepted Villanova’s offer to head their new library. He did so for nine years before again “retiring” in 1962, which did not prevent him from going on to direct his fourth academic law library, the University of Maine, until his death, at the age of seventy-six, in September of 1963. Id. at 66–67.
copyright limitations.”9 As evidence of the high regard accorded to the contribution made by this publication over its life span, in 1982 AALL awarded Margaret Moody, cataloger and assistant librarian at Harvard from 1942 to 1981, a special certificate recognizing her editorship of the *Annual Legal Bibliography* from 1969 to 1981.10

¶10 In 1970, Earl left Harvard—and law librarianship—to assume the position of associate director of the Stanford University Libraries. As he later told me, he had been at the “top” of the law library world for many years and was eager to take on the different set of challenges presented by a major academic research library. However, while he enjoyed his time at Stanford—and especially the Stanford Marching Band!—he missed law librarianship. So, in 1975, he moved south to become the associate librarian at the Los Angeles County Law Library, the same library where he had begun his career twenty-five years earlier.

¶11 It is at this point that our paths finally cross, because I was hired as an entry-level reference librarian at L.A. County in June 1975, and Earl began there three months later, on September 1. At first he was just my boss, but he soon became much more than that. Although he treated me as a professional equal (now that was a joke), we quickly developed a mentor-mentee relationship, which eventually blossomed into a warm friendship. That I was willing—make that eager—to engage in long, detailed discussions about library-related problems and their solutions helped this process along, but now I think he also was repaying the debt he felt he owed for the help he had received from Brede, Moreland, Gallagher, LeBus, and so many others early in his own career. He never forgot the “strangers [who] took time to tell me about the profession they loved and [who] convinced me that law librarianship should be my career choice.”11 It also didn’t hurt that, like Earl, I

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11. Borgeson, *supra* note 4, at 21. Earl honored the assistance these “strangers” had provided him by doing the same for others when he had the chance. For example, Ed Bander, for many years librarian and professor of law at Suffolk University Law School, says:

> Earl Borgeson gave me my first job as a law librarian. I had left my job at the Cuyahoga County Juvenile Court in Cleveland as my wife was homesick for Concord, Mass. While interviewing for jobs in Boston, a friend of mine, . . . who was a librarian, said to me, “Bander, you’re not made out to be a lawyer. You should be a librarian.” So I wrote a letter to all the law librarians in the Boston area. Earl was the only one who took the time to answer. [And he did more than that, he] hired me on the spot. That was around 1955 when he was the law librarian at Harvard. I immediately enrolled at Simmons to get a library degree. Earl made it possible for me to have a wonderful career and he deserved all the accolades bestowed on him.

E-mail from Edward Bander to author (Jan. 7, 2011).

Similarly, Francis Robert Doyle, or “Bobby” as Earl called him, who worked at Harvard from 1955 to 1967 and went on to become the director of the Loyola Law School Library in Chicago and receive the Marian Gould Gallagher Distinguished Service Award, says:

> Earl gave me my start in law librarianship at the Harvard Law Library as a page. . . . He encouraged me to go to college and made it possible for me [to do so] by letting me work evenings at the International Legal Studies Library . . . while I attended BU during the day. I have fond memories of working with Earl, George Strait, Phil Putnam and the Moody sisters. . . . I always looked forward to seeing Earl at AALL and sitting and sharing views on the state of our profession. I remember one early meeting . . . when Earl asked me if I was going to stay in the profession . . . . I [told him] how I loved what I was doing and that it was through his encouragement that I was plugging away.

E-mail from Francis R. Doyle to author (Jan. 7, 2011).
enjoyed sports, particularly baseball and college football, and was more than happy to grab lunch with him and talk about the Dodgers, Trojans, and Bruins, as well as law librarianship and librarians.

¶12 As with so many others before and after me, Earl played a crucial role in the development of my career as a law librarian and, especially, in my strong interest in professional activities and relationships outside the context of my job. Through words and, more important, through his actions, Earl taught me that there was more to being a member of a profession than simply performing your day-to-day job. By his words, he conveyed that it also meant engaging in service for professional organizations, conducting scholarly research and writing that advanced the profession, and taking on leadership roles within the profession. But it was in his long and distinguished record of service that he demonstrated so clearly what a professional could and should do in support of the profession. He not only served as AALL president-elect, president, and immediate past president from 1967 to 1970, he also served a separate term on the executive board from 1965 to 1967. He served on and chaired many important AALL committees, and presided over two different AALL chapters, the Law Librarians of New England and the Southern California Association of Law Libraries. And on several occasions he served as AALL’s representative to external organizations, including the Joint Committee on Library Problems Related to the Peace Corps (1962–66) and the Association of American Law Schools (1980–82). This life of exemplary service, in which he brought

his intellect, organizational skills and enthusiasm to his professional organizations, . . . influenced generations of law librarians, many of whom owe their success in law librarianship to him. . . . [H]e has left a legacy that encourages new law librarians entering the field to contribute their thinking, intellect, and great problem-solving skills through research and scholarship to our profession and the thousands we serve.

¶13 In 1978, Earl left the L.A. County Law Library and southern California to become professor of law and director of the Underwood Law Library at SMU, a

12. While at Harvard in the 1960s, Earl combined his talents for leadership and administration with his love of baseball and children when he served as president of the Little League in his hometown of Sudbury, Massachusetts.

13. He never stopped conveying that message. In an article based on an interview he gave to a new law librarian assigned to write about him for the newsletter of the Dallas Association of Law Libraries, the author reported that “Earl said his most important advice to those of us just beginning our careers would be to ‘develop a good career attitude. Take pride in being part of this profession.’ He urged law librarians to have a career plan, to be committed to growth in the profession, to think big, and not to be discouraged by setbacks.” Sue Ridnour, Spotlight on Earl Borgeson, DALL ADVANCE SHEET, May 1988, at 8, 9.

14. By my count, Earl served on at least thirteen separate AALL committees, including the Committee on the Index to Legal Periodicals (1953–69), the Special Committee on Policy (1955–58), the Education Committee (chair, 1957–58), the Joint Committee on Cooperation Between AALS and AALL (1961–65), the Library of Congress Liaison Committee (chair, 1966–68), the Law Library Journal Committee (1983–87), and the Special Committee on the Organizational Structure of AALL (1987–89).

position he held until his retirement in 1988. According to Kenneth L. Penegar, the dean at SMU when Earl arrived, “he brought [his] wealth of experience and his special talents with people, books and institutions to bear on the challenge of moving an already strong law library into the ranks of the premier institutions in this country.”¹⁶ Not surprisingly, Earl continued to focus his attention while at SMU on teaching, supporting, and inspiring those with whom he worked, particularly, though not limited to, members of the library staff. Ora Addis, who served as associate director at SMU during Earl’s tenure, wrote:

Earl prodded the staff to plan. Whether it be time or space planning, creative use of personnel, or innovative approaches to budgets, he challenged us to plan for the ultimate, even if in five or ten year segments. . . . Earl always encouraged his staff to think in the broadest terms, to let our imaginations soar, to set goals, to think creatively in order to accomplish what seemed impossible. He convinced us that seeming impossibilities can become improbabilities, and sometimes even possibilities.¹⁷

¶ 14 I will only add that from everything Earl told me about his years at SMU, they were among the happiest and most satisfying of his career. He loved the people there,¹⁸ he loved the challenge of planning for the growth and expansion of a program that he thought had great promise, and, most important, he loved being in the middle of all the action—both in the library and the law school. The latter is no surprise, for what he said of someone he called one of his favorites is equally apt for Earl: “[S]he was a ‘doer,’ not just a ‘talker.’”¹⁹ That was Earl in a nutshell—a doer, not just a talker.

¶ 15 Earl retired from full-time work in 1988, although he continued to be professionally active, through both his membership in AALL and in part-time employment with a Boston-based commercial library services company after he and Barbara returned to New England in the early 1990s. From the many in-person and telephone conversations we had and the correspondence we exchanged over the years, I can personally attest to the fact that, even in retirement, he never stopped thinking about library issues and the profession he held so dear.²⁰ But you don’t

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¹⁸. And they loved him. Addis wrote about how Earl quickly overcame the library staff’s “feelings of trepidation” over the arrival of this “established leader in the law library profession” at SMU in spring 1978: “[W]e soon discovered that he had that rare quality of making us feel at ease despite our awe of his reputation. Earl was one of the gang whether we were in a professional atmosphere, at library socials, or tailgating at football games.” Id. at xvii. She also noted that “Earl’s sense of humor permeated the atmosphere of the library. He gracefully accepted the ribbing about his predilection for order and time schedules, and his prolific memo writing, knowing that we all have benefited from his example . . . .” Id. at xx.

¹⁹. Borgeson, supra note 4, at 20 (describing Dorothea Blender of CCH).

²⁰. I wasn’t the only one who had such conversations and correspondence. Penny Hazelton, who currently directs both the Gallagher Law Library and the Law Librarianship Program at the University of Washington Information School, was kind enough to share with me her inch-thick file of correspondence with Earl Borgeson.
have to rely on me; the evidence can be found in Earl’s own words, such as these written in 2006:

We must place new and forceful focus upon the nature of the law librarian and the talents they will have to bring to the workplace within a quarter of a century. AALL should immediately structure a training regimen to produce that level and quantity of personnel. Library school is not enough! We must assume, require, recognize, and utilize a commitment to prepare and perform new skills and attitudes. Our education must have teachers and administrative environments that will challenge and dare participation and utilization of skills to flesh out the role of the future law librarian. . . . In all those fields dealing with information handling, those on the outer edge must intentionally include legal information and law library needs for inclusion in their ranks. All law librarians must be supportive of their own need to grow, to survive.21

¶16 Not surprisingly, upon his retirement, Earl’s professional peers celebrated his illustrious career by presenting him in 1988 with their highest honor, AALL’s Marian Gould Gallagher Distinguished Service Award. That it was named for his friend and teacher made it that much sweeter.22 In 1999, the University of Washington School of Library and Information Science presented him with its Distinguished Alumnus Award. Just a year later, in 2000, the Law Librarianship Program at the University of Washington honored him by establishing the Earl Borgeson Research in Law Librarianship Award to encourage scholarly research to enhance the profession and to support students seeking to become law librarians. How appropriate this was for Earl! Finally, in 2010, Earl was selected as one of the initial inductees to the American Association of Law Libraries Hall of Fame.23 Earl’s response to this latter honor was characteristic, in both its modesty and its embrace of the profession he so cherished:

I have had so many wonderful experiences as a law librarian, and as a member of the Association. This is certainly among the most significant for me.

Thank you [and] thank the membership for this honor. Consistency of presence and of performance provide plenty of opportunity to earn recognition. Count upon no one feature of experience. I look upon those so honored in the Inaugural Class of 2010 and see the names of many who have done major, significant service for so many years. My honor grows.24


22. That Marian Gallagher would have been very pleased—but not surprised—by Earl’s receipt of this award is evident from both the tone and content of the letter she wrote to him just prior to his retirement from SMU:

My feelings for you must resemble those of a mother for her first-born son, a mixture of special affection and pride that she tries to conceal from his later-arriving siblings. Come to think of it, I’ve slipped at times on the concealment, but can be forgiven, I hope, because it was so handy having a ready-made example to wave at those youngsters, an example of what can be done through intelligent planning, diligence and an abiding devotion to the improvement of law library service and the stature of the profession. Yours is a career that’s been an inspiration to many besides your U.W. siblings, and never needed my “waving” anyway.


23. See Frank G. Houdek, Introducing the AALL Hall of Fame, AALL SPECTRUM, July 2010, at 12.

¶17 What better way to conclude an appreciation of Earl Borgeson than by letting him have the last word. Earl contributed to an article I compiled for *Law Library Journal* in which individuals reflected on their “first AALL Annual Meeting.” For Earl this was in 1950, when, as a student, he helped Marian Gallagher organize a national meeting in Seattle. He closed his reflection with a statement that I think sums up Earl’s relationship to and feeling for his profession:

That first AALL meeting cemented my effort into the most enjoyable career one could ever hope for. Law librarianship has taken me across this great country to work and to meet with other law librarians; it has taken me around the world twice to do the same on an international scale. What a family I belong to! Be proud of what you are and what you do, Frank.25

—*Frank G. Houdek*26

26. Associate Dean for Academic Affairs and Professor of Law, Southern Illinois University School of Law, Carbondale, Illinois.
Earl C. Borgeson’s Ten Rules for Law Library Management*

¶1 When Earl Charles Borgeson passed away on Christmas Day, 2010, the law library profession lost one of its most prominent leaders. Earl’s career included stints at the Los Angeles County, Harvard, and Southern Methodist University (SMU) law libraries as well as the Stanford University Libraries. His influence on all who knew him was extraordinary. His experience at some of our most distinguished law libraries gave him a unique perspective on our profession and provided him with special insight into a variety of library types and management styles. By the time he arrived at SMU’s Underwood Law Library, he had a clear vision of the path he wished the library to take and a road map for achieving that end.

¶2 Frank Houdek has offered a wonderful memorial to Earl that explains Earl’s contributions to law librarianship and the example he provided for his colleagues.1 As Earl’s successor at SMU, I can only supplement Frank’s observations with the legacy Earl left me in his basic rules for law library management. Earl and I became friends from the moment I was offered the position at SMU, and maintained our relationship throughout his retirement. He generously shared with me his knowledge of the SMU School of Law and the Underwood Law Library, and introduced me to the management rules he had developed during his career and which he applied during his tenure at SMU. They have stood me in good stead, and are worthy of sharing.

1. Remember How Lucky You Are

¶3 After I had accepted my directorship at SMU, I spoke with Earl on the phone and listened as he filled me in on the challenges I would face when I arrived. He touched on the positives and negatives, warning me about potential problems that remained when he retired, identifying staff and collection strengths, and describing the demands I could anticipate from my faculty colleagues. Even though it had been almost two years since his retirement, he remembered every detail, describing the collection, discussing materials he had hoped to purchase when the budget permitted,2 and anticipating issues he thought would arise.

¶4 He concluded, however, by admonishing me not to be daunted, either by the information he was providing, or by what I discovered on my own when I actually arrived. Instead, he suggested that I should always remind myself that I had one of

* © Gail M. Daly, 2011.


2. SMU had recently been dealt the NCAA’s only Death Penalty, and was dealing with the extraordinary public relations and budgetary complications from that event. The law library during Earl’s final years had suffered severe budgetary cutbacks.
the best jobs in the world. He truly believed that—believed that he had been uniquely blessed in his choice of profession, in the people he had met, the friends he had made, and the libraries he had helped to shape. “You are lucky,” he told me, “to have one of the best jobs at one of the best law libraries. Don’t forget that—it will get you through any bad days.” And he was right.

2. Maintain a Constant Presence

¶5 As I learned from the staff, Earl was speaking from experience when he advised me to be everywhere in the library. He liked to touch base with all staff as often as possible, check in on what they were doing, offer advice (solicited or unsolicited), and know everything about “his” library firsthand. Not content to sit in his office and summon staff members, he would track them down and meet with them on their territory.

¶6 Earl explained that this is the only way a director can be one hundred percent sure of what is going on in the library, and the best way to encourage library patrons to feel comfortable approaching the director with complaints or suggestions. He felt that the staff appreciated the attention, that he learned from talking with and observing them, and that he usually stumbled across something that needed attention. Sitting in his office, he always felt that all sorts of exciting things were going on in the library that he was missing.

3. Pay Attention to Technical Services

¶7 Earl never had favorites among his library departments; technical services was neither hidden away in the basement nor considered second-class. Earl’s enthusiasm for the details of acquisitions, serials management, payment processes, and even loose-leaf filing was genuine. He had definite opinions about how everything should be done, took an interest in problems that arose, and reveled in the details of interpreting a West invoice.

¶8 Earl believed that public services staff could learn a great deal from those in technical services, and vice versa. He felt that his knowledge of technical services was an advantage that set him apart from many of his director colleagues, and that it had made him a better director. He chose his associate director from the ranks of technical services, and insisted that the staff who worked in the back rooms of the library receive the same recognition and job satisfaction that those who worked with the public enjoyed.

4. Encourage Staff Cross-Training

¶9 A logical extension of Earl’s interest in technical services was his advocacy of cross-training. I arrived to find a library staff that cross-trained between departments and within departments. Technical services librarians served on the reference desk, and reference librarians were encouraged to learn technical services policies and procedures.
In technical services, the support staff were generalists who shared the duties of opening the mail, checking in serials, preparing books for binding, and filing loose-leaves. There was no “Acquisitions Assistant” or “Cataloging Assistant”; instead there were staff who could perform any duty. As Earl explained, this provided a great deal of flexibility from a management perspective, and also made the work more interesting and varied for the individuals.

5. Organize!

When I arrived at my new office in the Underwood Law Library, I was amazed to see the bookshelves full of bound volumes of Earl’s files. Sets were labeled “Library Budget,” “Council of Library Directors Meetings Minutes,” “Faculty Meeting Minutes,” “ABA Questionnaire Data,” etc. There was no need to search through filing cabinets to unearth information on recent acquisitions budgets, staff evaluations, or minutes of meetings—everything was bound by subject, in chronological order, clearly labeled on the spines, each set bound in a different color, and easy to access. When I needed information, I merely had to turn to my bookshelves and find the volume that covered that subject and time period.

I was overwhelmed, and positive that there was no way I would be able to maintain these sets—and I was right. My successor will have to search through filing cabinets and manila folders for the information Earl left me in such perfect shape. I managed to follow his example for my first year, and then went astray. And I feel guilty about this, because I know how disappointed Earl would be—and how disappointed my successor is going to be. I apologize.

6. Pay Attention to Details

Related to the previous rule is Earl’s admonishment to avoid the temptation to consider the director a “big picture” person. He reminded me that, as attractive as scholarship and teaching and involvement in professional activities may be, a library director is hired first and foremost to manage the law library. In Earl’s management book there was no detail too minor for him to notice and act on.

At the same time, Earl cautioned that a director who involves himself in details must balance this practice with the necessity of leaving enough autonomy to the professional staff to make their jobs interesting. He warned me that this would be one of my major challenges, and that he felt he had achieved this delicate balance by maintaining the constant presence in the library mentioned above, and by dealing with the issues he observed through informal chats with the professional staff to guide them to what he considered the satisfactory solution. He warned that resisting the temptation to dictate solutions to problems was his biggest challenge, admitted that he hadn’t always been successful, and hoped that I would learn to do better. I think I have probably had the same mixed success that Earl enjoyed.
7. Work with Other Campus Libraries and Librarians

¶15 Earl warned me about the temptation to treat the law library’s autonomy as a stick with which to beat other campus librarians over the head. He noted that our unique relationship with the law school is a major advantage, but that we cannot afford to distance ourselves from our library colleagues elsewhere on campus. He was an advocate of campus library cooperation and standardization. Earl felt strongly that law library staff benefitted from working with staff from other libraries, and that serving on campus committees prevented the law library staff from becoming insular. He admonished me to cultivate these campus relationships, no matter how tempting it might be to drop out—and he advised me that it would often be tempting to do just that. He was right on both counts.

¶16 At SMU, Earl helped found the Council of Library Directors, which brought the directors of the Central University Libraries, the Bridwell Theological Library, and the Underwood Law Library together with representatives from the provost’s office and campus IT for monthly meetings. It was this group that first automated the campus library system, and the council continues to this day to serve as a vehicle for interlibrary cooperation and innovation.

8. Mediate Between the Library and Faculty

¶17 Earl valued his faculty status because of the advantages it brought to the library, not because of the advantages it brought to him. He felt that one of his major roles was to be the mediator between the faculty and the library—to anticipate faculty research needs, to keep abreast of their scholarship, to shape collection development to support curricular changes, to advertise library services to faculty, and to smooth out any potential conflicts.

¶18 To maintain harmony between the faculty and library, Earl never met a problem that couldn’t be solved over a lunch or an evening social occasion. He advised me to make friends on the faculty and to consider social obligations an important part of my director responsibilities. Although his office was in the library, Earl spent a significant amount of time in Storey Hall, the administrative building that houses our faculty offices. He advised me to attend all faculty presentations and seminars, to drop in on faculty during their free time, and to maintain a presence at all times. He felt that one of his major accomplishments at SMU was creating a strong library presence among the faculty, and he admonished me to maintain those ties.

9. Mentor New Librarians

¶19 The members of our profession who were mentored by Earl are numerous. He considered it his responsibility to nurture the next generation of law librarians and to do everything he could to help them advance their careers. Never shy about sharing his knowledge, Earl just assumed that everyone on his staff was interested in learning new skills and assuming new responsibilities.
He felt that participation in our professional organizations was both a duty and a privilege, and that it was the institution’s responsibility to support this participation. So strong was Earl’s commitment to professional development and mentorship that when he retired, he established the Barbara and Earl C. Borgeson Law Library Endowment Fund at the Underwood Law Library. This fund is dedicated to supporting the professional development of the law library staff, and provides us with generous funds each year to do just that.

Earl was very particular about reminding me that this fund was intended for professional development in addition to sending library staff to the AALL annual meeting. He felt very strongly that it was the duty of the institution to take care of AALL dues and attendance at the annual meeting, and that his endowment should be used solely for additional opportunities. Each year, when I wrote him a newsy letter that included information about our use of his endowment, he was quick to note those activities of which he especially approved.

10. Guard Your Institution’s Legacy

Above all, Earl told me, the library director is the guardian of the library’s legacy. Representing the library’s interests to law school and campus administration, publicizing the library’s services to students and faculty, maintaining ties with alumni and the local bar, and raising the library’s profile among its peers were matters Earl considered integral to his responsibilities. Preserving its history and the history of the law school were important to the image of the law school on campus and in academia, and he warned me not to overlook its importance.

He reminded me that the reputation of the academic law library can have a positive effect on the reputation of the law school, and noted a number of law libraries that enjoyed a better reputation than that of their law schools. To accomplish this, he always tried to keep up with new services and technologies and avoid complacency. At the same time, he felt that his participation and that of the library staff in professional activities ensured that the library would develop a reputation among its peers, and was an essential tool in building the library’s reputation. To that dual tactic of encouraging innovation and professional participation, Earl added his personal dedication to mentoring and “launching” new librarians and library directors. These, he felt, were the means by which a library director preserved his library’s legacy and passed it on to his successor. And he was right about this as well.

Earl’s rules of management are the product of experience and common sense, and are as relevant today as they were when he counseled me twenty years ago. He was the perfect example of the librarian’s library director—one who never felt the need to enhance his status by any means other than managing the very best law library he could. He was a good friend, a valued colleague, and leader in our profession. If we can continue to produce individuals like Earl, we will have done our job.—Gail M. Daly

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