American Association of Law Libraries

*Law Library Journal Author’s Guide*

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*Law Library Journal* is the official journal of the American Association of Law Libraries. It is published quarterly and circulates to more than 5000 members and subscribers. This guide is provided to assist authors in preparing articles for the *Journal*.

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# Table of Contents

## General Articles

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship</td>
<td>William M. Cross</td>
<td>195</td>
</tr>
<tr>
<td>Resource-Based Learning and Course Design: A Brief Theoretical Overview and Practical Suggestions</td>
<td>Margaret Butler</td>
<td>219</td>
</tr>
<tr>
<td>WikiLeaks: A Guide for American Law Librarians</td>
<td>James P. Kelly, Jr.</td>
<td>245</td>
</tr>
<tr>
<td>Cancellation of Print Primary Sources in Canadian Academic Law Libraries</td>
<td>Nancy McCormack</td>
<td>263</td>
</tr>
<tr>
<td>Donating and Procuring Organs: An Annotated Bibliography</td>
<td>Louis J. Sirico, Jr.</td>
<td>285</td>
</tr>
</tbody>
</table>

## Review Article

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Keeping Up with New Legal Titles</td>
<td>Creighton J. Miller, Jr.</td>
<td>311</td>
</tr>
<tr>
<td></td>
<td>Annmarie Zell</td>
<td></td>
</tr>
</tbody>
</table>

## Regular Features

<table>
<thead>
<tr>
<th>Title</th>
<th>Author</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Practicing Reference . . .</td>
<td>Mary Whisner</td>
<td>331</td>
</tr>
<tr>
<td></td>
<td>Fifty More Constitutions [2012-24]</td>
<td></td>
</tr>
<tr>
<td>Back and Forth . . .</td>
<td>Christine L. Sellers</td>
<td>341</td>
</tr>
<tr>
<td></td>
<td>Phillip Gragg</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WestlawNext and Lexis Advance</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Joan Sherer</td>
<td>349</td>
</tr>
<tr>
<td></td>
<td>Memorial: Felice Sacks (1945–2012)</td>
<td></td>
</tr>
</tbody>
</table>
Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship*

William M. Cross**

Mr. Cross describes the privileged nature of libraries in copyright law and the way that the recent trend toward licensing content undermines that position. In response, he proposes aggressive licensing and library use guided by the public library ethos, the core set of beliefs and practices that justify libraries’ privileged position.

Introduction

¶1 Digital media present both opportunities and challenges for libraries. New technology makes traditional library functions such as cataloging and reference services easier to offer and more sophisticated than at any time in the past. At the same time, these new practices raise practical and legal issues that can challenge librarians to adapt their traditional roles to new contexts. As this process occurs, it is important for librarians to remain cognizant and respectful of the special character of their work, a respect embodied by what Laura Gasaway has called the “public library ethos.”

¶2 This ethos, which informs library practices, reflects the special nature of the library in American law and culture that engenders the privileged position of libraries in the law, particularly in copyright law. Changes in technology, however, often lead to changes in library practice that in turn produce pressures on the legal status of libraries and the public library ethos itself.

¶3 A recent example of these pressures can be seen in the practice of some libraries, which have begun to use subscription DVD services like Netflix to buttress

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* © William M. Cross, 2012. This is a revised version of the winning entry in the student division of the 2011 AALL/LexisNexis Call for Papers competition.

** Director, Copyright and Digital Scholarship, North Carolina State University, Raleigh, North Carolina.

their film collections. This practice enables the library to offer a robust collection of DVDs as well as a significant collection of on-demand streaming media without purchasing hundreds of films, many of which are of limited or short-term interest. Unfortunately, Netflix offers only personal use licenses and no site licenses, so this practice seems to run afoul of the terms of service and may create substantial liability for these institutions.

§4 Libraries are beginning to embrace a similar model of content acquisition for e-books, licensing digital content rather than purchasing a physical object. There is an ongoing discussion among libraries about how this nascent model should operate, but, despite many disagreements and uncertainties, as well as recent evidence that students are ambivalent about e-books and e-textbooks, library adoption of e-books is proceeding.

§5 These issues came to a head in the spring of 2011, when HarperCollins, a major publisher of e-books, announced that circulation of new e-book titles acquired by libraries would be “capped” at twenty-six, and then the books would expire. Despite the publisher’s claims that this expiration reflected the rate of decay in physical copies, librarians have expressed outrage at this unilateral revision to the traditional practice of library lending. The American Library Association (ALA) released an official statement criticizing the policy and has created two task forces to address the issue.


4. See Terms of Use: Limitations on Use, Netflix, https://account.netflix.com/TermsOfUse#limitations (last visited Jan. 9, 2012) (“[T]he Netflix service, and any content viewed through our service, are for your personal and non-commercial use only . . . .”).


8. One library posted video of the HarperCollins books in their collection after circulating twenty-six times that were still in excellent condition. Cory Doctorow, How a HarperCollins Library Book Looks After 26 Checkouts (Pretty Good!), BoingBoing (Mar. 3, 2011, 8:24 A.M.), http://www.boingboing.net/2011/03/03/how-a-harpercollins.html. This claim also ignores the sophisticated preservation tools and techniques that librarians have developed through centuries of professional practice.


These new models of content acquisition are only the latest examples of a larger trend toward licensing rather than purchasing content, particularly digital content that has no physical artifact for the library to possess. This content-licensing model has significant implications for library practice and patron service. As Anne Klinefelter has written: “[T]he copyright and related law of electronic resources is complicating and even compromising some traditional library services.”11 Digital services such as streaming video and e-books are undeniably attractive, but their adoption has major consequences for libraries and for the social and civic benefits libraries provide.

This article examines the legal landscape under which libraries operate and how that landscape is being transformed by the move to licensed digital content. It begins with an overview of the current situation, describing the library as an institution that is privileged by the law and discussing the way libraries interact with the copyright law’s fair use provisions, the “library exception,” the first sale doctrine, and the educational exceptions. Next, it describes how each of these copyright provisions has been affected by libraries’ use of licensed digital content.

The adoption of a licensing model does significant harm to libraries and their patrons, reducing or even obliterating libraries’ ability to carry out their traditional mission. As illustrated by the changed application of library rights under 17 U.S.C. §§ 107–110, libraries are licensing themselves out of their established role. Reconsidering library practice in light of the public library ethos can put libraries back on the right track. After proposing a set of best practices for libraries licensing digital content in light of Gasaway’s four-part public library ethos, the article concludes by evaluating practices for streaming movies through a Netflix-like model and making text available through e-book models as illustrations of these best practices in action.

**Libraries and Copyright**

**Libraries as Privileged Institutions**

At least since Thomas Jefferson inaugurated the Library of Congress two centuries ago, American law has given special recognition to libraries in light of the unique role that they play in the accumulation, curation, and dissemination of America’s intellectual and cultural materials.12 President John F. Kennedy described the special nature of educational institutions such as libraries in a 1963 special address to Congress:

> The doors . . . to the library . . . lead to the richest treasures of our open society; to the power of knowledge—to the training and skills necessary for productive employment—to the wisdom, the ideals, and the culture which enrich life—and to the creative, self-disciplined understanding of society needed for good citizenship in today’s changing and challenging world.13

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¶10 The Supreme Court has recognized this special role in numerous cases. For example, in *Board of Education v. Pico*\(^\text{14}\) the Court identified school libraries as “the principal locus of [First Amendment] freedoms,”\(^\text{15}\) a place available to those seeking “self-education and individual enrichment.”\(^\text{16}\) Academic and public libraries serve a related function, and even private libraries that support corporations, law firms, or researchers provide enrichment and education that benefit all citizens with better-informed business, legal services, and research, promoting “the progress of science and useful arts.”\(^\text{17}\)

¶11 Beyond self-improvement, libraries are understood to be a powerful engine for the social and civic advancement of the nation as a whole. As one court wrote, libraries are “a vital institution in the continuing American struggle to create a society rich in freedom and variety of thought, broad in its understanding of diverse views and cultures and justifiably proud of its democratic institutions.”\(^\text{18}\) In short, libraries enable self-improvement and societal advancement, and the legal structures relating to libraries recognize this special role.

¶12 Librarians take this role extremely seriously. Laura Gasaway has described the way librarians understand their role as the “public library ethos.”\(^\text{19}\) She identifies four core values that make up this ethos: connecting people to ideas, offering “unfettered access to recorded knowledge,” encouraging “[l]earning in all its contexts,” and the “preservation of the human record.”\(^\text{20}\) Taken together, these could be described broadly as bringing “information to the people.”\(^\text{21}\) As Gasaway writes, “libraries are a shared intellectual resource maintained at public expense to provide resources that will be shared.”\(^\text{22}\) These values have developed over the course of many years\(^\text{23}\) and interact significantly with copyright law. As noted, the law recognizes these values and, in the copyright context, these special exceptions are contained in sections 107–110 of the Copyright Act.

**Section 107: Fair Use**

¶13 Fair use is one of the most important aspects of copyright law for library practice, but also one of the most daunting for librarians to employ. A general

\(15\). *Id.* at 868–69.
\(16\). *Id.* at 869.
\(17\). U.S. Const. art. I, § 8. Libraries in for-profit corporations and law firms are distinct in important ways. Their interrelationship with for-profit organizations often has an effect on their practice, and copyright law recognizes these differences. Some exceptions, such as the TEACH Act (discussed infra ¶¶ 27–32), are simply not available, and in cases where these libraries avail themselves of fair use, their claims may be substantially weakened by changes in the purpose and character of their use. Nevertheless, their core mission as libraries still relates to providing information in support of creative, often civic-minded expression. As such, the public library ethos may still be an important aspect of their practice as they make copyright and licensing decisions to support library users.


\(19\). Gasaway, *supra* note 1, at 120.

\(20\). *Id.* at 124.

\(21\). *Id.* at 121.

\(22\). *Id.*

\(23\). For an overview of the historical development of this ethos, see *id.* at 126–31.
defense to a charge of unauthorized use based on the benefit to society balanced against minimal harm done to the rights holder, fair use is deliberately open-ended to accommodate use in a variety of contexts.

¶14 Ann Bartow has described fair use as “an elastic and evolving concept that perplexes even those charged with applying the doctrine.”24 Kenneth Crews has called it simultaneously the most important and most misunderstood aspect of copyright law.25 Fair use is deliberately amorphous and undefined because it must be malleable and flexible. It has been called the “safety valve” of copyright,26 and many scholars have argued that the protections of fair use are necessary to keep copyright’s content-based restrictions of expression from running afoul of the First Amendment.27

¶15 Originally established in the common law,28 fair use was codified by the 1976 Copyright Act.29 Although it remains an “equitable rule of reason,”30 the statute provides four factors for consideration:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.31

¶16 Fair use is not a checklist where all factors must be met, nor is it a vote where the majority wins. Indeed, the statute indicates that these factors are not exclusive—other factors can be and have been included in a fair use analysis.32 As Deborah Gerhardt and Madelyn Wessel observe, fair use is complex and multifaceted, requiring analysis of legal, factual, and policy considerations.33

28. See Folsom v. Marsh, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901); Lawrence v. Dana, 15 F. Cas. 26, 58 (C.C.D. Mass. 1869) (No. 8136). See also Daniel E. Abrams, Comment, Personal Video Recorders, Emerging Technology and the Threat to Antiquate the Fair Use Doctrine, 15 ALB. L.J. SCI. & TECH. 127, 130 (2004) (“The doctrine has existed in common law for some time as an equitable defense designed to ‘avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster . . . .’”) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (1998)).
33. Deborah Gerhardt & Madelyn Wessel, Fair Use and Fairness on Campus, 11 N.C. J.L. & TECH. 461, 484 (2010) (“[F]air use analysis is not easy. It is not neat. It is not clear. It requires a vigilant eye over current legal decisions and factual, case-by-case, intensive review of factors that sometimes conflict.” (footnotes omitted)).
¶17 An examination of these factors indicates how library use often fits comfortably under the aegis of fair use. As nonprofit, educational institutions, most libraries begin fair use analysis on a firm footing. The first factor, purpose and character of the use, almost always favors libraries’ educational, generally nonprofit use. The fourth factor, effect on the market, is a point of contention for many stakeholders. Publishers often characterize any library use as a “lost sale,” but librarians may counter that the library purchase mitigates this harm, particularly where a use falls below the threshold amount where a user would have purchased an entire work. Factors two and three, the nature of the work and the amount and substantiality used, are more case-specific, but most library practice is targeted to the type and amounts appropriate to the library’s or patron’s need. As Gerhardt and Wessel note, “When the first and fourth fair use factors favor a finding of fair use, as they will in many educational contexts, a finding of fair use is nearly assured.”

¶18 Gasaway describes how librarians interpret fair use in light of the public library ethos as a “user’s right” that goes beyond being a legal defense; rather, it is a tool to protect and empower individuals and libraries. This perspective is buttressed by the Copyright Act’s special protection from statutory damages, remitting damages in situations where librarians “believed and had reasonable grounds for believing” that their use was fair. Fair use is at the heart of library operations, and its factors are designed to privilege the sort of use that makes up core library functions.

Section 108: The Library Exception

¶19 Section 108 of the copyright law, colloquially referred to as the “library exception,” permits libraries to reproduce copyrighted works without permission in some situations. For example, under certain circumstances library and archival staff can make copies for preservation, to replace damaged or stolen works, and to reproduce published works in the last twenty years of their copyright protection.

¶20 Librarians can also make copies for a library user, reproducing single articles for private, noncommercial use by patrons and reproducing an entire work where a replacement copy cannot be found for a fair price. Finally, section 108 permits lending of reproductions of copyrighted works to users in other libraries for private, noncommercial use.

¶21 The library exception codifies libraries’ central role in preserving and curating information. This is particularly important because information is stored

34. Id. at 499 (citing Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005, 156 U. PA. L. REV. 549, 584 (2008)).
37. Id. § 108.
38. Id. § 108(b).
39. Id. § 108(c).
40. Id. § 108(h).
41. Id. § 108(e).
42. Id. § 108(a), (d).
in media that are constantly deteriorating. Physical artifacts ranging from books to CDs to films decay or become worn, and libraries do substantial work preserving and repairing them. Digital media present different challenges but can be substantially more costly to preserve than traditional media. Section 108 is expressly designed to support library practice, and without the section 108 exceptions, libraries would be unable to do their job, and many of the artifacts of recorded knowledge would simply be lost.

Section 109: First Sale

¶22 The first sale doctrine has been present in American copyright law since its inception in the common law and has been included in both twentieth-century copyright statutes. It is also at the heart of libraries’ day-to-day operations. It provides libraries, and anyone who owns a particular copy of a copyrighted work, with an exception to the copyright holder’s exclusive rights. Anyone who purchases or lawfully acquires a copy of a work can dispose of that copy however they wish under section 109(a). This permits owners to sell, give away, or lend their copies of a work.

¶23 There are several limitations to section 109(a). First, section 109 protects only distribution; it gives libraries no right to reproduce, publicly perform, or adapt a copyrighted work without authorization. Section 109(a) also limits protection to the specific copy of the work, the physical artifact itself. It grants no protection to distribution of the underlying content. Similarly, works that are transferred by rental, lease, or lending for direct or indirect commercial purposes also fall outside of the scope of 109(a). Section 109 permits owners to display a legally acquired copy, provided that, for images, only one image is displayed at a time in the same place that the artifact itself is held.

46. See, e.g., Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 351 (1908) (holding that the copyright owner’s right to “vend” his book did not give the copyright owner the right to restrict future retail sales of the book or the right to require that the book be sold at a certain price per copy).
50. See 17 U.S.C. § 202 (2006) (stating that when a party transfers ownership of a material object in which a copyrighted work is fixed, such transfer does not transfer any rights in the copyrighted work itself).
51. For a discussion of the development of the “rental right,” see Kupferschmid, supra note 49, at 833–35.
52. 17 U.S.C. § 109(c).
¶24 Section 109 is vital for at least two reasons. First, it permits libraries to lend items to users, facilitating the “sharing” function at the heart of libraries’ mission. This maximizes the efficiencies of shared copies as well as making it economically feasible for libraries to offer patrons access to works for free, providing information to poor citizens who would otherwise be unable to access it and reap the personal and social benefits of better-informed citizenship.

¶25 Section 109 is equally vital to the library’s function of preserving information and artifacts. Along with museums, libraries are one of the few public organizations that make sure that works that are less popular or are no longer being commercialized do not fade away into the dust of history.

**Section 110: Education and Streaming**

¶26 Finally, section 110 governs nonprofit educational performances and displays. Libraries interact less directly with section 110, but the section still plays an important role in the educational mission of libraries. Section 110 contains two subsections governing physical and digital instruction respectively. Section 110(1) permits public performances and displays of a work by instructors or students in the course of face-to-face teaching activities in a nonprofit educational institution.53 This is tangentially related to core library activities, but is used when libraries offer programming or instruction or when, at the request of a faculty member, for example, they show films in the library for a class and the library becomes the “classroom” for that purpose.

¶27 Section 110(2), the Technology, Education and Copyright Harmonization (TEACH) Act, deals with instruction in the online environment.54 To reassure publishers that are concerned about the openness of the online environment, TEACH places several institutional and individual requirements on universities regarding copyright notice and protection. These institutional requirements include limiting TEACH’s application exclusively to “government or accredited educational institutions.”55 In order to qualify for TEACH, these institutions must create and display an institutional copyright policy, publish copyright information, and offer a specific notice to students regarding the copyright status of materials being performed or displayed.56 These requirements are generally common sense and impose no serious barriers to streaming video in a reasonable fashion.

¶28 TEACH also creates a set of technological requirements designed to ensure that the “classroom” nature of the online space is retained in the open environment of the web. These include limiting access to enrolled students and the establishment of technological measures that reasonably prevent retention or further dissemination of materials.57 As with the institutional requirements, these do not place undue strain on an institution that wishes to offer streaming video. Password protection fulfills the limited access requirement, and the act of streaming functionally limits retention and further dissemination.

53. *Id.* § 110(1).
54. *Id.* § 110(2).
55. *Id.*
56. *Id.* § 110(2)(D)(i).
57. *Id.* § 110(2)(D)(ii).
The third set of TEACH requirements places restrictions on the practice of instruction. Unlike the institutional and technical requirements, which primarily implicate the institution’s policies and online architecture, these requirements necessitate cooperation between the institution and the individual instructor. Instructors must provide specific oversight, that is, items posted or streamed must be “at the direction of or under the supervision of the instructor.” Further, the materials must be “an integral part of a class session” and “directly related and of material assistance to the teaching content.”

Although aimed primarily at instructors, TEACH has important implications for the ways that libraries make information available. As Kenneth Crews writes,

Nothing in the TEACH Act mentions duties of librarians, but the growth and complexity of distance education throughout the country have escalated the need for innovative library services. Fundamentally, librarians have a mission centered on the management and dissemination of information resources. Distance education is simply another form of exactly that pursuit.

TEACH can be seen as creating a new avenue by which to share information through streaming. It also creates new opportunities and obligations when providing information in the digital environment.

One important limitation of TEACH is that, like 17 U.S.C. § 110(1), it only covers performance and display of works. For example, under TEACH, a video clip could be streamed but an article could not be posted, since that would be a distribution, rather than a display. Nonetheless, TEACH remains an important part of the infrastructure of library practice, facilitating instruction and reference activities.

Section 110(4) comes into play for libraries making noncommercial, nonpublic performances of nondramatic literary or musical works. Designed to permit limited “performances” such as poetry readings or musical performances, section 110(4) allows libraries to enhance their programming and community activities.

Consequences of Licensing

From Rights of Ownership to Terms of Service

Libraries have undergone a major shift in collection development practice in the last twenty years, moving a substantial amount of their collections budgets from purchasing content to licensing it. One study indicates that from 1994 to 2005 the use of licensing agreements rose by 600%. The consequences of licensing are important and far-reaching. Most obviously, licensing content removes library ownership from the legal equation, and this has both legal and practical consequences.

58. Id. § 110(2)(A).
Practically speaking, of course, licensed digital content is not physically stored in the library. This has an enormous effect on the day-to-day use of material, particularly in the context of uses that are legally uncertain but may be subject to fair use. Possession of the physical artifact permits librarians, rather than content holders, to make copyright determinations, since they have the item in-hand to use, copy, or circulate.

License terms restrict librarians’ ability to make copyright determinations, and in fact, these terms are often coded into the digital material. As a result, in cases of contested use or legal gray areas such as fair use, where a librarian could decide for himself to lend or copy a physical object, the digital version most often forecloses this option entirely. Coupled with the Digital Millennium Copyright Act’s prohibition on measures to circumvent technological restrictions, the computer code of digital objects can override the rights of libraries that may be permitted by the Copyright Act.

Licensing also transforms a one-time purchase cost into a recurring one that, if not paid in perpetuity, may cause materials to disappear from the collection altogether. Further, the terms are often difficult to negotiate, particularly where a single publisher has a stranglehold on a journal or set of materials that is central to a library’s mission or critical for the work of patrons. This often leads to publishers’ “bundling” multiple works into a package that libraries must take or leave. Negotiating is made even more difficult for libraries because of limitations imposed by publishers against disclosure of pricing and terms. These nondisclosure clauses “allow publishers unilateral control over communication about the purchase or the terms of use of the product,” often forcing librarians to negotiate without crucial information about peer institutions and the market for works.

Even when licenses are purchased, technical difficulties beyond the library’s control may make a work unavailable. Because online journals are hosted on publishers’ servers, anytime the publisher has technical issues libraries and patrons may lose all access to the licensed content. Unlike a proprietary online database, physical books never “go down.”

Beyond the pragmatic considerations of physical possession, the move to licensed digital content has important ramifications for the legal strictures that control libraries’ ability to operate in harmony with their ethos. Bartow argues that this move to licensed digital content has allowed publishers to “restructure their relationship with libraries and to force abandonment of all pre-existing norms in the new distribution mediums.” Each of the copyright exceptions available to libraries is affected negatively by this restructured relationship.

65. Farb, supra note 60.
66. Bartow, supra note 24, at 78.
Section 107: Fair Use

¶39 In Gerhardt and Wessel’s investigation of the state of fair use on campus, the authors observe that evaluating fair use is one of the most complex legal decisions librarians must make and that this complexity often leads large institutions simply to decline to exercise their fair use rights at all.

¶40 These complexities are multiplied exponentially in the digital environment, because there is less established law and practice on which to rely and because new uses appear frequently. Large institutions are naturally risk averse, and fair use provides no certain answers as to what uses are permitted, so many institutions are extremely reluctant to assert their fair use rights except in the most cut-and-dried circumstances.

¶41 Even more problematic is that licenses often remove fair use from the equation altogether. More than a decade ago scholars expressed concern that a licensing regime “could be developed so that it disallows any free use of copyrighted works, even uses that qualify as fair use.” A recent study of library licensing practices concluded that roughly a quarter of licenses have made this fear a reality, expressly prohibiting fair use by the terms of the license.

¶42 As the copyright statute makes clear, contracts such as the licenses that libraries sign trump copyright exceptions, leaving libraries without the fair use “balancing test” between owners and users. The unique nature of fair use as copyright’s “safety valve” might suggest that completely removing fair use would violate the First Amendment. By locking up expression, copyright is naturally in constant tension with the guarantees of the First Amendment, which regards content-based prohibitions on expression as presumptively unconstitutional. The Supreme Court has concluded that copyright is saved by the flexibility of fair use, which

67. Gerhardt & Wessel, supra note 33.
68. Id. at 465 (“When answers are not clear and potential liability is thought to be significant, saying ‘no’ to a proposed use is often considered the safest course. The legal risks may be perceived as especially threatening at institutions with limited resources. In seeking clarity and avoiding risk, the temptation can be strong to act as if fair use does not exist and to shift campus copyright policy to a safe zone based on blanket licenses, fees, and permissions, even when law would not require these actions.”).
69. Lawrence Lessig’s infamous quip that fair use amounts to little more than “the right to hire a lawyer,” Lawrence Lessig, Free Culture 187 (2004), expresses an important truth, but this gallows humor also indicates the fatalistic outlook many users have toward a right that should be central to copyright analysis in the context of library use.
71. Farb, supra note 60, at fig.2.
permits the unfettered, socially valuable expression necessary for the marketplace of ideas to function.75 As such, a regime that removes fair use from the equation closes off this “safety valve” and might put too much pressure on free expression, unconstitutionally violating the guarantees of the First Amendment.

¶43 So far this argument is untested by the courts, and its prospects are not promising in the context of contract law. There are several cases holding that First Amendment freedoms can be waived by contracts such as government service76 and press confidentiality agreements.77 The chances of a court’s invalidating a negotiated license based on violation of the First Amendment are extremely slim.

Section 108: The Library Exception

¶44 The problems discussed regarding fair use loom even larger in the section 108 context. Where fair use is expressly removed by a quarter of licenses, the right to archive is removed by more than half of the library licenses surveyed by Farb.78 Even in cases where a license does not foreclose section 108 copying, many of the section 108 protections are blunted in the digital environment.79 These problem-atic areas include difficulties with defining what constitutes a “copy,” as well as the nature of lending “reproductions” in section 108(d) and (e).

¶45 These problems have been identified and discussed by the Section 108 Study Group that has worked to understand and address these problems. In a 2007 article describing her experience in the study group, Laura Gasaway identifies four areas where section 108 challenges library practice in the digital realm: institutional eligibility, preservation and replacement, digital copies for users, and specific practice issues.80 Gasaway proposes solutions based on the work of the study group, but they have not yet been adopted. At present, a host of issues remain unresolved, and even areas that might be promising exist at the whim of rights holders who license content to libraries.

Section 109: First Sale

¶46 Even without express licensing language, first sale simply does not apply to licensing regimes where there is no “sale,” but only licensed use.81 As R. Anthony Reese notes, the first sale doctrine serves several important interests, particularly in


76. See United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (holding that a former CIA employee could be required to submit material to the agency for approval prior to publication under the terms of a signed secrecy agreement).


78. Farb, supra note 60, at fig.2.


81. See Kupferschmid, supra note 49; Charles A. Masango, The Future of the First Sale Doctrine with the Advent of Licenses to Govern Access to Digital Content, 7 S. AFR. J. INFO. & COMM. 64 (2006).
the context of library use, all of which are lost when works are licensed digitally rather than purchased. First sale enables libraries to offer works to patrons at minimal cost as well as providing out-of-print works and works withdrawn by the publisher, and to preserve rare works, but all of these functions are threatened if the first sale exception is not available.82

¶47 One author goes further, arguing that this change effectively creates an entirely new right for publishers: the “right to control access.”83 Some scholars have argued that the first sale doctrine could be updated or reinterpreted to accommodate the library’s special function,84 but so far such proposals have not led to any official action. In the present environment, licensed digital items simply do not qualify as works libraries own, and libraries therefore have no recourse to section 109’s first sale provision.

Section 110: Streaming Under TEACH

¶48 The TEACH Act is limited by licensing in several important ways. At the selection level, TEACH’s requirement that only legally obtained copies be used may preclude the use of items that are licensed but not owned. Indeed, collection development decisions are fundamentally complicated by the uncertain nature of licensed materials. Librarians relying on TEACH to stream their audio and visual collections may also be frustrated by licenses that limit TEACH-based activities by contract or through technological locks on use and copying.

¶49 Many librarians rely on TEACH when they engage in online instruction using materials in the library’s collection.85 When using licensed materials, however, librarians may be uncertain whether those library materials qualify as “lawfully made or acquired”—as mandated by the TEACH Act86—if they are working with patrons not covered by their license. As with the rights discussed above, of course, explicit language in the license may further restrict the librarian’s activities, particularly in the online context.

Restoring the Public Library Ethos

¶50 Licensing as it is currently practiced significantly harms, and in some cases completely dismantles, the copyright infrastructure designed to support the societally valuable work libraries perform. In the long run, lawmakers and judges

evaluating library use must confront this problem, but there is no indication that change is imminent. Indeed, the recent trend has been in the other direction, with rights holders carving out greater and greater limitations through aggressive practice and targeted lobbying.

§51 Libraries and librarians are unlikely to acquire the wealth or clout to challenge seriously the tens of millions of dollars annually spent by the content industry bending Congress’s ear. Librarians can, however, begin aggressively to assert their rights in ways that respect the law but that also recognize the privileged nature of library activities.

§52 Aggressive decision-making not only allows librarians to better serve their patrons, it has important doctrinal consequences as well. In copyright law, established norms have a positive effect on the law itself. This is especially true for licensing, where library practice leads to what copyright scholar James Gibson calls “doctrinal feedback.” Because the scope of copyright and particularly of fair use can be ambiguous, and many libraries are risk averse in the face of potential litigation, they often seek licenses in cases where no license is needed or where liability is unlikely to exist.

This practice of unneeded licensing feeds back into doctrine because of one final uncontroversial premise: the fair use defense looks to the existence vel non of a licensing market when defining the reach of the copyright entitlement. The result is a steady, incremental, and unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users.

§53 In response to this tide of doctrinal feedback, librarians need to reclaim their rights. To do this safely and credibly, however, library practice must be grounded in the public library ethos that justifies libraries’ privileged position. This ethos has four central components: the connection of people to ideas, uneff-
tered access to information, support for learning in all its contexts, and preservation of the human record.

Connection of People to Ideas

§54 The first principle of the public library ethos is the idea of libraries as institutions devoted to connecting people to ideas. Grounded in the library’s role as a source of individual education and personal growth, this is, according to Gasaway, the most important core value of bringing “information to the people.”

§55 This value implicates libraries as the source of informational artifacts as well as educational programming and reference services in support of the public good. Significantly, despite the ways that the Copyright Act often distinguishes between nonprofit libraries and truly “educational institutions” such as universities, librarians generally do not make this distinction between purely educational institutions and libraries that work to educate all citizens whether or not they are enrolled in a specific course of study. The functions of academic and school libraries are deeply intermingled with academic institutions. Public libraries have been described as “the people’s university,” and librarians often regard library space as an extension of the classroom.

§56 This value has been expressed broadly in almost every statement of purpose and values generated by library organizations. The ALA’s Core Values of Librarianship, for example, assert that libraries are an “essential public good and are fundamental institutions in democratic societies.” The Association of Research Libraries’ (ARL) Intellectual Property Statement of Principles similarly states that copyright exists “for the public good.”

§57 All of the section 107–110 rights, as well as the shared mission of libraries and the Copyright Clause, are involved. Like libraries, copyright law itself exists ultimately to benefit the public, not to reward authors or support business models. This shared purpose drives the special status of libraries and should guide library practice.

§58 In the licensing context, this value should lead librarians to make sure that they retain their traditional ability to serve all patrons, not only those registered for a specific class or doing “official” business. Library ethos and copyright law both emphasize the duty to provide information for education and personal growth of “the People” in the grand republican sense.

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94. Id. at 121–22.
95. Id. at 121.
99. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”).
Unfettered Access to Recorded Knowledge, Information, and Creative Works

¶59 The second principle of the public library ethos centers on access to information. The First Amendment and copyright both focus on protecting and incentivizing the creation and dissemination of information. Libraries make this theory a reality by making the product of creation available to all citizens.

¶60 To fulfill this function, libraries must acquire and make information available inexpensively, broadly, and in as many forms and formats as possible. Libraries work to remove barriers of cost, space, prejudice, and culture so that the greatest number of people have the greatest access to as much good information as possible. This means making works available for a minimal cost, offering a variety and diversity of methods for accessing the works, and providing the works in a way that diverse patrons are comfortable using. Gasaway notes in particular the importance of the right to browse and search large bodies of information, an ability significantly improved by digital search functions but often immediately disabled by restrictive terms of use.

¶61 This principle of access has been expressed in most library statements of purpose as well. ALA’s Core Values of Librarianship state that “[a]ll information resources that are provided directly or indirectly by the library, regardless of technology, format, or methods of delivery, should be readily, equally, and equitably accessible to all library users.” The ARL’s Statement of Principles highlights the value of access and the danger of its disappearance: “Each year, millions of researchers, students, and members of the public benefit from access to library collections . . . [t]he loss of these provisions in the emerging information infrastructure would greatly harm scholarship, teaching, and the operations of a free society.”

¶62 This principle ties into much of copyright law, particularly fair use and the value of the public domain. As new technology comes to the fore in library practice, TEACH also plays an important role in online instruction and reference. Copyright law and library practice also intersect, not always comfortably, in the question of how much access is permitted. For librarians, the principle of access is a principle of unfettered access. Librarians want to give their patrons full access to use materials when, where, and how they want, and once the library has paid the content owner, this is what librarians expect.

¶63 In licensing, however, this is hardly the norm. Licensing slices “access” along numerous lines and restricts patrons from accessing content except at the prescribed time or in the prescribed manner. Even “open” licenses can still restrict access. This is a problem for the access principle today, and as technology enables

100. Gasaway, supra note 1, at 122.
101. Core Values of Librarianship, supra note 97.
103. Gerhardt & Wessel, supra note 33, at 482 (“the societal benefits that justify a regime of copyright require that ‘individuals learn from those [copyrighted] works, and [l]earning requires access to the work in which the ideas to be learned are embodied’”) (quoting Douglas L. Rogers, Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries, 10 Tul. J. Tech. & Intell. Prop. 1, 11 (2007)).
even more sophisticated forms of access, increasing the number of people who can take advantage of the services in libraries, these problems can be expected to increase.

¶64 Librarians can address some of these issues through savvy licensing.105 This means crafting agreements that permit access at all times regardless of place. A license should also permit diverse patrons to translate or alter materials to ensure greater access to non-English speakers, the disabled, and others for whom traditional access is insufficient.

**Learning in All Its Contexts**

¶65 The third principle of the public library ethos deals with the civic nature of libraries. The learning enabled by library practice not only serves the individual, it also helps patrons better themselves and engage thoughtfully in the democratic process.

¶66 Libraries offer materials and instruction in a variety of contexts, from teaching technical skills and practical job-hunting techniques to inculcating “professional” middle-class values and practices.106 For this reason, libraries have played a vital role in social mobility and the integration of marginalized populations into mainstream society.

¶67 Libraries also provide free information on social and political issues that informs interested citizens on the issues of the day. They have been described as “a mighty resource in the free marketplace of ideas.”107 Amateur inventors, pro se litigants, aspiring writers, and patrons looking for the latest popular novel all rely on the library to help them understand the world around them and prepare for the future. Statements of purpose uniformly express this function. The ALA notes that “A democracy presupposes an informed citizenry. [Therefore], the publicly supported library provides free and equal access to information for all people of the community the library serves.”108

¶68 This principle, which Gasaway describes as a “shared intellectual resource,”109 drives libraries to emphasize users’ rights such as fair use and to push to offer information from many perspectives, including the perspectives of multiple authors and the resources of multiple companies and rights holders.

¶69 In the context of licensing, this principle should encourage librarians to ensure they can offer complete material that meets both the practical and abstract needs of their patrons. One article has proposed a new theory in contract law well suited to this issue: “public interest unconscionability.”110 This theory would

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109. Gasaway, supra note 1, at 121.

“empower courts to control non-negotiable terms concerning access to, and use of, computerized information that either party—licensors or licensees—seek to impose on the other without any true manifestation of assent.”111 Breaking new legal ground of this sort is intriguing but, as with the proposed First Amendment limitation on licenses that remove fair use discussed above, unlikely to emerge as a real solution in the near term. Instead, librarians must license and act to protect this right to the best of their ability.

Preservation of the Human Record

¶70 The fourth principle of the public library ethos is less focused on users’ rights and more focused on historical and societal memory and reflection. Libraries seek out and collect works based on quality and value for their patrons. Libraries also support scholarly publishing by purchasing these works. Indeed, many university presses could not function if university libraries did not buy their scholarly monographs.112

¶71 Libraries also curate these collections, preserving aging items, maintaining digital files, and making sure that works stored in obsolete technological formats are not lost. This work entails evaluating materials for quality in light of new developments in the relevant fields and organizing materials so they can be effectively searched and retrieved.

¶72 Once again, mainstream library organizations have emphasized this principle in their statements of purpose. The ALA, for example, has stated that “[t]he Association supports the preservation of information published in all media and formats. The association affirms that the preservation of information resources is central to libraries and librarianship.”113 Obviously, this principle is closely tied to the section 108 exceptions as well as to section 109’s first sale provisions. Retention and analysis tend to be fairly straightforward in copyright terms, but the copying and updating necessary to keep a collection ahead of technological obsolescence and physical or digital decay can be problematic.

¶73 Licensing generally makes this even more problematic because retention itself is often prohibited. A licensed work, after all, is made available rather than acquired. As such, licensed collections can disappear due to technological malfunctions, nonpayment of fees, or decisions by the content owner. Similarly, the organization and curation that libraries do to maximize the value of a collection may be impeded by restrictions on use.

¶74 In response, librarians should fight for licenses that at least permit backup copies in case technological problems make legally obtained works unavailable. The larger issue of long-term preservation may require partnerships between

111. Id. at 929.
112. Alfred L. Brophy, Mrs. Lincoln’s Lawyer’s Cat: The Future of Legal Scholarship, 39 Conn. L. Rev. CONTEMPLATIONS 11, 19 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997845 (“[I]n these days of drastically reduced library budgets and of shrinking subsidies from universities for their presses, the economics of publishing are really beginning to hurt opportunities for publishing scholarly monographs . . . .”).
113. Core Values of Librarianship, supra note 97.
authors, publishers, and librarians. New models of practice such as institutional repositories are promising, but as yet far from ready to meet these challenges.

The Public Library Ethos in Practice: Streaming Video and E-Books

75 Generally the purpose of streaming is to provide access beyond the walls of the library, so access is based on relationship or user status, rather than physical location. This is in line with most licenses as well as the boundaries established by TEACH and by fair use’s preference for limited distribution.

Movies

76 Several libraries have begun using commercial services such as Netflix to offer streaming media and have written openly about this practice as a new model for librarianship. Despite the fact that legal scholars uniformly agree that this practice violates the Netflix terms of service, libraries seem to be responding to patron demand in this way either intentionally or based on misunderstanding or ignorance of the law. Librarians have described the way that services such as Netflix create new expectations that carry over to library services. Netflix and similar movie services create demand for services that are “personal, easy, fast, and very convenient for users.”

77 Streaming is currently done in a variety of ways, and practices differ significantly from library to library. Some libraries offer streaming video only to computers within the library or to those verified as part of the institution’s network, such as with password protection. Others stream more widely, to all computers where the user can be authenticated with a password or student identification number.

78 As streaming continues to be offered, the public library ethos should guide libraries’ response to these “transformative, if disruptive, technologies.” Until Netflix or a competitor adopts some form of institutional license, libraries cannot use that service, but patron demands can be expected to drive libraries to offer streaming video in some form. Streaming as part of education and instruction should be guided by TEACH and fair use, but using streaming video to support the general collection will require some licensing, whether that comes from a Netflix site license or another service altogether.

115. See, e.g., Dorothea Salo, Innkeeper at the Roach Motel, 57 LIBR. TRENDS 98 (2008).
¶79 As libraries negotiate this proposed license and establish best practices, they should be guided by the public library ethos to help ensure that their rules and practices are consistent with libraries’ highest values as socially valuable actors deserving of their privileged position in copyright law. For example, librarians can serve the value of connecting people to information by streaming to ensure general, rather than limited, access. Streaming that serves broad republican aims of bringing information to the people means licensing that permits this. Streaming also supports aggressive application of fair use when deciding where and how to stream in harmony with the points of confluence of library practice and the Copyright Clause, both of which are dedicated to promoting expression and innovation.

¶80 The value of unfettered access, the second aspect of the public library ethos, is served when libraries stream in ways that allow all patrons to view and use films regardless of limitations based on language, location, or disability. A library could work explicitly to license that right, but where a license is silent, aggressive application of TEACH and fair use, both of which expressly favor streaming media as the preferred method of sharing, can also restore this value.

¶81 Libraries can support the third value, learning in all of its contexts, by streaming content that provides a “shared intellectual resource” for the civic aspects of citizenship. Licenses that recognize that value may be useful, but this is another area where removing contractual roadblocks may be sufficient to permit aggressive fair use by libraries.

¶82 Finally, the library’s role in preserving the human record must be honored. Streaming content is, by its nature, short term, but licenses can be designed that permit backup copies to fill in when the system goes down or when third-party disputes over content make work unavailable. Long-term issues with preservation must be addressed as well, although they are beyond the scope of library practice since streamed films are designed to be temporary.

E-Books

¶83 E-books are becoming an increasingly important part of library collections. Although the 2009 Ithaka survey of faculty reported that “despite the arrival of devices like the Amazon Kindle . . . e-books have remained marginal to scholars,” more than thirty percent of respondents reported that e-books will be important in their professional lives in five years. Numerous libraries have piloted e-book programs, and librarians have done significant research on service models in the digital environment and on patron demands.

122. Id.
So far, patrons in academic libraries have not yet widely embraced e-books. This reflects some patron frustration, particularly with format issues, and the fact that e-books have generally included significant digital rights management (DRM) restrictions that cripple the uses that patrons expect. Nevertheless, e-books appear to be a new medium that is gaining traction.

Though the practice of lending e-books is currently in its infancy, some common procedures have begun to develop. Most libraries lend a digital copy online that replicates the qualities of a physical book. A patron downloads the copy to his computer, e-reader, or other device, and that copy cannot be shared or moved to another device while the patron has it. At the end of the prescribed borrowing period, the copy automatically disappears from the user’s device. Libraries themselves buy multiple “copies” of the work, so that only as many patrons can use the work at a time as the library has purchased copies.

Rebecca Tushnet discusses this replication of the physical-book model as an important disconnect between libraries, patrons, and publishers. She argues that publishers in this arena have failed to do what Netflix has done in the past few years: offer service that exceeds the value of physical copies. “The real problem [with e-books],” Tushnet writes, “is that [the publisher’s] argument [for DRM] is like telling a doctor that disease and death are part of the human condition and therefore to be replicated, not reduced, by any new treatments. Permanence is the point and deterioration is the enemy.”

Recent efforts to recognize this issue and improve the experience of using e-books may be more successful. Recently, e-books have been designed to interface digitally with libraries, available to “check out” online and disappearing from the e-reader once the e-book is due. Some universities have begun replacing physical textbooks with digital versions, arguably the best candidate for e-book deployment. The rise of popular e-readers such as Amazon’s Kindle and Barnes & Noble’s Nook may also offer users a model that showcases the value of e-books. Amazon in particular has released applications for the Kindle to mimic library lending functions, suggesting that technology may help bridge the divide between publishers and patrons.

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129. Jenkins, supra note 126, at 3.
Libraries have started to lend e-readers loaded with books, and, as is the case with Netflix, the practice is currently outpacing legal agreements, placing libraries on uncertain, perhaps even perilous, legal footing. Licenses must be developed and best practices must emerge to govern this activity. As with streaming media, however, librarians must develop their efforts to incorporate e-books around the public library ethos.

First, library values related to connecting people to ideas should be retained with provisions for the educational and developmental needs of patrons. This may mean strategic licensing, particularly with vendors targeting the academic market.

Second, unfettered access to recorded knowledge, information, and creative works must be protected. Rebecca Tushnet’s discussion about replicating the flaws of physical documents is especially germane here. Library practice should push the access principle but should also be tailored to the specific issues of e-books. Unlike streaming movies, e-books are aimed at providing individual access rather than ongoing availability. Because of this, issues center around formats, translations, and accommodations for differently abled patrons, such as the recent exemption given for circumvention by visually impaired users to enable read-aloud and specialized format functionality.\textsuperscript{134}

Activities that protect learning in all its contexts, the third value of the public library ethos, must also be protected. This civic value implicates licensing in ways similar to those for streaming media. The controversy over third-party monitoring raises privacy concerns that run throughout the shared nature of licensed content.\textsuperscript{135}

Finally, the fourth value, preservation of the human record, must also be guarded with particular vigilance, given recent bad actions. The ironic case of Amazon’s removing George Orwell’s \textit{1984} after customers had purchased it indicates the particular difficulties of preservation in the context of e-books.\textsuperscript{136} As long as libraries are piggybacking on generally available technology, they will struggle to curate works properly. As e-book vendors begin to offer specialized library versions, licenses must find a way to protect these values, either within individual libraries or collectively across consortia and the profession.

\textsuperscript{134} Exemption to Prohibition on Circumvention, 37 C.F.R. § 201.40(a) (2010) (“The prohibition against circumvention of technological measures that control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to . . . [l]iterary works distributed in ebook format when all existing ebook editions of the work . . . contain access controls that prevent the enabling either of the book’s read-aloud function or of screen readers that render the text into a specialized format.”).


Conclusion

¶ 93 Fair use is like a muscle:137 if not used it atrophies, but when vigorously exercised it grows more powerful. James Gibson’s discussion of doctrinal feedback138 suggests the ways that copyright law for library practice follows a similar principle of use-it-or-lose-it. After a decade of atrophy, library copyright is inert and flabby. Librarians need to flex these muscles for the good of the profession and society as a whole, but they must do so responsibly.

¶ 94 Negotiating license agreements in harmony with the public library ethos can help to ensure that core library values are not lost in the digital environment. Designing practice based on the public library ethos can empower librarians to aggressively assert their rights in a way that maximizes the public values at the heart of copyright law. By focusing on the shared mission of library practice and the Copyright Clause, librarians can make decisions that honor both values as well as reinvigorating libraries’ rights and their place at the heart of American intellectual and cultural life.

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138. Gibson, supra note 91.
Resource-Based Learning and Course Design: A Brief Theoretical Overview and Practical Suggestions*

Margaret Butler**

Ms. Butler argues that librarians teaching legal research should follow resource-based learning pedagogical strategies. Her article provides a background in constructivist educational theory and resource-based learning before identifying useful instructional strategies regarding course design decisions related to goal setting, assignments, rubrics, and assessment.

Introduction ................................................................. 219
Resource-Based Learning ........................................... 221
Problem-Based Learning ............................................. 223
Developing Metacognitive Skills ................................. 224
Instructional Strategies: Questioning Students and Scaffolding ........... 225
Building Schemata to Maximize Working Memory ............... 229
Benefits of Resource-Based Learning ........................... 232
Course Design Decisions ........................................... 234
Setting Goals .......................................................... 234
Instructional Strategies ............................................. 238
Assignments, Rubrics, and Assessment ........................ 240
Assignments ............................................................ 240
Rubrics ................................................................. 240
Assessment ............................................................. 241
Conclusion ............................................................... 244

Introduction

¶1 The best methodology for teaching students legal research is a subject of debate within the law librarian community.¹ Though the debate existed before the current push in legal education to improve law students’ practical and ethical

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* © Margaret Butler, 2012. This is a revised version of the winning entry in the new member division of the 2011 AALL/LexisNexis Call for Papers competition. The article was presented at the 2010 Boulder Conference on Legal Information: Scholarship and Teaching, and I would like to thank the conference participants for their feedback and support in drafting it.

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1. For a history of the debate, see Paul D. Callister, Beyond Training: Law Librarianship’s Quest for the Pedagogy of Legal Research Education, 95 LAW LIBR. J. 7, 8–9, 2003 LAW LIBR. J. 1, ¶ 4.
understandings of the law, law librarians’ analysis of the best ways to teach legal research is seeing more prominence. Like law professors, however, law librarians do not generally have pedagogical training. Most pedagogical training for law librarians comes in the form of on-the-job training, presentations at professional conferences, and professional literature.

Although some people may be described as “natural teachers,” that gift is rare. But teachers can be trained in the mechanics of teaching, ultimately improving the education delivered. Through training, teachers may learn to consider instructional, or pedagogical, theory as they develop their courses. Kristin Gerdy has suggested that adult learning theory—the learning theory relevant to law students, rather than elementary school students—should be considered in the development of legal research courses.

Adult learners share some traits that should be considered when designing a course. First, adult learners are able to choose options that best suit their learning needs. When preparing lessons for adult learners, instructors should briefly provide an overview and context, and summarize the “big picture” for students—this

2. The MacCrate Report and the Carnegie Report both represent efforts to improve legal education. Am. Bar Ass’n, Section of Legal Educ. & Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) [hereinafter MacCrate Report]; William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (2007) (Carnegie Report). Though not as a direct result of those reports, the law librarian community has engaged in conversation about the best way to teach legal research, through debates around bibliographic instruction and process (the Berring and Wren debate) as well as other topics. Recently, the Berring and Wren debate was revisited by Berring: “Almost 20 years later, one might wonder what all the fuss was about. In hindsight, the Wrens espoused a more important role for legal research training and they felt it was best done in an environment where the student was learning how to use the research tools.” Robert C. (Bob) Berring Jr., Twenty Years On: The Debate over Legal Research Instruction, 17 Perspectives: Teaching Legal Research and Writing 1, 3 (2008).


4. Job postings for academic reference librarians (who are generally the librarians involved in teaching legal research) typically require a J.D. degree as well as a degree in library or information science. Degrees in education (for either child or adult learners) are not mentioned in these job postings, and are not generally required of librarian instructors. See generally Employment Opportunities, Law Librarian Blog, http://lawprofessors.typepad.com/law_librarian_blog/employment_opportunities/ (last visited Dec. 21, 2011).


8. Id. at 74.
enables students to learn experientially. Many law librarians have noted that student interest in “real world” questions is very high; this interest is important because students learn best when they see the relevance of the research to the tasks they know they will be expected to perform, whether as summer associates, interns, or practicing attorneys. Accordingly, a good legal research instructor should contextualize legal research and allow students to learn by using legal research resources—whether electronic or print—to answer questions, so students can draw their own conclusions about the relevance or utility of the information presented by the teacher.

¶4 In other words, legal research students will benefit from a resource-based or a problem-based approach to teaching. These approaches, which are discussed more fully below, require students to engage with resources, such as primary and secondary legal sources, and problems to learn to conduct legal research. But these approaches to teaching, by themselves, are not all that instructors should consider when seeking to improve their teaching skills. Teaching strategies; course design decisions; and assignments, rubrics, and assessment plans must be considered when one hopes to improve one’s teaching. This article addresses the pedagogical benefits of resource-based and problem-based learning in the legal research classroom and offers theoretical and practical suggestions for course design decisions, including the use of teaching strategies, the development of assignments, the benefits of rubrics, and assessment techniques.

Resource-Based Learning

¶5 In the resource-based learning model described in British academic legal literature, teachers must pay “careful attention to pedagogy, including learning outcomes to be achieved by students from the project and methods of feedback.”10 In this model, “students learn by using resources,”11 with information and communications technology “used to support learning in more flexible ways.”12 The language of “resource-based learning” and resource-based learning as a pedagogical approach are also used in the United States, though not usually in law-specific contexts.13

¶6 Resource-based learning approaches have great potential to be helpful not only in research courses in which students are asked to consider challenging problems, but also in clinical work and other project-based law school coursework. “Resource-based learning involves establishing contexts for, tools for acting on and with, and scaffolds to guide the differentiated interpretation, use, and understanding of resources in ways that are consistent with the epistemology, foundations, and assumptions of a given learning model.”14 “[R]esource-based learning is a peda-
gogical approach associated with inquiry- and project-based learning in which [students work with] ‘a wide range of learning resources rather than from class exposition.’”

¶7 Resource-based learning presents an attractive pedagogical approach for teaching legal research for several reasons. First, resource-based learning lends itself to virtual learning, and it is often associated with distance or virtual learning in educational literature. Although law school accreditation rules limit the ways in which law schools may implement distance education, many law school courses contain some virtual components if they use TWEN, BlackBoard, or other web course technology. Resource-based learning also may be used with a variety of epistemological models, or models of peoples’ ways of knowing. In particular, those who oppose the “banking model” of education, in which an all-knowing teacher stands at the front of the room and “data dumps” knowledge into awaiting (empty) student minds, may find resource-based learning appealing, as it “is underlain by the philosophical assumption that allowing the learner to achieve learning outcomes in a more flexible and independent manner is inherently better than the traditional learning methodology, epitomized by the ‘banking’ concept of education criticized by [Paolo] Freire.”


16. See Steve Ryan et al., The Virtual University: The Internet and Resource-Based Learning (2000). Because of the correspondence between resource-based learning materials and virtual or online learning materials, some of the teaching approaches suggested here are adapted from materials that address the development or teaching of online or virtual courses.

17. See Am. Bar Ass’n, Standards and Rules of Procedure for Approval of Law Schools 27–28 (2011–2012) (Standard 306) (requiring distance education courses to be approved using the same process as traditional courses and limiting students to no more than four credit hours per term, for a maximum of twelve credit hours, with distance learning functionally prohibited in the first-year curriculum).


20. A less inflammatory description of this type of teaching would be direct instruction. Teaching may involve a variety of approaches, so a constructivist might spend five to seven minutes of direct instruction teaching a mini-lesson on a narrow topic, possibly in response to a student question; but the banking model of education suggests that the bulk of learning should be done by direct instruction.

%8 Resource-based learning is one type of constructivist pedagogical theory.22 Constructivism has, at its base, the assumption that “Knowledge is not transmitted: it is constructed.”23 Within constructionist schools, there are individual constructivists and social constructivists. The individual constructivists generally believe that “Learning results from a personal interpretation of knowledge,” while social constructivists generally hold that “Learning is collaborative with meaning negotiated from multiple perspectives.”24 Some constructivists would add an element of contextualism to their philosophy, recommending “presenting problems in situations that are realistic to learners and common to everyday applications of knowledge,” thus providing students with opportunities for “authentic learning.”25

%9 Understanding constructivist theory, its underlying principles, and how it relates to resource-based learning may help instructors in creating, planning, and teaching a course. Resource-based learning may be described as a constructivist approach incorporating valuable instructional strategies that should be considered in the professional discussion of the development of a pedagogy of legal research.26

**Problem-Based Learning**

%10 Problem-based learning is similar to resource-based learning. In problem-based learning, “students work in small collaborative groups and learn what they need to know in order to solve a problem. The teacher acts as a facilitator to guide students through the learning cycle.”27 Problem-based learning originated in medical education, though it has been adopted by other fields.28 Both resource-based...
and problem-based learning rely on student experience as the locus of learning, treating the teacher as a facilitator, though problem-based learning often has an additional expectation that students are working collaboratively, rather than individually.\textsuperscript{29} Problem-based learning focuses on the development of critical thinking skills,\textsuperscript{30} making it a tempting pedagogical approach in the legal research context. However, it is extremely time intensive and does not lend itself to easy use in a first-year legal research course.\textsuperscript{31}

\textsuperscript{11} For problem-based learning to be effective, the problems generated and used in instruction should meet several criteria: problems should be complex and present open-ended questions, and they should “be realistic and resonate with the students’ experiences” while also presenting students with opportunities to evaluate their knowledge and their approach to the problem.\textsuperscript{32} By definition, an effective problem raises student interest in the subject matter and engages students with the information necessary to solve the problem as well as with problem-solving strategies. The problem-based learning approach may be particularly successful in an adult education context because the realistic nature of the problems serves to motivate students.

\textbf{Developing Metacognitive Skills}

\textsuperscript{12} The MacCrate and Carnegie Reports both call for the development of lawyering skills and values.\textsuperscript{33} Resource-based learning, as well as problem-based learning, to the extent that they can be implemented in a law school setting, can be used to advance students’ ability to become effective problem solvers, employing the tools that they will ultimately work with in practice as they develop the skills necessary to approach a client’s problem from a legal perspective. Using resources and hypothetical problems can provide instructors with the opportunity, as well, to engage students in dialogue about their professional responsibilities to clients. For example, an instructor may make an ethical question about the representation of a client’s interests the basis for both a research problem about the state’s administr-
tive law and authority regulating lawyers, and a theoretical question about lawyers’ professional responsibilities to zealously represent their client’s interests.

§13 Both problem- and research-based learning motivate students by providing them with real-life, or at least realistic, problems. Legal research instruction must prepare students to continue learning, even after the required legal research course is completed. The development of metacognitive skills, defined as “executive control process of planning one’s problem solving, monitoring one’s progress, and evaluating whether one’s goals have been met,” is a critical function for a legal researcher. Callister notes that “the final skill is meta-cognition—the ability to assess, not only the result, but the schemata, including the processes leading to the result. It is a kind of self-awareness and reflection of the research experience.”

Both problem-based and resource-based learning encourage students to develop an awareness of the research process as they may encounter it in professional practice. The ability of a researcher to explain how an answer was reached—for example, why one resource was preferable—rather than simply stating the answer is a critical metacognitive task developed in resource-based and problem-based learning.

**Instructional Strategies: Questioning Students and Scaffolding**

§14 In both the resource-based and the problem-based learning environments, the teacher plays the role of facilitator, modeling appropriate behavior for students and guiding students to use learning or instructional strategies such as thinking aloud when generating a list of index or search terms related to a research problem. This process of thinking aloud develops students’ metacognition when

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34. Hmelo-Silver, *supra* note 27, at 236 (discussing problem-based learning). Shawn G. Nevers and David Armond have described the value they have found in creating a Practitioners’ Council, as it connects “real world” researching practitioners with legal research instructors, allowing for better motivation of students. Shawn G. Nevers & David Armond, *The Practitioners’ Council: Connecting Legal Research Instruction and Current Legal Research Practice*, 103 LAW LIBR. J. 575, 593–94, 2011 LAW LIBR. J. 36, ¶¶ 68–70.

35. When researching, whether as students or attorneys, motivation to address a research question may be either internal—curiosity or self-interest—or external—a client question, a boss’s demand for an answer, an ethical obligation, etc. Most important is that the researcher perform adequately regardless of motivation. Students in legal research classes may be motivated by learning of the risks of malpractice for failure to perform adequate legal research.


37. See Kristina L. Niedringhaus, *Teaching Better Research Skills by Teaching Metacognitive Ability*, 18 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 113, 115 (2010) (“A student who is metacognitively aware will be better able to assess what knowledge they have not learned thoroughly. These students will be able to develop a plan for relearning the material using techniques that speak to their preferred methods of learning. These students, by reflecting on what they have learned and filling the gaps, will not only be better students but will be able to contribute more fully to the classroom experience.”).

38. Callister, *supra* note 22, at 210, ¶ 39. See also Kristin B. Gerdy, *Teacher, Coach, Cheerleader, and Judge: Promoting Learning Through Learner-Centered Assessment*, 94 LAW LIBR. J. 59, 64, 2002 LAW LIBR. J. 4, ¶ 21 (noting that to complete the learning cycle, “learners and teachers must assess and evaluate the learning that has occurred”; without this metacognitive step, learners are not as likely to retain their learning).

addressing the research problem. Within instructional literature, scaffolding is used to describe “instructional procedures designed to support learning so that a student can improve beyond his or her current level of understanding with guidance from a peer, teacher, or instructional aid.”40 An instructor may provide procedural scaffolds in the form of guiding questions for students to consider as they approach a problem.41 In a legal research course, such questions may encourage students to reflect on why they chose to consult a primary resource, rather than a secondary resource. Another example of scaffolding in the classroom would be when a class solves a problem as a whole group, perhaps with the instructor thinking aloud through the problem; the class then goes on to solve a new problem with a similar structure. The similarity of the problems and the opportunities for collaboration are scaffolding—opportunities for students to apply their knowledge about how to solve one problem to another problem.

¶15 Instructors may use different strategies of questioning students to scaffold student learning.42 A historical review of questioning in the classroom noted the importance of questioning in teaching. The author explained that the teacher has been called “‘a professional question maker’ and claimed that the asking of questions is ‘one of the basic ways by which the teacher simulates student thinking and learning.’”43

¶16 Many in the law librarian community are familiar with the questioning format known as the Socratic method, in which “the teacher asks students for a position on an issue, then asks appropriate follow-up questions to probe the student’s position.”44 Of course, in the Socratic method, “the teacher has the ‘right’ answer and it is the student’s task to guess/deduce through logical questioning that correct answer.”45 The notion that the teacher has the “right” answer and is querying students to guide them logically to that right answer is inconsistent with the “teacher as facilitator” model of both resource-based and problem-based learning. Under those theories, instructor questioning should push students to the “leading edge” of their thinking.47 However, as Callister has suggested, Socratic questioning may have a place in the legal research classroom, because it may force the learner to examine her own frameworks for how she understands and solves problems. “[T]he Socratic method is an appropriate and perhaps even necessary tool to facilitate the learning experience of law students studying legal research.”48 In other words, the Socratic method may be used to help students engage in metacognition,

41. Id. at 159.
42. Hmelo-Silver, supra note 27, at 246.
44. Id. at 711.
45. SAVERY & DUFFY, supra note 28, at 5.
47. SAVERY & DUFFY, supra note 28, at 5.
thinking about and understanding the research process that will best address the research question at hand.

¶17 The Socratic method may not immediately come to mind as a strategy one would use in the context of resource-based learning, as it usually casts the instructor as expert and challenges the learner’s grasp of the material. However, “the facilitator scaffolds student learning through modeling and coaching, *primarily through the use of questioning strategies.*”49 A “good question,” one that encourages students to learn, “is always on the edge of what an individual knows—on the edge of one’s construct (or schema) of reality. To be able to see that edge—to recognize when one is approaching it—is the beginning of all inquiry and a necessary skill.”50 For first-year students in a legal research course, the edge of their knowledge on the first day of class may be that Google is the best way to find the answer to a question. A good demonstration of scaffolding would be to take students to that edge and teach them to see the resources that exist in addition to Google, showing them that their familiarity with using Google may help them learn how to use other research tools.51

¶18 Teachers can also be trained to improve the questions that they ask students.52 Of course, questions should be aligned with learning goals, and they should ideally enable students to achieve these learning goals.53 Less helpful questions might require only that students recall facts, rather than encouraging them to engage more deeply with the material.54 Gall noted that elementary school teachers who went through a training program had “many highly significant changes in [their] questioning behavior.”55 Some of the positive changes included an increased frequency of questions “designed to have a number of students respond to one student’s original question,” “thought questions,” and “questions which require students to improve or elaborate on their original response.”56 Teachers can also be taught to minimize “poor questioning habits,” such as repeating questions, repeating student answers, answering their own questions, and interrupting students as they answer questions.57

¶19 Teacher questioning may take many forms. One of the most commonly discussed models for questioning is based on Bloom’s taxonomy. Benjamin Bloom published a handbook in 1956 classifying educational goals and objectives in three ways, cognitive, affective, and psychomotor.58 In this article, I focus on the cognitive skills described by Bloom, leaving others to address his categorization of affective

51. As described in the Carnegie Report, scaffolding “provid[es] support for students who have not yet reached the point of mastery.” SULLIVAN ET AL., *supra* note 2, at 61.
53. Id. at 711.
54. “About 60% of teachers’ questions require students to recall facts; about 20% require students to think; and the remaining 20% are procedural.” *Id.* at 713.
55. *Id.* at 717.
56. *Id.*
57. *Id.*
and psychomotor skills. Since Bloom’s handbook was first published, it has been subjected to discussion, study, and refinement.\textsuperscript{59} Based on the most recent and widely accepted refinement, the cognitive skills, from the lowest level of thinking to the highest, are remembering, understanding, applying, analyzing, evaluating, and creating.\textsuperscript{60} The following list shows Bloom’s original cognitive skills and their revised counterparts:\textsuperscript{61}

<table>
<thead>
<tr>
<th>Original Version</th>
<th>Revised Version</th>
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<tbody>
<tr>
<td>Evaluation</td>
<td>Creating</td>
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<tr>
<td>Synthesis</td>
<td>Evaluating</td>
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<tr>
<td>Analysis</td>
<td>Analyzing</td>
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<tr>
<td>Application</td>
<td>Applying</td>
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<tr>
<td>Comprehension</td>
<td>Understanding</td>
</tr>
<tr>
<td>Knowledge</td>
<td>Remembering</td>
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\(\S 20\) Educators find Bloom’s taxonomy (original and revised)\textsuperscript{62} useful for both questioning and goal setting.\textsuperscript{63} Bloom’s taxonomy helps teachers to develop appropriate questions for students—questions that will help deepen student understanding of subject material. In the context of a legal research course, the deepened understanding may reflect the difference between simply knowing that there is a service to help legal researchers identify whether a legal opinion remains “good law,” and understanding the significance of a yellow flag in KeyCite or Shepard’s.

\(\S 21\) Each level of cognitive skill in Bloom’s taxonomy is associated with verbs that may be useful when posing student questions. For example, the lowest-level cognitive skill, remembering (whether the student can recall or remember information), can be associated with the following verbs: define, duplicate, list, memorize, recall, repeat, reproduce, and state.\textsuperscript{64} Higher-order cognition, such as evaluating, may be associated with verbs such as appraise, argue, defend, judge, select, support, value, and evaluate.\textsuperscript{65}

\(\S 22\) Although these verbs may be used in questioning students, for example by asking a student to defend a decision to rely on a case for which a citator shows a yellow warning signal, student answers may not rise to the higher level of cognition sought by the instructor.\textsuperscript{66} It is at this point that a teacher’s ability to ask follow-up

\textsuperscript{59.} See Mary Forehand, \textit{Bloom’s Taxonomy}, in \textsc{Emerging Perspectives on Learning, Teaching, and Technology} (M. Orey ed., 2005), http://www.coe.uga.edu/epltt/bloom.htm. Callister has called for a professional discussion to refine Bloom’s taxonomy for legal research pedagogy. Callister, supra note 22.


\textsuperscript{61.} Adapted from \textit{id}.

\textsuperscript{62.} From this point forward, unless otherwise noted, the discussion of Bloom’s taxonomy relates to the revised taxonomy of cognitive skills.

\textsuperscript{63.} The role of Bloom’s taxonomy in goal setting is discussed \textit{infra} \S 45. Considering questioning before considering goals may be putting the cart before the horse, in terms of curriculum design. The best practice in instructional design is to first identify the educational objectives and then develop “questions which enable the student to reach each objective.” Gall, supra note 43, at 711.

\textsuperscript{64.} Overbaugh & Schultz, supra note 60.

\textsuperscript{65.} \textit{Id}.

\textsuperscript{66.} “A weakness of the cognitive-process approach to question classification is that these processes are inferential constructs. Therefore, they cannot be observed directly.” Gall, supra note 43, at
questions becomes critical. A follow-up question may challenge a student whose response is at the level of recall to engage with the material and answer at a more critical level. Question classification systems such as Bloom’s taxonomy do not specifically take question sequence into account. Though it is tempting to assume that an instructor would begin asking questions at the lowest (recall) level and move through the cognitive stages to the higher-order thinking levels, the levels of Bloom’s taxonomy do not simply present a linear progression for instruction. As in research, an instructor may need to loop back and ask simpler questions to ensure students all move toward the ultimate goal of full engagement and understanding.

Building Schemata to Maximize Working Memory

A difficulty for instructors of legal research arises from the large amount of information that students must be able to recall in order to learn how to research effectively. When planning a course, an instructor must balance the need to give students information about resources with the need to teach students how to conduct research (think, analyze, refine the query, etc.). A researcher needs an adequate toolbox of resources that may be consulted to address a research question, but instruction that focuses too closely on resources may resemble the worst form of bibliographic instruction: data dumping. On the other hand, a researcher familiar with the research process is stymied if she does not know what resources to consult. Legal information is changing, and it is critical that students understand not only the value of the information, but how the resources are used. Bob Berring has described the approach he and Kathleen Vanden Heuvel take to teaching advanced legal research as a “functional approach.” A student who understands the purpose of a citator and how a citator works, for example, will be able to figure out how to use a citator that becomes available in a new format.

710. Questions developed with Bloom’s taxonomy in mind may be designed as higher-order questions, such as one asking students to compare the LexisNexis and Westlaw citators, but a student’s answer may demonstrate only recall (of material from a textbook or a class discussion). Id. In other words, the best laid lesson plans may go awry.

67. Id. at 712.

68. Just as research does not always follow a linear path, so does instruction deviate.


70. Callister notes that researchers’ needs may differ, depending on their status. Students research different questions, with different constraints, than do lawyers, clerks, judges, or librarians. He suggests that legal research instruction should prepare students to research effectively in a variety of contexts. Callister, supra note 1, at 23–24, ¶¶ 37–38.

71. Berring, supra note 2, at 3.

72. Id. “Though we could not foresee the future, we could guess that new formats and new tools were coming.” Id. By emphasizing the function of resources, Berring and Vanden Heuvel hoped to prepare students to continue to use and evaluate new resources and access methods as they became available.

73. Id. The introduction of Bloomberg Law to the legal market is just such an example. As they explore the options available on Bloomberg Law, students will have to use their existing knowledge of...
From a learning theory perspective, the challenge of designing a legal research course that conveys all that information is daunting because of the way that knowledge develops in the human brain. According to one explanation of human cognitive architecture, a person can generally hold no more than seven new pieces of information in working memory.\textsuperscript{74} “Because working memory is most commonly used to process information in the sense of organizing, contrasting, comparing, or working on that information in some manner, humans are probably only able to deal with two or three items of information simultaneously when required to process rather than merely hold information.”\textsuperscript{75}

Not only is the working memory limited in the number of pieces of information it can hold, it is also limited in its duration. Studies suggest that the brain is able to hold information in working memory for only ten to twenty seconds.\textsuperscript{76} To hold information for longer, the information must move from working memory to long-term memory. This transfer of information is “the most critical process of all the information processing to those who are interested in learning.”\textsuperscript{77} The process of making meaning from information helps learners to retain information. “[T]he more ‘deeply’ information is processed, the more likely it is to be remembered.”\textsuperscript{78}

How is information processed deeply? According to schema theory, the long-term memory stores knowledge in the form of a schema that “categorizes elements of information according to the manner in which they will be used.”\textsuperscript{79} In other words, for information to move from working memory to long-term memory, the student needs to develop a schema in which to store the information. The schema may be newly created, or it may relate to an existing schema. This is likely why encouraging students to relate new information to information that they already know is an effective teaching strategy.\textsuperscript{80} The more comfortable a person is using a schema, the more automatic using that schema may be, the more working memory may be available for new information and learning.\textsuperscript{81} “From an instruc-


\textsuperscript{75} Id.

\textsuperscript{76} \textsc{Smith & Rag\lowercase{an}}, \textit{supra} note 23, at 21.

\textsuperscript{77} Id.

\textsuperscript{78} Id. Some might say that deeper processing of information is associated with the higher-order cognitive skills of Bloom’s taxonomy.

\textsuperscript{79} Sweller et al., \textit{supra} note 74, at 255.

\textsuperscript{80} The use of a schema can be distinguished from the strategy of scaffolding. Scaffolding generally refers to the support that a learner may receive from a teacher or a fellow student in learning. A "student’s partner could also provide a coaching and scaffolding role . . . . The teacher did not take an intentional role in providing conceptual or metacognitive scaffolding, but provided support when it was requested." Jan Herrington & Ron Oliver, \textit{An Instructional Design Framework for Authentic Learning Environments}, \textit{Educ. Tech. Res. & Dev.}, Sept. 2000, at 23, 40. “Students benefit from the opportunity to articulate, reflect and scaffold with a partner, and they will seek these opportunities covertly if they are not available by design.” \textit{Id.} at 42.

\textsuperscript{81} “With automation, familiar tasks are performed accurately and fluidly, whereas unfamiliar tasks—that partially require the automated process—can be learned with maximum efficiency because the working memory is available.” Sweller et al., \textit{supra} note 74, at 258.
tional design perspective, it follows that designs should not only encourage the construction of schemas, but also the automation of schemas that steer those aspects of a task that are consistent from problem to problem.  

¶27 Another theory is based on mental models, which are like schemata, but which also “contain information about task demands and task performances that are used for problem solving.” In short, information stored in long-term memory is organized, and good teaching creates opportunities for students to undertake the organizational process of moving information from working memory to long-term memory. To put that theory in the context of legal research pedagogy, as students encounter and interact with new resources, which may include learning not only the name for the resource but also how the source is created, its authority, how to access and use the source, and how to properly cite the source, they are creating schemata or mental models for the new information.

¶28 Creating opportunities for students to build schemata in which related sources are explicitly compared may help students more quickly learn resources and move that knowledge from working to long-term memory. Drill problems, though generally out of favor, may also allow students to practice research skills so that aspects of the use of particular resources become automatic, increasing the availability of working memory to consider a research problem. For example, after developing a schema and a bit of research practice, students may automatically seek the “current-as-of” information for a statute or regulation, while a student just learning about statutes will more likely have to stop and consider the question: “What next?” before remembering to check the currentness of a statute.

¶29 What does all of this mean for the development of a pedagogy for legal research? Keep in mind that pedagogy has two definitions. One refers to “the art or profession of teaching,” while the second refers to “preparatory training or instruction.” A more complete definition of pedagogy as an art or profession describes it as the “study of teaching methods, including the aims of education and

82. Id.
83. SMITH & RAGAN, supra note 23, at 21.
84. “All evidence, from the laboratory and from extensive case studies of professionals, indicates that real competence only comes with extensive practice. . . . The instructional task is not to ‘kill’ motivation by demanding drill, but to find tasks that provide practice while at the same time sustaining interest.” John R. Anderson et al., Applications and Misapplications of Cognitive Psychology to Mathematics Education, TEX. EDUC. REV., Summer 2000, at 21–22.
85. Consideration of learning theory in the law librarian literature is typically discussed in terms of student learning styles or pedagogy, though Kristin Gerdy properly uses the term andragogy to refer specifically to adult learners. Gerdy, supra note 7, at 73. Law librarians are concerned about whether students are able to successfully integrate research skills. In her historical review of the development of the theory of andragogy, Sharan Merriam explains:

The five assumptions underlying andragogy describe the adult learner as someone who (1) has an independent self-concept and who can direct his or her own learning, (2) has accumulated a reservoir of life experiences that is a rich resource for learning, (3) has learning needs closely related to changing social roles, (4) is problem-centered and interested in immediate application of knowledge, and (5) is motivated to learn by internal rather than external factors. Sharan Merriam, Andragogy and Self-Directed Learning: Pillars of Adult Learning Theory, in THE NEW UPDATE ON ADULT LEARNING THEORY 5 (2001).
86. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1299 (5th ed. 2011).
the ways in which such goals may be achieved. The field relies heavily on educational psychology, or theories about the way in which learning takes place." The development of a pedagogy of legal research, then, refers to more than simply the teaching of legal research. It includes the study of teaching methods as well as the instructional goals that are set for law students, and it encourages the consideration of learning theory from other fields, such as educational psychology, to ensure that students have the best learning experiences possible. Paul Callister has called for open dialogue and scholarly engagement within the law librarian professional community regarding the "underlying pedagogy at the heart of legal research instruction."88

**Benefits of Resource-Based Learning**

§30 Law students will benefit from the constructivist, resource-based learning approach, particularly if elements of problem-based learning are included. Unfortunately, the limited time available for basic or first-year legal research instruction does not provide enough opportunity for students to be exposed to the number and variety of problems that would be necessary to meet first-year legal research requirements.89 However, a resource-based approach may incorporate the use of limited real or realistic problems to increase student interest and the sense that research skills are relevant to their future needs. Providing students with a mix of tasks that allows for the practice necessary to automate research skills and also encourages the development of schemata or mental models regarding research is critical. Those tasks should include a variety of instructional formats and types—ranging from drill exercises90 to computer-assisted legal instruction to in-class group assignments to individual problems. The mix of tasks should optimally promote "not rote learning but learning with understanding."91 Students should have adequate opportunities to engage with resources, such that the use of those resources becomes automatic.


88. Callister, supra note 22, ¶ 4. General educational pedagogical theories, such as constructivism or behaviorism, may underlie a legal research instructor’s decision to emphasize a bibliographic or process-based approach to legal research (though she may not realize it if she has not studied educational philosophy). A constructivist approach would lend itself to process-based teaching.


90. So-called treasure hunt research exercises, in which the student researcher is given a problem with a clear and correct answer, enabling the researcher to self-check the accuracy of the research process, may also be described as “drill and kill.” For example, student researchers could be asked to find particular cases from particular courts and decided on particular dates, to familiarize them with the digest system. Proponents of the treasure hunt point to students’ ability to gain confidence in their skills as well as the automation of research skills. The treasure hunt exercise is complemented by the process-type problem, which often does not have a clear-cut answer. Proponents of the process problem believe that the problems present students with realistic research experiences, particularly learning to address the indeterminacy of legal research.

91. Anderson et al., supra note 84, at 31.
§31 A full discussion of legal pedagogy should include a major determinant in the success of any pedagogy: the motivation of the learner. Resource-based learning techniques are particularly appropriate for adult learners, who benefit from the motivational aspects of the pedagogy. Student motivation is increased “when they believe that the outcome of learning is under their control.” Law students should “learn most effectively when new information is connected to and built upon a student’s prior knowledge and real-life experiences,” and students “tend to do well when allowed to have some control over the learning environment, and respond best to collaborative learning environments.” For a pedagogy of legal research to be successful, it must at a high level activate student interest in learning. Interest may be generated a number of ways, ranging from explicit application of problems and learning to real life to involving students in the creation of their own educational goals. “Students encouraged to ask questions [when introduced to a new topic of study] will learn more than a group of students deprived of this opportunity.” Most important, “there is almost universal consensus that only the active learner is a successful learner.”

§32 Resource-based learning reflects elements of both process and bibliographic methods of teaching legal research. For example, students may be given problem-based projects (which require them to read through facts and determine which resources to consult to answer the question, akin to a process-oriented approach), but instructors are also encouraged to “make the resources part of the culture of [their] teaching and learning,” advice which would be expected to accompany a bibliographic approach to teaching.

§33 Resource-based learning is a pedagogy particularly suited to legal research courses. Although legal research courses may be taught with an emphasis on bibliographic instruction or with an emphasis on the research process, in both cases students need to develop and build skills using resources to become successful researchers. The need to be conversant with basic resources exists for all researchers, whether they are planning on print or electronic research. Additionally, legal

92. Hmelo-Silver, supra note 27, at 241.
93. Gershon Tenenbaum et al., Constructivist Pedagogy in Conventional On-Campus and Distance Learning Practice: An Exploratory Investigation, 11 Learning & Instruction 87, 90 (2001).
94. Goal setting, like asking students questions at the beginning of a learning experience, can raise student interest. Unfortunately, instructional designers, “especially those who hold deterministic beliefs and set goals about learning,” have a difficult time allowing students to generate goals. Id. at 108. Perhaps the discomfort experienced by instructional designers arises from distrust that students will generate adequate goals and fear that students will not be able to reevaluate and amend goals as they may be found wanting. This is contrary to the resource-based learning goal of developing students’ metacognitive skills.
95. Gall, supra note 43, at 716.
96. Anderson et al., supra note 84, at 32. Though it is tempting for instructors to take the approach that “you can lead a horse to water, but you can’t make it drink,” such an attitude is self-defeating and overlooks an instructor’s responsibility to create an educational environment that motivates students.
97. Maharg & Paliwala, supra note 10, at 100.
98. Id. at 102.
research classes also provide instructors with an opportunity to teach students how to approach both new, unknown problems and new, unknown resources.99

Course Design Decisions

¶34 When creating and teaching a class, a teacher’s path is filled with choices. Although some of those choices may be dictated—consciously or not—by the pedagogical theory espoused by the instructor, other choices may stem from instructional or institutional mandates. Instructional or pedagogical choices may be as basic as whether to begin with electronic or paper resources, or they may be more complicated, such as how to implement an electronic web course. Underlying teaching decisions are choices about content—what must be included, and what the teacher believes students should “know” on completing the course.

¶35 For many courses, including research courses, there are textbooks readily available. A “good” textbook may be chosen based on popularity, the institutional affiliation of its author, or the instructional biases underlying the textbook.100 For example, a professor may be tempted to use The Process of Legal Research because the title suggests a process emphasis, rather than a bibliographic instruction emphasis. Selecting a textbook without first considering course design, however, may lead the instructor to invest in a book that doesn’t support his instructional choices.

¶36 The following sections describe some of these choices, first addressing theoretical concerns regarding the development of instructional goals, the implementation of instructional strategies that provide students guidance and support in their work, and course evaluation, and then offering suggestions regarding praxis. Suggestions cover syllabus design, assignments, and student assessment. The analysis that follows presumes a loosely constructivist pedagogy.

Setting Goals

¶37 The first step in planning a course, whether it is doctrinal or focuses on a skill such as research or drafting, is to identify learning goals. This critical step is not as obvious as it sounds. To begin with, what are learning goals? Learning goals are the goals that a student should have achieved on successful completion of the course. Sounds like nonsense, right? Rephrasing that definition makes the meaning a bit more apparent, and much more helpful: A student should be able to perform

99. Berring’s discussion of the “functional approach to legal information,” in which researchers understand the nature of the information itself, not the specific format in which it is delivered, is germane to the changing nature of the delivery of information today. Berring, supra note 2, at 3. Student researchers—and law librarians—are constantly adjusting to changing formats and changing interfaces. The WestlawNext platform and concomitant debate are one example of the ongoing nature of change. See Ronald E. Wheeler, Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research, 103 LAW LIBR. J. 359, 2011 LAW LIBR. J. 23.

the course learning goals, meeting certain performance standards, on successful completion of a course. An instructor who is hopeful that, by the end of the class, students will be able to recognize that a federal regulation is the proper source to consult to answer a research question and to locate the regulation on point for the research problem, may have as a learning goal that students will understand the authority of federal regulations and be able to navigate the Code of Federal Regulations, including the steps necessary for updating. Setting learning goals for students before commencing the course will more likely ensure that the instruction will meet the goals. Ideally, an instructor’s overall course goals are met by the subsidiary goals associated with units and individual lessons.

§38 Recognizing the importance of course goals is relatively easy, but how does one generate those course goals? It depends. The guiding question is what the student should be able to do (or know) at the end of the course. Does the course prepare the student for a subsequent course? Are there several sections of the same course taught, such that the students across all sections should have a core common experience or knowledge? Should the students who complete the course be able to meet skills/knowledge levels of peers at other institutions? A first-year criminal law course, for example, raises all of these questions—the course may prepare students, at a basic level, for a subsequent criminal procedure course. There may be multiple sections of the course in one institution, and all the students should likely be able to define mens rea and actus reus, regardless of the theoretical biases of the instructors. At least one meeting of all the course instructors will help ensure that they all address the basic issues. Additionally, the students are likely paying their tuition with the expectation that they will learn what they need to know to pass the bar exam and successfully practice law; this expectation stems from a reasonable belief that all accredited law schools will teach certain core materials.\textsuperscript{101} These same questions arise in the context of research courses.

§39 One of the easiest ways to identify learning goals is to consider educational standards. Although states have developed educational standards and goals for students in elementary and secondary education,\textsuperscript{102} such standards and goals have not been developed for law students.\textsuperscript{103} In the law school context, educational standards

\textsuperscript{101.} Student expectations are complex. A professor may reasonably guess that students will expect to learn materials necessary for passing the bar exam and successfully practicing law. But other factors may affect students’ expectations as well. A student’s reasons and motivations for enrolling in a course—at as basic a level as whether the course was required or an elective—may affect the student’s enthusiasm and goals. For example, a student taking a one-credit weekend research course because that one credit will enable the student to graduate that semester may simply want to “get through it,” while a student electing to take an advanced research course to prepare for a summer job or externship may bring different expectations.

\textsuperscript{102.} State standards exist for many subjects and for every grade. In New York State, for example, standards are meant to help teachers identify what their students need to know and be able to do in order to succeed on mandatory state testing. \textit{New York State Learning Standards and Core Curriculum},\texttt{NYSED.GOV} (last updated Jan. 23, 2012), http://www.emsc.nysed.gov/ciai/cores.html.

\textsuperscript{103.} One could argue that the minimum standards for law students have been set by the multistate bar examination, as that test is the most common shared experience of law students across the country. That exam, however, does not address research skills.
are in their infancy.\textsuperscript{104} Absent external standards that have been ratified by an institution such as the American Bar Association or the Association of American Law Schools, an instructor in a research course may begin by identifying any community standards that may exist.\textsuperscript{105} Thankfully, tools exist to assist in the development of course goals for research courses.

\textsuperscript{¶} Professional associations, such as AALL, may provide guidance. Following the release of the MacCrate Report, the AALL Research Instruction Caucus produced the \textit{Core Legal Research Competencies}, setting forth the information that students should know about researching by the time they graduate from law school.\textsuperscript{106} Another source to consider is professional literature on the subject. For example, Nancy Johnson memorialized her view of what first-year law students should learn, based on her twenty-five years of teaching.\textsuperscript{107} On the premise that a syllabus will reflect learning goals, one might also consult syllabi for research courses. These may be accessed by searching the World Wide Web,\textsuperscript{108} by conferring with colleagues in person, or by soliciting syllabi on a listserv.

\textsuperscript{¶} Generating goals for a first-year legal research course does not have to be complicated.\textsuperscript{109} Goals are written with student performance in mind. When generating a set of goals, start with an idea of what students should know, or what they should be able to do, and then consider Bloom’s taxonomy and the verbs associated with the different cognitive thinking levels. For example, for a lesson about using annotated statutes, a lower-level goal might be that students will be able to “describe the types of annotations one may find in an annotated statute.” A higher-level goal might be that students will be able to “evaluate whether an annotated statute or an official code would be a more appropriate resource to consult, given a variety of circumstances.”

\textsuperscript{¶} When developing a class, an instructor may find it easier to develop micro-level goals (e.g., at the lesson level, as in the example above) and then build them up to macro-level goals, such as “students will be able to consult a state statute, using search/index terms to identify the relevant section(s), and evaluate the statute to determine its applicability to a research question and the currentness of the statute.” Others may find it easier to begin with broad learning goals and break the broad goals down into component goals. However developed, learning goals

\begin{footnotes}
\textsuperscript{104} The American Bar Association sets forth standards and Rules of Procedure for Approval of Law Schools, which are relevant for law school accreditation, but those standards are not very helpful for designing learning goals. See \textit{Am. Bar Ass’n}, supra note 17.

\textsuperscript{105} This discussion presupposes an instructor who is either new to teaching research or who is teaching a new course. A veteran teacher with significant experience may benefit from considering instructional goals, but may not need to do much work to identify community standards.

\textsuperscript{106} \textit{Core Legal Research Competencies}, supra note 69. Because the competencies express ideal student knowledge on graduation, they may have limited value for determining what should be included in a first-year legal research course. Presumably some of the knowledge or skills captured by the competencies would be learned in later law school courses or activities.

\textsuperscript{107} Johnson, supra note 89.


\textsuperscript{109} Goals for an advanced legal research course would be different, because students in an advanced course are presumably more experienced than first-year law students.
\end{footnotes}
should be made explicit to students, so they know what to expect to learn. It may be that one class session has several goals—or even several separate lessons. The goals (and lessons) presented in one day of instruction may address several topics. Ideally, no single lesson should be broken up into two class sessions, but a larger goal may have subsidiary lessons that span two class sessions. In such a case, spending a minute or two to review the prior lesson is a good use of class time.

§43 Once the learning goals are set, the instructor may engage in backward planning, identifying the intermediate steps necessary to reach the educational goal. For example, if students should learn how to locate cases using a digest, the instructor needs to plan when in the course to introduce the subject of digests. To understand or use a digest, a student needs to understand the elements of a case and the working of the reporter systems. Consequently, the introduction of digests should happen after the introduction of cases.

§44 The logical sequencing of learning goals for a course will ideally be reflected in a course syllabus. Though goals may be inferred from the syllabus, a better practice is to state them explicitly. A syllabus may contain a section called “Course Goals,” in which the instructor describes what students will learn in the class. The syllabus may then be broken down into units (e.g., cases, statutes, secondary sources), and each unit and individual lesson should have its own objectives. Consistently generating learning goals and expectations regarding what students will take away from a unit or lesson ensures that students know how to meet the course goals.

110. When learning goals are made explicit to learners, learners are better able to evaluate their progress toward reaching the goals and may be able to adjust accordingly.

111. See, e.g., Bay Area School Reform Collaborative, Inquiry in Curriculum Design 3 (Oct. 5, 1999 rev.), http://www.sfsu.edu/~teachers/download/Inquiryframework.pdf. This is one example of the abundant pedagogical materials provided for K–12 educators that are freely available on the web. Though some adaptation of the materials may be necessary for adults, many of the core instructional strategies or planning ideas are sound.

112. “Unfortunately, most students do not share the professors’ passions for the West key number system. Some students never really understand digests, which is unfortunate because digests provide an effective and efficient method for finding cases.” Johnson, supra note 89, at 85. Though students may not understand the digest system as it appears in print, students using the online interface for the LexisNexis and Westlaw case digest systems may stumble across the value of these systems by clicking on the hyperlinks. How the new WestlawNext interface will affect student searchers’ use of the West digest system remains to be studied.

113. Students come to research class familiar with the idea of cases, at least, even if they have never seen a written judicial opinion prior to their first day of law school. They are much less likely to have interacted with a digest system. Keeping in mind that it is easier for students to learn when building on existing knowledge, beginning with cases and following with digests is appropriate.

114. In his interesting discussion of Bloom’s taxonomy, Callister includes a table relating learning types (Bloom’s taxonomy levels) to research competencies and activities. He explains that “it is the beginning of a syllabus.” Callister, supra note 22, at 218, ¶ 43. Though his table is quite useful, particularly with regard to assessment ideas, others might find it more helpful to develop a syllabus beginning with learning goals (closely related to his student competencies), rather than with learning types. His chart suggests that learning is a linear process, in which students begin with lower-level thinking and move ultimately to higher-level thinking tasks. In fact, learning often involves revisiting prior knowledge to build new knowledge and skills.

115. On the other hand, too much emphasis on course goals can be detrimental. Publication of pre-specified learning outcomes in course materials may inadvertently stifle creativity and originality in both staff and students. Used rigidly, there is a danger that learning outcomes
Bloom’s taxonomy can be useful when generating learning goals because the cognitive skills, from the lowest level of thinking to the highest, are associated with verbs describing student learning behaviors. Associating learning goals with particular student behaviors will enable both the student and the instructor to evaluate whether the learning goal has been met. For example, the lowest level cognitive skill of remembering can be associated with the verb “recall,” so that a student who has participated in a lesson about case law research ought to be able to recall the component parts of a judicial opinion by the end of the lesson. A secondary benefit of clearly stated learning goals is that they encourage student engagement with the material. Learning goals may both make clear to students the lacunae in their knowledge and provide students with the ability to assess their own progress toward filling in the gaps.

Instructional Strategies

Educational training materials suggest that, after identifying learning goals, an instructor’s next step in designing a course is the selection of an instructional strategy or strategies (also called instructional methods). Instructional strategies are described in a variety of ways. A brief and simple definition is “decisions about teaching sequences and tactics.” Johnson and Aragon, who developed an online master’s degree program in human resources, identified the following strategies as necessary in creating an effective learning environment: (1) address individual differences, (2) motivate the student, (3) avoid information overload, (4) create a real-life context, (5) encourage social interaction, (6) provide hands-on activities, and (7) encourage student reflection. For purposes of this discussion, instructional strategies are the approaches and decisions made by an instructor to ensure that students are able to engage with, comprehend, and learn material.

Strategies used in the classroom may vary depending on the goal of the lesson. Although constructivist theory places a premium on the preexisting knowledge of the learner and places the instructor in the position of facilitator, the instructor may choose to use direct instruction. Another strategy might be to ask students to “think, pair, share.” In this type of exercise, students are given a research

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118. Ryan et al., *supra* note 16, at 47.


120. Searching Google for instructional strategies provides over a million results that may inspire instructors as they plan their classes. Although many online course design materials are hosted by school districts, some universities and colleges of education, not to mention other nonprofit sites, make course design materials, including goal-setting and instructional strategies, freely available. See generally Glossary of Instructional Strategies, http://glossary.plasmalink.com/glossary.html (last updated Aug. 28, 2010) (containing 988 instructional strategies); Saskatoon Public Schools, Instructional Strategies Online, http://olc.spsd.sk.ca/de/pd/instr/index.html (last visited Jan. 3, 2011) (links from this page describe direct instruction, interactive instruction, indirect instruction, independent study, experiential learning, and instructional skills).
problem and a set amount of time to think about the problem independently. Students then pair up to discuss the problem, and finally a couple of student pairs are invited to share their answers with the class. In a research context, the answer might be a research process, such as, “We started with the *United States Code Annotated*, but we realized that we needed a regulation, so we turned to the *Code of Federal Regulations*, which had our answer. Last, we updated the regulation on the Internet.”

§48 Encouraging students to put their understanding of a subject into action using a graphic organizer is another valuable instructional strategy. Graphic organizers are “visual displays teachers use to organize information in a manner that makes the information easier to understand and learn.” An example of a graphic organizer is a T chart (a chart with two columns and a heading or question on top), which may be used for comparisons. For example, students often wonder whether LexisNexis or Westlaw is “better.” Asking students to test the services, evaluate their citator products (a higher-order skill), and chart the results in a T chart allows them to more deeply process information. Assigning students to create or use a graphic organizer encourages them to develop metacognitive skills—“help[ing] students work through the ideas and connections.”

§49 Strategies often involve the creation of a product. The learning product may be intangible, such as the think-pair-share response, or it may be tangible, such as a chart comparing Shepard’s to KeyCite. These learning products may be used by both the instructor and the student to evaluate—or assess—learning. The learning product, such as an answer to a question or follow-up question, may be informally assessed. An answer to a written exam may be formally assessed.

§50 One of the more difficult tasks in teaching is evaluating student understanding. A major source of this difficulty is that the process of evaluation is never complete. While teaching, whether acting as a facilitator or providing direct instruction, an instructor must continually assess student comprehension and interaction with the material. When the students are quiet, does that reflect deep contemplation of a higher-order question, or does it mean they are intently reading the latest celebrity antics on Facebook? How does an instructor find the right balance when part of the class understands the lesson and would be able to perform

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124. The Carnegie Report uses different language; rather than providing interim assessment, the instructor coaches students, “providing guidance and feedback.” *Sullivan et al., supra* note 2, at 61. Whichever language is used, the pedagogical purpose is that students receive feedback on their performance as they are learning, so they can engage in the metacognitive analysis necessary to improve their performance.
the learning goal and the rest of the class does not and would not? If an instructor is not evaluating student success, both informally and formally, she is not even going to begin to ask these critical questions.

**Assignments, Rubrics, and Assessment**

§51 Assignments, rubrics, and assessment are integrally related. They may be imagined as three sides of a triangle: each side is necessary for the triangle to exist, and though the sides may look a lot alike, they are distinguishable.

**Assignments**

§52 For purposes of this discussion, an assignment is a task assigned by an instructor, the function of which is to reinforce the learning objective for a particular lesson or unit. A few example assignments include answering a research question, writing a description of a research process, or participating in an online course discussion. The assignment should reflect the instructor’s learning goals; an assignment that relates to a subject or issue unrelated to the learning goals is likely a waste of time.125 Assignments are typically listed in a syllabus, and the portion of the course grade that is attributable to a particular assignment is also made clear in the syllabus.

**Rubrics**

§53 Instructional rubrics are rarely seen in law school;126 they are, however, very helpful in making clear to students an instructor’s expectations about performance. An instructional rubric is a short document—ideally one or two pages—that “giv[es] students informative feedback about their works in progress and . . . give[s] detailed evaluations of their final products.”127 Generally, a rubric is organized as a table, with assignment quality along one axis and particular criteria for the assignment along the other. The rubric should be generated by the instructor and distributed to the students at or about the same time as the assignment.

§54 Rubrics have several instructional benefits. The first is clarity. Students and instructor alike should see the alignment of the learning goals with the criteria described in the rubric. Students undertake assignments with a clearer understanding of their instructor’s expectations, and the rubric encourages the instructor to consider whether the questions asked by the assignment are, in fact, the questions the instructor intends the students to answer. Students appreciate understanding in advance the issues of concern for a particular assignment.128 If, for example, an

125. In addition to wasting students’ time completing the task and the instructor’s time grading or reviewing students’ work, an assignment unrelated to course goals runs the risk of making students think of all the assignments in a course as a waste of time—even those that are integral to the completion of the course goals.
126. Students in doctrinal courses are more likely to be given model answers or old exams for practice, rather than rubrics.
128. Gerdy notes that “legal research teachers must not only create learning outcomes but also *publicize* them by providing their students with a list of important concepts and skills that they will
instructor is not concerned with citation style for in-class assignments, but cares deeply about it on a take-home assignment (and grades accordingly), the rubrics for in-class assignments would make that clear to students, who could then focus their learning energy appropriately.

§55 Rubrics have also been shown to support student learning. Within the context of a constructivist pedagogy, a rubric encourages students to develop metacognitive skills. As noted earlier, students may have difficulty realizing that they have found “the answer,” or sometimes even an answer, to a particular research question. When using a rubric, students can stop and evaluate their progress toward completing an assignment, encouraging them to monitor their own thinking about the assignments and their progress toward achieving learning goals. In addition to developing metacognition, rubrics have been shown to improve both the development of content learning and critical thinking, and the development of skills.

Assessment

§56 The third leg of the triangle is assessment. As discussed earlier, an instructor may assess student progress or understanding formally, with assignments and examinations, or informally, through questioning. Like assignments and rubrics, assessment should reflect learning goals, to ensure that instructional time and student out-of-class work time are both being used to promote student learning. Assessments that are not aligned with goals are neither fair nor equitable.

be responsible for and that will be measured in an assessment. Presenting this information ‘up front’ is key.” Gerdy, supra note 38, at 73–74, ¶ 55.

129. Students who have not used rubrics in their prior education will benefit from a brief lesson in how to read and use a rubric. I have used rubrics in an upper-division legal research course, without explicitly describing to students how they could use the rubrics to their advantage. During an office visit regarding an assignment, a student indicated that it would have affected his performance if he had actually read the rubric in advance of completing the assignment. In a law school setting, students may also benefit from participating in the creation of a rubric.

130. See Andrade, supra note 127, at 15.


132. Andrade, supra note 127, at 16. Although the studies involved middle school students, there is no reason to believe that rubrics would not provide similar value to law students.

133. Gerdy describes assessment as answering two questions: “What have my students learned and how well have they learned it? How successful have I been at accomplishing the goals and objectives I have set (for a single class period, a particular skills set, or an entire course)?” Gerdy, supra note 38, at 65, ¶ 25. I disagree with Gerdy’s characterization of both questions as relating to assessment. In my view, the question of student learning is assessment. The second question, about the instructor’s success at accomplishing goals and objectives, is course evaluation. Gerdy’s discussion of learner-centered assessment, however, is enlightening. Id. at 68–78, ¶¶ 38–68.

Assessment of learning goals should not be confused with assessment of teaching goals (i.e., course evaluation). If one’s teaching is to be observed and evaluated, whether for an annual evaluation, promotion, or tenure, it is advisable to review the evaluation form prior to the scheduled observation. An example of a form used in the teaching development program at the University of Missouri–Kansas City School of Law (UMKC) is instructive. UMKC Law Teaching Observation Evaluation Form, http://law2.umkc.edu/faculty/profiles/glesnerfines/Classroom%20Observation%20Form.pdf (last visited Mar. 22, 2012).

134. Lisewski & Settle, supra note 21, at 109; Pellegrino, supra note 131, at 9.
Additional factors to consider when planning assessment in a legal research course include whether the measurement is effective (does it measure what it purports to measure), whether the assessment may be used to improve both teaching and learning, and whether the assessment provides a snapshot or a continuing picture of student development over time.\textsuperscript{135}

¶57 Assessment may be used in a legal research class to both excite student interest and evaluate students’ prior knowledge and understanding. A preliminary assessment, given to students before class begins\textsuperscript{136} or on the first day of class, offers several benefits. The assessment results can help an instructor plan the amount of time necessary to adequately address required topics. It may also help an instructor identify students who would be able to explain research process concepts or research resources to other students.\textsuperscript{137} Students, upon realizing the depth of their ignorance, may be more motivated to actively participate in a course.\textsuperscript{138} A preliminary assessment may complement a course’s final assessment. By comparing the two assessments for a particular student, it is possible to evaluate the degree of improvement—the student’s success at achieving the course’s learning goals.\textsuperscript{139}

¶58 Assessment can be used to facilitate individualized instruction. Ideally, students should receive feedback on all the assessments they complete. Feedback can be verbal correction of a misunderstanding demonstrated by a student’s answer to an in-class question.\textsuperscript{140} Alternatively, it can take the form of detailed comments on a research exercise, perhaps combined with a model answer or a rubric. Instructional technologies can be especially useful in this respect.\textsuperscript{141} Course management systems enable instructors to provide immediate feedback on assessments by including specific explanations about answers and why they are (or are not) correct. An example of this is the exercises available online at the Center for Computer-Assisted Legal Instruction (CALI).\textsuperscript{142} Additionally, instructors may direct students to particular resources that would improve their understanding in an area in which they failed to achieve learning goals.

\begin{thebibliography}{99}

\bibitem{135} Pellegrino, supra note 131, at 8.

\bibitem{136} By giving an assessment as an assignment prior to the first class session, the instructor can better target the initial class session to the students. The assessment may also include some questions that will help the instructor remember students’ names.

\bibitem{137} Encouraging students to explain difficult concepts to each other is an effective instructional strategy. Sometimes students are more attentive to and better able to understand an explanation delivered by a peer, rather than by an instructor. Conducting a pre-assessment may help target students who bring valuable (and accurate) prior knowledge to a classroom. Alternatively, a pre-assessment may help an instructor create learning groups. Students may be grouped and assigned different tasks, depending on the prior knowledge they bring to the course.

\bibitem{138} The preliminary assessment may both gain students’ attention and help them to see the relevance of the instructional goals. The teaching in response may build confidence and satisfaction. \textit{See} Niedringhaus, supra note 37, at 115–16.

\bibitem{139} According to Ann Hemmens’s survey, only 26.8\% of advanced legal research courses use a research exam to evaluate students. Hemmens, supra note 100, at 234, ¶ 58. Hemmens’s survey is from 2000 though; assessment strategies may have changed since then.

\bibitem{140} Green, supra note 6.

\bibitem{141} Pellegrino, supra note 131, at 11–12.

\bibitem{142} CALI makes interactive, online lessons on a variety of topics available to law students. A number of research skills lessons are available, some of which are targeted to specific subjects or jurisdictions. \textit{See} CALI, http://www.cali.org (last visited Jan. 4, 2012).

\end{thebibliography}
Final examinations are a typical form of law school assessment. Doctrinal law school courses, particularly those in the first year, assess students primarily by a comprehensive final exam at the end of the semester. Some first-year course professors may offer students in first-year courses an opportunity to take a midterm exam, thus giving them exposure to the high-stakes testing that is typical in law school.

Other options may exist for assessing students in a legal research course. Nancy Armstrong advocates that instructors of legal research courses consider implementing an oral final exam. She explains that the goal of such an exam is to have students talk about research techniques or actually demonstrate their research strategies and skills. She advises instructors who wish to try this method that they should estimate the amount of time they think is needed to complete the exam and then double it. When proctoring her exams, she usually schedules students for one hour, with forty-five minutes spent working in the library and fifteen minutes debriefing the exam together in the office. Such an exam may please learners who have a variety of learning styles, but it may be more time-consuming to proctor than a more typical take-home research problem set or pathfinder.

A pedagogical question not yet discussed, but raised by assessment, is what constitutes a “right” answer. Assume an instructor designed a question that would require a student to identify a section in the Code of Federal Regulations, read the section, and provide an answer to a legal question. If the instructor’s pedagogical goal is simply that students can identify appropriate resources and navigate those resources when faced with a research problem, the student might earn complete credit for identifying a proper resource and locating the relevant section(s) in the source, regardless of the accuracy of the answer to the legal question. Another instructor, having designed the same question, might only give partial credit for the same student answer, on the basis that the student failed to correctly read and analyze the source when answering the legal question. The better practice would be to consider the accuracy of the analysis, at least in part because the use of legal resources to answer questions requires analysis and evaluation at many stages in the research process (developing the initial research query, reviewing results for responsiveness to the problem, revising the query). Proponents of the opposing view might argue that the legal research instructor’s job is to teach research, rather than writing and analysis. Regardless of the pedagogical perspective of the instructor, the assessment is not complete if it does not include adequate feedback.

143. According to Hemmens, advanced legal research courses are remarkably standardized in their methods of assessment. Though there are a variety of assessment options used in advanced legal research courses, 88.7% of the courses use library exercises or research assignments, while 69% of the courses require students to create pathfinders. Hemmens, supra note 100, at 234 tbl.15.


145. Id. at 119–20.

146. In the interest of transparency, students should understand—from instructions or a rubric—whether or not the accuracy of analysis will be a factor in the grading of the question.

Legal research courses are not required to follow the doctrinal course model of formal assessment, in which students are graded based solely on a summative examination at the end of a course; they have a panoply of assessment options available. A student could be assessed based on his performance in relation to instructor questioning—the student’s answers could be the basis of a higher grade at the end of the semester. The instructor might also give additional assignments that are the basis of the student’s final grade. Additional assignments could include treasure hunt questions, process-based research questions, completion of CALI lessons, or required “lab time” in which students are taught computer-assisted legal research skills. The doctrinal course model provides students with little or no feedback about their progress toward achieving learning goals; a well-designed legal research course should provide students with ongoing feedback, encouraging the development of schemata and metacognitive skills.

Conclusion

The pedagogy of legal research is an important issue for law librarians to consider, in no small part because law librarians are experts in legal research, including the resources and strategies that may best be used to answer a research question. Even without formal pedagogical training, law librarians can improve their teaching by reading professional literature and engaging in the burgeoning conversation about teaching. By considering both the theory of teaching strategies, such as the use of scaffolding, schema theory, and the role of questioning, as well as the practical application of teaching strategies, such as the think-pair-share technique and related questioning strategies, law librarians can improve their effectiveness in the legal research classroom. Further, by articulating course design decisions through learning goals and the use of rubrics and assessments, legal research instructors can provide students with helpful tools for developing metacognitive skills, enabling students to continue to improve their legal research skills later in law school.

148. The options implemented may be limited by the type of class offered; an advanced legal research course with an enrollment of fourteen students lends itself to different assessment tools than a first-year basic legal research course with an enrollment of sixty (or more) students.
WikiLeaks: A Guide for American Law Librarians*

James P. Kelly, Jr.**

In posting confidential and classified information, WikiLeaks has become one of the world’s most controversial web sites. This paper examines the federal law concerning WikiLeaks and the use of WikiLeaks as an information source. It raises questions librarians must ask themselves as technology advances and leaks continue.

¶1 WikiLeaks has become one of the world’s most controversial web sites. In posting confidential and classified information from governments, businesses, and organizations around the world, it has become a target for those in power. Others have vigorously defended the web site, saying it promotes and defends the ideals of a free press and free speech that are vital to democracy. For librarians generally, WikiLeaks represents a new source for information that might otherwise be unavailable. However, how this information was acquired can present significant legal and ethical problems for its users.

¶2 This article examines WikiLeaks from a legal and a library perspective. While the legal status or problems of WikiLeaks in other countries is occasionally

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mentioned, it is devoted solely to the legal status of WikiLeaks in the United States and concerns only the legal status of the web site, Julian Assange, and the organization with regards to the information posted there. It does not address Assange’s other legal troubles or the status of WikiLeaks in other nations, except incidentally. The last part of the article discusses some of the issues WikiLeaks presents for librarians, particularly those of using WikiLeaks as a source for useful and otherwise unavailable information. No solutions are offered—the issues are raised for the purposes of awareness and debate.

Background

¶3 WikiLeaks describes itself as “a not-for-profit media organisation.”¹ Formed in 2007, the organization publishes “original source material” and news stories on its web site.² WikiLeaks claims it is based on “the defence of freedom of speech and media publishing, the improvement of our common historical record and the support of the rights of all people to create new history.”³ It sees itself as a news organization and an outlet for whistle-blowers. Although it presents its news stories in a Wikipedia-like style, it has no relation to Wikipedia. Despite its name, WikiLeaks is not a wiki, so general users cannot edit documents.⁴

¶4 Since its inception, the web site has stirred controversy for its publication of documents “of political, diplomatic, or ethical significance.”⁵ This has included, in many cases, publishing documents that have been classified by governments. The web site accepts anonymous sources of information and vets this information for accuracy and authenticity.⁶ The web site contains “a high security anonymous drop box fortified by cutting-edge cryptographic information technologies,”⁷ and places a high value on anonymity and protection of its sources:

We use traditional investigative journalism techniques as well as more modern technology-based methods. Typically we will do a forensic analysis of the document, determine the cost of forgery, means, motive, opportunity, the claims of the apparent authoring organisation, and answer a set of other detailed questions about the document. We may also seek external verification of the document.⁸

¶5 One of the most important features of WikiLeaks, from a legal perspective, is that it claims it does not solicit information. It sees itself as a site for enabling

². Id.
³. Id.
⁴. Id.
⁷. About WikiLeAKs, supra note 1.
⁸. Id.
whistle-blowing. Rather than go directly to the press, whistle-blowers can go to WikiLeaks, and WikiLeaks can then leak to the press and public at large.9

§6 The web site’s “home,” the Internet host Bahnhof, is currently located in a bomb shelter in the mountains of Sweden.10 Because of its troubles and international scope, the web site has multiple URLs and has moved over time, but is currently available at both http://www.wikileaks.org and http://www.wikileaks.ch. Most notably, WikiLeaks at one point moved its site to Amazon.com’s servers following an attack by a hacker on its old servers. Amazon then ousted WikiLeaks, claiming WikiLeaks did not follow Amazon’s terms of service.11

§7 When Amazon ousted WikiLeaks, a group of hackers calling themselves “Anonymous” targeted the web sites of Amazon and other companies that had stopped working with WikiLeaks, such as Paypal, MasterCard, and Bank of America, along with critics of WikiLeaks like Senator Joseph Lieberman and former vice presidential candidate Sarah Palin, with distributed denial of service (DDoS) attacks, designed to shut the sites down.12 The attack against Amazon was not successful, but Paypal was down for a time.13 It does not appear that WikiLeaks was responsible, but the organization said the attacks reflected public opinion in support of WikiLeaks.14 Indeed, the attacks seem to have been a coordinated effort by hackers who supported WikiLeaks’ cause.15 In July 2011, sixteen people in the United States and five in Europe were arrested for their alleged roles in the cyber attacks.16

§8 The public face of WikiLeaks is Julian Assange, an Australian publisher, journalist, and former computer hacker. His status in the United States indicates how divisive a figure he has become: U.S. officials have called for his arrest, and Vice President Joseph Biden has characterized him as a terrorist,17 but he was voted Readers’ Choice for Time magazine’s 2010 Person of the Year.18 As of this writing, he resides in England while appealing an order of extradition to Sweden on charges for...
of sexual assault.\textsuperscript{19} Assange claims the charges are false and politically motivated.\textsuperscript{20}

**Legal Troubles**

\textsuperscript{9} The nature of WikiLeaks and the information it has published has brought the organization into direct conflict with many governments, businesses, and organizations. According to its web site, “since formation in 2007, WikiLeaks has been victorious over every legal (and illegal) attack, including those from the Pentagon, the Chinese Public Security Bureau, the former president of Kenya, the Premier of Bermuda, Scientology, the Catholic & Mormon Church, the largest Swiss private bank, and Russian companies.”\textsuperscript{21} Among some of the more contentious documents posted on WikiLeaks are more than 91,000 U.S. military reports related to the war in Afghanistan\textsuperscript{22} and almost 400,000 reports related to the war in Iraq.\textsuperscript{23} On April 5, 2010, WikiLeaks released one of its most controversial stories: a classified U.S. military video of a helicopter attack in Iraq in 2007 that resulted in the death of, among others, two Reuters correspondents.\textsuperscript{24}

\textsuperscript{10} In November 2010, WikiLeaks, along with several newspapers including the *New York Times*, released 250,000 U.S. diplomatic cables.\textsuperscript{25} Prior to the release, however, Julian Assange sent a letter to the U.S. ambassador to the United Kingdom, offering to consider not publishing specific reports or names if the U.S. government believed that the information would put people at significant risk of harm.\textsuperscript{26} The State Department responded by saying that publication of any classified material would be a violation of federal law and demanded the return of the documents.\textsuperscript{27} Once the documents were published, U.S. Secretary of State Hillary Clinton stated that “this disclosure is not just an attack on America’s foreign policy interests, it is an attack on the international community.”\textsuperscript{28} As a result of this incident and others, many U.S. government officials have condemned WikiLeaks in strong language. One of the strongest condemnations came from Peter King, chair-

\begin{itemize}
  \item [21] *About WikiLeaks*, supra note 1.
\end{itemize}
man of the Homeland Security Committee of the House of Representatives, who called WikiLeaks a foreign terrorist organization.29

¶11 On November 29, 2010, U.S. Attorney General Eric Holder announced that a criminal investigation was under way.30 A federal grand jury was convened in Alexandria, Virginia, to consider possible charges against WikiLeaks and Julian Assange.31 On December 14, 2010, a court order requested Twitter to turn over records “for each account registered to or associated with WikiLeaks,” under the authority of 18 U.S.C. § 2703(d) (the Stored Wire and Electronic Communications and Transactional Records Access Act).32 The Twitter order and related documents were filed under seal, thus making them unavailable publicly. However, the order is available on WikiLeaks.33 The American Civil Liberties Union moved to unseal the documents and vacate the order, citing the constitutional issues involved.34 On November 10, 2011, the district court held that the Twitter disclosure order did not violate the Fourth Amendment or due process, and that there was no expectation of privacy in their Internet protocol addresses because its privacy policy permits Twitter to retain users’ IP addresses.35

¶12 To date, however, there have been no American charges or prosecutions regarding WikiLeaks itself. The suspected leaker of the Afghanistan war documents, Army Private Bradley Manning, is facing a court-martial.36

Financial Troubles

¶13 While they have been unsuccessful to date, the legal challenges to WikiLeaks have not been without consequence. The cost of defending the site has placed WikiLeaks in financial straits. According to the site, five major financial institutions—Visa, MasterCard, PayPal, Western Union, and Bank of America—will no longer allow donations to WikiLeaks, blocking over ninety-five percent of the organization’s donations.37 In October 2011, WikiLeaks temporarily suspended publishing operations and announced that without the lifting of the restrictions by

33. Id.
35. Id.
financial services companies the organization would shut down by the end of the year.\textsuperscript{38} Earlier in the year, the site opened a gift shop with shirts, bags, and other merchandise with the WikiLeaks logo along with pictures of Assange and the tagline “Courage is contagious.”\textsuperscript{39} Assange reportedly sold the rights to his autobiography for an alleged $1.3 million to keep the site afloat.\textsuperscript{40} However, he supposedly kept his advance and never delivered a final manuscript.\textsuperscript{41} With the help of a ghostwriter, the British publisher Canongate released \textit{Julian Assange: The Unauthorized Autobiography} in September 2011.\textsuperscript{42}

\textsuperscript{14} Whether or not WikiLeaks survives or is embroiled in legal turmoil for years to come, the questions it raises about confidential and classified information and the immediacy of electronic disclosure of material, along with the confidentiality of its sources, will continue to be relevant. In fact, although none of them have yet garnered the attention that WikiLeaks has, many copycats have sprung up.\textsuperscript{43} The questions of national security and military secrecy versus freedom of speech and of the press, combined with the technological advances that make a site like WikiLeaks possible, should be of great interest to librarians of all sorts and law librarians in particular. The applicable law, as will be shown, is unsettled, and its application to WikiLeaks is challenging.

\section*{The Espionage Act}

\textsuperscript{15} Known formally as the Barbour Espionage Act, the Espionage Act was passed in 1917 and is currently codified at 18 U.S.C. §§ 793–798. An extensive study of the Espionage Act and related laws was published by Harold Edgar and Benno Schmidt, Jr., in 1973.\textsuperscript{44} According to that study, the Act remains substantially unchanged since its original adoption.\textsuperscript{45} There has been little change in the Act since the study as well.

\textsuperscript{16} The portions of the Espionage Act that bar the dissemination of classified government material are codified at 18 U.S.C. § 793. The law specifically deals only

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\textsuperscript{41} Leigh, \textit{supra} note 40.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} For example, OpenLeaks (http://openleaks.net) was founded in September 2010 by Daniel Domscheit-Berg, a former WikiLeaks spokesperson. See \textsc{Daniel Domscheit-Berg, Inside WikiLeaks} 239 (Jefferson Chase trans., 2011).


\textsuperscript{45} \textit{Id.} at 939.
with national defense information. The description of “information” in the statute is lengthy and seemingly exhaustive but definitely written for the pre-Internet era: “any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense . . . .”46

¶17 The statute provides for a fine or imprisonment when a government employee in lawful possession of information “related to the national defense” that “the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation” provides that information “to any person not entitled to receive it.” Section 793(c) allows for prosecution of persons who receive this information as long as the recipient knows or should have known that the source violated other portions of the Act. Section 793(d) prohibits the willful distribution of the information, while section 793(f) prohibits negligent distribution of the information.

¶18 As some scholars have pointed out, section 793(e) is “one of the scariest statutes around.”47 It prohibits distribution of classified defense information to anyone not entitled to receive it. These scholars note that the statute lacks a specific intent requirement—one does not need to intend to violate the law to have violated it.48 Theoretically, a person could be charged with a violation of section 793(e) without even knowing or intending to break the law or distribute classified defense information. Further, section 793(e) prohibits the retention of the information and failure to return it.

New York Times Co. v. United States

¶19 The most significant test of the Espionage Act came in the Pentagon Papers case, New York Times Co. v. United States.49 In that case, the Nixon administration sought to block the New York Times and Wall Street Journal from publishing a top-secret Pentagon document detailing U.S. involvement in Vietnam in the 1960s. The administration argued that the executive branch had such authority if it could show a “grave and irreparable danger” in the publication of the material.50

¶20 The federal district court held that the government had not met this high standard for prior restraint.51 However, the Second Circuit left in place a temporary stay blocking publication, remanding to the lower court for further examination of the documents.52 The U.S. Supreme Court, in a per curiam opinion, agreed with the district court and held that the government “carries a heavy burden of showing justification for the imposition of such a restraint.”53 Justice Black, in his concurrence,

48. Id.
49. 403 U.S. 713 (1971).
50. Id. at 732 (White, J., concurring).
52. United States v. N.Y. Times Co., 444 F.2d 544 (2d Cir. 1971).
found the government’s demands completely at odds with the intent of the First Amendment guarantee of freedom of the press: “The Government’s case here is based on premises entirely different from those that guided the Framers of the First Amendment.”54 Thus, the executive did not have the power or authority to bar publication.

¶21 Justice Douglas focused on the language of the Espionage Act and found it irrelevant to the case at hand: “It is apparent that Congress was capable of and did distinguish between publishing and communication in the various sections of the Espionage Act.”55 Section 793 does not use the word publication, but only bars those who “willfully communicate.”56 The government argued that publication was implicit in this wording, but, as Douglas noted, some chapters of the U.S. Code dealing with national security use the term published while others do not.57 This distinction evidenced congressional intent to exclude publication as prosecutable behavior. The district court had also found that the statute did not apply to publishing.58 A previously rejected version of section 793 that appeared in the Congressional Record was cited by the government to show congressional intent, but Douglas noted that the provision had specifically been defeated in the Senate.59 In other concurrences, Justice White discussed the legislative history and intent of the Espionage Act, making clear that he was unwilling to proscribe publication absent some legislation enacted by Congress,60 and Justice Black noted as well that there was no statute barring publication.61

¶22 While the Pentagon Papers case was a loss for the government, Daniel Ellsberg, a U.S. military analyst, was charged with, among other offenses, violating the Espionage Act for releasing the material to the New York Times. Ellsberg turned himself in voluntarily.62 The trial judge in the case eventually threw out the charges after revelations that White House operatives had burglarized Ellsberg’s psychiatrist and wiretapped conversations Ellsberg had with others about the Pentagon Papers.63 The failed prosecution left the legal issues posed by Ellsberg’s distribution of the documents unresolved.

¶23 Ellsberg has met with Julian Assange and seems to favor WikiLeaks and its philosophy, claiming it contributed to the recent downfall of dictators in Tunisia and Egypt.64

54. Id. at 717.
55. Id. at 721.
57. 403 U.S. at 721.
59. N.Y. Times Co. v. United States, 403 U.S. at 721.
60. Id. at 733–34, 740.
61. Id. at 718.
United States v. Rosen

¶24 The most recent decision of note regarding the Espionage Act, United States v. Rosen, comes from a federal district court in Virginia in 2006. In that case, two members of the American Israel Public Affairs Committee (AIPAC), a pro-Israel lobbying organization in Washington, D.C., were prosecuted under the Act. While neither of them had a security clearance, they obtained a piece of intelligence concerning terrorist activities in Asia and the government’s proposed response from a Defense Department analyst. They allegedly orally communicated this information to a member of the media and were charged with violating the Espionage Act.

¶25 The defendants challenged the constitutionality of the statute, arguing that the statute was vague, that it violated the First Amendment’s guarantee of free speech, and that it was overbroad. The court noted that the statute’s “litigation history is sparse,” but that it had withstood constitutional arguments similar to the defendants’. The defendants also argued the oral communication of the information distinguished their case, since earlier cases involved the transmission of documents and other tangible items. The court held that the phrase “information relating to the national defense,” while not defined by the statute, had a plain meaning that included orally transmitted information. The court held the prosecution could proceed.

¶26 The court, however, did observe other problems with the Espionage Act as currently written:

[T]he basic terms and structure of this statute have remained largely unchanged since the administration of William Howard Taft. The intervening years have witnessed dramatic changes in the position of the United States in world affairs and the nature of threats to our national security. The increasing importance of the United States in world affairs has caused a significant increase in the size and complexity of the United States’ military and foreign policy establishments, and in the importance of our nation’s foreign policy decision making. Finally, in the nearly one hundred years since the passage of the Defense Secrets Act mankind has made great technological advances affecting not only the nature and potential devastation of modern warfare, but also the very nature of information and communication. These changes should suggest to even the most casual observer that the time is ripe for Congress to engage in a thorough review and revision of these provisions to ensure that they reflect both these changes, and contemporary views about the appropriate balance between our nation’s security and our citizens’ ability to engage in public debate about the United States’ conduct in the society of nations.

¶27 As has been pointed out, the significance of the Rosen case is the court’s “sustaining for the first time the liability of third-party intermediaries under the Espionage Act . . . and acknowledging, however implicitly . . . third-party inchoate liability arising out of newsgathering.” According to the judge, “the government

66. Id. at 610.
67. Id. at 613.
68. Id. at 613–16.
69. Id. at 645.
70. Id. at 646.
71. Vladeck, supra note 47, at 224.
can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense.\(^\text{72}\)

### Other Relevant Statutes

\(^\text{28}\) Besides the Espionage Act, many of the statutes in the *U.S. Code* today dealing with the release and dissemination of classified information are remnants of the Cold War. They focus heavily on the person who initially takes the information from the government, rather than subsequent distributors.

**18 U.S.C. § 641**

\(^\text{29}\) Section 641 of title 18 prohibits theft of government property, including records, “to his use or the use of another.” The statute does not make specific mention of classified information, but it has been used to prosecute disclosers of government information.\(^\text{73}\)

**50 U.S.C. § 421**

\(^\text{30}\) Section 421 of title 50 proscribes the disclosure of the identity of covert intelligence officers, agents, informants, and sources. It allows for the prosecution of three types of persons: (1) those who have access to classified information regarding covert agents who intentionally disclose information they know will reveal the agent’s identity,\(^\text{74}\) (2) those who learn the identity of a covert agent and knowingly disclose it to people unauthorized to know,\(^\text{75}\) and (3) those who through a “pattern of activities intended to identify and expose covert agents” learn the identity of an agent and knowingly disclose it to anyone not authorized to know.\(^\text{76}\) Each of these has a specific intent requirement.

**18 U.S.C. § 1030(a)(1)**

\(^\text{31}\) The most recent statute related to this issue is 18 U.S.C. § 1030(a)(1), which prohibits fraudulently accessing government computers and keeping, communicating, or transmitting information on them to “the injury of the United States.” While the definition of information for this statute is broader than that for the Espionage Act, this law, as with the Espionage Act, focuses primarily on the individual who takes the information rather than the receiver or any subsequent transmitter. The statute, however, does include a clause related to conspiracy, which could be relevant, depending on the circumstances.\(^\text{77}\)

### Prosecuting WikiLeaks Under Current Law

\(^\text{32}\) Under current law, a criminal action against WikiLeaks or Julian Assange would be problematic at best. Besides the problems of extradition and other juris-
dictional issues, the First Amendment implications of such a prosecution are troubling. As has been pointed out by government researchers, “Leaks of classified information to the press have only rarely been punished as crimes [in the United States], and [we are] aware of no case in which a publisher of information obtained through unauthorized disclosure by a government employee has been prosecuted for publishing it.”

§33 The unlawful acquisition and divulgence of the information is more easily prosecutable. All the statutes mentioned above focus on the person who acquires the information and the nature of the information itself. Some of the language of the Espionage Act indicates that those who come into possession of defense material may be held accountable, but what WikiLeaks has divulged, classified though it may be, is not all likely to be considered detrimental to national defense. For the purposes of the other statutes mentioned, the material may be government property and taken from a computer, but those statutes again focus on the person who takes the property from the government, not on subsequent receivers or divulgers.

§34 Since it does not apparently request or solicit such information, WikiLeaks would not be the target of those prosecutions. In the case of the Afghan war documents that have been released, the divulger, Bradley Manning, has been charged and arrested. The language in the Espionage Act that could be used to prosecute WikiLeaks for not returning the documents to the government, as requested, presents constitutional problems. The Rosen case also seems to leave open the possibility of prosecution under the Act. Again, to date, no U.S. criminal charges have been levied against WikiLeaks, Julian Assange, or other members of the organization.

§35 In the wake of these problems, there have been congressional moves toward making the criminalization and prosecution of actions like those of WikiLeaks more possible. However, these proposed statutes pose other problems.

Proposed Legislation

§36 On December 21, 2010, the Espionage Statutes Modernization Act was introduced in the Senate. As the title suggests, the proposed Act attempted to rewrite some of the obsolete language of the Espionage Act and to broaden the types of information covered. It would have covered not just defense information, but all classified information related to national security. In the 112th Congress, a similar bill has been introduced in the Senate and referred to the Judiciary Committee, but as of this writing, no further action has been taken on the bill.

§37 The proposed Securing Human Intelligence and Enforcing Lawful Dissemination (SHIELD) Act has also been proposed in both chambers. It would provide penalties for disclosure of classified information, identifying two types of

79. Suspect in Leaks Case Moves One Step Closer to Court-Martial, supra note 36.
information that may not be disclosed.82 The first is information “concerning the human intelligence activities of the United States or any foreign government.” “Human intelligence,” for this purpose, is defined as “all procedures, sources, and methods employed in the collection of intelligence through human sources.” The second is “information concerning the identity of a classified source or informant of an element of the intelligence community of the United States.” The definition of “classified information” is broadened and defined as “information which . . . is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution.”83 In short, the law would cover anything not intended for public scrutiny that is related not only to defense, but also to national intelligence gathering.

¶38 On December 16, 2010, the House Judiciary Committee held a hearing to discuss the Espionage Act and the legal issues related to WikiLeaks.84 The committee members spoke of the balance between national security and constitutional free speech. Members also questioned whether the WikiLeaks scandal demonstrates that too much government information is being classified unnecessarily.85

¶39 Expert witnesses spoke on a variety of issues. Geoffrey Stone, professor of law at the University of Chicago, stated that the proposed SHIELD Act was unconstitutional: “At the very least, it must limit its prohibition to those circumstances in which the individuals who publicly disseminated classified information knew that the dissemination would create a clear and imminent danger of grave harm to our Nation or our people.”86 In his prepared remarks, Stone emphasized that “[i]n the entire history of the United States, the government has never prosecuted anyone (other than a government employee) for publicly disseminating such information.”87

¶40 Abbe David Lowell, an attorney involved in the Rosen case, testified about the flaws of the Espionage Act. The law is almost one hundred years old, and the constitutionality of some of its provisions is questionable in light of the decision in the Pentagon Papers case.88 If charges were filed against WikiLeaks or Julian Assange, it:

would be unprecedented because it would be applying [the Espionage Act] to a (a) non-government official, (b) who had no confidentiality agreement, (c) who did not steal the information, (d) who did not sell or pay for the information involved, (e) who was quite out front and not secretive about what he was doing, (f) who gave the U.S. notice and asked if the government wanted to make redactions to protect any information, and (g) in a context that can be argued to be newsgathering and dissemination protected by the First Amendment.89

83. Id. (the language in both bills is identical).
85. Id. at 4.
86. Id. at 8.
87. Id. at 17.
88. Id. at 22.
89. Id. at 33.
Similarly, other witnesses focused on the need for revision of the Espionage Act while keeping in mind First Amendment–guaranteed freedom of the press and the demands of national security. WikiLeaks clearly is not the first challenge the government has faced, even in a post-9/11 world.  

Cases Involving WikiLeaks

To date, there is only one reported case involving WikiLeaks as a party, and it involved corporate rather than government information. In 2008, Bank Julius Baer sued WikiLeaks and its domain registrar Dynadot in federal district court in California, claiming the site had published confidential and forged bank documents. The suit alleged causes of action for unlawful and unfair business practices, interference with contract, interference with prospective economic advantage, and conversion. The bank requested an injunction to block the WikiLeaks domain name, thus preventing access to the site. The district court questioned whether it had subject matter jurisdiction, since all the parties except Dynadot were foreign. Second, it found that the remedy, an injunction, was problematic because of the First Amendment implications and because it was likely overbroad. Rather than shut down WikiLeaks, the court could have ordered the removal of the documents. Further, the initial temporary injunction had an effect opposite to what was intended. It increased interest in the material that had been posted, and mirror sites made it available through other sources. Thus the injunction was dissolved, and further injunctions were denied. The bank then dropped the suit.

While not a party, WikiLeaks played a significant role in another recent federal case. After being fired, Rhonda Salmeron brought an action claiming her employer, Enterprise Recovery Systems, committed fraud in its student loan collection practices. Other defendants, including USA Funds, Inc., and Sallie Mae, Inc., were added. Salmeron’s attorney in the case was repeatedly admonished for misconduct and was warned against future misconduct. When a copy of a confidential Guarantee Services Agreement between Sallie Mae and USA Funds appeared on WikiLeaks, bearing stamps that showed it had come from the lawsuit and was designated for “attorney’s eyes only,” the district court dismissed the action as a sanction for the disclosure. The Seventh Circuit affirmed, noting that Salmeron’s attorney had been warned against further misconduct.

90. See id. at 52 (statement of Gabriel Schoenfeld, Senior Fellow, Hudson Institute).
92. Id. at 983–84.
93. Id. at 984–85.
94. Id. at 985.
A Host of Research Problems

¶44 WikiLeaks presents other problems besides the difficulty of prosecution. From the perspective of librarians, an interesting question is the ability to use and access the information posted on WikiLeaks, information that might not otherwise be available. The federal government, by way of the general counsel’s office of the Office of Management and Budget (OMB), has barred its employees from viewing documents on WikiLeaks, absent “legitimate need.” The material, despite its disclosure, remains classified.98

The Congressional Research Service and the Library of Congress

¶45 The Congressional Research Service (CRS) is a legislative agency under the Library of Congress (LOC). It reports directly to Congress, providing reports and analysis for its purposes. “Its highest priority is to ensure that Congress has 24/7 access to the nation’s best thinking.”99 CRS reports are indeed authoritative and well researched. In fact, one of the best resources I found while researching this article was a CRS report, made available by a public interest group,100

¶46 However, while their research and content are highly regarded, the reports have also generated controversy: Although they are funded by taxpayer dollars (approximately $100 million annually),101 they are not made generally available. According to a 2007 memo by the director of CRS, the agency does not have the “authority to make its products available to anyone other than the Congress of the United States.”102 An act of Congress would be required to make them generally accessible. While a number of reports have been placed online by various organizations,103 many are still unavailable. As of this writing, WikiLeaks has posted almost 7000 CRS reports on its web site.104

¶47 Because WikiLeaks posted confidential and classified government information, the LOC decided to block access to WikiLeaks from its computers. Thus, CRS, as part of the LOC, cannot access documents available on WikiLeaks. Several employees of CRS questioned whether this was appropriate, and whether CRS’s research capabilities would be damaged as a result:

“It’s a difficult situation,” said one CRS analyst. “The information was released illegally, and it’s not right for government agencies to be aiding and abetting this illegal dissemina-

100. ELSEA, supra note 78.
104. LaFleur, supra note 101.
tion. But the information is out there. Presumably, any Library of Congress researcher who wants to access the information that WikiLeaks illegally released will simply use their home computers or cell phones to do so. Will they be able to refer directly to the information in their writings for the library? Apparently not, unless a secondary source, like a newspaper, happens to have already cited it.”

“I don’t know that you can make a credible argument that CRS reports are the gold standard of analytical reporting, as is often claimed, when its analysts are denied access to information that historians and public policy types call a treasure trove of data,” a former CRS employee said.105

CRS is one part of the LOC. According to its website, the mission of the LOC “is to support the Congress in fulfilling its constitutional duties and to further the progress of knowledge and creativity for the benefit of the American people.”106 LOC has blocked access to WikiLeaks across its network, even in its reading room.107

According to an LOC spokesman, WikiLeaks was blocked “because applicable law obligates federal agencies to protect classified information” and “[u]nauthorized disclosures of classified documents do not alter the documents’ classified status or automatically result in declassification of the documents . . . .”108 While OMB’s memo indicated that circumstances might allow researchers and others to access WikiLeaks in pursuit of legitimate government interests,109 LOC does not seem to be as flexible. Ruling out one particular source of information may compromise the integrity or quality of any research done by CRS or LOC. This, in turn, may influence and even jeopardize the government’s decision-making functions as it relies on less than all of the available information. Further, it may impact those who use the information CRS or LOC provides, believing it to be authoritative and comprehensive.

Reliability and Moral Quandaries

Outside the government, the use of material from WikiLeaks may be less problematic, but not without controversy. WikiLeaks claims to vet the information it receives for authenticity, describing its process as follows:

Typically we will do a forensic analysis of the document, determine the cost of forgery, means, motive, opportunity, the claims of the apparent authorising organisation, and answer a set of other detailed questions about the document. We may also seek external verification of the document[.]. For example, for our release of the Collateral Murder video, we sent a team of journalists to Iraq to interview the victims and observers of the helicopter attack. The team obtained copies of hospital records, death certificates, eye witness statements and other corroborating evidence supporting the truth of the story. Our verification process does not mean we will never make a mistake, but so far our method has meant that WikiLeaks has correctly identified the veracity of every document it has published.110

108. Id.
109. OMB Memo, supra note 98.
110. About WikiLeaks, supra note 1.
Since its inception in 2007, WikiLeaks has posted hundreds of thousands of documents, and the sheer volume of documents might give users pause. For an organization of its size, which claims to perform such scrupulous checks, WikiLeaks has provided a mountain of information in a short time. On the other hand, the government’s and others’ dramatic responses seem to indicate that the information is genuine. It has been cited and relied upon by even some of the most recognized and respected news organizations.111

The question of the legitimacy of the information coming from WikiLeaks must be more carefully examined. In a memoir about his time as a spokesman for WikiLeaks practically from its inception, Daniel Domscheit-Berg claims that, particularly when the organization first started, “authenticity checks” consisted of himself and Julian Assange simply reviewing documents to see if they appeared genuine.112 He also claims that, when he left the organization as a result of disagreements with Assange, he took with him the person he refers to as “the architect,” the inventor/programmer of WikiLeaks’ submissions system, to start OpenLeaks.113 WikiLeaks’ submission system has been down since the architect left, though WikiLeaks has said the system was down due to a backlog of documents.114 WikiLeaks has promised legal action concerning Domscheit-Berg’s book.115

The controversy also brings up the question of whether too much material is classified by the government.116 Furthermore, it demonstrates the obsolescence of current legislation regarding the release of this kind of information, and the law’s inability to deal with the technological advances of the past hundred years. The government’s interest in national security and keeping government agents and others safe from harm must be balanced with support for free access to information and other constitutional rights.

Additionally, there are moral and ethical questions regarding the use of WikiLeaks’ information. At the very least, this material has been designated for limited circulation. Some of it is classified and designated as top secret and may be damaging to the nation’s interests. Whether librarians, researchers, and other information professionals should use material that has been acquired or disclosed in violation of the law is a question individuals and institutions must decide for themselves, according to their own circumstances and needs.

In late 2010, Forbes published an interview with Julian Assange in which he claimed WikiLeaks would publish thousands of internal documents from a large American bank. The article points out that “[m]odern whistleblowers, or employ-
ees with a grudge, can zip up their troves of incriminating documents on a laptop, USB stick or portable hard drive, spirit them out through personal e-mail accounts or online drop sites—or simply submit them directly to WikiLeaks.” The article compares this relative ease of disclosure today with the challenge of disclosure during the Pentagon Papers days.

§55 The major focus of the article, though, is that WikiLeaks is not content to disclose sensitive government information. Assange said WikiLeaks expects to release many corporate-sector secrets in the future and that it has a backlog of information it has yet to release. For law librarians, the disclosure of corporate secrets by WikiLeaks presents many issues. First, of course, is whether such secrets relate to illegal and prosecutable activity by companies. WikiLeaks and Assange imply that the information to be disclosed relates to wrongdoing or at least unethical behavior. Second, and perhaps more challenging, is the use of the information in other legal maneuvering. Even if these secrets do not lead to criminal prosecution, they may contain information that could support civil actions or affect already pending litigation or negotiations. Once such information is disclosed, there would be no need for subpoenas or other orders to acquire the information or possibly even to enter it into evidence. In fact, courts themselves may take judicial notice of material on the Internet. This includes material from public records and government documents as long as they are from reliable Internet sources. Whether WikiLeaks would qualify as such a reliable source has yet to be judicially determined.

§56 Finally, there is the question of the motives of WikiLeaks and Julian Assange. Assange claims that the high profile that both the site and Assange maintain further the brand, making it seem that much more trustworthy. This, in turn, provides more opportunities for it to disclose wrongdoing and expose information the public has a right to know. However, there does seem to be a sense of personal self-promotion, along with pettiness or vengeancefulness toward WikiLeaks targets. As with any source of information, particularly those online, librarians must approach this source with caution. They must weigh its availability and truthfulness against its intended purposes and their patrons’ needs.

Conclusion

§57 Generally, librarians strive for free access to information, and WikiLeaks does provide a great deal of information, free to the public. The organization’s

118. Id. at 74.
119. See Wang v. Pataki, 396 F. Supp. 2d 446, 458 n.2 (S.D.N.Y. 2005) (citing Hotel Employees & Rest. Employees Union, Local 100 v. N.Y. Dep’t of Parks & Recreation, 311 F.3d 534, 549 (2d Cir. 2002)).
120. Fox v. Grayson, 317 S.W.3d 1, 18 n.82 (Ky. 2010).
stated purpose of access and democracy comport with many librarians’ ideals, even if its methods are questionable. Individuals and institutions dedicated to information access and research, such as law librarians and libraries, must be aware of these considerations. As technological advances make the instant disclosure of more documents possible, WikiLeaks may be only the beginning.
Cancellation of Print Primary Sources in Canadian Academic Law Libraries

Nancy McCormack

Professor McCormack discusses the results of a 2010 survey of academic law library directors in Canada regarding the cancellation of primary source material in their libraries. She identifies the criteria ascertained by the survey for cancellation of print materials and explores whether a shift in format matters to libraries and their users.

Introduction

¶1 Library literature over the past few decades has been dominated by discussions of what will become of books, journals, and other material in print form in an increasingly digital environment. Some authors have gone so far as to predict the end of print altogether. James Milles, for example, writes: “Libraries in the future are going to be mostly digital. . . . [T]he most heavily used research sources—statutes, cases, administrative regulations and rulings, treatises, and even law journals—will be used almost exclusively in electronic format.”¹ In contrast, Michelle Wu, in her 2005 study, is not quite as convinced that electronic materials will eclipse print. She says “a twenty-first century academic law library requires both traditional print materials and electronic resources.”²

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¶2 Even if modern law libraries do (as Wu asserts) require both formats, trends afoot in these very libraries might well cause drastic reductions in or, in some cases, even the complete elimination of print. A 2007 article noted that “some law libraries are canceling certain print services entirely,”³ while a 2010 article confirmed that most law firms are now “favor[ing] the electronic version [over print sources] as long as it is covered in a flat-rate contract with a vendor.”⁴ In addition, “[m]any of the large law firms are dismantling their hard copy libraries and moving to a totally digital environment. Every week on the law-lib listserv [there are] offers of law libraries available for the cost of shipping.”⁵

¶3 These changes are, in fact, not just restricted to law firms. But, as Michael Chiorazzi writes, “While academic law libraries tend to have a broader mission than law firm libraries, law firm libraries are our canary in the mine.”⁶ Law firms, in other words, may be leading the charge on this front, but they will not be alone. A survey of law school libraries on the question of how acquisitions expenditures on electronic resources changed between 2002–03 and 2006–07 revealed that in 2002–03, law libraries spent 10.4% of their budget on electronic resources. That had almost doubled by 2006–07 to 19.8%.⁷ The additional money for electronic materials clearly had to come from somewhere, and there is no doubt print materials were the casualties.

¶4 Perhaps most surprising was the news in 2010 that the Harvard Law Library had revised its collection development policy and made several “digital only” changes to its collections practices.⁸ For example, print reporters would no longer be collected for lower federal courts if stable access online in PDF was available. In addition, state reporters would no longer be collected; instead, LexisNexis and Westlaw would be used to provide access.⁹ Of course, Harvard is not the first law library to implement this type of collections policy; however, as the Law Librarian Blog noted, “when Harvard does it, folks take notice.”¹⁰

¶5 While it is clear from the above that collections are changing fundamentally and radically, there have been few studies on exactly what material academic libraries are keeping or canceling in terms of their primary source material (i.e., legisla-

6. Id.
9. Id.
10. Id. See also Diane Raper, 40 Years On—Ensuring an Academic Law Library Is Fit for Purpose, 9 LEGAL INFO. MGMT 163, 166 (2009) (discussing the Kent Law School at the University of Kent: “We no longer provide Blackstone’s Statutes for student use. Our students have access to alternatives online and are expected to use them.”).
tion and case law), and which factors might be guiding their decisions. This article discusses the results of a survey of academic law library directors in Canada conducted in 2010 regarding the cancellation of primary source material in their libraries. It identifies and describes the criteria ascertained by the survey for cancellation of print materials. The role of bar association standards in the cancellation of print resources is briefly discussed. Finally, the article looks at the issue of whether format does indeed matter to libraries and library users or whether the differences between print and electronic are so minimal as to be unproblematic in law libraries.

**Print Cancellation Policies**

§6 Primary sources in law are the components of the law itself—constitutions, statutes, court decisions, regulations, and rules. Their origins are the legislatures or courts. These materials, therefore, must form the bedrock of any law library collection. One could (albeit with some difficulty) imagine a law library without secondary sources (which comment on the law), but one could not imagine a law library without primary sources (i.e., the law itself).

§7 Given the vital importance of such material to a law library, it is surely surprising that not a great deal has been written about the criteria used by law libraries to make cancellation decisions. This is in marked contrast to the vast amount written in other library literature on the criteria used by librarians to make cancellation decisions for print sources generally.11

§8 A relatively early survey, for example, conducted by the library at Saint Mary’s University of San Antonio, Texas, in 1994, proposed a number of factors to take into account when considering replacing print with electronic sources.12 Among these criteria were price (i.e., buying/maintaining print13 versus the costs associated with electronic products14), ease of access,15 usage patterns,16 end results/11. See Paul E. Howard & Renee Y. Rastorfer, *Do We Still Need Books? A Selected Annotated Bibliography*, 97 LAW LIBR. J. 257, 2005 LAW LIBR. J. 15, for a comprehensive list of books and articles published between 1995 and 2005 on the subject of whether or not to cancel print resources.

12. Margaret Sylvia & Marcella Lesher, *Making Hard Choices: Cancelling Print Indexes*, ONLINE, Jan. 1994, at 59. The print indexes under consideration for cancellation were the Social Science Citation Index (SSCI), the Index Medicus, and the Engineering Index.

13. This includes the additional costs of preservation and the replacement of lost print volumes. There are also personnel costs involved when checking in pocket parts. *Id.* at 60.

14. These include the costs of hardware and software and any ongoing subscription costs, as well as costs associated with training staff and users. *Id.* at 59–60. Additional costs can be incurred in the installation process and when fixing bugs.

15. Generally, print sources can be used by only one person at a time and searched only one volume at a time. Where space is at a premium, print sources might be off-site in a storage facility. In contrast, electronic sources are often available to more than one user at a time, although this might be limited by the number of workstations one has available in the library, or by network issues. Availability also depends on the type of license the library has signed with the vendor; some licenses allow for only a limited number of users at any one time. *Id.* at 60.

16. A study of usage patterns involves determining how the print is used compared to electronic sources, and whether it is being used for a course or for individual research. It also involves determining whether users want print or electronic sources. *See id.* A variety of studies have shown that patrons generally prefer electronic access to print access. *See, e.g.*, Sanford N. Greenberg, *Legal Research
retrieval, quality of content (is the online source an exact copy or something less?), and ownership (i.e., would you like to own the material you purchased, or is paying a subscription fee from year to year sufficient?).

¶9 In 2002, Karen Rupp-Serrano, Sarah Robbins, and Danielle Cain provided what appeared to be a near-exhaustive list of criteria to be used when considering whether to cancel print sources in favor of electronic. They included the following:

- Licensing restrictions (Does the license allow for the cancellation of print?)
- Accessibility (Can users access this source anywhere and at any time?)
- Archiving (How will older material be accessed—online or in print?)
- Provider reliability/stability
- Aggregator duplication (Are you paying for certain titles in more than one source?)
- Availability in local consortia (Has the library made an agreement with other libraries to keep the print?)
- Discipline/curriculum/research importance
- Faculty input (Who wants print? Who wants electronic?)
- Institutional commitment (Does the institution have a commitment to keep the print?)
- Subject (Is it one that requires the library to keep the print source?)
- User preference/usage
- Completeness (Is the electronic source reproduced exactly the way it was printed?)
- Nature of publication (Is the online information large in size? Will printing from the online source prove a burden?)
- Reproduction capabilities (Is equipment available for color or oversized reproductions?)
- Authentication (If a subscription uses IP recognition, is a proxy service available?)

Training: Preparing Students for a Rapidly Changing Research Environment, 13 LEGAL WRITING: J. LEGAL WRITING INSTITUTE 241, 242 (2007). For long stretches of reading, though, there is some evidence that students, in particular, still prefer access to print. See Raper, supra note 10, at 165.

17. Paper does not allow for Boolean searching, but does permit easier browsing and reading in context. Electronic resources allow Boolean searching, but can result in more unwanted results.

18. In 1997, Trisha Davis cautioned that electronic products that reproduced print products had to be scrutinized carefully to make sure that the content was the same. She noticed that often the scope and breadth of electronic sources were different from their print counterparts, and that this information was missing from marketing brochures and other information offered by the publisher. She also suggested that the reputation of the producer and distributor of the electronic product was an important criterion in choosing the electronic source over its print counterpart. Other considerations included the user-friendliness of the electronic product, the type of software and hardware required, and how the information would be accessed by patrons. Trisha L. Davis, The Evolution of Selection Activities for Electronic Resources, 45 LIRN. TRENDS 391 (1997).


• Hardware, software, etc. (Can these be upgraded on a regular basis?)
• Monetary savings
• Space limitations
• Staffing (What staffing needs are part of the shift from print to electronic resources?)

¶10 Nonetheless, since that time librarians have proposed additional criteria. A 2005 survey that explored canceling print journals, looked at the additional criterion of usage statistics (how frequently the same titles available in both print and electronic were used during a given time, annual photocopying statistics for copies within the library, gate counts of patrons entering the library, and shelving statistics). Final considerations included archival access, reliability of the interface, and “allowances for scholarly sharing.”

¶11 Looking at the few studies specific to law libraries, decisions to cancel appear to be based largely on cost and also on efficiency of information retrieval. In a study conducted by Leslie Street and Amanda Runyon, for example, survey respondents looked at factors such as user-friendliness of the database in addition to publisher, format, and dependability. Price, however, was the major factor (i.e., whether the resource was available in a flat-fee database). The cancellation of print materials in law libraries seemed to be caused primarily by stagnant acquisitions budgets and costs of materials rising well above inflation.

¶12 In a 2007 study, Ian Gallacher provided some examples of the more outrageous price increases for legal materials in the United States between 1999 and 2003:

The price of the Atlantic Reporter, Second series, increased by more than 77 percent between 1999 and 2003, but substantially more disturbing has been the increase in print digest cost. The price of the Hawaii digest, for example, was $312 in 1999 and was $1,371.50 in 2003, and the Rhode Island digest rose from $432 in 1999 to $1,272.50 in 2003. Added to the costs of the books themselves is the cost of storing and maintaining them in libraries that contribute nothing to a law firm’s bottom line.

As of 2008, price increases were still well above the rate of inflation. In the United States, annual increases for legal materials were “running at least 8%.” As Rita Reusch commented, “this effectively means an 8% cut on a flat budget, and collection decisions are all about what to cancel next.”

¶13 Harvard’s 2010 change to its collection development policy, which implemented a digital-only standard for many of its law reports, was also, in part, a response to drastic price increases. As one commentator noted, “When Harvard’s

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21. Id. at 372–77.
22. John Gallagher et al., Evidence-Based Librarianship: Utilizing Data from All Available Sources to Make Judicious Print Cancellation Decisions, 29 LIBR. COLLECTIONS, ACQUISITIONS, & TECH. SERVS. 169 (2005).
23. Id. at 177–78.
24. Street & Runyon, supra note 4, at 417, ¶ 38.
Law School Library can’t afford to pay for maintaining the status quo in primary and secondary materials, the duopolists better take notice.”

¶14 In Canada, average annual price increases have also been a cause for concern. The national law library journal, Canadian Law Library Review, periodically publishes surveys of legal resource prices and has discovered increases that run well above the inflation rate. For example, the average price increase for the tracked titles from 2005 to 2006 was 5.4%, for 2004–2005 it was 6.3%, for 2003–2004 it was 9.5%, for 2002–2003 it was 3.8%, and for 2000–2001 it was a whopping 19.48%.

¶15 Clearly, law libraries of all sizes in both Canada and the United States are feeling the pinch in terms of price increases and are responding by canceling print materials. These cuts include primary sources in print. As a recent U.S. survey discovered, 38.7% of respondents had canceled state reporters, 25.8% had canceled state annotated codes, 6.5% had canceled federal annotated codes, 25.8% had canceled session laws, and 9.7% had canceled the Code of Federal Regulations.

¶16 In Canada, as the survey results that follow indicate, price is without question a major factor when considering the cancellation of primary print sources. Not surprisingly, however, given the library literature on cancellation criteria discussed above, several other factors also come into play when making such decisions. These factors, too, are discussed below.

Method

¶17 At present, Canada has twenty law schools. On June 29, 2010, each of the twenty law library directors received a copy of the survey on the cancellation of print primary sources. Of the twenty academic law library directors in Canada, fifteen responded, for a seventy-five percent response rate.

27. Hodnicki, supra note 8. See also Sarah Robbins et al., The Changing Format of Reference Collections: Are Research Libraries Favoring Electronic Access over Print?, 35/36 ACQUISITIONS LIBR. 75, 76 (2006) (“Librarians must ask themselves whether it is worthwhile to purchase a seldom used print copy of a title for archival purposes when the library is also paying for more heavily used electronic access to the same title.”).


29. Id.

30. Id.

31. Id.


33. See Runyon, supra note 7, at 199–200, ¶ 54.

34. Id. at 190 tbl.6.

35. They are at the University of Alberta, University of British Columbia, University of Calgary, Dalhousie University, Laval University, University of Manitoba, McGill University, University of Moncton, Université de Montréal, University of New Brunswick, University of Ottawa, Université du Québec à Montréal, Queen’s University, University of Saskatchewan, Sherbrooke University, University of Toronto, University of Victoria, University of Western Ontario, University of Windsor, and York University.

36. For a copy of the survey questions, see infra app.
The survey itself contained twenty-seven questions or statements with which participants could agree or disagree, and it was compiled using SurveyMonkey, a web-based interface for creating and publishing custom web surveys. Participants were asked about their libraries’ spending on print and electronic sources, as well as specific primary sources to which their libraries subscribed; they were also asked about cancellations of primary sources, collection development policies, and factors that might figure into the cancellation of these sources. The survey was closed on October 31, 2010.

Survey Results

Acquisitions Budget

Library directors were asked, first of all, about the state of their acquisitions budgets, in order to provide some background information on cancellation decisions and the general ability of the law library to afford the purchase of legal materials. The answers to this section were not by any means uniform. Of the respondents, 53.3% had seen an increase in their acquisitions budget over the last twenty-four months, while 26.7% indicated that the budget had stayed the same. Twenty percent reported a decrease.

As for what was being purchased, most law library acquisitions budgets were still spent primarily on print. But even though thirteen out of fifteen law library directors spent thirty percent or less of their acquisitions budget on electronic sources, the percentage was rising; eighty percent of law libraries had increased the amount they spent on electronic products in the last twenty-four months.

Collection Development Policies

A question on collection development policies was included in the survey to determine whether those documents guided format choice for law library purchases. The responses were revealing. Seventy-three percent of the law library policies did not specify the format in which material was to be acquired. Of the remaining libraries whose policies did specify format, only one policy specifically stated that electronic material was to be preferred to print in those cases where the electronic material was available, stable, and could provide perpetual access.

Purchasing Primary Source Materials

Statutes and Regulations

Academic law libraries in Canada continue to buy print copies of statutes for most jurisdictions. The statutes of ten jurisdictions out of a possible thirteen were collected by all of the respondents. Only one respondent had canceled a

37. One respondent spent between 31 and 40% and another spent between 51 and 60%.
38. The amount spent on electronic resources decreased in 6.7% of the libraries and in 13.3% it stayed the same.
39. Canada has fourteen jurisdictions: thirteen provinces/territories and the federal government.
print subscription to statutes in the last twenty-four months. Print regulations were not collected quite as widely; nonetheless, the regulations of each of the thirteen jurisdictions were purchased by no fewer than half the responding libraries. 40

¶ 23 Two-thirds of library directors said it was unlikely that they would cancel a subscription to print statutes or regulations from any Canadian jurisdiction in the next twenty-four months and rely solely on electronic sources; 26.7% replied that it was somewhat likely. Only 6.7% said that it was very likely.

Law Reports

¶ 24 Most academic law libraries continued to subscribe to print law reports. The titles of forty-six national, regional, and topical reporters were supplied, and libraries were asked which of these they subscribed to. Only one of the titles was subscribed to by less than half of the respondent libraries. Eighty percent or more of the libraries surveyed subscribed to thirty-six out of the forty-six titles.

¶ 25 Even so, sixty percent of libraries had canceled a subscription to one or more Canadian print reporters in the last twenty-four months. Reasons for the cancellations included having access to the material through an online subscription, or because decisions became freely available in some other way (e.g., via a free source on the web). Another reason was the attempt to free up money to buy different resources such as monographs. Forty percent of law libraries said it was somewhat likely they would cancel more print reporters in the near future, while one-third said it was very likely.

Possible Criteria for Cancellation

Price

¶ 26 Price was not a major factor in any decisions to cancel print legislation. As can be seen in table 1, in response to the statement “The price of print legislation is a concern for the library” only 26.6% of academic law libraries said that they agreed or somewhat agreed. In contrast, 80% of law library directors agreed or somewhat agreed with the statement, “The price of subscribing to print reporters is a concern for the library.”

Nunavut, however, does not print statutes; they are only available electronically. The ten are Alberta, Manitoba, Newfoundland, Northwest Territories, Nova Scotia, Ontario, Prince Edward Island, Quebec, Saskatchewan, and the Yukon. Federal statutes were subscribed to by 80% of law libraries, British Columbia by 93.3%, and New Brunswick by 86.7%.

40. To the question, For which jurisdiction does your law library currently buy print regulations (either as part of the Gazette or in some other form, e.g., looseleaf), the responses were Federal, 86.7%; Alberta, 73.3%; British Columbia, 66.7%; Manitoba, 73.3%; New Brunswick, 53.3%; Newfoundland, 66.7%; Northwest Territories, 66.7%; Nova Scotia, 73.3%; Ontario, 80%; Prince Edward Island, 73.3%; Quebec, 80%; Saskatchewan, 66.7%; Yukon, 73.3%. Almost all (93.3%) libraries had not canceled a subscription to print regulations from any Canadian jurisdiction in the last twenty-four months.
Table 1

| Is Price a Consideration When Subscribing to Print Legislation or Reporters? |
|-------------------------------------------------|-----------------|-----------------|-----------------|-----------------|-----------------|
| The price of print legislation is a concern for the library. | Agree 13.3% | Somewhat Agree 13.3% | Neither Agree nor Disagree 13.3% | Somewhat Disagree 20.0% | Disagree 40.0% | Not Applicable 0% |
| The price of subscribing to print reporters is a concern for the library. | 60.0% | 20.0% | 6.7% | 6.7% | 6.7% | 0% |

**Duplication of Materials**

§27 The overlapping of print and online sources was also of greater concern for print reporters than it was for print legislation. In response to the statement “The duplication of print and online legislation is a concern for the library,” forty percent said that they agreed or somewhat agreed compared with eighty percent who agreed or somewhat agreed to the same question involving reporters.

**Ease of Use**

§28 In the case of both legislation and case law, the majority of law libraries agreed that online sources were easier to use, although here, too, the responses were quite varied. Fifty-three percent of law libraries agreed or somewhat agreed that “research involving legislation is easier with online sources,” while 93.3% agreed that “research involving case law is easier with online sources.” Forty-six percent agreed or somewhat agreed that “faculty members prefer online sources for legislative research” while all agreed that “students prefer online sources for legislative research.” In contrast, two-thirds agreed that “faculty members prefer online sources for case law” and, once again, all agreed that “students prefer online sources for case law.”

**Personnel**

§29 Most of the respondents felt that personnel costs were lower with electronic resources. Eighty percent agreed with the statement, “Personnel costs are lower with electronic sources for legislation than with print” while 93.3% of respondents thought this was true for case law in electronic form versus print form.

41. Cf. Reusch, supra note 26, at 557, ¶ 12 (“Among the print publications that we have been committed to keeping are the state codes, for a couple of reasons. First, we continue to subscribe to the general consensus among serious legal researchers that statutory research works better in the print version of codes—even with improved browsing capacity and other developments in the online versions. This is a value we try to impress upon law students, though it usually doesn’t stick. Second, our collection of state codes is very popular with law review cite checkers and practitioners, and it does get used. Nevertheless, after some debate, we recently cancelled upkeep on codes for selected remote, smaller states. We’ll see whether we get push-back on that one.”).
Reliability

¶30 There was far less trust in the reliability of online sources for legislation than for case law. Only 26.6% of respondents thought that online sources were reliable enough to cancel print legislation sources compared with seventy percent who thought electronic sources were reliable enough to support cancellation of print sources of case law.

Space

¶31 The space to house print sources for legislation did not seem to be a pressing problem for academic libraries. Thirteen percent of respondents agreed or somewhat agreed with the statement “the library is running out of space for print legislation,” compared with fifty percent of respondents who thought that the library was running out of space for print reporters.

Use

¶32 As table 2 shows, close to three-quarters of respondents (73.3%) agreed or somewhat agreed with the statement “print legislative materials are used on a regular basis.” This is in contrast to 53.3% of respondents who agreed or somewhat agreed that “print law reporters are no longer used.”

<table>
<thead>
<tr>
<th>Table 2</th>
<th>Are Print Materials Used Regularly?</th>
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<tbody>
<tr>
<td></td>
<td>Agree</td>
</tr>
<tr>
<td>Print legislative materials are used on a regular basis.</td>
<td>40.0%</td>
</tr>
<tr>
<td>Print law reporters are no longer used.</td>
<td>20.0%</td>
</tr>
</tbody>
</table>

Teaching and Research

¶33 Seventy-three percent of respondents agreed or somewhat agreed that print legislation supported curriculum/teaching needs, while 93.3% agreed or somewhat agreed that this material supported research needs. In contrast, sixty percent agreed or somewhat agreed with the statement “print law reporters support curriculum/teaching needs,” and two-thirds agreed or somewhat agreed that “print law reporters support research needs.”

Discussion

¶34 The survey results show a clear distinction between how legislation and law reports are viewed by law library directors in Canada. Far more directors appear
confident about continuing to subscribe to legislation in print than they are about continuing to subscribe to print reporters. The price of reporters, along with the duplication of content, their relative lack of ease of use, the space that they take up in a library, and the personnel required to deal with them are among some of the key concerns.

¶35 Bar association standards do not and have not figured prominently in the discussion on what to cancel in Canada. In the United States, the American Bar Association standards set out criteria for law library collections, and go so far as to discuss what types of materials must be included in a law library core collection. These include

1. all reported federal court decisions and reported decisions of the highest appellate court of each state;
2. all federal codes and session laws, and at least one current annotated code for each state;
3. all current published treaties and international agreements of the United States;
4. all current published regulations (codified and uncodified) of the federal government and the codified regulations of the state in which the law school is located;
5. those federal and state administrative decisions appropriate to the programs of the law school; [and]
6. U.S. Congressional materials appropriate to the programs of the law school; . . . .

¶36 There is no comparable national standard set out by the bar associations/law societies for law libraries in Canada. The closest thing appeared in 1969, in a single sentence dealing with standards required for law schools in Canada: “The Law Society requires to be assured that adequate facilities, including library books and reading space, are available to the students and the faculty.”

¶37 The national coordinating body of Canada’s fourteen law societies, the Federation of Law Societies of Canada, appointed a task force in June 2007 to review existing requirements that had come into effect forty years earlier but had never been explicitly agreed to by law societies across Canada. It also set out to

43. Attachment to letter from Kenneth Jarvis, Secretary, Law Society of Upper Canada, to Thomas G. Feeney, Dean, University of Ottawa (Apr. 15, 1969), in FED’N OF LAW SOC’YS OF CANADA, TASK FORCE ON THE CANADIAN COMMON LAW DEGREE: CONSULTATION PAPER app. 3, at 5 (Sept. 2008), available at http://www.flsc.ca/_documents/Common-Law-Degree-Consultation-Paper-2008.pdf [hereinafter CONSULTATION PAPER]. In 1957, a special Committee of Benchers (the name for the individuals who run the Law Society of Upper Canada, Ontario’s Bar Association) working with a small group of lawyers and professors drafted a memorandum outlining the academic requirements for anyone who wished to earn a Canadian law degree. These included the minimum amount of schooling one would need to get into a law school, the types of courses that would be taught in a university law program, and the bar admission course requirements after the university law school training component had been completed. The Report of the Special Committee on Law School of Feb. 14, 1957, set out the requirements for “an approved law course in an approved University”; these requirements were modified somewhat in 1969 and included the sentence on libraries quoted in the text. See Letter from Kenneth Jarvis, Secretary, Law Society of Upper Canada, to David H. Jenkins (Feb. 20, 1984), in CONSULTATION PAPER, supra, at app. 2.
propose national academic requirements necessary for any law school to graduate students eligible for entry into a bar admission program. In the document specifying the requirements, it is stated that each law school must maintain “a law library in electronic and/or paper form that provides services and collections sufficient in quality and quantity to permit the law school to foster and attain its teaching, learning and research objectives.”

¶38 The Canadian Council of Law Deans responded to the Federation’s rather general comment thus: “We urge you to address in your final report the essential nature of a well equipped law library . . .” Since that time, an implementation committee (established by the Federation to determine how compliance with the new national academic requirements could be measured) has also urged, among other things, that standards for law libraries be made more concrete. The committee, which presented its final report in August 2011, inserted a note in parentheses along with several recommendations after section 2.4, which deals with the matter of law libraries:

(A useful reference for this requirement is the Canadian Academic Law Library Directors Association’s standards.)

The Implementation Committee recommends that the following information be provided in this section:

- Overview of library staff complement, qualifications and reporting structure.
- Overview of library facilities and description of collection and collections policies.
- Overview of library acquisitions budget.
- General description of support services available to faculty, students and other library users.

In 2012, the Federation began implementing the Committee’s recommendations, and the first step was to ask Canadian law schools to report back on how they planned to meet the new requirements. A description of current library staff, facilities, and budgets was to be included in the report from each school. What use the Federation will make of this information, however, or how it will determine if a law school library fails to meet what is, at present, a largely unarticulated standard, is still unclear.

¶39 As a result, when Canadian academic law library directors were asked which individuals or bodies they were likely to consult when making decisions about cancellation of print subscriptions, they gave a variety of answers including the dean of the law school, the university librarian, the relevant library committee, law faculty, law library personnel, librarians working in government documents, and “all of the above.” Bar associations were, not surprisingly, absent from the discussion.

45. Id. at 11 (emphasis omitted).
46. The Canadian Council of Law Deans is an independent association made up of the heads of all law schools and departments of law across Canada.
Does Format Matter?

¶40 Leslie Street and Amanda Runyon have noted that: “Collections are fundamentally changing because of new technologies and a growing reliance on electronic materials. Faced with this new reality, though, law libraries and scholars have done little research examining the impact of potential cancellations on legal research education.”49 We are in the dark, for example, about the long-term stability of various titles in various databases and are unlikely to be able to predict the future here with any real accuracy.

¶41 In Canada, for example, in April 2008, the publisher Canada Law Book removed its publications from the LexisNexis Quicklaw database. Until that time, the Canada Law Book content available via LexisNexis Quicklaw included key reporters such as Canadian Criminal Cases, Canadian Patent Reporter, Dominion Law Reports, and Labour Arbitration Cases, along with additional key reference resources such as the Canadian Law List.50 The reason for removing these titles had to do with Canada Law Book’s promotion of its own database, BestCase, which was to be the only online source for these materials. Those libraries that took it all in stride and subsequently bought a subscription to Canada Law Book’s BestCase database were astonished to learn in 2010 that Carswell (Thomson Reuters) had purchased Canada Law Book. It remains unclear to this day, given the duplication of content in various publications by the two companies, whether Carswell will cease to publish some of the Canada Law Book’s resources (including BestCase).51 Clearly, five years ago, only the most astute and precognitive of librarians could have accurately predicted any of this. Given that the sand shifts continually beneath our feet in this way, can we, as Rita Reusch asks, “cancel print with confidence that the content will remain available under the educational contract license?”52

¶42 In addition to problems involving the stability of titles in various electronic databases, we also know little about how the electronic model versus the print model will change the services provided by academic law libraries. Print, once purchased, belongs to a library for as long as it exists physically. It can be loaned to borrowers, placed on reserve, and sent to other libraries through interlibrary loan. Critics of reliance on electronic resources that are not owned but only provide access note that “like rent, money spent on [electronic] access is gone. The library has nothing concrete to show for the dollars expended. . . . Most alarming of the many criticisms of access is that if everyone moved to the access paradigm, no collections from which to borrow would exist.”53 The licensing agreements that aca-

49. Street & Runyon, supra note 4, at 400, ¶ 2 (footnote omitted).
52. Reusch, supra note 26, at 560, ¶ 22.
ademic libraries sign generally prohibit those libraries from providing interlibrary loan access to the content of that database. For some librarians, this sounds like the death knell for interlibrary loan: as more and more material is available electronically, less and less will be available to lend to other libraries.\textsuperscript{54}

\section*{43} Finally, there is little information available on whether providing access only to electronic sources will affect the work of students and researchers, though there are recent indications that the legal community appears to have certain reservations about law libraries that are entirely electronic. In a 2005 survey of Chicago-area lawyers, for example, a significant number of respondents agreed that more time should be spent training law students while still in school to use print resources. Print resources, according to respondents, were not only more economical, but were necessary since not everything was available online.\textsuperscript{55} In addition, the librarians who answered a 2007 survey discussed above were not happy about what they saw as “too much reliance on electronic [databases].”\textsuperscript{56} Lawyers who responded to a companion study commented that when young associates relied solely on electronic resources and failed to consult print sources, they also failed to develop key legal concepts “as a result of their myopic use of keywords.”\textsuperscript{57} Seasoned lawyers who responded had a sense that something important was missing from research based solely on electronic sources.\textsuperscript{58}

\section*{44} Clearly more work needs to be done in this area. While the survey of Canadian law library directors reveals a likelihood of cuts to print resources—particularly law reports—in the future, there are no accompanying studies to tell us whether this is good for patrons, bad for patrons, or unlikely to affect them at all. There is also little to indicate whether library collections will suffer no ill effects from the move toward electronic resources, or if the practice will indeed leave libraries in a far worse position.

\begin{thebibliography}{99}
\bibitem{54} See Chiorazzi, \textit{supra} note 5, at 25 (“[U]ltimately, we will need to reexamine our societal mission. If we do not collect the less heavily used materials, … if we do not preserve our cultural heritage, who will? We run the risk of relying on others until there are no others to rely upon. If every library were to rely on interlibrary loan to supplement its own collections, the system collapses.”).
\bibitem{55} Greenberg, \textit{supra} note 16, at 251–53.
\bibitem{56} Gallacher, \textit{supra} note 25, at 13 n.47 (quoting respondent to Tom Gaylord’s 2007 survey of law librarians).
\bibitem{57} \textit{Id.} at 14 n.47 (quoting respondent to author’s 2007 survey of attorneys). There may be more to this than meets the eye. Katrina Fischer Kuh, citing work in the area of medium theory, posits that the way in which “information is communicated—for example, oral versus print—is not neutral. Instead it significantly shapes how the conveyed information is understood.” See Katrina Fischer Kuh, \textit{Electronically Manufactured Law}, 22 HARV. J.L. & TECH. 223, 229 (2008). Even if this idea is not understood overtly, it seems to be understood intrinsically on some level by people who have spent time doing legal research. Using print versus online sources may not just be a matter of different research practices, it could also affect how we research and, in turn, the results of that research. \textit{See generally}, Barbara Bintliff, \textit{Context and Legal Research}, 99 LAW LIBR. J. 249, 2006 LAW LIBR. J. 15.
\bibitem{58} Some writers have tried to explain this away as “generational.” As Ian Gallacher explains, law students and new associates are “comfortable with the internet, uncomfortable with books and libraries, and are headed for an unpleasant rendezvous with the traditionalists who still inhabit law firms, and who have very different ideas about the relative merits of books and electronic legal research.” Ian Gallacher, \textit{Forty-Two: The Hitchhiker’s Guide to Teaching Legal Research to the Google Generation}, 39 AKRON L. REV. 151, 166 (2006).
\end{thebibliography}
Conclusion

¶45 John Budd notes in *The Changing Academic Library*: “For almost as long as academic libraries have been in [existence], they have been associated with the collections they have selected, acquired, organized and housed.”59 There is, he continues, “some dispute regarding the purpose of the library. On the one hand, there are those who advocate breaking through the constraints a physical collection imposes on library services. On the other hand are those who make the case for the preservation of recorded knowledge.”60 The latter statement would include the sixty percent of Canadian law library directors who agreed or somewhat agreed with the statement: “The library in its role as repository should maintain a print reporter collection.” Twenty-six percent disagreed or somewhat disagreed.

¶46 Yet Budd may also be correct when he comments that “both points are correct; what is constricting is a narrowness of vision that puts libraries in an either/or stance.”61 Nonetheless, as noted above, law libraries are now nearing an “either/or stance.” Certainly, law firm libraries will get there first, driven by lawyers’ demands for libraries to eat up less office space, and for libraries to provide resources that can be accessed from a variety of locations. How this will manifest itself in academic law libraries in the future is unclear, but as this survey clearly reveals, the writing could already be on the wall for print reporters, and what is to become of print legislation once reporters have been dealt with still remains to be seen.

60. Id.
61. Id.
Appendix

Primary Sources Cancellation Survey

1. Please identify your law library:

2. What percentage of your total law library acquisitions budget is spent on online/electronic resources?

   ____ 0–10%
   ____ 11–20%
   ____ 21–30%
   ____ 31–40%
   ____ 41–50%
   ____ 51–60%
   ____ 61–70%
   ____ 71–80%
   ____ 81–90%
   ____ 91–100%

3. What percentage of your total law library acquisitions budget is spent on print resources?

   ____ 0–10%
   ____ 11–20%
   ____ 21–30%
   ____ 31–40%
   ____ 41–50%
   ____ 51–60%
   ____ 61–70%
   ____ 71–80%
   ____ 81–90%
   ____ 91–100%

4. Has your total law library acquisitions budget increased, decreased, or stayed the same during the last twenty-four months?

   ____ Increased
   ____ Decreased
   ____ Stayed the same

5. Has the amount that the law library spends on online/electronic sources increased, decreased, or stayed the same during the last twenty-four months?

   ____ Increased
   ____ Decreased
   ____ Stayed the same

6. For which jurisdictions does your law library currently buy print statutes (i.e., bound annual volumes, consolidated statutes, or something similar)?

   ____ Federal
   ____ Alberta
   ____ British Columbia
   ____ Manitoba
   ____ New Brunswick
   ____ Newfoundland
   ____ Northwest Territories
   ____ Nova Scotia
   ____ Ontario
   ____ Quebec
   ____ Saskatchewan
   ____ Yukon
   ____ None of the above

7. Have you canceled a subscription to print statutes from any Canadian jurisdiction in the last twenty-four months?

   ____ Yes
   ____ No

   If yes, please specify jurisdiction(s):
8. For which jurisdictions does your law library currently buy print regulations (either as part of the Gazette or in some other form, e.g., looseleaf)?

- Federal
- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland
- Northwest Territories
- Nova Scotia
- Ontario
- Quebec
- Nunavut
- Saskatchewan
- Yukon
- None of the above

9. Have you canceled a subscription to print regulations from any Canadian jurisdiction in the last twenty-four months?

- Yes
- No

If yes, please specify jurisdiction(s):

10. How likely is it in the next twenty-four months that you will cancel a subscription to print statutes or regulations from any Canadian jurisdiction and rely solely on online/electronic sources instead?

- Very likely
- Somewhat likely
- Not at all likely

11. If you have to make cuts to print legislation subscriptions in the next twenty-four months, which jurisdiction(s) are you likely to cancel?

- Federal
- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland
- Northwest Territories
- Nova Scotia
- Ontario
- Quebec
- Nunavut
- Saskatchewan
- Yukon
- None of the above

12. Are you planning in the next twenty-four months to weed (either disposing of permanently or placing in storage) any of the following Canadian print sources from your collection?

- Statutes
- Regulations
- Law reports
- None of the above

13. To which print national and regional reporters does the law library subscribe? (Choose all that apply)

- Dominion Law Reports (D.L.R.)
- Supreme Court Reports (S.C.R.)
- Federal Court Reports (F.C.R.)
- Atlantic Provinces Reports (A.P.R.)
- Federal Trial Reports (F.T.R.)
- Western Weekly Reports (W.W.R.)
- National Reporter (N.R.)
- None of the above
14. To which jurisdiction-specific print reporters does the law library subscribe? (Choose all that apply)

___ Alberta Law Reports
___ Alberta Reports
___ Annuaire de jurisprudence et de doctrine du Québec
___ British Columbia Law Reports
___ British Columbia Appeal Cases
___ Manitoba Reports
___ New Brunswick Reports
___ Newfoundland and Prince Edward Island Reports
___ Nova Scotia Reports
___ Ontario Appeal Cases
___ Ontario Reports
___ Quebec Appeal Cases
___ Recueils de jurisprudence du Québec
___ Saskatchewan Reports
___ None of the above

15. To which print topical reporters does the law library subscribe? (Choose all that apply)

___ Administrative Law Reports
___ Business Law Reports
___ Canada Tax Cases
___ Canadian Bankruptcy Reports
___ Canadian Cases on Employment Law
___ Canadian Cases on the Law of Insurance
___ Canadian Cases on the Law of Torts
___ Canadian Criminal Cases
___ Criminal Reports
___ Canadian Environmental Law Reports
___ Canadian Human Rights Reporter
___ Canadian Labour Law Cases
___ Canadian Patent Reporter
___ Canadian Rights Reporter
___ Carswell’s Practice Cases
___ Construction Law Reports
___ Dominion Tax Cases
___ Estates and Trusts Reports
___ Immigration Law Reporter
___ Labour Arbitration Cases
___ Motor Vehicle Reports
___ Municipal and Planning Law Reports
___ Personal Property Security Act Cases
___ Real Property Reports
___ Reports of Family Law
___ None of the above

16. Has the law library canceled a subscription to one or more Canadian print reporters in the last twenty-four months?

___ Yes
___ No

17. How likely is it in the next twenty-four months that the law library will cancel all or some print law reports and rely solely on online/electronic sources for that content instead?

___ Very likely
___ Somewhat likely
___ Not at all likely
18. Does the law library’s collection development policy specify which statutes, regulations, and reporters are to be purchased?

____ Yes
____ No
____ We don’t have a collection development policy

If yes, what does the policy say?

19. Does the law library’s collection development policy specify the format (i.e., print or electronic) in which to buy library materials and resources?

____ Yes
____ No

If yes, what does the policy say?

20. Which electronic resources do you think might adequately replace Canadian print legislation in the law library? (Choose all that apply)

____ Westlaw Canada
____ LexisNexis
____ Government web sites
____ CanLII
____ Other

If “Other,” please specify:

21. Which electronic resources do you think might adequately replace Canadian print law reports in the law library? (Choose all that apply)

____ Westlaw Canada
____ LexisNexis
____ Government web sites
____ CanLII
____ Other

If “Other,” please specify:

22. Would a decision by the law library to cancel print legislation or law reports require consultation with any of the following? (Choose all that apply)

____ Dean
____ University Librarian
____ Library Committee
____ Law Library personnel
____ None of the above
____ Other

If “Other,” please specify:
23. In the past twenty-four months, has the law library canceled any online/electronic product in favor of keeping the print equivalent?

_____ Yes
_____ No

If yes, please specify:

24. To what extent do you agree or disagree with the following statements about print and electronic sources for legislation?

<table>
<thead>
<tr>
<th></th>
<th>Agree</th>
<th>Somewhat Agree</th>
<th>Neither Agree nor Disagree</th>
<th>Somewhat Disagree</th>
<th>Disagree</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>The price of print legislation is a concern for the library.</td>
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<tr>
<td>The duplication of print and online legislation is a concern</td>
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<tr>
<td>for the library.</td>
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<tr>
<td>Research involving legislation is easier with online sources.</td>
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<tr>
<td>Faculty members prefer online sources for legislative research.</td>
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<tr>
<td>Students prefer online sources for legislative research.</td>
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<tr>
<td>Personnel costs are lower with electronic sources for legis-</td>
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<td>lation than with print.</td>
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<tr>
<td>Electronic sources for legislation are reliable enough to can-</td>
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<td>cel print.</td>
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<td>The library is running out of space for print legislation.</td>
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<tr>
<td>Print legislative materials are used on a regular basis.</td>
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</tbody>
</table>
25. To what extent do you agree or disagree with the following statements about print and electronic case law reports?

<table>
<thead>
<tr>
<th>Agree</th>
<th>Somewhat Agree</th>
<th>Neither Agree nor Disagree</th>
<th>Somewhat Disagree</th>
<th>Disagree</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
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</tbody>
</table>

- Print legislation supports curriculum/teaching needs.
- Print legislation supports research needs.
- The price of subscribing to print reporters is a concern for the library.
- The duplication of print and online sources for case law is a concern for the library.
- Research involving case law is easier with online sources.
- Faculty members prefer online sources for case law.
- Students prefer online sources for case law.
- Personnel costs are lower with electronic sources for case law than with print.
- Electronic sources for case law are reliable enough to cancel print.
- The library is running out of space for print law reports.
<table>
<thead>
<tr>
<th>Agree</th>
<th>Somewhat Agree</th>
<th>Neither Agree nor Disagree</th>
<th>Somewhat Disagree</th>
<th>Disagree</th>
<th>Not Applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Print law reports are no longer used.</td>
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<tr>
<td>Print law reports support curriculum/teaching needs.</td>
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<tr>
<td>Print law reports support research needs.</td>
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<tr>
<td>The library in its role as repository should maintain a print reporter collection.</td>
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</table>

26. In the event of a follow-up study on this topic, is there a question that you feel is important to ask the Canadian Law Library Directors? (optional)

27. Final comments on the cancellation of print primary sources in your law library or generally? (optional)
Donating and Procuring Organs: An Annotated Bibliography*

Louis J. Sirico, Jr.**

This annotated bibliography surveys recent law review articles dealing with proposed systems for increasing the availability of organs for transplantation as well as related topics.

Introduction ................................................. 285
Background .................................................... 286
Proposed Solutions to the Organ Shortage ................. 289
Motivating Potential Donors .............................. 289
Noncompensatory Organ Procurement Systems ............. 292
Compensatory Organ Procurement Systems ................. 294
Market Systems ............................................. 294
Financial Incentives ....................................... 297
Ethical, Moral, and Legal Concerns ......................... 301
Ethical Concerns ............................................ 301
Alternative Sources of Transplantable Organs: “Strangers” and Children ........................................ 304
When to Harvest .............................................. 305
Legal Rights of Next of Kin ............................... 307
Legal Rights of the Cadaveric Organ Donor ................ 308
Human Trafficking ........................................... 309
The Future of Organ Transplantation: Xenotransplantation? ............... 309

Introduction

¶1 The need for organs and the inadequate supply present a life-and-death tragedy for those who must have organ transplants in order to live.¹ Academic responses to the problem have taken two avenues. One avenue looks to practical solutions, ranging from compensating donors to establishing systems in which individuals are presumed to consent to donating their organs. The second avenue has focused on the jurisprudential principles underlying the various proposals.

** Professor of Law, Villanova University School of Law, Villanova, Pennsylvania.
¹ See Scientific Registry of Transplant Recipients, http://www.srtr.org (last visited Feb. 29, 2012) (containing reports on size of waiting lists, number of transplants, and number of deaths of patients on waiting lists).
With respect to the latter, Guido Calabresi has identified four dominant approaches: (1) Doctrinalist: This approach looks to existing rules and doctrines, which hold that individuals own their own bodies and make their own choices concerning whether to donate their body parts; (2) “Law and” viewpoint: Schools such as “law and economics” and “law and philosophy” and groups within those schools analyze the issue from different perspectives and come to different resolutions; (3) Legal process: This analysis focuses on the suitability of different institutions to determine ownership of body parts, particularly in light of the range of values and rights that the issue raises; and (4) Law and status: In assessing rules for allocation of body parts, scholars focus on the impact on groups such as women, racial minorities, the poor, and those with minority sexual orientations. My survey indicates that in the academic literature, a law and economics approach to the issue dominates the scholarship.

This annotated bibliography offers a survey of law review articles dealing with proposed systems for increasing the availability of organs for transplantation as well as related topics. The articles were located by conducting a Westlaw search using the search terms “transplant” and “transplantation.” Because medicine has advanced so rapidly in this field, almost all included articles are from 2000 or later. From that time period, all articles relevant to the topic were included.

Background

The following laws and organizations comprise the current legal framework governing organ donation in the United States.

Uniform Anatomical Gift Act (UAGA). Originally promulgated in 1968 by the National Conference of Commissioners on Uniform State Laws, this Act addresses the critical organ shortage by providing additional ways for making organ donations. The Act is designed to encourage individuals to make anatomical gifts; to honor and respect the autonomy interest of individuals to make or not to make an anatomical gift of their body or parts; and to preserve the current altruistic anatomical gift system by requiring a positive affirmation of an intent to make a gift and prohibiting the sale and purchase of organs. In 1968, all states promptly enacted the law. The current 2006 revision has been adopted by forty-five states.

National Organ Transplant Act (NOTA). Passed by Congress in 1984 to increase the supply of transplantable organs and ensure fairness in the allocation and distribution of organs, this Act established the Organ Procurement and Transplantation Network (OPTN) and the formation of Organ Procurement Organizations (OPOs). The Act is notable for expressly forbidding the exchange of human organs for “valuable consideration.”

4. Id. at 42–43.
6. Id. § 274e(a).
¶7 United Network for Organ Sharing (UNOS). A private, nonprofit organ procurement organization that administers the OPTN. UNOS locates, tracks, procures, and allocates organs on a national level; maintains a national database of all patients awaiting organ transplants; and carries out the mandates of the Department of Health and Human Services (DHHS) and NOTA.7

¶8 Organ Procurement and Transplantation Network (OPTN). Created by NOTA and operated by UNOS under contract with DHHS, OPTN is a private, nonprofit organization that maintains the national waiting list for organs, establishes medical criteria for organ allocation, and sets standards of quality for the acquisition and transplantation of donated organs.8

¶9 Organ Procurement Organizations (OPOs). Private, nonprofit organizations responsible for the recovery, preservation, and transportation of donated organs, and the maintenance of a system to locate prospective recipients for all recovered organs.9

¶10 The following articles offer background information on alternative organ procurement systems and the current legal framework for organ procurement in the United States.


This article offers a brief overview and comparative evaluation of several alternative organ procurement systems. The authors also discuss the various ethical issues involved in each system.


The Final Rule, announced by the DHHS, declares that organs may no longer be distributed according to geographic distinctions.10 The author of this note believes that the Final Rule does not preempt state law. He further argues that state laws restricting the transfer of organs outside the state violate the dormant Commerce Clause. He then questions whether the application of federal preemption and the dormant Commerce Clause may fail to achieve a sound organ allocation policy, raises policy questions not considered by these constitutional doctrines, and concludes that Congress should provide clearer instructions for allocating organs.


This comment examines organ allocation, focusing primarily on the debate between the states, which favor local distribution of organs, and the Final Rule, which favors a national, need-based system. The author calls for a quasi-national, need-based system of organ distribution, managed by UNOS, with limited over-

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sight by the DHHS. She argues that such a system is necessary to overcome the deficiencies inherent in a local distribution system and to provide for more equitable organ allocation.


Employing a narrative account of documentary sources, this note offers the social and legislative history of NOTA. It focuses on the concerns, aspirations, and effects that are most prevalent in the source materials. The author argues that NOTA was the product of a specific technological, economic, political, and cultural context and analyzes the motives behind banning commerce in human organs and NOTA’s impact on organ procurement and allocation. According to the argument, NOTA failed to alleviate the organ shortage and thus created pressures for further innovations in organ allocation policy. The author contends that new scientific technologies will largely govern the future of organ allocation, and hopes that they will lessen the organ shortage.


According to this comment, states have attempted to circumvent existing regulations under NOTA to exert control over the flow and number of viable organs present in the federally controlled “pool” of commerce. The author explores legal issues regarding whether the constitutional rights of potential organ recipients are adequately protected by the Act. He argues that the Act is inadequate, because it has indirectly created a national commerce in organs, resulting in citizens’ being denied access to a federally controlled product. The author proposes reworking federal law, including the Act, to avoid inequity in allocation, and to more strictly regulate UNOS.


This article provides background information on organ donation and encourages education of attorneys and potential donors on the laws regarding organ donation. It also discusses the difficulties in organ allocation faced by UNOS. The author argues that it is an attorney’s responsibility to ensure, through knowledgeable and compassionate discussions with the client and the family, that the client has the opportunity to choose to become a donor while alive, while near death, and after death.


Here, the rule-making process for organ allocation policy undergoes examination. The author argues that private rule-making appears to be relatively effective in tapping into the technical expertise and tacit knowledge of stakeholders to allow for the adaptation of rules in the face of changing technology and information. According to the analysis, however, the system of representation employed gives less influence to some stakeholders than they would have in public regulatory arenas, thus giving them an incentive to seek public rule-making as a remedy for their persistent losses within the private framework.

At issue is how the states have applied the Uniform Anatomical Gift Act. According to the article, it is essential to coordinate the states’ organ transplant efforts. The author argues that the states, California in particular, must continue to revise their laws to protect these goals in the face of ongoing medical advancements.

**Proposed Solutions to the Organ Shortage**

**Motivating Potential Donors**

¶11 The following terms describe several proposals to motivate potential donors in order to increase the supply of transplantable organs.

¶12 *Express Consent.* The system of organ procurement currently employed in the United States. The organ donor must give written consent before death or expressly authorize another person to give consent when that person, usually a family member, is qualified to make the decision after the donor’s death. A contrasting system would presume consent absent a clear contrary statement from the potential donor.11

¶13 *Nonfinancial Incentives.* Also referred to generally as nonmonetary or noncompensatory incentives, nonfinancial incentives attempt to increase private motivation to donate organs through such incentives as paired organ exchanges12 or mutual insurance pools.13 Included in this category are priority incentives and reciprocal altruism. Priority incentives reward living organ donors with priority recipient status if the donor needs an organ in the future. Reciprocal altruism is best explained by the definition of “paired organ exchange” below.

¶14 *Mutual Insurance Pool.* A type of priority incentive that creates a “pool” of willing, living organ donors and rewards members with priority recipient status in the future if donors agree to make their organs available to other members of the pool upon death.14

¶15 *Paired Organ Exchange.* A type of reciprocal altruism that creates an organ transplant facilitation system to match living donors with recipients. For example, Patient A and Patient B both need kidney transplants but both are incompatible with their respective relatives who are willing to donate. Patient A’s relative is compatible with Patient B, however, and Patient B’s relative is compatible with Patient A. Patient A’s relative then agrees to donate to Patient B, and Patient B’s relative agrees to donate to Patient A.15

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14. *Id.*
The articles described below discuss ways to expand the scope of organ procurement through statutory modifications and nonfinancial incentives while maintaining the current system of express consent.


According to this note, legislation in other countries may offer guidance to the United States in improving its regulatory system. The author suggests three elements that legislation should contain: (1) the recipient should pay for out-of-pocket expenses; (2) organ procurement organizations should be expanded; and (3) incentives other than direct compensation should be made available in order to entice others to donate, for example, travel and accommodation expenses, tax credits for medical expenses, and employment insurance. The note also discusses alternative ways to increase the number of donors.


This comment discusses Spain’s response to its organ donation shortage and analyzes the possibility of applying that policy to other countries, including the United States. The author argues that Spain’s presumed consent laws do not generate as many donations as most believe. Spain’s success in procuring organs, the author believes, is attributable to its system of directly encouraging organ donations among potential donors. He suggests that if such elements of the Spanish model were adopted in the United States, the organ-donation rate would likely increase.


This survey analyzes the laws relating to cadaveric organ procurement and how they affected procurement rates in seventeen countries between 1990 and 2002. The author concludes that no distinctive legal concept of consent is responsible for countries’ achieving high organ-procurement rates. According to Healy, no research demonstrates that presumed consent laws achieve their expected goal. He further argues that contemporary debates about altruism versus self-interest and disputes over presumed and informed consent mask the real solution, which lies in organizational reform, specifically in logistics and process management.


At issue is the efficacy of repealing the ban on offering valuable consideration for organs and possible consequences of repeal. This note argues against repealing the ban and advocates promoting organ donation within the existing regulatory framework. Hurley argues that offering financial consideration for organs will lead to exploitation of underprivileged groups and will result in unnecessary ethical and moral problems. The note instead suggests providing nonfinancial incentives.


This note examines the interplay of federal law and compliance issues resulting from Iowa’s adoption of the 2006 revision of the Uniform Anatomical Gift Act.
The author argues for the necessity of having uniformity between state and federal laws. According to the author, the organ shortage will never lessen without a uniform law that complies with and supplements federal law while taking into account changes in technology and medical science.


Here, several proposals to increase organ donation undergo examination. The author adopts elements of these proposals to formulate a priority incentive system which, he argues, should encourage people to donate without financial or nonfinancial incentives and should reduce everyone’s waiting time for an organ. The author also argues that the current altruistic system leads to unnecessary, preventable pain and death.


This note examines paired organ exchanges and argues for amending federal law to allow the already-existing registry of patients in need of organ transplants to be used to bring together the families and friends of different patients on the waiting list in order to save lives. The author contends that this system will increase the number of organs available, and that it is the best way to supplement the current procurement system.


At issue here are the deficiencies in and lack of remedies available to plaintiffs asserting valid claims to the organs of a cadaveric organ donor, the effect of these shortcomings on organ donation generally, and potential solutions. This note argues that a simple and effective step toward resolving the organ shortage would be to provide a means to enforce and thus protect and expand the minimal rights that are granted under the current regulatory framework for organ donation. Morris contends that these steps would have a positive effect on organ donation.


A California statute established a donor registry to permit sharing of information about willing donors with procurement organizations and transplant centers. This registry (the Altruistic Living Donor Registrar) allows altruistic donations and thus increases the availability of organs. This article advocates requiring the motor vehicles department to ask anyone seeking a driver’s license to make an affirmative decision as to whether they would like to become organ donors.


A reciprocity-based system rewards individuals who sign up to be organ donors with priority recipient status if they ever need an organ. The authors argue that this system would not violate NOTA, and that it is more ethical than a presumed consent system, because it does not violate individual autonomy.


In this article, the authors suggest promoting a reformulated social understanding of the moral premise of organ donation by emphasizing reciprocal altruism, establishing a national plan for organ transplantation insurance, and gradually
shifting social expectations in the direction of assuming that everyone is a potential donor.


Private solicitation of organ donations is this article’s proposal. The author would encourage donations from individuals who are neither related to, nor close friends with, the recipient. The author addresses critics’ concerns regarding commodification of the human body and exploitation of the poor and contends that permitting private solicitation will increase the supply of organs and remedy inequities that exist in organ allocation.


Written by the Executive Director of Lifesharers, a nonprofit organization that promotes a quid pro quo system of organ donation, this article proposes an organ allocation system of reciprocal altruism.

**Noncompensatory Organ Procurement Systems**

¶17 Noncompensatory organ procurement includes four proposed systems: presumed consent, required response, routine request, and conscription. Under presumed consent (or opt-out), everyone is presumed to be an organ donor upon death, unless the person had registered a dissent to organ donation. Required response (or mandated choice) requires adults to register their consent or objection. Routine request requires hospital personnel to ask potential donors if they object to transplantable organs being removed after death. Under a system of conscription (or routine salvaging) “physicians do not have to ask for consent, and surviving family members are not allowed to object posthumously.” The following articles explore these proposals.


This article reviews some of the medical and ethical issues surrounding the procurement of uncontrolled donation after cardiac death (uDCD) organs, with emphasis on the European situation. The authors address the system of presumed consent in use in most European countries, as well as the Institute of Medicine’s position on uDCD organs. They argue that the Institute of Medicine, which accepted the use of preservation techniques, should have gone further in pursuing a presumed consent system.


Presumed consent finds an advocate in this student article. The author argues

17. *Id.* at 379.
18. *Id.*
that this system is the best method of increasing the legal organ supply, and that it encourages nations to adopt mandatory reporting requirements for doctors who suspect the organs they receive for transplants are products of trafficking.


At issue is whether presumed consent organ donation laws are ethical or constitutional. The author analyzes anatomical gift statutes and the ways in which the current system in the United States already encompasses presumed consent; examines the Supreme Court’s conceptions of the rights of individual and family-based privacy, autonomy, and liberty; and analyzes presumed consent laws in light of the donors’ and their families’ privacy, autonomy, and liberty interests. She concludes that current presumed consent organ donation laws in the United States are both unethical and unconstitutional. (cross-referenced under Ethical, Moral, and Legal Concerns: Ethical Concerns)


This article was the first to propose a system of organ procurement called “routine request,” which requires hospital personnel to ask potential donors if they have any objection to the removal of transplantable organs after death.


The express consent system of organ procurement used in the United States is compared with the various presumed consent systems used in several other countries. The author argues that the presumed consent system is likely the most successful approach worldwide. She examines the viability of implementing a presumed consent system in the United States and the potential legal and ethical barriers to such a change. The author proposes that the United States place a greater emphasis on organ donation by moving toward a variation of the presumed consent approach.


This article reviews the history of presumed consent in the United States and concludes that presumed consent failed because it could not overcome the refusal of family members to give consent to donation. The author argues that this history with presumed consent indicates that other proposed reforms will be needed to address the organ shortage.


In this comment, seven alternatives to the current organ donation system are analyzed. The author argues that the best solution to the current organ shortage is to implement a required response system because (1) it could eliminate the problems of the presumed and informed consent systems while still honoring the wishes of the deceased, (2) it would not raise the same constitutional or moral issues as a presumed consent system, and (3) it has the best chance of eliminating the organ shortage.

After examining the organ shortage crisis, the evolution of anatomical gift law, and the current system of encouraged donation, this note evaluates five alternative organ procurement systems. The author concludes that a mandated choice system is the best alternative because it best protects both the legal rights and the social values of donors. He also argues, however, that this system must be implemented along with a nationwide education program in order to successfully increase the organ supply. Spellman further proposes implementing an effective organ allocation system that would allow for the most rational use of organs.


This comment advocates implementing a presumed consent law. The author emphasizes the similarity between a presumed consent law and other Pennsylvania statutes and demonstrates that the importation of a presumed consent law from abroad is not unconstitutional. After examining the differences between strong and weak presumed consent statutes, she suggests that Pennsylvania should adopt a strong presumed consent statute.

Compensatory Organ Procurement Systems

**Market Systems**

¶18 Market proposals for organ donation range from unregulated free markets (also referred to as open markets or inter vivos sales in which donors and patients can buy and sell organs freely) to various types of regulated markets to futures markets. A futures market permits individuals to sell the right to remove their organs upon death, creating a contractual relationship.19 The following articles discuss the different types of market systems.


In this note, the author explores the economics of a free market in human organs and argues that such a system is the best solution to the organ shortage.


The author defends the introduction of a market in human organs for transplantation to compensate donors and their families. He argues that human kidneys are commodities. Denying that fact, he maintains, encourages the continuation of dishonest public policy. Next, the author argues that individuals possess authority over their own bodies, and that even if financial incentives do not increase the organ supply, an insurmountable burden of proof must be overcome to justify forbidding individuals from selling their organs.

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In this article, Epstein develops an economic theory of altruism in order to better understand the organ shortage in terms of supply and demand and to predict future demand for organs. He argues that altruism operates like ordinary economic markets, but produces an equilibrium position in which more organs are transferred at lower cash prices. The author defends this economic model against behavioral and traditional objections. According to Epstein, this model properly predicts that the use of financial incentives will not disrupt the operation of organ markets and should be used to redress the worsening organ shortage. He further contends that repealing the total prohibition against organ transfers for valuable consideration will not constrict the organ supply or distort either social practices or donative behavior.

This article discusses the flaws in the American altruistic system of organ procurement and advocates a market system. The author proposes a hybrid system that would preserve the altruistic system, but would decriminalize exchanging “valuable consideration” for organs. She also proposes adopting a paired kidney exchange and reallocating government spending.

To increase the supply of transplantable organs, this article proposes establishing a government-regulated, posthumous organ market, with economic incentives for the donors. The authors examine and reject several alternatives to a free market, including presumed consent, altruism, and China’s system of procuring organs from executed prisoners. They justify a free market approach by making an analogy to the market for egg donations.

This note analyzes other nations’ successes and failures with alternative organ procurement systems, particularly presumed consent models. The author recommends creating a trial program of regulated open markets for cadaveric organs in one or several states and suggests that the United States use a combination national donor registry with priority for recipients who are also registered as donors. According to the author, these measures would best address the organ shortage within the existing legal and ethical framework.

According to this article, there are economic misconceptions about a proposed financial market for organs. The author explores the definition and measurement of the shortage, the likelihood of the emergence of a black market as a result of legalizing organ sales, and the distinction between the use of market forces to procure organs and the use of market forces to allocate organs. According to the analysis, the altruistic system of organ procurement is the reason for the shortage and thus it needs to be changed.

Although a futures market using indirect financial incentives will increase donor incentive and donor autonomy, it will not maximize the supply of organs, according to this note. The author argues, however, that such a futures market is currently the only practical proposal to increase supply. (cross-referenced under Financial Incentives)


Organ-trading tourism can be defined as the trading of organs involving more than one jurisdiction. According to the author, when European policy makers adopted blanket prohibitions on organ trading, they overreacted to legitimate public health concerns and the evils of organ trafficking. Pattinson advocates a trial of a regulated system of organ trading, which could eventually lead to a limited system of organ tourism.


This student article advocates a quasi–free market organ procurement system consisting of a network of organ procurement agencies that would facilitate the sharing of information between buyers and sellers. After exploring other proposals, such as inmate donations, presumed consent, conscription, routine request, and tax incentives, the author concludes that although these systems would likely reduce the organ shortage, they also raise serious ethical considerations and hence are less preferred.


This note advocates an organ procurement system in which recipients give financial compensation to donors. The author justifies this approach by comparing it to the current financial compensation system for egg donors.


The author proposes a kidney procurement system that would pay donors for their kidneys. He analyzes religious thinking on paying kidney donors, with a focus on Judaism, and discusses other significant medical, ethical, and economic arguments both for and against this proposal. Steinbuch details a proposal for creating a system to regulate the sale of kidneys that enlists the existing nonprofit kidney distribution organization to serve as a clearinghouse for both the purchase and distribution of commercial kidneys, without modifying the current system of kidney distribution.


Six alternative procurement systems undergo analysis here. The author proposes
that two—financial incentives and an organ market—are worthy of a trial. She considers the advantages and disadvantages of these two proposed systems, the effect of the black market on organ donation, the different types of organ sales, and the enhancement of donation through international cooperation.


This comment proposes the legalization of organ sales as well as the establishment of a privatized institution to supervise the trade. Woan examines China’s former system of harvesting organs from prisoners who are executed as a lesson about why individual rights must be protected. Although the system in the United States is purely altruistic, commercial transactions nevertheless take place. The author argues that the altruistic system has failed and contends that the only reliable way to reduce the growing shortage is through financial incentives.

**Financial Incentives**

19 Financial incentives, also called indirect financial incentives, offer valuable consideration for organs, but are not market-based. Financial incentives attempt to motivate private organ donation by offering organ donors tax credits, college scholarships, health-care coverage, and death benefits, such as estate tax deductions and funeral expense allowances. The following articles explore proposals for financial incentives as a means of increasing the supply of transplantable organs.


This comment advocates an organ market employing indirect financial incentives alongside the current altruistic system as a solution to the organ shortage.


Here the author describes the growing organ shortage in America, analyzes current donation and procurement law, and explores both monetary and nonmonetary incentives aimed at eliminating the shortage. He discusses notions of morality, distributive justice, imperfect information, and negative externalities, which, he notes, are routinely offered to justify the law prohibiting sales. Calandrillo proposes financial incentives, nonfinancial incentives, and aggressive educational programs to solve the organ shortage.


This comment examines the effect of NOTA on the possibility of implementing alternative systems. The author criticizes the Act for failing to authorize demonstration projects utilizing financial incentives in cadaveric organ donation, and for failing to clearly define the scope of the federal prohibition on the exchange of organs for valuable consideration. He argues that a death benefit system is an acceptable complement to altruism and offers several reasons why it is workable within the framework of federal law.

After examining the kidney shortage in the United States and the emergence of the black market, this comment’s author argues that the current altruistic and cadaveric donation systems are ineffective. She criticizes several proposals—an open market, a futures market, and presumed consent—and argues that they are not feasible due to ethical problems and an inability to supply enough kidneys. The author proposes a combination of presumed consent, an expanded education and awareness campaign, and weak economic incentives as an effective and ethically permissible system for increasing the kidney supply.


Here, tax credits are proposed to compensate living organ donors for the expenses related to donation. The author argues that this approach will lighten the financial burden of organ donation without using the ethically controversial mechanism of determining whether a person’s body is property or the market value of organs. He criticizes market systems for commodifying the human body and for the high potential of abuse. The author also criticizes noncompensatory systems for their inability to supply enough organs.


This note examines and proposes solutions to the organ shortage in New York. The author argues that the only solution is to increase the number of donors. He suggests moral incentives, direct economic payment, and indirect financial incentives, with emphasis on the latter.


In this article, tissue and organ default rules, particularly presumed consent, face criticism. First, the author argues that presumed consent raises pragmatic concerns, including information problems and opt-out constraints. Next, she notes that presumed consent may be more susceptible to fraud, corruption, and abuse than other procurement systems. The author then discusses incentive approaches to organ procurement and evaluates ethical objections to monetary procurement strategies. She suggests that states experiment with procurement protocols by seeking exemptions to the National Organ Transplant Act.


This article provides a general overview of the arguments for and against financial incentives for live organ donation with a particular focus on offering college scholarships as an incentive to potential donors. The article discusses pros and cons, but takes no position.


This article examines the organ procurement systems of India, Iran, and the United States and proposes an alternative approach that combines elements of a
The author proposes motivating potential living kidney donors by offering them academic scholarships. According to the author, this proposal would reduce the kidney shortage and protect the best aspects of the current altruistic regime.


In this note the author proposes using tax credits as incentives, creating a national donor registry, enhancing regulation of hospitals and other health-care providers to ensure they are procuring organs, and facilitating decision-making about medical care when someone is very ill. He defends the proposal against ethical and political concerns, and contends that it will procure more organs than the current altruistic system.


This comment focuses on the need to increase the organ supply while honoring the altruistic nature of the current organ donor system. The author argues for the importance of respecting the ethics and morals underlying the ban on selling organs. She proposes that Congress narrowly define types of permissible consideration and thus provide guidance for states and federal organ donation organizations to develop pilot programs and legislation. The author also suggests that states should provide incentives that would not be a material element in the ultimate decision to donate organs, and, in this way, both increase organ donations and honor the altruistic nature of the donations.


The arguments for creating tax incentives for organ donations are analyzed in light of the goals, principles, and practices of the U.S. tax system. The author argues that tax incentives are an inefficient and inappropriate means to encourage increased donations of organs. Using tax incentives to encourage organ donations, she contends, undermines the goals and principles of the tax system.


This note advocates changing federal tax law to compensate living donors for expenses related to donation. The author argues that the current system of compensation for expenses is ineffective and that a federal tax credit would assist more living donors and provide fair compensation for expenses.

The authors propose a system of tax incentives to meet the increasing demand for transplantable organs. They argue that providing tax incentives for organ donations will increase the number of transplantable organs and drive down Americans’ involvement in the illegal organ trade. The authors propose two measures: first, offer taxpayers a refundable income tax credit during life in exchange for their agreement to become organ donors when they die; and second, clarify the law to remove any potential tax disincentives to organ donors.


This comment analyzes three models for compensating organ providers—inter vivos payments, a futures market, and a death benefits system—as possible alternatives to America’s altruistic organ procurement system. The author rejects noncompensatory systems as viable alternatives and evaluates the ethical and practical criticisms of compensation systems. The author argues that, ethically and practically speaking, the death benefits system is the most viable of the three proposals.


Here the proposal is for an incentive-based system. The comment examines several proposed systems, including presumed consent, mandated choice, insurance benefits, open and futures markets, and death benefits. The author proposes a two-part solution. For the present, she advocates weak economic incentives, increased education and awareness, and avoidance of an open market. For the future, she states that science will advance far enough to create organs out of stem cells, effectively rendering donated organs obsolete.


This article proposes compensating organ donors with long-term health-care coverage. Smith argues that this proposal would reduce the organ shortage, reduce the number of Americans without health care, and prevent further exploitation of the poor.


This note proposes combining different elements of international organ procurement systems to forge a new system that greatly reduces illegal and ethically unsound methods of donation. Statz suggests a hybrid framework of increased donations, weak economic incentives, and paired organ exchanges.
Ethical, Moral, and Legal Concerns

Ethical Concerns


The authors present an ethical framework for allocating livers and the development of a liver allocation policy. They argue that the current allocation system, which generally gives livers to the sickest people, should be replaced with a more utilitarian system—distributing them to those people who would benefit the most from transplants in terms of life years gained.


Some of the more common ethical arguments against donor payments receive criticism here. The authors present an approach using the traditional cost-benefit methodology of economics. They argue that ethical issues cannot be resolved on the basis of a cost-benefit analysis alone, but that important public policy questions cannot be answered or ethically evaluated without such information. Because most of the ethical objections to donor payments are illegitimate, the authors argue, the cost-benefit calculations assume heightened importance.


Various proposals for organ procurement and distribution undergo an ethical analysis and assessment in light of moral principles already embedded in U.S. institutions, laws, policies, and practices.


According to the authors, the kidney donation and transplantation system is fraught with racial inequity, and a market in kidneys will exacerbate this inequity. To prevent the exclusion of the poor, the government must play a critical role in the allocation of kidneys. The authors examine xenotransplantation and a financial market for kidneys, but argue that these options either raise intractable ethical concerns or are unavailable in the short term. They propose a modification of the kidney waiting lists to recognize the racial inequity of kidney distribution by making African Americans a priority.


Evans presents the findings of a pilot study conducted to determine whether people think that families should end life support of a family member in order to harvest organs if various incentive policies are in place. In reviewing the ethical and policy implications of the study’s findings, he concludes that the amount of money received from organ donation is a consideration in making the decision whether to end life support.

This note addresses the issue of racial disparity in the allocation of transplantable kidneys and offers possible legal solutions. Fauci analyzes various responses to disparities in kidney allocation on the basis of race, including public education, organ donation publicity campaigns, presumed consent to donation laws, the creation of criteria for placement on a UNOS kidney allocation waiting list, alteration of kidney allocation guidelines, and litigation under both the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.


The precise definition of death continues to be an unsettled issue. According to the authors, the law should not declare a patient dead until all integrated circulatory and brain functions have ceased. However, they argue, individuals or their surrogates should be able to decide when to end care or donate organs based on their own concept of death.


In examining the issue of presumed consent as an organ procurement strategy, the author considers whether it is an ethically sound policy for diverse societies. After considering jurisdictional issues, ethical concerns, and societal factors, Jacob argues that a presumed consent system is not an effective method of harvesting organs in a diverse and heterogeneous society. Instead, she advocates an informed consent system.


Under analysis here is a bill proposed by state senators in South Carolina that would have given state prisoners the opportunity to reduce their prison sentence by 180 days by donating a kidney. Lee sees this proposal as initiating a conflict between the criminal justice “market” (plea bargaining) and the human body “market” (prostitution and organ donation), which, the author argues, are two long-standing American legal traditions. She analyzes these “markets” and their respective rules, theorizes on the assumptions underlying each, and applies the rules and assumptions to the bill to determine which long-standing tradition, as a legal matter, should govern. Although Lee is critical of the proposal, she concludes that the rule of the criminal justice “market” would prevail and support the bill’s underlying concept.


Mahoney, Julia D. “Altruism, Markets, and Organ Procurement.” *Law and Contemporary Problems* 72, no. 3 (Summer 2009): 17–35.

Here, implementing financial incentives is the proposal for increasing the organ supply. The author evaluates several arguments against compensating organ
donors and contends that such arguments are either highly contestable or demonstrably wrong. She further addresses questions of institutional design, examines the most popular compensation proposals, and offers preliminary assessments of their promise and feasibility.


Conflicting concerns beset the issue of providing Texas criminal offenders with access to organ transplants. This article examines the perspectives of attorneys, ethicists, and health policy scholars. It considers the legal and ethical obligations under correctional health policies, economic factors, and associated ethical considerations. The authors conclude that organ transplants should be made available to medically qualified offenders at public expense.


This note analyzes the scope and implications of nonconsensual organ-harvesting statutes in Texas. The author examines the constitutionality of these statutes in light of the Texas Religious Freedom Restoration Act, the Texas Constitution, and the U.S. Constitution. It further explores international norms concerning human rights and organ harvesting. The author concludes that presumed consent is both unconstitutional and immoral.


To increase the number of available organs, the author calls for a cultural and conceptual shift that would expect medical personnel to discuss organ donation with a patient earlier on the patient’s trajectory toward death. Whether such an earlier discussion would increase donations, Price admits, is not certain.


This article surveys fundamental principles of Islamic law and jurisprudence regarding organ donation, contrasts them with Western tradition, and delineates the prospects of practical applications of Islamic law in Ontario, Canada. The author highlights the status of Ontario’s Trillium Gift of Life Network and contrasts benchmarks with the Iranian compensated organ donation model. He argues that the disparity between the supply and demand of both models provides strong arguments for revisiting Ontario’s “altruism only” approach to organ donation.


Renal failure is a major problem among the elderly. Yet, according to the authors, the current system of kidney allocation discriminates against this group of potential recipients. The authors discuss the dynamics of allocating the scarce supply of transplantable organs and the various schemes for doing so, examine renal failure as a major problem affecting the elderly, explain how donated kidneys can ensure better clinical outcomes for the affected elderly compared with dialysis, consider
the implications of organ donation for Medicare, and evaluate current efforts to restructure the allocation system of donated kidneys. They conclude that allowing some form of compensation for organ donors would increase the supply of transferable kidneys.


According to this article, the kidney shortage has a disproportionately negative effect on low-income individuals. The author argues that poor people will not meet the financial criteria necessary to qualify to receive a kidney transplant because they cannot afford the high cost of maintaining a transplant over a lifetime. Along with several other proposals, the author supports a bill introduced in Congress that would require the government to pay eighty percent of the lifetime cost for the post-transplant medications.


This note states that transplant wait times are decreased when patients are on multiple lists; these patients are most likely to be financially wealthy. Despite the perceived inequality, the author advocates continuing to permit the practice of multiple listings because it decreases the likelihood that an organ will be wasted and offers more suitable matches between organ and recipient. In addition, the patient’s ability to choose to be on multiple waiting lists recognizes patient autonomy and translates into a better chance of survival.

Alternative Sources of Transplantable Organs: “Strangers” and Children


This article applies the due process framework prescribed in In re Gault21 to potential adolescent recipients. In Gault, the Supreme Court held that the Constitution requires the government to treat minors fairly when they are faced with deprivation of their liberty interests and to facilitate their participation in decision-making processes. The author seeks to ascertain the precise impact of Gault’s due process requirement on an adolescent’s living donation and addresses the state’s role in structuring a decision-making process compatible with the unifying principles derived from Gault. She argues that states should develop a statutory scheme in which the adolescent’s donative desires are heard, and the adolescent is given an opportunity to explore those desires along with all information pertinent to donative decision-making.


This note addresses the ethically questionable practice of conceiving a child for the purpose of donating his or her organs to a sibling. The current legal framework permits child donors to donate tissue and organs. According to the author, this framework does not adequately protect children and requires modification.


At issue here are ethical considerations in altruistic organ donation by strangers. Although the author would permit anyone to be a donor, any donation should not exceed a certain threshold of risk. The author advocates a national allocation system to ensure that stranger donations will go to the highest priority patient, rather than according to the priority of the donation center.


This article discusses the ethical and policy considerations of altruistic organ donation by donors who have no relationship to the recipients. The author supports organ donations by strangers, but advocates strict regulation to avoid unethical and arbitrary results.


Courts use two common law approaches to determine whether a minor or incompetent adult may donate: (1) the substituted judgment standard, a subjective determination of what the individual would do if he or she was competent; and (2) the best interest standard, an objective determination of whether the donor will benefit from the procedure. This note argues that the common law standards are inadequate and recommends several criteria the courts should use instead.

**When to Harvest**

¶20 The *Uniform Determination of Death Act* (UDDA) was drafted in 1980 by the Uniform Law Commissioners and adopted by most states. Its goal is “to provide a comprehensive and medically sound basis for determining death in all situations.” It requires the “irreversible” cessation of the functions of either the entire brain or the heart and lungs before a person can be considered dead.22 For purposes of organ procurement, determining the moment when a person is considered dead has critical implications for the supply of transplantable organs.

¶21 Donation After Cardiac Death (DCD) is an organ-harvesting practice that uses a donor’s organs when the donor is not yet brain dead, but heart and lung functions have ceased. Controlled DCD involves procuring organs when circulatory arrest follows the removal of mechanical ventilation from a critically ill patient after the family refuses further treatment.23 Uncontrolled DCD (uDCD) involves procuring organs from a patient who dies following unsuccessful resuscitative efforts.24 DCD is also referred to as donation after circulatory determination of death.25

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Donation After Brain Death (DBD) is an organ-harvesting practice that uses a donor’s organs when the donor is declared brain dead, even when artificial support enables the donor’s cardiopulmonary function to continue to perfuse and maintain the donor’s organs.26


Under consideration here are the lessons and debates about the kinds of consent necessary and sufficient for temporary organ preservation in the context of DCD and organ donation itself; on conflicts of obligation, loyalty, and interest in donation after cardiac death and ways to address those conflicts; and on benefit, cost, and risk assessments of uDCD programs, including measures to achieve a more favorable balance of benefits, costs, and risks.


This brief article argues that organ recovery from uDCD is unlikely to result in a significant number of organs and that this small gain must be balanced against significant risk of unduly influencing the decision to resuscitate and jeopardizing public trust in the propriety of organ donation and transplantation.


This article discusses the legal and ethical issues relating to the transplantation process of DCD, including determining a donor’s death based on the irreversible cessation of cardiopulmonary function, procedures conducted on the donor for the benefit of the recipient, informed consent and the surrogate decision maker, choosing appropriate DCD candidates, and conflicts of interest. The author summarizes general recommendations for donor candidate selection, consent and approval, withdrawal of life-sustaining measures, criteria for determining death, organ recovery, and financial considerations.


Under examination here is the practice of donation after cardiac death. This article examines whether these donors are legally dead under the Uniform Determination of Death Act. It further explores whether it is appropriate to apply donation after cardiac death as is currently practiced, addresses the concern that donation after cardiac death is causing the death of donors, and suggests several approaches to resolve the controversy over the determination of death in these situations. The author argues that this debate should move beyond scholarly journals and into the public arena.


The author argues that although challenges are numerous, uDCD is a promising source of organs. He would require a system that promptly initiates in situ preservation pending location of families and authorization for organ donation.

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26. See id. at 125, 131.

After analyzing homicide laws, the UDDA, and the protocols for DCD, the authors conclude that DCD likely violates criminal homicide rules.


A provision of the Transportation Code of Texas permits a medical examiner to authorize removal of a decedent’s major organs if the next of kin cannot be contacted within four hours of death. The author of this comment argues that this statute interferes with the quasi-property interest in a corpse, violates the Uniform Anatomical Gift Act, and violates the American notion of personal autonomy. She further argues that Americans should enjoy the freedom to donate organs, much like the right to contract, marry, and have children. She recommends several solutions to comply with federal law and to avoid violating the personal choices of the individual and next of kin.

**Legal Rights of Next of Kin**


A potential donor may die unexpectedly without any recorded expression of his or her wishes about being a cadaveric organ donor. The authors argue that it is ethically permissible to preserve a deceased person’s organs for a reasonable time while seeking a responsible family member to make a decision. The authors find the authority for this step already implicit in most, if not all, governing state statutes. They note that the Uniform Anatomical Gift Act implicitly authorizes this waiting period. Even if courts were to conclude that statutes do not confer the necessary authority, they argue, preserving organs without explicit statutory authority nevertheless would not violate the rights of family members and would not pose any meaningful risk of liability.


This article surveys the different explicit and presumed consent organ procurement systems used for postmortem donation in ten Western European countries, with a focus on the legal role of relatives within the consent process and the role of relatives in practice. The authors find that the difference between the systems of explicit consent and presumed consent is less important than it seems to be at first sight.


This note analyzes the various common law and statutory rights held by next of kin, considers whether these rights create any sort of liberty or property interest protected by the Due Process Clause, and if so, determines what sort of process the state must provide before it can deprive family members of any right they may have in making, or refusing to make, an anatomical gift of a body organ of a dece-
dent. Peterson proposes amending the Uniform Anatomical Gift Act to unilaterally establish that the relatives of a decedent have a legitimate claim of entitlement to control the disposition of the deceased’s body organs and to establish a proper procedural framework to ensure that family members are not unjustly deprived of their established constitutional rights.


Informed consent is a difficult issue in emergency cases involving incompetent donors, that is, donors whose consent cannot be considered legal consent because it is not given with full understanding and out of free will. The author compares three different approaches—Israeli civil law, the U.S. legal system, and the traditional Jewish law system—and argues that none offers a clear solution.

**Legal Rights of the Cadaveric Organ Donor**


According to this article, the donor does not receive satisfactory protection under the common law and existing statutory regulations that focus on increasing the number of organs available for transplantation. The author argues that respecting a donor’s dignity at the end of life should be a goal superior to that of increasing the number of organs available for transplantation. He proposes several solutions such as enacting a statute to protect donors’ rights and imposing liability for breach of those rights, creating a broad cause of action for breach of the physician’s duties toward a patient, and introducing “enterprise liability” into the health-care system.


Directed or conditional deceased organ donation permits donors to dictate who will receive their organs. At issue is whether these directives are permissible in the United Kingdom. The authors state that overruling such an individual request conflicts with the “appropriate consent” principle that the U.K.’s Human Tissue Act of 2004 seeks to advance. Appropriate consent means allowing an individual to consent or refuse to be an organ donor. The authors also argue that to ignore the restrictions imposed by the donor may subject the transplant team to criminal liability.


This article explores the remedial challenge faced in issues regarding organs during the period between harvesting and transplantation. The author suggests that a property-based approach to organ litigation would be useful.


Does the Fourteenth Amendment impose substantive limits on a state legislature’s power to authorize presumed consent to organ donation? This comment argues that presumed consent statutes would violate the interest of personal autonomy protected by the Due Process Clause.
Human Trafficking


An anencephalic infant is one born missing a major portion of the brain. This article argues that an organ donation from such an infant can be both beneficial and morally justifiable. For the sake of infants in need of organ transplants, the authors advocate a properly tailored transplant policy permitting parents of anencephalic infants to donate their children's organs for use in transplants.


In this comment, the author provides background on the international organ trade and criticizes existing sources of regulation that attempt to protect children from being involuntary donors in organ trafficking. Morelli endorses several proposals that, she argues, should increase the supply of organs and diminish the need to turn to underground channels for organ procurement. These proposals, along with stricter restrictions in international treaties and domestic laws, she contends, will better protect children.


The sale of body organs is often motivated by the poverty of potential donors. The author explains that the poor are put into situations in which they are coerced, duped, or even killed for the harvesting of their organs.


This comment examines the prevalence of organ trafficking in impoverished countries and recommends several solutions. The author compares the organ donation systems of third-world countries with the United States and argues that the U.S. system is too restrictive. She argues that closing the gap between supply and demand for organs in the United States is one of the most effective ways to end organ trafficking. According to her analysis, a presumed consent system coupled with a modicum of due process offers the best way forward.

The Future of Organ Transplantation: Xenotransplantation?

¶23 Xenotransplantation consists of transplanting into a patient live tissues or organs retrieved from animals.¶27 Other biotechnologies are currently under consideration, for example, artificial organs, but these topics are very expansive and outside the scope and purpose of this bibliography. The following articles explore the legal issues regarding xenotransplantation research and clinical trials.

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According to the authors, legislation implementing a post-xenotransplantation surveillance system should withstand constitutional scrutiny because (1) it would not be discriminatory, and (2) although it would violate fundamental rights of recipients, these violations would be justified under existing constitutional doctrine.


Enforcing compliance with the public safeguards necessary in xenotransplantation would require lifelong collection of tissue and body fluid specimens from xenotransplant recipients. The authors find legal authority for such surveillance in informed consent, the law of contracts, and public health legislation. They also briefly comment on the constitutionality of xenotransplant legislation and conclude that it should be feasible to craft legislation that is both effective and constitutional.


At issue are the regulatory issues regarding xenotransplantation and the ethical and legal guidance on selecting people for experimental treatments and research. The author explores the propriety of selecting those who are competent, but desperately ill, for the first genetically engineered whole-organ xenotransplants. She seeks a balance between the opportunity for potential subjects to extend or improve their quality of life and the need to limit participation to prevent exploitation for the purpose of providing information to future generations.


Acknowledging the risks of xenotransplantation while advocating its use requires a challenging analysis. Here, the authors conclude that the potential risks of xenotransplantation are too great to consider the procedure a viable option for the organ shortage problem in light of other solutions—for example, stem cells and a reformation of the transplant recovery system.


This comment analyzes the legal issues regarding informed consent and xenotransplantation. The author argues that the risks associated with xenotransplantation require recipients to consent to long-term surveillance.


Federal regulation imposes a life-long surveillance requirement on xenotransplant recipients and, according to the authors, effectively abrogates the right to withdraw from a clinical trial after the transplantation has taken place. They argue that recipients should receive full disclosure of this regulation.
Keeping Up with New Legal Titles*

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

Contents

Reclaiming Fair Use: How to Put Balance Back in Copyright .......................... 313
The Lawyer-Judge Bias in the American Legal System .......................... 315
Legally Poisoned: How the Law Puts Us at Risk from Toxicants .................. 317
Inside the Castle: Law and the Family in 20th Century America .............. 318
Habeas for the Twenty-First Century: Uses, Abuses, and the Future
of the Great Writ .......................................................... 320
Ducktown Smoke: The Fight over One of the South’s Greatest
Environmental Disasters .................................................. 322
Discretionary Justice: Looking Inside a Juvenile Drug Court .............. 323
Fan Fiction and Copyright: Outsider Works and Intellectual
Property Protection ...................................................... 325
Information and Exclusion ................................................. 327

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Legally Poisoned: How the Law Puts Us at Risk from Toxicants .............. 317

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*Information and Exclusion* .......................................................... 327
The affirmative defense of fair use is one of the most vexing aspects of copyright law. Though codified in a statutory section that is only 175 words long, the doctrine has generated numerous law review articles and a major treatise dedicated to analyzing its history and judicial application. When fair use so often baffles legal professionals, it seems unfair to expect lay citizens to rely on it as justification for the use of copyrighted works in their own creative endeavors. American University professors Patricia Aufderheide (School of Communication) and Peter Jaszi (Washington College of Law) offer codes of best practices as one solution to this problem. Developed by individual creative communities, these codes “represent the community’s current consensus about acceptable practices for the fair use of copyrighted materials” and function as tools that can help users gauge whether a particular use of copyrighted material qualifies as fair. Aufderheide and Jaszi’s new book, *Reclaiming Fair Use: How to Put Balance Back in Copyright*, serves both as a manual for developing these codes of best practices and as a readable story that recounts the historical development of fair use.

The first half of the book summarizes the origins and the history of fair use. In large part, this account is also the more general tale of U.S. copyright law. Over the course of the last two centuries, Congress has gradually but steadily expanded the scope of works protected by copyright and extended the term of copyright protection, all to safeguard the interests of businesses in politically influential

industries. This has produced a “Long and Strong Copyright” (part of the title of chapter 2) that stifles those creative efforts that rely on preexisting copyrighted works for raw materials.

¶3 Conventionally, the authors’ narrative would veer off here in one of two opposing directions, either denouncing copyright infringers as thieves who deprive authors and publishers of hard-earned income or demanding that copyright be reformed—or even abolished—to remove a major obstacle to freedom of speech and access to information. Fortunately, Aufderheide and Jaszi eschew these well-worn paths. They advocate, instead, for the widespread use of collaboratively developed codes of best practices that can provide content creators with practical guidance on fair use and establish industry norms that can be consulted by lawyers, judges, funding agencies, and insurance companies. Such codes can boost the confidence that content creators have in their own decisions about fair use, thus promoting the generation of new creative works, even in political environments hostile to the legislative reform of copyright law.

¶4 A recent shift in the courts’ application of the fair use doctrine has made development of these codes more useful. The copyright act establishes a four-factor test for analyzing questions of fair use. In the 1970s and 1980s, under the influence of the law-and-economics movement, judges generally treated one factor, a use’s effect on the market for the copyrighted work, as the most critical. “Since fair use inevitably involves not paying a license fee” (p.82), this focus left fair use largely irrelevant as a copyright defense. In the 1990s, however, courts shifted their emphasis to focus on the overarching issue of transformativeness, whether a particular use “repurpose[s]” (p.80) a copyrighted work for a new context. In an influential law review article, Judge Pierre Leval argued that fair use should favor transformative uses,5 and the 1994 U.S. Supreme Court decision in Campbell v. Acuff-Rose Music, Inc. endorsed this approach.6 This emphasis on transformation was “the key to open the fair-use door” (p.93). Now, when considering a question of fair use, courts ask three questions: “Was the use of copyrighted material for a different purpose, rather than just reuse for the original purpose? Was the amount of material taken appropriate to the purpose of the use? Was it reasonable within the field or discipline it was made in?” (p.135). By specifying the uses that a creative community considers reasonable, codes of best practices can help to answer the final question.

¶5 At the time of the book’s publication, eight “communities of practice” (p.155) had adopted codes providing guidance on fair use, including documentary filmmakers, poets, and media literacy educators. (The Association of Research Libraries subsequently adopted a code.)7 The second half of the text discusses the drafting and adoption of these codes and the role that the book’s authors played in these developments. With funding provided by major foundations, Aufderheide and Jaszi organized meetings of various creative communities, beginning with the

documentary filmmakers. At each meeting, participants discussed the situations commonly giving rise to issues of fair use within their particular community. A legal advisory board then vetted general principles regarding the appropriate scope of fair use within these situations and presented a code compiling the principles for potential adoption by organizations representing the creative community. Several case studies demonstrate that the codes of best practices resulting from these processes help to clarify what constitutes fair use, giving creators and copyright owners a better idea of which uses are appropriate and which should be licensed.

¶6 Reclaiming Fair Use is an informative and readable call for content creators to work collectively in establishing fair use norms and asserting their fair use rights. It would make an excellent acquisition for any academic or public library that serves patrons who rely on fair use. In addition to their substantive material, Aufderheide and Jaszi provide a number of useful appendixes, including “Template for a Code of Best Practices in Fair Use,” “Documentary Filmmakers’ Statement of Best Practices in Fair Use,” and “Myths and Realities about Fair Use.” Sprinkled throughout the book are a number of text boxes labeled “Fair Use: You Be the Judge” that present scenarios prompting readers to evaluate the real-world application of fair use principles, and the book’s final appendix provides the “answers” to these scenarios.


Reviewed by Leslie J. Kallas

¶7 The Lawyer-Judge Bias in the American Legal System, by University of Tennessee College of Law professor Benjamin H. Barton, is an exploration of the intimate relationship between the nation’s lawyers and its judges. The simple fact that nearly all judges are also lawyers establishes the innate possibility of bias, both “conscious/crass” and “unconscious/subtle” (p.14), in every aspect of the law, from legal education to professional standards, attorney-client interactions, and courtroom dynamics. Barton’s study exposes the systems and situations that promote this bias, the consequences that flow from the underlying relationship, and the obstacles that impede reform.

¶8 Barton begins by describing the nature of the relationship between lawyers and judges. He emphasizes their identical education and training, participation in a joint professional community, and reliance on a common intellectual approach to problem solving. Who can better understand a lawyer’s perspective than a judge, and who but an attorney can fully appreciate the inner workings of the judiciary? Barton maintains that this connection contributes to an unnecessary complexity in legal proceedings and to a pattern of allowances and exemptions for lawyers. At its worst, the dynamic can produce malpractice.

¶9 The problem, Barton suggests, stems in part from the manner in which the legal profession is regulated, and he devotes two of his book’s twelve chapters to this topic. Chapter 5 recounts the history of lawyer regulation, reaching as far back as the courts that preceded the Norman Conquest of England, while chapter 6 addresses the current state of that regulation. According to Barton, the number of
lawyers in the United States increased rapidly following the American Revolution, spurring early bar associations to establish training standards, licensing systems, and codes of professional behavior. Barton’s criticism is that bar associations—groups managed by attorneys and judges themselves, with no external controls or outside input—formulate rules and procedures that primarily benefit lawyers, not the community at large. Citing the need to standardize educational requirements and improve technical skills, modern bar associations have, in fact, made legal education more exclusive and expensive, instituted bar exams that are more challenging than law school, and created intense competition for entry-level placements in firms. Such changes could be portrayed as improvements to professional standards that benefit clients, but Barton takes the contrary view. He submits, “Lawyers push for stricter entry requirements to suppress competition and increase their wages; judges do so to ease their jobs” (p.151). When consumer choice is lost, these purported reforms do not benefit the public—they just leave too many lawyers representing the wealthy and well-connected and “too few . . . willing to do everything else” (p.145).

¶10 To further illustrate the impact of the close relationship between lawyers and judges, Barton presents the example of legal malpractice, a cause of action significantly more difficult to prove than is its close analogue, medical malpractice. Indeed, “Although tort liability has grown in almost every other area of American endeavor, judges have kept the operation of their own courts free from the distracting threat of possible liability” (p.187). Powerful legal tools exist for avoiding or defeating professional malpractice claims, and they are available only to protect lawyers and judges. In this regard, the example of the Enron scandal receives special attention. Barton labels the lawyers who aided and defended Enron as “Sole Survivors” (p.243), the only actors to emerge largely unscathed from the company’s disastrous collapse. Accountants and executives, by contrast, were fined, decertified, and imprisoned. Barton writes, “The takeaway point is quite simple: to accomplish its massive fraud, Enron needed a lot of help. Much of that help came from lawyers” (p.246). Yet, no lawyers or law firms were sanctioned as a result of the Enron debacle.

¶11 Barton’s final criticism of the lawyer-judge connection addresses the complexity of law. He suggests that this attribute benefits lawyers and judges in various ways, even while it produces “an opaque legal system that the public cannot disentangle” (p.272). For instance, complexity creates more demand for the technical expertise that lawyers possess, yielding an economic benefit for attorneys. Judges also gain, in part because “[c]omplexity makes it easier to decide almost any case in line with the judge’s other preferences” (id.). The link between lawyers and judges, and therefore the lawyer-judge bias in the law, persists because those who can and should reform the system are its creators and retain direct, personal interests in its underlying flaws.

¶12 The Lawyer-Judge Bias in the American Legal System is provocative in both tone and approach. Professor Barton’s study should stimulate conversation on lawyers and judges, how they work together, and whether they work for the public good. And there may be some cause for optimism. Awareness of a problem is an essential precursor to change, and Barton sees this book as one step toward that
goal. The volume will make an interesting addition to law school and court libraries, as well as the collections of bar associations.


Reviewed by Valerie R. Agerbeck

¶13 If you have read a newspaper within the past year, you have probably noticed articles on Bisphenol A (or BPA) and its potential to cause endocrine disruption.8 If you are a parent, you may have seen stories about harmful toxicants in Johnson & Johnson baby shampoos.9 And, if you are interested in laws pertaining to manufacturing or industry, you may already be familiar with the proposed Safe Chemicals Act of 2011,10 intended to modernize and improve the regulation of industrial chemicals. Within this context, Carl Cranor’s *Legally Poisoned: How the Law Puts Us at Risk from Toxicants* takes on a timely and complex issue. Cranor, who holds a Master of Studies in Law from Yale and a Ph.D. in philosophy from UCLA and who has served on two National Academy of Science committees and various scientific advisory panels, provides a sobering look at both the science and the law related to industrial compounds.

¶14 *Legally Poisoned* begins with a general overview of Cranor’s positions. He submits that humans are exposed to toxicants on a daily basis; try as we might, we simply cannot escape them. These chemicals can adversely affect our health, a concern that is insufficiently reflected by current laws that “do not require testing or a public health agency’s reviewing of industrial compounds for toxicity before they enter the market” (p.6) (emphasis added).

¶15 In the first half of the book, Cranor provides the scientific background for this argument. He describes the health effects of both well- and lesser-known toxic substances, such as lead, mercury, polychlorinated biphenyls (PCBs), and BPA. According to Cranor, these chemicals can be found in many common sources—plastic bottles, cosmetics, nonstick frying pans, couches, televisions, carpets, and so on—and can enter our bodies via ingestion, inhalation, or through contact with the skin. Children tend to receive greater exposure and be more susceptible to toxicants than adults, points of particular concern for Cranor. To support his claims, Cranor relies heavily on recent scientific data (most of it published after 2008), including studies in respected academic journals, reports from government agencies, and papers produced by national and international organizations. He subtly intertwines technical descriptions of toxic chemicals with accounts of actual incidents stemming from exposure, which makes this sometimes complicated material engaging and accessible to a general readership.

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The second half of Legally Poisoned addresses the regulation of toxic chemicals. Currently, toxic substances are regulated primarily under the Toxic Substances Control Act (TSCA). TSCA is a “postmarket law” (p.135) that allows most “commercial chemical products (80 to 90 percent) . . . [into] the market without any required testing for their toxicity” (p.132). This effectively places the burden on government agencies to identify the risks and make a case for regulation “after substances are in commerce” (p.136)—thus, after the public may have been harmed.

Cranor believes the law needs to change to reflect a “more prudent, sensible legal and regulatory approach to protect us from toxic chemicals” (p.12). He takes sides, strongly advocating the development and implementation of legislation that would require testing of chemical products prior to their introduction into the marketplace. His approach relies heavily on Europe’s REACH (Registration, Evaluation, Authorization, and Restriction of Chemicals) legislation, on existing premarket testing and licensing rules for the pharmaceutical and pesticide industries, and on the basic “ethics of research on human subjects” (p.178). This section, probably one of the book’s strongest, introduces Cranor’s American audience to methods of comparative reasoning and to European primary law concepts that may be new to many readers.

Legally Poisoned is sometimes repetitive, as several key points and examples are reused in different chapters; Cranor’s prose style can also be distracting at times. The book lacks nuance, and a novice reader may come away with the notion that scientists, governments, and companies are simply careless with human health. The actual problems are far more complex than that impression suggests, and addressing them demands a careful balancing of risks and benefits. In spite of these flaws, the book offers a valuable starting point for those interested in the topic. Extensive notes cite relevant primary and secondary authorities, and these references will prove helpful to readers who wish to pursue the topic in greater depth. More important, Cranor’s work raises critical questions regarding our society’s moral and ethical values and our sense of personal responsibility. Growing public awareness and concerns about toxic chemicals have now brought these issues to the forefront of national attention, and we are likely to hear more about such controversies as science continues to advance. Legally Poisoned is recommended for purchase by general academic and public libraries as well as law libraries supporting educational programs and scholarly research on environmental issues. The book represents an optional purchase for most law firm and government libraries.


Reviewed by Ellen M. Richardson

With Inside the Castle: Law and the Family in 20th Century America, Hofstra law professor and family law expert Joanna L. Grossman has joined forces with

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Lawrence M. Friedman, a preeminent legal historian and professor at Stanford Law School, to produce a fascinating social and legal history of American family law. Their work skilfully interweaves traditional legal sources with statistics and media reports to produce a tapestry that chronicles the development of family law in the United States. As the authors note, they attempted not to predict the future of family law, but rather “to explain how we got to where we are, and why, and what the steps were along the way” (p.331).

§20 The book is divided into four parts. Part 1, “Tying the Knot: Marriage and Promises to Marry,” addresses the history of marriage in the United States. Specific topics covered include changing restrictions on the right to marry, the demise of common law marriage, and the dramatic decline in so-called “heart balm” causes of action (e.g., alienation of affection or breach of promise). Throughout part 1, the authors trace the effects that developments in the law and shifting social mores have had on society’s fundamental understanding of the institution of marriage. Grossman and Friedman report a shift at the beginning of the twentieth century from a focus on traditional marriage, a relationship consistent with “the old idea of ‘separate spheres’ for men and women” (p.57), to companionate marriage, one “based on ‘the importance of emotional ties between wife and husband—their companionship, friendship and romantic love’” (id.). The end of the twentieth century saw the evolution of a new conception, expressive marriage, an enterprise through which spouses seek personal fulfillment, “‘elevat[ing] marital affection and nuclear-family ties above commitments to neighbors, extended kin, civic duty, and religion’” (p.58).—“a heavy burden for a marriage to bear” (id.).

§21 Part 2, “Anything Goes: Love and Romance in a Permissive Age,” details the connection between evolving American attitudes toward sexual behavior and U.S. Supreme Court decisions recognizing constitutional rights to privacy. In particular, Grossman and Friedman review landmark cases on contraceptives, abortion, and sexual activity. One chapter covers cohabitation, and another addresses the history and current status of same-sex marriage in the United States.

§22 Part 3, “When the Music Stops: Dissolving a Marriage and the Aftermath,” considers the legal and practical consequences of divorce and annulment. Here, as well as in part 1, Grossman and Friedman’s research and writing truly shine. In one chapter, “Dollars and Sense: The Economic Consequences of Divorce,” the authors seamlessly blend together case law, statistics, social science research, and real-world anecdotes to paint a comprehensive picture of what happens when a marriage breaks down, detailing the effects of this collapse on both the couple and society at large.

§23 Finally, part 4, “The Old and the New Generation,” offers a stark look at law and the reality of modern family life. One chapter briefly examines major issues concerning the elderly—inheritance and estate planning; elder abuse, neglect, and competency; increased life expectancy; and the rising importance of Social Security and Medicare. The authors note that the burden of caring for the elderly has largely shifted from the family to the state over the course of the twentieth century. The

chapters on children and parenting are two of the most interesting in the book. Among other topics, Grossman and Friedman examine who, exactly, can be considered a parent, given the complexities of modern life. For example, “In modern surrogacy, it may take as many as five people to ‘procreate’: a sperm donor, an egg donor, a gestational carrier—and two intended parents” (p.301). Divorce and remarriage add further confusion, including the potential for de facto parents—should these stepparents be entitled to visitation rights when the marriage ends? No doubt technological advances and changes in family dynamics will continue to present such challenges for the courts.

¶24 Inside the Castle is a well-written and thoroughly researched work of legal history that touches on nearly every aspect of American family life. The book is also well organized, with a cogent arrangement of topics. Useful summaries at the end of each chapter list significant points and note questions that remain to be answered. The book’s index is thorough, and its comprehensive endnotes should prove valuable for those interested in further research. Inside the Castle is recommended for all public, academic, and law libraries and for anyone with an interest in family law or social history.


Reviewed by Renee Y. Rastorfer

¶25 The unique purpose behind Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ is foreshadowed by the work’s title. Rather than being an exclusively historical account of the writ of habeas corpus—a judicial mechanism “used . . . to inquire into the legal basis for a person’s imprisonment” (p.vii)—the book also represents a call for refocusing the so-called Great Writ to avoid the trivialization of habeas review through overuse. Authors and law professors Nancy King (Vanderbilt University) and Joseph L. Hoffmann (Indiana University–Bloomington) have crafted a legislative proposal for addressing what they see as the steady devaluation of habeas, and their book is intended largely to present arguments in support of this plan.

¶26 Central to Habeas for the Twenty-First Century is its authors’ understanding of the proper roles that habeas has played within the American political dynamic: to reimpose constitutional norms during times of perceived threat to national security and to restore balance between the state and federal systems as needed. Correctly applied, the judiciary’s reliance on habeas has yielded executive obedience to constitutional principles and appropriate legislative responses to underlying problems. However, if habeas is “routinely invoked” (p.167) after the original need for review has passed, the writ “transforms . . . into a burdensome and even despised source of wasteful litigation” (p.168). To support their claim that habeas review can become unwieldy and inefficient, the authors rely heavily on a 2007 empirical study of habeas filings in federal district courts, a study they believe demonstrates that use of the writ in certain types of cases is useless as a means for accomplishing the ends sought but still an enormous drain on limited judicial resources.
King and Hoffmann analyze the use of the writ of habeas corpus in five different types of cases, weighing the benefits and costs associated with each. Perhaps their most dramatic recommendation for the future of habeas, however, falls in the context of state noncapital cases. The authors insist that the need for a wide scope of habeas review in this area has “come and gone” (p.106). Moreover, they note that, even for those petitioners who successfully navigate the many hurdles to a hearing on the merits, the chances of obtaining habeas relief in these cases are “very close to zero” (p.81). Accordingly, the authors recommend limiting habeas review in state noncapital cases to only those instances when

(1) the petitioner is in custody in violation of a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court; or (2) the petitioner is in custody in violation of the Constitution or laws or treaties of the United States, and has established by clear and convincing new evidence, not previously discoverable through the exercise of due diligence, that in light of the evidence as a whole, no reasonable fact finder would have found him guilty of the underlying offense (pp.91–92).

Of course, King and Hoffmann offer recommendations applying to other contexts as well. They suggest, for example, that sentence-administration issues (“challenges to . . . decisions revoking good-time credits following prison disciplinary proceedings and decisions denying, deferring, or administering release on parole” (p.154)) be addressed under a separate statutory scheme completely disconnected from habeas review, and they urge a modest increase in the use of habeas review for federal noncapital cases, as this review may be a prisoner’s “first and only bite at the apple . . . for . . . claims that could not be raised on direct appeal” (p.170).

The authors submit their proposals partly as a jumping-off point for more comprehensive discussion of reforms to habeas corpus; hopefully, their book will spark exactly this kind of conversation. However, the proposal from King and Hoffmann to limit habeas review of state noncapital cases is troubling in light of the experiences of Bruce Lisker, a state noncapital habeas petitioner recently released from nearly thirty years of wrongful incarceration for the alleged murder of his mother. Lisker’s case presents a bleak story of state obstructionism, shoddy and perhaps deceitful police work, and ineffective assistance of counsel. Yet Lisker, an innocent man, would not have received habeas relief under the authors’ proposed statutory reforms. Perhaps this disquieting result demonstrates that review of state noncapital cases should not be limited to quite the extent that the authors suggest.

Habeas for the Twenty-First Century is a work perfectly suited for academic libraries, and it would make a solid addition to any such library supporting programs in law, political science, criminal justice, or public policy. Throughout their book, King and Hoffmann have provided sufficient background for readers with limited knowledge of the subject area to follow their arguments and reasoning. They also claim to have included enough sophisticated matter to engage experts in the field, though this is difficult to judge. For nonspecialists, however, Habeas for the Twenty-First Century offers an exciting take on an important societal problem, arguments well supported by empirical research, and intriguing proposals that may spur changes in the law. The book follows closely on the heels of Paul D. Halliday’s Habeas Corpus: From England to Empire, which King and Hoffmann clearly recog-
nize as the authoritative historical work in the area. By contrast, the worth of *Habeas for the Twenty-First Century* does not lie exclusively in the quality of the book itself, but also in the impact it may have on this important area of law.


*Reviewed by Matthew S. Cooper*

¶31 In *Ducktown Smoke: The Fight over One of the South’s Greatest Environmental Disasters*, historian and practicing attorney Duncan Maysilles skillfully documents the landmark litigation that arose in the late nineteenth and early twentieth centuries over pollution from copper mining in Tennessee’s Ducktown Basin (also known as the Copper Basin). As Maysilles describes, sulfur dioxide smoke emitted by copper smelting operations in the basin created, over the course of many years, a barren, desert-like landscape in the middle of an otherwise verdant southern Appalachian hardwood forest. The toxic smoke spread south across the nearby Georgia border, destroying vegetation and affecting the livelihoods of numerous farmers and loggers. Following years of marginally successful state court lawsuits instituted by Georgia citizens, the state itself filed an original action in the U.S. Supreme Court seeking injunctive relief against the two mining companies active in the basin. The case eventually resulted in an opinion from Justice Oliver Wendell Holmes that reformed the mining companies’ practices and provided states with a new tool for addressing cross-border pollution.

¶32 Maysilles situates the Ducktown smoke litigation as a classic environmental law controversy arising before its time. A federal pollution-control regime and the establishment of the Environmental Protection Agency would not arrive for decades, and with no statutory remedies available, plaintiffs seeking redress for the smoke could file only common law nuisance actions for individual damages or injunctive relief. The primary concerns of these plaintiffs were not for the quality of the air per se, but for the effects of the smoke on farming and logging. Meanwhile, many of those affected by the pollution, including the state of Georgia itself, understood that though the smoke was harmful, driving out the copper companies that provided so many Georgians with a livelihood would be equally undesirable. As a consequence, the state ultimately sought and the Supreme Court carefully fashioned relief that delayed enforcement so that industry could develop a technological solution.

¶33 The scope of Maysilles’s nine-chapter work is fairly broad, ranging from the tragic 1838 removal of the Cherokees from the region to present-day reclamation efforts in the basin. However, the bulk of the book (chapters 2–8) focuses on the smoke litigation that occurred between the 1890s and 1916. Maysilles first discusses the early lawsuits filed by northern Georgia farmers and then covers in detail the state’s Supreme Court action. He continues with a discussion of the aftermath to Justice Holmes’s 1907 opinion and of cooperative efforts to postpone the enforcement of injunctive relief.
Throughout, Maysilles supports his legal and historical analysis with exhaustive research, documenting his sources with copious endnotes and a nineteen-page bibliography. Maysilles notes the preservation efforts of the Ducktown Basin Museum in his book’s acknowledgments, and he makes extensive use of previously unexamined mining company documents rescued by museum employees from an abandoned warehouse near one of the former mining sites. These documents include correspondence between the various “attorneys, corporate officers, farmers, loggers, and others on both sides of the litigation” (p.ix). Through the Georgia Department of Archives and History, Maysilles also gained access to materials from the state of Georgia, including the official correspondence for the period of both the state’s governor and attorney general.

Ducktown Smoke’s chief strengths lie in Maysilles’s highly informed analysis of the legal strategies employed by various litigants and in his discussion of the gradual changes to nuisance law that occurred over the course of the litigation. Neither success should be surprising given Maysilles’s dual background as a historian (he has a Ph.D. from the University of Georgia) and as a King & Spalding attorney specializing in environmental and toxic tort litigation. Drawing on correspondence and court filings, Maysilles describes in exacting detail the litigation tactics used by both the mining companies and their opponents. He discusses the flat either/or choice faced by Tennessee nuisance plaintiffs between seeking monetary damages in circuit court or injunctive relief in chancery court. He documents the efforts of mining company attorneys to defeat or stall opposing litigants through procedural motions filed in the courts and lobbying efforts applied to the legislature. He also addresses broader legal topics affecting the litigation, such as jurisdictional issues and the effects of a state ban on contingency fees. Substantively, Maysilles traces the development of Tennessee nuisance law from a strict liability analysis to a balancing test that weighs individual harms against social and economic benefits. On a broader scale, he describes the evolution of nuisance from a private law doctrine governing disputes between neighbors to a powerful enforcement tool available to the states under federal common law.

Though he discusses rather complex legal and scientific topics, Maysilles’s writing is always clear and accessible. He capably navigates the intricacies of nuisance doctrine, mining processes, scientific reports, and similar technical matters. He has produced an interesting and unique work that explores in considerable depth an important environmental law controversy that arose before environmental law was even recognized as a field. Ducktown Smoke would make an excellent addition to academic law libraries. Though the book will probably be more accessible to readers with a background in the law, it would also be appropriate as a history selection for undergraduate academic libraries and public libraries.


Reviewed by Catherine A. Lemmer

In her newly published “ethnography” (p.7) of a southern California juvenile drug court, sociologist Leslie Paik contests the underlying “‘therapeutic’ orientation”
(p. 41) of what has become a widely accepted model of alternative justice. Paik spent more than a year personally observing operations and interviewing participants in a court designed to send juvenile substance abusers to treatment rather than prison. In *Discretionary Justice: Looking Inside a Juvenile Drug Court*, she presents the results of her study and challenges readers to consider whether such “courts [are] truly therapeutic or . . . simply a new form of punishment under the guise of help” (p.173).

§38 Juvenile drug courts seek to modify the behavior of youthful offenders through an emphasis on individual accountability and the use of “Big Brother”-style monitoring mechanisms to measure compliance with program requirements. Paik maintains that this emphasis on accountability ignores real-life “social structural barriers” (p.14) that can shape a juvenile’s ability to control his or her own actions. Paik ultimately argues that determinations of participant compliance or success based on concepts of individual accountability actually veil “differential treatment based on race, class, and gender” (p.14).

§39 In the course of making this argument, and as promised by the book’s subtitle, Paik takes her readers inside the day-to-day workings of a juvenile drug court. She describes in detail the operation of the court’s entire system of activity, including external factors such as offenders’ families and schools, local police and sheriff departments, probation offices, residential programs, drug treatment centers, and funding mechanisms. At the center of the behind-the-scenes action are the drug court staff and the weekly meetings at which they assess offenders’ adherence to program requirements and negotiate proposed strategies for dealing with noncompliance. While these staff discussions focus on determining the individual compliance and personal accountability of the juvenile offenders, Paik’s fieldwork exposes and underscores the impact of other, largely unacknowledged factors, leading her to characterize the staff assessments as merely “social constructions” (p.4). Examples of characteristics that influence staff decisions on compliance and accountability include the juvenile’s race and gender, the specific court to which an offender is assigned, parental and family involvement, and staff interpretation of drug test results.

§40 Previous juvenile drug court researchers have largely ignored such staff decision-making practices (p.7). Yet it is precisely these practices, Paik suggests, that reveal a persistent tendency toward overreaching by the legal system and that indicate the “reintroduction of discretion into legal decision making” (p.173). The assessments and the negotiated strategies that underlie them also serve to establish an offender’s “workability” (p.5)—the staff’s “continuously revised” (p.6) sense of the youth’s potential for achieving success through drug court intervention—a measure that can have a detrimental impact lasting even beyond the youth’s participation in the drug court program itself.

§41 Despite her critique, Paik neither dismisses the work of juvenile drug courts nor advocates for their demise. Rather, she endorses a shift away from the existing focus on individual accountability and urges a new emphasis on the duty that society and the judicial system have to provide a framework for successfully rehabilitating youth offenders. In this vein, Paik makes five specific policy recommendations intended “to mitigate the unintended punitive consequences of . . . drug court intervention and to facilitate its stated therapeutic goals” (p.177).
Throughout *Discretionary Justice*, Paik does an excellent job of organizing and presenting the wealth of data from her fieldwork. The book is well footnoted and includes a comprehensive index, an extensive bibliography, and three helpful appendixes—“Methods,” “Concepts and Terms,” and “Additional Resources.” Although difficult to read, due both to the technical nature of the study’s content and the human impact of the personal stories it tells, this is an important work. Federal and state support for juvenile drug courts is substantial, and they are likely to remain one of the key institutional weapons for combating drug abuse. It is imperative that practitioners, politicians, and other policy makers appreciate the consequences of programs based on personal accountability. Paik’s work may also help inform the development of other alternative courts, such as mental health courts and veterans treatment courts.

Though Paik is presently an assistant professor of sociology at the City College of New York and the Graduate Center City University of New York, *Discretionary Justice* stems from questions she first encountered prior to graduate school while “work[ing] at a nonprofit legal organization that designed, implemented, and evaluated drug courts and other problem-solving courts” (p.vii). The result of Paik’s pursuit of those initial questions is a text that should prove instructive for anyone interested in drug courts or similar alternative forms of justice. *Discretionary Justice* is recommended for academic and government law libraries, libraries serving private practitioners working in or with drug courts, and nonlegal academic libraries that support graduate or undergraduate programs in the areas of criminal or juvenile justice.


Reviewed by Mikhail Koulikov

Works that draw on established settings and characters are a staple of literary traditions around the world. The Hollywood adaptation of a classic novel, a book sequel published long after the original, an amateur story based on a popular television show and posted online—each is a work of imagination, but none is truly original. Under modern intellectual property law, though, each example raises complex issues of copyright, licensing, adaptation, and fair use. Indeed, since the idea of creative works as commodities first emerged, questions surrounding the rights of creators and owners to control later uses of their intellectual property have grown more and more complicated.

One contemporary area of particular tension concerns *fan fiction*—frequently contracted to one word, *fanfiction*, or even further to *fanfic*—that is, creative work, generally a written narrative, that uses specific elements from a pre-existing story without explicit permission from the prior work’s copyright holder. Scholars from fields outside of law have been looking at fan fiction for at least two decades,¹⁵ and the topic has seen some coverage in law review articles.¹⁶ However,  

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Aaron Schwabach’s *Fan Fiction and Copyright: Outsider Works and Intellectual Property Protection* is the first book that attempts to summarize the full scope of the relationship between copyright law and fan fiction, to subject the topic to rigorous legal analysis, and to discuss specific areas of potential legal conflict between fan fiction authors and those who hold rights in underlying works of intellectual property.

¶ 46 The broad sweep of Schwabach’s book is best reflected by its subtitle—*Outsider Works and Intellectual Property Protection*. Written fan fiction is not the only kind of work that the book covers, and copyright is not the only area of law. Yet, the author’s real goal is not merely to survey such broad issues, but to resolve basic misconceptions about the links between copyright law and fan fiction. Schwabach begins in chapter 1 by introducing readers to the concept of fan fiction, to its history as a form of creativity, and to the reactions, both positive and negative, that it tends to provoke in authors and even other readers. This introductory material concludes by identifying a pair of fundamental issues that must always be addressed when thinking about fan fiction: “first whether the underlying work or element (such as a character) is protected by copyright and, second, if so, whether the fanfic or other fan work violates that copyright” (p.20). The bulk of Schwabach’s analysis, found in the two chapters that follow, directly addresses these basic questions.

¶ 47 First of all, in chapter 2, Schwabach considers whether a conflict even exists—whether copyright law actually covers the preexisting elements used in a particular work of fan fiction. This calls for a brief and necessarily simplistic survey on changes to the term of copyright protection under U.S. law—from the Copyright Act of 1909 through the Copyright Term Extension Act of 1998—and for a significantly more in-depth treatment of how copyright principles operate when applied to individual characters in a work, rather than to the work as a whole. Although this latter discussion includes extensive analysis of relevant case law, most of the cases Schwabach cites involve disputes between competing authors or production companies, not between rights holders and fans. Nonetheless, the information adds important background that is valuable for further discussion of fan fiction concepts.

¶ 48 Chapter 3 deals with an issue that is more directly connected to the theme of the book as a whole. When, the chapter asks, does fan fiction actually constitute copyright infringement? Much of the analysis in this section revolves around the concept of derivative works—permitted only when authorized by the underlying copyright owner—and the far more complex idea of a transformative work—one that is based on a preexisting creation, but nonetheless qualifies as “a new, original work, commenting on and critiquing the original” (p.68). The author argues that understanding these concepts is critical to properly appreciating the relationship between works of fan fiction and the copyrighted material upon which they are based. He also extends his analysis in this chapter beyond written fan fiction to address other fan-created works, such as videos, illustrations, and songs.

¶49 From these general questions, the book moves into a more specific discussion of the conflicts that can arise between the creator of an original work and those who create fan fiction based upon it. This is probably the strongest of the book’s five chapters, largely because Schwabach uses real-world disputes as examples to support his analysis. Unfortunately, two of these disputes never actually reached the litigation stage, and the third, although resolved in a reported decision, involved a fan-created work (The Harry Potter Lexicon) that strains the definition of fan fiction.17

¶50 Schwabach concludes his study with a speculative section—“Fanfic: The New Voyages”—on legal issues that fan fiction may face in the future, such as the possibility for conflicts between competing fan fiction writers and the blurring distinction between authors and fans. Three short appendixes (a G.K. Chesterton excerpt discussing parody, copies of the principal United States Code sections on copyright, and a very brief list of web sites relevant to fan fiction authors) accompany the main text. Lastly, the book offers an extensive bibliography of books and law review articles relevant to the subject matter.

¶51 Overall, Fan Fiction and Copyright is a very useful introduction to a marginal but emerging area of intellectual property law. A unique and relatively inexpensive book, it is definitely appropriate for most law school library collections, especially those that support research, teaching, or clinical programs in entertainment, publishing, intellectual property, or copyright law. Law firms with practices in these areas may also want to consider acquiring this title, though with the caveat that this is a monograph, not a practice guide. Readers will not find direct answers or practical guidelines for litigating cases that involve fan fiction and copyright issues. One final note: Schwabach seems to be a fan fiction enthusiast. This leaves him very familiar with the community and its language, but he occasionally gets carried away and veers off on tangents that, though interesting in and of themselves, do not really belong in a book on the legal aspects of fan fiction.


Reviewed by Todd G.E. Melnick

¶52 Exclusion is fundamental to the concept of property—to own a thing is to enjoy the right to keep others from using it. Eliminating the idea of exclusion is as impossible as eliminating property. However, the strategies of exclusion employed by property owners vary widely, ranging from the subtle to the overt, from the permissible to the proscribed. Society would benefit by privileging strategies based on reliable information over those that depend on rumor, innuendo, or prejudice. In his new book, Information and Exclusion, University of Chicago Law School professor Lior Jacob Strahilevitz examines the link between the availability of information about people and the methods used to exclude or include them in a variety of social arenas. His goal is to investigate ways in which society might actually become

more just through the wider dissemination of information that is conventionally considered private.

¶53 In the first portion of the book, Strahilevitz lays the groundwork for his ideas by identifying three fundamental strategies of exclusion and coining three new terms to describe them. Some property owners simply wield their “bouncer’s right” (p.4), invoking principles of trespass to keep certain people out while allowing others in. A nightclub owner can select who is admitted to dance in the club and who must remain behind the velvet rope. Likewise, Google can disregard job applicants who do not ace its test of I.Q. and computational skill, and Trump Tower can reject a would-be tenant based on a suboptimal credit report. Other owners use subtler means to exclude. Some use design and marketing to imbue their property with “exclusionary vibes” (p.4) meant to discourage disfavored applicants from seeking entry. Thus, a bar owner might keep out suburbanite patrons by promoting the establishment as a haven for bikers. Even more subtly, owners sometimes attach “exclusionary amenities” (p.5) to their property in an attempt to exclude those with no use for these features. Anyone can live here, says a building’s owner, but those who do so must contribute for the upkeep of a day care center, an evangelical chapel, or a bowling alley. Nonparents, atheists, or those who hate bowling will probably stay away.

¶54 In the middle section of his book, Strahilevitz briefly describes how the choices property owners make between these strategies are influenced by the amount of information generally available about the private thoughts, inclinations, and personal histories of potential entrants. Under a regime in which information of this sort is plentiful—perhaps because the privacy of arrest records or credit reports is unprotected—owners exercise their bouncer’s right and exclude or include as the data dictate. When this information is scarce—where the privacy of such records is protected by law—subtler, less justifiable, and more difficult to regulate exclusion strategies prevail.

¶55 Strahilevitz devotes the final and most interesting part of the book to discussing some quite unexpected ways that information can discourage or promote exclusion strategies. He presents the “reputation revolution” (p.6), the ever-increasing ubiquity of easily obtainable and endlessly concatenated online reputation information, as a solution to the problem of improper racially and culturally motivated exclusion. African Americans, he argues, are often discriminated against in employment decisions because misguided employers use skin color as a proxy for such undesirable characteristics as a criminal background, indebtedness, or inferior education. If, rather than protecting the privacy of job seekers, government promoted absolute transparency and provided access to reliable information about the criminal history, financial status, and educational attainment of applicants, employers would be able to make confident hiring decisions based on actual risk factors instead of historically disfavored proxies like race, gender, or age. Or, government might provide trial lawyers with a deep file of conventionally private information about prospective jurors prior to voir dire, thus encouraging attorneys to stop issuing challenges on the basis of race and to exclude would-be jurors, instead, on the basis of actual, justifiable facts. Leave it to an acolyte of law and economics like Strahilevitz to propose a solution to the problem of discrimination
that takes advantage of the inherent human tendency to discriminate. Though we may wish that the law would teach us to love our fellow man, perhaps the best it can do, Strahilevitz suggests, is help us to hate more fairly.

\[\S 56\] Information and Exclusion is not a work of present-tense practicality, but rather one firmly embedded in the realm of provocation, elaboration, and forward-looking abstraction. No present government will act on the book’s insights, sacrificing citizens’ cherished privacy protections in order to foster bouncer’s rights. Nor does Strahilevitz suggest that governments should do so. His mission is to question familiar assumptions, not to prescribe. This book belongs in an academic collection, not a law firm or court library. Legal scholars will find it pleasurably counter-intuitive and mind expanding, but the text holds little value for firm and court librarians looking for materials to support practicing lawyers. Strahilevitz’s ideas may very well influence future legal doctrine, but the speculative and hypothetical nature of his book suggests that it is best suited to the legal academic market.
The U.S. Constitution may get all the attention, but as Ms. Whisner points out, state constitutional law is also important to legal researchers. Unfortunately, the sources for researching state constitutions are more limited and difficult to find. She describes a web site created by the Gallagher Law Library at the University of Washington School of Law that makes available sources of Washington State constitutional history.

¶1 Ask a person on the street about constitutional law and—assuming you’ve met up with a fairly knowledgeable person1—you’re likely to hear about equal protection, the Bill of Rights, or perhaps the separation of powers. He or she might mention some of the great constitutional cases: Brown v. Board of Education,2 Gideon v. Wainwright,3 Miranda v. Arizona.4 (These will also be the main points mentioned if you ask most law students or attorneys.) If you prowl around a large bookstore, you’ll see books about the framers of the Constitution—the “Founding Fathers” or, as one author dubbed them, the “Founding Brothers”5—as well as recent works on the role of the Supreme Court in interpreting the Constitution.6 If you’ve been a tourist in Philadelphia, you might have visited Independence Hall, where the Constitutional Convention met in the summer of 1787. As a member of the audience that reads Law Library Journal, you likely know much more than the
average person about the drafting and adoption of the Constitution and its amendments, as well as the debates about its interpretation and application in the last 225 years. And of course you can direct researchers to print and online resources for digging deeper.7

¶2 But the U.S. Constitution is not the only constitution in our system. Each state has a constitution, and therefore a body of state constitutional law.8 Yet state constitutional law is largely neglected. I don’t have a source to cite, but I think it’s a fair bet that the high schools that expose their students to the federal constitution seldom say much (if anything) about their states’ constitutions. Even law schools rarely teach state constitutional law.9 The national press, which plays an important role in educating the public about constitutional issues, focuses on the U.S. Supreme Court, and hence on the federal constitution.10

¶3 But despite our general ignorance, state courts have been plugging along, applying their state constitutions to important issues, often providing protections greater than those afforded by the U.S. Constitution as interpreted by the federal courts. A prominent supporter of using state constitutions was Justice William J. Brennan. In an influential article in 1977,11 he recounted victories for individual rights in the 1960s and early 1970s,12 and then “a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being . . . application of the federal Bill of Rights and the restraints of the due process and equal protection clauses of the fourteenth amendment.”13 Brennan heralded recent state court decisions that interpreted provisions of state constitutions

8. Indian tribes also have constitutions, but Indian law is a topic for another day.
9. State constitutional law is not a part of the academic culture of most American law schools, especially the nation’s leading law schools. In the 2007–2008 academic year, no school ranked in the top fifteen offered such a course, and only one of the top twenty law schools offered a course in state constitutional law.


10. Local papers do cover state constitutional issues, such as cases on motor vehicle fuel tax or education. But state constitutional law doesn’t have its Nina Totenberg, let alone the journalists who have written book-length accounts of constitutional struggles, e.g., Richard Kluger, Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality (rev. ed. 2004); Anthony Lewis, Gideon’s Trumpet (1964), or biographies of Justices who shaped constitutional law, e.g., Linda Greenhouse, Becoming Justice Blackmun (2005).


13. Id. at 495.
more liberally than the Supreme Court had construed parallel—or sometimes identical—provisions in the federal constitution. For instance, Article I, Paragraph 7, of the New Jersey Constitution was identical to the Fourth Amendment, but in 1975 the New Jersey Supreme Court rejected U.S. Supreme Court precedent in order to provide more protection—in this case, requiring the prosecution to show that consent to a search was voluntary.\(^{14}\)

\(\S 4\) U.S. Supreme Court cases may dominate the headlines, but state supreme court cases outnumber them—by a lot.

State supreme courts decide more than ten thousand cases each year, roughly twenty percent of which involve state constitutional issues. The U.S. Supreme Court, by contrast, now issues around seventy-five decisions a year, around forty percent of which involve constitutional issues. . . . [T]he California Supreme Court now issues more opinions about state constitutional law than the U.S. Supreme Court issues decisions about federal constitutional law.\(^{15}\)

Some of those constitutional decisions relate to matters unique to state government—for example, whether an initiative’s ballot title is acceptable,\(^{16}\) whether the governor can compel the attorney general to withdraw an appeal,\(^{17}\) or whether a particular means of funding public education satisfies the state’s duty “to make ample provision” for the education of all children.\(^{18}\) Other cases address issues that are common to the federal and state systems. As in the examples discussed by Justice Brennan, state courts have provided protections above the level set by the U.S. Supreme Court on “school finance, disparate impact proofs of discrimination, voter registration laws, abortion funding, religious liberty protections, takings, same-sex sodomy, and a host of criminal procedure protections.”\(^{19}\)

\(\S 5\) It’s worth noting that the increased activity in state constitutional law in the late twentieth century was a rebirth, not a birth. In fact, state constitutional law had been very much alive before that. “Throughout the nineteenth century and until the growth of the national government during and after the New Deal, the focus of American constitutional law was at the state level.”\(^{20}\) And state courts considered themselves free to differ from the U.S. Supreme Court in interpreting state constitutional provisions similar to those in the federal constitution.\(^{21}\) Some states were far ahead of the U.S. Supreme Court in certain areas of individual rights. For instance, the Wisconsin Supreme Court ruled that the Wisconsin Constitution required counties to provide lawyers for poor defendants charged with felonies in 1859, over a century before *Gideon v. Wainwright.*\(^{22}\)

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15. Devins, *supra* note 9, at 1635 (footnotes omitted).


19. Devins, *supra* note 9, at 1636. Between 1977 and 1988, there were four hundred state court interpretations giving greater protection to individuals than U.S. Supreme Court cases did. *Id.* at 1638.


21. *Id.* at 1171–72.

When state courts rely on state constitutions, their decisions are generally insulated from reversal by the Supreme Court.23 As Brennan put it: “the state decisions not only cannot be overturned by, they indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such state decisions.”24 There’s a slight qualification: the state court must do more than mention the state constitution. For instance, in Michigan v. Long, the Supreme Court held that it had jurisdiction despite the state court’s statement, “We hold . . . that the deputies’ search . . . was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution.”25 The Michigan court’s opinion had discussed the Fourth Amendment and cited Supreme Court cases on the Fourth Amendment, but cited the state constitution only twice, without analysis.26 The state court apparently “decided the case the way it did because it believed that federal law required it to do so.”27 Deciding that it had jurisdiction “in the absence of a plain statement that the decision below rested on an adequate and independent state ground,” the Court could review (and reverse) the Long decision.28 Of course, state courts responded to the Court’s instruction and began making their reliance on state grounds explicit.29

Despite state constitutions’ typically low profile, they do sometimes land in the spotlight. The public might not care much about the fine points of search and seizure law, but when the Hawaii Supreme Court said that the statute defining marriage was subject to strict scrutiny under the state’s constitution,30 people definitely noticed. Within the state, the reaction was to undo the ruling by amending the constitution to empower the legislature to ban same-sex marriage.31 And there was a strong reaction beyond the state, too: between 1998 and 2009, thirty-one other states also adopted constitutional amendments limiting same-sex marriage and

23. Not everyone sees this as a good thing. “Since the early 1970’s, what has troubled the critics of the once ‘new judicial federalism’ is the strategic use of state constitutional law in a way that expands the rights domain while insulating such state court decisions from otherwise adverse federal court review.” Ronald K.L. Collins, Foreword: The Once “New Judicial Federalism” & Its Critics, 64 Wash. L. Rev. 5, 6 (1989).
25. 463 U.S. 1032, 1037 n.3 (1983) (quoting People v. Long, 320 N.W.2d 866, 870 (Mich. 1982)).
26. Id. at 1043.
27. Id. at 1041.
28. Id. at 1044. For more on the issue of the Supreme Court’s lack of jurisdiction when a state decision rests on “independent and adequate state grounds,” see 16B Charles Alan Wright et al., Federal Practice and Procedure §§ 4019–4032 (2d ed. 1996). The sequence of deciding state and federal claims is discussed in 1 Jennifer Friesen, State Constitutional Law, at 1-18 to 1-41 (4th ed. 2006).
29. See Patricia Fahlbusch & Daniel Gonzalez, Case Comment, Michigan v. Long: The Inadequacies of Independent and Adequate State Grounds, 42 U. Miami L. Rev. 159, 188 n.200 (1987) (“At one time or another, all of the state courts surveyed in this study placed in their opinions the declaration that their decisions rested on bona fide, separate, adequate and independent state grounds. And in all cases the Supreme Court denied review.”).
often other types of same-sex unions. By the later years, the states adopting constitutional amendments were reacting not just to the case from Hawaii, but also to cases from other states, including Vermont, Massachusetts, and California.

Advocates for same-sex couples made their cases using the distinctive provisions of state constitutions. For example, compare the equality provisions from Connecticut, Iowa, and Massachusetts with the equal protection clause of the Fourteenth Amendment:

Connecticut All men when they form a social compact are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community. No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.

Iowa All laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.

Massachusetts All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

United States No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Clearly, equality provisions are not created equal. The state cases may also involve constitutional provisions that have no parallel in the federal constitution. For

37. Id. § 20.
40. U.S. Const. amend. XIV, § 1.
instance, in *Andersen v. King County*, the Washington Supreme Court discussed the state constitution’s privacy provision and Equal Rights Amendment as well as equal protection and due process.

¶9 The ability of a state’s legislature and voters to amend their constitution to undo a court decision with which they disagree illustrates one significant way in which state constitutions differ from the federal constitution: they are much easier to change in response to political mood or changing circumstances. Most states have had at least three constitutions since their founding; altogether the states have adopted more than 7000 constitutional amendments. Marriage is not the only area in which voters have responded to an unpopular ruling by amending the constitution. After the California Supreme Court held that the death penalty was prohibited by the California Constitution’s cruel or unusual punishment clause, the state adopted an amendment reinstating the laws that had been struck down. And after the Florida Supreme Court interpreted its constitution’s search and seizure protections more liberally than the federal courts interpreted the Fourth Amendment, the legislature and the voters amended the constitution to add explicit instructions to the courts: “This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.”

42. 138 P.3d 963 (Wash. 2006) (upholding statute defining marriage as only between a man and a woman).

43. *Id.* at 986, ¶ 84 (citing *WASH. CONST.* art. I, § 7: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”).

44. *Id.* at 988, ¶ 96 (citing *WASH. CONST.* art. XXXI, § 1: “Equality of rights and responsibility under the law shall not be denied or abridged on account of sex.”).


46. Devins, supra note 9, at 1640.


49. *FLA. CONST.* art. I, § 12 (as amended Nov. 2, 1982). A similar provision ensures that Florida will stay in step with the Supreme Court’s Eighth Amendment rulings: “The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.” *Id.* § 17.

The Florida Constitution refers to the Supreme Court in another context:

The legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor’s right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor’s pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

*Id.* art. X, § 22 (added Nov. 2, 2004). Searching Westlaw’s ST-CONST database for te(“united states”/2 “supreme court”), I found no other state constitution that makes a similar reference to U.S. Supreme Court decisions. I did find an example of a state legislature going the other direction: a concurrent resolution passed by the Louisiana legislature stated that “the citizens of Louisiana have chosen a higher standard of individual liberty than that afforded by the Constitution of the United States of America and the jurisprudence interpreting the federal constitution” and that the Supreme
¶10 State constitutions are important. As Justice Brennan advised, “although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.” Therefore, lawyers, law students, and others interested in the state constitution need to find relevant sources. The first source, of course, is the constitution itself, and that is easily found—in state codes and often on state web sites. Researchers then will want cases interpreting the constitution, and cases are also easily found, using annotated codes, digests, and full-text searching.

¶11 What is more difficult to find is the history of a state constitution, which is often an important source in interpretation. Researchers can often turn to the published proceedings of their state’s constitutional convention. It is not surprising to find good records for recent conventions, but there are published proceedings even for very early conventions—for instance, Maryland’s, from 1776.

¶12 Washington, however, is among the few states whose proceedings have not been published. The members of the convention in 1889 hired court reporters to record debates in shorthand, but Congress did not appropriate the money to pay them—and their notes are lost. In the early 1960s—decades after the convention—the University of Washington’s School of Law (with “the active personal interest” of the law library’s director, Marian Gould Gallagher) and Department of History funded a project to fill this gap. Beverly Paulik Rosenow, then a law student, edited a transcript of the handwritten minute book; an index prepared by a history student provided references from constitutional provisions to the dates in the journal when they were discussed, along with citations to contemporary newspaper articles that reported on the convention. After the project was completed, photostatic copies of the newspaper articles were deposited with the University of Washington law library, where researchers occasionally requested them.
¶13 By the late 1990s, Rosenow’s book was out of print, and the sepia-toned photostats were very hard to read. The law library, now named for Marian Gould Gallagher and led by Penny Hazelton, again undertook a project to improve access. Securing the copyright from the original publisher, the library arranged for the William S. Hein Company to reprint the book, so that a new generation of lawyers, historians, and other researchers could acquire it. Students and staff returned to the microfilm of the newspaper articles to make new copies, which Hein published in a bound volume. Now it’s available at all three state law schools and the state law library, not just the library where it was compiled, and it’s on acid-free paper, not the fading photostats comprising the first set.

¶14 Even though the reprints by Hein improved access, there was more to do. Hugh Spitzer, who teaches Washington State constitutional law at the University of Washington, was concerned about the situation of a practitioner in a small town, hundreds of miles from a big law library: state constitutional law issues are important, and the state supreme court says that lawyers should brief the history of constitutional provisions; yet that small-town lawyer wouldn’t have easy access to many of the important sources. For instance, the Washington Supreme Court has cited an unpublished dissertation that was available until recently in only a few libraries. David Hancock, a student in Spitzer’s class and the editor-in-chief of the *Washington Law Review* in 2008–2009, began a project to post materials online, acquiring Hein’s digital versions of the newspaper articles and scanning or locating previously scanned copies of other texts. After Hancock’s graduation, the project lay fallow for a while, until the law library took it up in the summer of 2011. We have organized the digital materials Hancock gathered and added links to many more sources from a central page: *Washington State Constitution: History* (http://lib.law.washington.edu/waconst).

¶15 Like the drafters of many state constitutions, Washington’s delegates to the constitutional convention borrowed from other states’ constitutions. Many used compilations, so that the delegates had many texts before them. The index in the *Journal of the Washington State Constitutional Convention* cites various constitutions that were influential, including the California Constitution of 1879 and the

Oregon Constitution of 1857.63 Now the web site links to them.64 The site also links to a variety of commentary, including articles in the state’s historical society journal written by former delegates,65 the unpublished dissertation mentioned above,66 and many law review articles from the last three decades. A separate page lists the constitutional amendments, along with links to voters’ pamphlets describing the ballot measures when they were adopted.67

¶16 State constitutional law does not always have a high profile, and yet state constitutions are important authority, as are the cases interpreting them. State constitutions provide for the structure and operation of state government. They also have provisions to protect individual rights and liberties—provisions that are sometimes interpreted to offer more protection than the federal Bill of Rights.68 Historical materials may not always be easy to locate, but making them available is a worthy project for law libraries. We can serve not just the patrons who can visit our building, but a much wider audience of researchers.69


64. We sought sources that seemed official or quasi-official—e.g., from archives, legislatures, and state historical societies. Sometimes we found separately published constitutions in Google Books. In a few instances we linked to compilations. A separate section of the guide links to compilations available online.


66. Airey, supra note 60.


68. See Robert F. Williams, Why State Constitutions Matter, 45 NEW ENG. L. REV. 901 (2011). The article includes as an appendix a resolution from the Conference of Chief Justices, encouraging all law schools to offer a course in state constitutional law. Id. at 912.

69. A recent brief to the Washington Supreme Court cites the web site for both Stiles, supra note 65, and Airey, supra note 60. Brief for Appellant, In re: Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District, No. 86552-3 (Wash. Nov. 15, 2011), 2011 WL 7005433, at *24 n.9, *28 n.12. It is gratifying to see that the web site is already being used by the bar.
WestlawNext and Lexis Advance*

Christine L. Sellers** and Phillip Gragg***

The columnists discuss and debate the emergence of WestlawNext and Lexis Advance, and consider their impact on legal research, law school instruction, and the practice of law.

¶ 1 CS: For this column, we decided to take a look at WestlawNext and Lexis Advance—and what’s funny to me is what I found in my research: the volume of opinions on WestlawNext greatly outnumbers Lexis Advance by an almost unbelievable amount. So let’s get started and perhaps add a bit to the literature on both systems. I think we can probably agree that Ron Wheeler’s article on WestlawNext in Law Library Journal is an excellent place to start.1

¶ 2 PG: Definitely. As you said, there is much more written about WestlawNext, and the system is out front in other ways as well. For one, it was launched earlier, so it has all the advantages of being first (a questionable advantage, as they were not very likely to take market share from LexisNexis), and all of the disadvantages. I wish we could have been flies on the wall of the planning meetings surrounding WestlawNext and Lexis Advance. I imagine LexisNexis must have seen WestlawNext as a shot across the bow, and initially there must have been great concern.

¶ 3 LexisNexis has taken a more limited approach than Westlaw to developing Lexis Advance, probably due to cost. And since they are offering it as a free enhancement to LexisNexis, the development model is necessarily different. LexisNexis has also had the advantage (and maybe LexisNexis should change Advance to Advantage) of watching the very mixed reaction to WestlawNext and the heavy-handed way in which West attempted to foist it upon the masses—although I think they used the word “launch.”

¶ 4 CS: Actually, LexisNexis already has a product called atVantage, so that’s out.2 I went to a “launch” for WestlawNext and thought at the time that LexisNexis

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2. atVantage: Legal Prospects, LEXISNEXIS, http://law.lexisnexis.com/atvantage (last visited Feb. 10, 2012). LexisNexis describes the product as a powerful law firm business development tool that helps you analyze and track your firm’s growth opportunities with clients and prospects, research industry and market trends, and evaluate competing firms. You can do this all from a single, intuitive Web interface designed around the way marketers and business development professionals perform their daily tasks.
was unlucky to be going second. However, I think that LexisNexis learned from Westlaw’s mistakes with WestlawNext, and that was strongly encouraged and noticed by both librarians and bloggers.³

¶5 **PG:** My impression, not having read any of the literature, is that Westlaw is attempting to force this on us, whether we like it or not, and not in a subtle way. When the very early objections to the introduction of WestlawNext were made, the company merely delayed their time line for rollout. Then, when it started to move forward again, the company used the same tactics—a clumsy, forcible introduction. (This is a tactic often employed by governments—wear people down until they accept the reality that you force on them.) I even had the sense that people working at Westlaw had to grin and bear the transition.

¶6 LexisNexis may or may not have planned a more aggressive approach that mirrored Westlaw’s, but if memory serves, during the beta phase, when they first got some push-back, they stopped, reevaluated, and came back with a cleaner, more user-friendly enhancement to their platform. The impression I got from our LexisNexis representative, and others I’ve met at conferences, is that the emphasis seems to be on the customer. I’ve never had that feeling with WestlawNext. Now, let me go read the literature! [Days pass, house plants go unwatered, and the editor of Law Library Journal graciously endures another missed deadline by the authors.]

¶7 **CS:** I think Westlaw had a very “Apple-like” mind-set when launching WestlawNext. While I was reading the literature, the Steve Jobs quote that came to mind was: “You can’t just ask customers what they want and then try to give that to them. By the time you get it built, they’ll want something new.”⁴ I don’t want to deemphasize that WestlawNext was innovative, but a product has to be more than just innovative to win over librarians.

¶8 **PG:** You’ve drawn a parallel between Steve Jobs and Westlaw; but Steve Jobs re-created a world, whereas Westlaw services a world that is old and intransigent. No matter how much Westlaw changes things, it will not fundamentally alter the practice of law or legal research. After all, some thought and reflection is still required of the lawyer, and this is the crux of the problem: a product that does not require thought as an input in the research phase will leave the lawyer captive to the automated, thoughtless results that flow out of such a system.

¶9 We’re in an interesting situation with the commercial vendors. There are few vendors, so we have few alternatives. Our relationship can span the spectrum between partnership and animosity. I realize academic institutions are a small part of the market, but we also offer the keys to the kingdom—access to new lawyers—and we should be mindful of this.

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CS: What I really noticed was the positive response WestlawNext first received from the bloggers invited to Eagan, Minnesota, to preview the product.5 The shine wore off fairly quickly though. Information Today summed up West’s mistakes, “which involved telling everyone at the same time about a new product while only providing it to one market and leaving other markets to the guesswork; not telling anyone the price; and generally irritating librarians by promoting the new but often unavailable service directly to patrons.”6 Greg Lambert also pointed out the uncertain prices and mixed messages that characterized the time period after the launch.7

PG: If questioned about tactics, West would probably engage in some revisionist history, but I have little doubt that the obscurity with which WestlawNext was launched was intended to test the market and see if traditional Westlaw could be pulled out from under us and prices increased. Either that or the launch was ham-handed. I see no other alternatives—and it didn’t help that this was done during an economic downturn. The launch felt like a top-down decision. West’s management would have done well to listen to their soldiers in the field, and most important, their customers who spend enormous sums for access to their products.

CS: Getting back to Ron Wheeler’s article on WestlawNext, I thought he did an excellent job of summarizing the process of legal research and then discussing the potentially negative impact of WestlawNext on that process.8 Issues he highlighted included the “crowdsourcing” algorithm of WestlawNext’s new search engine, which could make esoteric materials more difficult to find;9 the lack of the ability to start with a broad search strategy that then can be narrowed;10 and searching without first choosing a database, which could impact users’ knowledge of sources.11 He did point out positive impacts as well, which include users finding and using previously unknown sources and documents.12 He noted that WestlawNext will change the way legal research is taught in law schools.13 Will it change how or what you teach?

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7. Lambert, supra note 3.
9. Id. at 366, ¶ 20.
10. Id. at 371, ¶ 36.
11. Id. at 374, ¶ 46.
12. Id. at 373, ¶ 44.
13. Id. at 376–77, ¶¶ 55–56.
¶13 **PG:** Yes and no. The “Googlization” of legal research has a few benefits, but the ease of searching, while impressive, expects less of the user. It assumes a lack of skill and understanding of material, and attempts to reduce complex and nuanced problems to the lowest common denominator. If legal research, analysis, and writing ever become full automated, lawyers will become little more than clerks.

¶14 We must hold our students to higher standards so that a search product that results in an answer of the lowest common denominator does not result in a student whose skill approximates the lowest common denominator. I expect intelligent inquiry from my students, flexible, creative responses to difficult situations, and an understanding of the “how and why.” In short, I don’t feel WestlawNext is a threat to librarians; it’s a threat to lawyers. To answer your question, I will teach WestlawNext and Lexis Advance, but it will not change the expectation I have of my students to be knowledgeable and professional. What effects have you seen in government and law firms?

¶15 **CS:** At the Law Library of Congress, Westlaw was only used for congressional inquiries. I don’t foresee a switch to WestlawNext anytime soon, especially with the pricing issues and looming budget cuts. As for the law firm where I now work, we don’t use WestlawNext. I’m not sure what will happen in the next five years as more and more law students use WestlawNext in law schools. Based on discussions I’ve had with librarians and attorneys, it seems the students who have access love it and can’t imagine using anything else. However, the reality of paying for this service might change that, as it changes all things in legal practice.

¶16 **PG:** I have students who love WestlawNext, but also recognize some of its limitations related to both cost and how it is structured. At the start of our Advanced Legal Research class in January, a student said he used WestlawNext all the time, but he signed up for the class because he wanted to know how to find things himself. In Louisiana, as in so many other states, there are materials that only exist in print or have only recently been added to agency or legislature websites.

¶17 **CS:** So what do you think of your own use of WestlawNext or Lexis Advance? I found myself . . . frustrated. For those of us who are advanced searchers and know where to look for things, a results list with everything in it is too much. I don’t want to have to dig when I know what source the answer will be in. On the other hand, I think there is a steep learning curve with each product, and I don’t think I’ve used either product long enough to adjust my mental map of how my research should proceed.

¶18 **PG:** The main, Google-like search box is to me like staring into the abyss. You don’t really know what’s down there and what is going to come back. Every search seems to result in 10,000 results—as if this were a good thing. It makes me pine for the good old days of traditional LexisNexis and Westlaw where you would get error messages saying, “This search has resulted in excess of 10,000 hits.” The subtext was, thank you for playing, you may want to try again. Perhaps the shotgun approach is preferred by some. After retrieving the universe of information, you can pick through the results to find a few good resources. The filtering now has to occur at the end of the process.
¶19 I’ll admit that when I was a law student, I would wantonly and indiscriminately search in the All Feds or even All Cases databases. But my days of reckless youth are past me, and I now try to teach my students that the best filter is their own mind. Several days ago I demonstrated the deficiency of the shotgun approach. Side by side, a student and I looked for the elements of kidnapping in a particular secondary resource. In traditional Westlaw, we went right to the narrower and less expensive database containing only the individual volumes in question. The WestlawNext search required a search of the universe and then narrowing several times, and then reverting to a table of contents view to understand the full coverage of the resource.\textsuperscript{14} The WestlawNext search also failed to retrieve related hits in surrounding sections within the given resource. In print or in traditional Westlaw, reading the table of contents would have resolved this issue quickly. It is ironic that all of this technology cannot fully supplant the simple act of reading. However, it is not lost on me that many people, students and lawyers in particular, find WestlawNext to be a godsend.\textsuperscript{15}

¶20 CS: I was also wanton and indiscriminate in my youth with the searching. I shudder to think of those searches now. I would characterize both of us as good researchers—we usually know where to find what we are looking for and find it there. When our search results are broader than what we want, it can come across as noise and distract us.

¶21 PG: True. Perhaps this is not noise to the young lawyers we are training, but they are not beyond hope. In another amusing incident, I walked up to the reference desk one day and greeted the reference librarian and the student receiving help. We got into a conversation about WestlawNext, and I expressed my concerns about it, including its limitations. “Oh, it has everything!” the student replied. I then asked him what he was looking for today that required the assistance of the reference desk. He lowered his head and sheepishly admitted that he couldn’t locate the federal legislative material he sought through his iPad app. He had spent about thirty minutes searching, and couldn’t believe it was not on WestlawNext. We rather quickly located the material for \textit{free} through THOMAS (thomas.loc.gov).

¶22 CS: Ah, you know I love a good THOMAS story! On the other hand, part of the concern I have with librarians’ reactions to WestlawNext is that they can sometimes seems like just a gut reaction against change. Are we fuddy-duddies? Do some of us resist change just because it is change? I sat on a panel for an early version of Lexis Advance. While I’m not that young, I was one of the younger librarians in the room, and I remember thinking that some of the librarians were only complaining because things weren’t like they used to be. One of the librarians wanted to make sure she could still use DOS-type commands—to me this seemed like an irrational desire to keep things the same, even if new methods are better.

\textsuperscript{14} While some sources can be searched individually in WestlawNext, the one the student needed could not. It should be noted, though, that WestlawNext has recently been making changes to allow specific sources to be searched individually.

¶23 I firmly believe that being a good librarian involves adapting to change. Heck, I think being a good person involves adapting well to change, even though I admit to struggling with it. If we hold on to things that are archaic, what does that say about us as a profession? Does this influence the way librarians are perceived—rigid and silence-enforcing rather than innovative and forward-thinking? I think the answer can sometimes be yes. I also think the answer is that we can’t hold on to the past just because it worked for us before. That’s the past. Things change. Get used to it. Be flexible. Be adaptable. Make sure when you complain or resist something it’s actually for a good reason. I don’t want to suggest that everyone suffers from this, but I do think it’s something we need to be cognizant of in our profession and our lives.

¶24 I’m not saying to change just to change, nor am I saying adopt a new technology just to do so. Technolust for its own sake is never good. However, I do think more empirical research on the effects of these new systems on research, as Ron Wheeler called for,16 is needed. This column was not the place for it, but this journal is.

¶25 PG: Let me go back to your earlier question and say: yes, we are being fuddy-duddies. Although I have previously expressed suspicion of and caution about new technologies,17 sometimes tongue in cheek, my skepticism is often legitimate (hey, remember RFID tags?). For me, there are two central issues: (1) Does the cost of a new product or technology outweigh the benefits? We have limited budgets and a fiduciary responsibility to our institutions. And (2) Does the new technology produce a better, more well-rounded and practice-ready attorney?

¶26 Perhaps everyone is going the way of WestlawNext, but let me pose this simple question: Would it be easier to train a person who had been through a comprehensive advanced legal research class (covering books as well as databases such as HeinOnline, CCH, BNA, etc.) to use WestlawNext or to train someone who has only relied on WestlawNext to use a variety of new sources? The former person is by far the more flexible and adaptable. If my question seems a bit simplistic or ridiculous, consider that WestlawNext seems to be asking users the question: “Why do you need knowledge and understanding when you have me?” I cannot in good conscience abdicate my responsibility to teach a student as many paths to information as possible. Lay your burdens down and seek redemption at the temple of simple solutions? No, the law demands more, and I can’t ignore that.

¶27 CS: I agree that the former person is more flexible and adaptive and, therefore, a better researcher. I don’t want to come across as though I think skepticism isn’t valid, because I greatly admire each and every librarian who questions both the status quo and change. I think it’s part of our professional responsibility to create a dialogue about new products. Hopefully, we have contributed to that here.

¶28 PG: Well, for my part, I pledge to continue to scrutinize new technologies and not dismiss them out of hand. Electronic catalogs, digital and digitized books, and technologies such as optical character recognition (OCR) have brought about

a welcome and massive shift in the way we can access and locate information. I will welcome any technology that promotes access and ease of use, combined with intelligent inquiry and results. If my assessment of this new direction in legal research is in error, then it is forever memorialized here. I can live with that. I’ll chalk it up to professional vigilance.
Memorial: Felice Sacks (1945–2012)*

¶1 Felice Sacks, Director of Library Services at Lionel, Sawyer & Collins in Las Vegas, passed away on January 5, 2012, while undergoing a heart valve replacement. Felice experienced several health issues during the last few years, but she did not let that interfere with her zest for life. She is survived by her husband Steven, her two daughters, Erika and Marni, her son, Kenneth, and five grandchildren.

¶2 Although she grew up in New York, Washington, D.C., was home to Felice for most of her career as a law librarian. She was a librarian at the Environmental Protection Agency and at the law firm Wilmer, Cutler & Pickering (now Wilmerhale), and Library Director at the Pension Benefit Guaranty Corporation (PBGC). Felice retired from PBGC a few years ago and moved to Las Vegas, but she did not stay retired for very long.

¶3 I met Felice when we both worked at Wilmer, Cutler & Pickering. She stunned me one day by announcing she had joined a dance troop. Growing up in New York, she had taken tap dance lessons and over the years had developed a renewed interest. Whatever Felice participated in, she always gave 100%, and tap dance was no different. During her first recital, she was dancing her heart out, not realizing she was nearing the edge—and then she fell off the stage! Typically for Felice, she got right up and continued to dance.

¶4 Felice may have been a law librarian by profession, but at heart her real passion was art. Whenever the opportunity arose, she would call on her artistic skills to design newsletters and web sites. In her spare time Felice was a silk-screen artist and had a penchant for interior design. Her philosophy of art was simple: “Art enables me to interpret the patterns, textures, lines and colors floating around me on a daily basis. Through various medi[a] I express my own individuality and creativity.”

¶5 During her time in Washington, D.C., Felice studied screen printing at the Corcoran School of Art. This led to an opportunity in 2001 to participate in the school’s annual Portfolio Project. The theme was “911,” and Felice’s print was one of the entries acquired by the Library of Congress. As a student of interior design at the Fashion Institute of Technology in Manhattan, Felice began working on interior design projects in watercolor, markers, and computer graphics. Even after moving to Las Vegas, she continued to take classes, enrolling in the University of Nevada, Las Vegas, art program and focusing on areas as diverse as typography, animation, digital images, illustration, and web development.

¶6 Her career and artistic talents were important to Felice, but nothing was as important as her family. Her face would light up when she talked about their...
accomplishments. When her daughter Marni developed Crohn’s disease, Felice became an advocate, familiarizing us with its adverse affects. She was happiest when her family was all together.

¶7 What I will remember most about Felice was her generosity of spirit, her kindness, her laughter, and her unwavering friendship. This statement from her web site to me invokes the perfect picture of Felice: “[O]n Sunday mornings in her silk screen art studio, you can always find Felice busy developing and implementing new ideas for prints, with the radio blasting and the sunlight of a new day streaming in through the tiny window.” She truly was one of a kind. She will be missed.—Joan Sherer

2. Id.