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# American Association of Law Libraries

## *Law Library Journal* Author's Guide

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1. Content. *Law Library Journal* includes articles in all fields of interest and concern to law librarians and others who work with legal materials. Examples include law library collections and their acquisition and organization; services to patrons and instruction in legal research; law library administration; the effects of developing technology on law libraries; law library design and construction; substantive law as it applies to libraries; and the history of law libraries and legal materials. Submissions aimed at all types of law libraries and at all areas of library operations are encouraged. The *Journal* also encourages the publication of memorials to deceased members of the Association.

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2. Abstract. Provide an abstract of fifty words or less.

3. Table of Contents. If the article is divided into headings and subheadings (which is preferred), provide a table of contents telling where in the text each heading is found.

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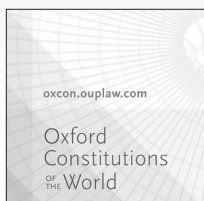
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## From the Editor: Passing the Torch\*

Janet Sinder\*\*

¶1 As I write this in my office, very near to the Statue of Liberty,<sup>1</sup> the image of a torch is not far away. The passing of torches evokes long-distance runners, not an inapt metaphor for the life of the *Law Library Journal* editor: working on one issue, reading the page proofs of the previous issue, and reviewing possible articles for forthcoming issues, all at the same time, and realizing the process will repeat itself four times every year.

¶2 I recently reread Frank Houdek's piece from the last issue he edited<sup>2</sup> and was tempted just to reprint much of it under the title, "Ditto." One of the points that resonated strongly was Frank's statement that his years as editor were the time when he knew the most about what was going on in law libraries. Reading, rereading, cite-checking, editing, and proofreading articles on all aspects of law librarianship have provided me with an in-depth education on the issues facing the profession today.

¶3 Editing a journal has two facets—one intellectual, the other practical. On the intellectual side, it has been exciting and challenging to edit the journal during a time of acute change in our profession. The first volume I worked on was volume 100, in which much space was given to a celebration of the history of law librarianship and *Law Library Journal* itself.<sup>3</sup> By 2013's volume 105, the mood had become more anxious than celebratory, with several articles focused on how law libraries can save themselves during the current crisis in legal education.<sup>4</sup>

¶4 On the practical side, I've become an expert cite-checker, *Bluebooker*, and proofreader, and I've learned about running heads, extra leading, and internal footnote reference linking. Despite the fact that editing *LLJ* can sometimes seem

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\* © Janet Sinder, 2013.

\*\* Director of the Library and Associate Professor of Law, Brooklyn Law School, Brooklyn, New York.

1. If I could fly there, it would only be 2.9 miles. GOOGLE MAPS DISTANCE CALCULATOR, <http://www.daftlogic.com/projects-google-maps-distance-calculator.htm> (last visited Aug. 23, 2013).

2. Frank G. Houdek, *From the Editor: Endnote*, 99 LAW LIBR. J. 937, 2007 LAW LIBR. J. 59.

3. Each issue contained a Centennial Feature article: Frank G. Houdek, *The Essential Law Library Journal*, 100 LAW LIBR. J. 137, 2008 LAW LIBR. J. 6; Bernita J. Davies, *Law Library Journal: The First Fifty Years*, 100 LAW LIBR. J. 363, 2008 LAW LIBR. J. 18 (reprinting 49 LAW LIBR. J. 157 (1956)); Frank G. Houdek, *A Law Library Journal Centennial Timeline: Highlights from One Hundred Years of LLJ History*, 100 LAW LIBR. J. 541, 2008 LAW LIBR. J. 24; AALL *Special Interest Section Recommended Reading Lists*, 100 LAW LIBR. J. 713, 2008 LAW LIBR. J. 35.

4. See, e.g., Simon Canick, *Library Services for the Self-Interested Law School: Enhancing the Visibility of Faculty Scholarship*, 105 LAW LIBR. J. 175, 2013 LAW LIBR. J. 8; Genevieve Blake Tung, *Academic Law Libraries and the Crisis in Legal Education*, 105 LAW LIBR. J. 275, 2013 LAW LIBR. J. 14.

like a lonely occupation, there are numerous people helping behind the scenes. At AALL headquarters I worked most closely with Julia O'Donnell (who left AALL in 2012 to pursue opportunities in Austin) and Ashley St. John. I have been lucky to have an excellent copy editor in Christine Schwab, and I especially want to thank Chris Keech, at ALA Publishing, who has masterminded the typesetting and production of *LLJ* for the past six years. Chris was also the main designer of the new look adopted for the journal beginning with volume 101. No matter the delays on the editorial end, Chris has always managed to find a way to get the issue out on time.

¶5 I am particularly grateful to the people who have written regular columns for *Law Library Journal*, contributing between two and four articles per year,<sup>5</sup> as well as the six librarians who have worked on the "Keeping Up with New Legal Titles" book review section during my term.<sup>6</sup> Special recognition must be given to Mary Whisner, who has come through with a "Practicing Reference" column for every issue over the past six years (and for many, many more before my editorship).<sup>7</sup> Just as many readers of the *New Yorker* magazine look first at the cartoons, many *LLJ* readers probably flip to Mary's column before reading anything else.

¶6 Learning about the topics on the minds of law librarians was only one benefit of editing *LLJ*—another was working closely with so many law librarians across the country. Editing isn't writing; you don't produce anything that you can really call your own. On the other hand, it is incredibly rewarding to help people get their ideas across as clearly as possible, and I am extremely appreciative of the fact that so many authors have trusted me with their work. It's difficult to see one's work torn apart and put back together by someone else, so I have been pleasantly surprised by how amenable authors are to the process. Now that my editing days are behind me, I'm looking to turn my hand to writing, and I hope to be as willing to trust an editor to use his or her "outside" perspective to improve my work.

¶7 In passing the torch to James Duggan, I want to thank him and wish him the best of luck as he takes over as editor in volume 106. James and I have been working together over the past year, which has been a great help to me (and I hope has not proved too traumatic for him). I'm sure that under his editorship the journal will continue to promote its original vision, "a higher standard and usefulness of law libraries."<sup>8</sup>

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5. Raquel J. Gabriel, Phillip Gragg, Jean M. Holcomb, Darla W. Jackson, Lynne F. Maxwell, Diane Murley, and Christine L. Sellers.

6. Amy Atchison and Laura Cadra (volume 100), Creighton J. Miller, Jr., and Annmarie Zell (volumes 101 through 104), and Benjamin J. Keele and Nick Sexton (volume 105).

7. Her first column was Mary Whisner, *Golf Buddy Reference Questions*, 91 *LAW LIBR. J.* 413 (1999).

8. *Editorial*, 1 *LAW LIBR. J.* 30, 31 (1908).



## Locked Collections: Copyright and the Future of Research Support\*

D.R. Jones\*\*

*Researchers in institutions of higher education depend on access to the scholarly record, and academic libraries play a critical role in supporting this research. As academic collections shift to primarily electronic format, research support is in jeopardy. Copyright holders, through the use of licensing and contracts to control electronic works, limit or prohibit interlibrary loan and other means of research support. As predominantly digital library collections increase, libraries may find that they have locked collections. They will be unable to lend or to borrow. This article examines how increased reliance on e-collections impacts the ability of academic libraries to support research and explores and assesses various approaches to ensure research support.*

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\* © D.R. Jones, 2013. I would like to thank the participants and faculty at the Duke/UNC Legal Information and Information Law and Policy Workshop held April 4–5, 2013, in Chapel Hill, North Carolina, for their comments and suggestions. I would also like to thank Professor William Kratzke for his suggestions.

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**Introduction**

¶1 Scholars need access to existing scholarship to ensure the reliability of their work and to further develop their research. The work of these scholars in turn expands the body of knowledge. Academic libraries are “key players in [this] generation and propagation of knowledge.”<sup>1</sup> To support the needs of researchers, an academic library must rely not only on its own collection, but also on the collections of other libraries.

¶2 As academic library collections have become more electronic, publishers have curtailed libraries’ ability to support research through interlibrary loan and other methods. Publishers have preferred to license, rather than sell, e-journals and e-books. This arrangement has allowed publishers to control the use of scholarly works beyond what copyright law would allow. This increasing control jeopardizes the ability of libraries to support research. In effect, library collections are becoming “locked” as publishers rather than libraries determine access.

¶3 This article examines the challenge to libraries of making resources available as publishers’ control of digital works increases. It explores and assesses various approaches that libraries can pursue to ensure research support and to enhance the availability and preservation of the scholarly record. The section “Research Needs and Shrinking Library Collections” discusses scholars’ use of resources to ensure the reliability of their works. It explains how academic libraries have had to limit their individual collections and therefore must seek outside support to meet the needs of scholars. The section “Copyright Holders and Libraries” reviews the intertwined relationship of copyright law with library lending and borrowing during a time of technological advances. It traces the efforts of copyright holders to control usage of copyrighted works on the one hand and of libraries to obtain and provide access on the other. The section “Loss of Control: The Effect of Licensing and Contracts” examines how publishers’ reliance on licensing and contracts to control e-collections jeopardizes research support and eliminates copyright protections such as fair use. “Options for Ensuring Research Support” explores and assesses approaches that libraries can take to ensure the use of e-collections for research support. In conclusion, the article urges libraries to actively pursue agreements that reinforce their mission to support the creation, dissemination, and preservation of knowledge. At the same time, libraries must be agents of change. They must be active participants in the transformation of the scholarly communication system to allow scholars to regain control of their works.

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1. ASS’N OF RESEARCH LIBRARIES, FAIR USE CHALLENGES IN ACADEMIC AND RESEARCH LIBRARIES 2 (2010), available at [http://www.arl.org/storage/documents/publications/arl\\_csm\\_fairusereport.pdf](http://www.arl.org/storage/documents/publications/arl_csm_fairusereport.pdf).

## Research Needs and Shrinking Library Collections

¶4 Institutions of higher education foster the development, circulation, and exchange of knowledge. Academic libraries, including law libraries, play a key role in this mission by supporting, facilitating, and fostering faculty research and scholarship.<sup>2</sup> These libraries “have a deeply ingrained mission to promote the creation and diffusion of knowledge and to preserve it for the long term.”<sup>3</sup> In expanding the body of knowledge in a discipline, scholars are both consumers and producers.<sup>4</sup> Scholars consult the works of others in creating their own work.<sup>5</sup> Their writings then become available for future researchers. Academic libraries facilitate access for scholars to existing research and also preserve the record of scholarship,<sup>6</sup> thus supporting faculty scholars in both their roles. While researchers have a critical need to access a wide variety of resources, individual library collections cannot meet all of these needs, and libraries must seek support to fulfill their mission.

¶5 It is a fundamental requirement that scholarly research be reliable.<sup>7</sup> To ensure that their research is reliable, scholars must be exacting in their use of and reference to sources.<sup>8</sup> Researchers must verify the accuracy of the information they find in secondary sources.<sup>9</sup> They also seek support for their own assertions and to provide information for readers of their works and future researchers.<sup>10</sup> The only

2. Academic law libraries also have a unique role in supporting faculty research through library support of law reviews. Student-edited law reviews at law schools are the primary outlet for scholarly writing in law. Student editors select articles and prepare them for publication in the law review. They review and edit each article. This process includes identifying, obtaining, and checking all cited sources and identifying the need for additional citations. Darby Dickerson, *Citation Frustration—And Solutions*, 30 STETSON L. REV. 477 app.1 at 506–08 (2000). This review is to ensure accuracy. The student editors therefore are critically involved not just in disseminating faculty scholarship but in assuring the reliability of the work. Law librarians support the work of law review editors and staff in their work, especially in identifying and obtaining sources. See Pamela D. Burdett et al., *What Librarians Can Do for Your Law Review*, 30 STETSON L. REV. 593 (2000); Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 2012 LAW LIBR. J. 28.

3. James L. Mullins et al., *Foreword*, in RAYM CROW ET AL., *LIBRARY PUBLISHING SERVICES: STRATEGIES FOR SUCCESS* 1 (2012), [http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1023&context=purduepress\\_ebooks](http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1023&context=purduepress_ebooks).

4. ELDRED SMITH, *THE LIBRARIAN, THE SCHOLAR, AND THE FUTURE OF THE RESEARCH LIBRARY* 20 (1990).

5. *Id.* at 19; STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 15: *PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES* 49 (Comm. Print 1960) (written by Borge Varmer) [hereinafter *PHOTODUPLICATION BY LIBRARIES*] (“Effective research requires that the researcher be informed of the findings and opinions of others and have an opportunity to study the materials written by them.”).

6. SMITH, *supra* note 4, at 7 (“Throughout their history, research librarians have functioned as the conservators of the record of scholarship.”).

7. *Id.* at 20 (“Inaccurate or omitted relevant information jeopardizes the quality and acceptance of the work.”).

8. VERNER W. CLAPP, *THE FUTURE OF THE RESEARCH LIBRARY* 15 (1964). As Clapp noted, “Exactitude is one of the hallmarks of scholarship.” *Id.*

9. Clapp describes how checking references reveals flaws: “How often the secondary text proves corrupt! How often the footnote citation, traced to its source, fails to support the statement that it seemed to imply! How still more often are the meaningful details abridged!” *Id.*

10. Paul N. Courant notes that “to practice the scholar’s trade it is essential that we be able to provide our readers . . . with accurate and reliable guides to the sources of our knowledge and understanding.” Paul N. Courant, *Scholarship: The Wave of the Future in the Digital Age*, in *THE TOWER AND THE CLOUD: HIGHER EDUCATION IN THE AGE OF CLOUD COMPUTING* 202, 204 (Richard N. Katz ed., 2008). One legal scholar comments: “[T]he digital age has made the need for background information more

way to ensure accuracy and provide reliability is to consult the sources of the information.<sup>11</sup>

¶6 It is the role of the library “to make available, to the fullest extent of its assignment and its capabilities,” the needed resources.<sup>12</sup> Having all materials available in a single library collection would provide the most accessibility. Budget and space limitations, however, routinely preclude any library from maintaining a collection that could meet all possible needs of researchers, even in specialized areas. The rise in interdisciplinary research has made it even more difficult for specialized research libraries, such as law libraries, to maintain collections that serve faculty who need materials from many different disciplines. In working to develop collections that they can sustain, libraries have realized that researchers only use a small portion of a collection on a regular basis.<sup>13</sup> Libraries thus have an incentive to focus their core collections on those “vital few”<sup>14</sup> resources that their primary researchers regularly use. Increasing budget restrictions are forcing more and more academic

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necessary, not less. Precisely because an online search can turn up *any* article, not just the seminal article on a topic, every article should have sufficient background information to direct a reader to the most important primary sources.” Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y. L. SCH. L. REV. 349, 362 (2007–2008).

11. “For the truth one must go to the sources.” CLAPP, *supra* note 8, at 15. The precision that scholarship demands often requires consulting a source “to verify a date, to find a chemical formula, to check up on the terms of an equation, to note the exact phraseology used in a legal decision.” FREMONT RIDER, *THE SCHOLAR AND THE FUTURE OF THE RESEARCH LIBRARY* 26 (1944).

12. CLAPP, *supra* note 8, at 59.

13. This phenomenon (researchers using only a small portion of the collection) is a manifestation of the “Pareto principle,” which is commonly associated with economist Vilfredo Pareto. It was actually J.M. Juran who used the name “Pareto principle” to describe the universal phenomenon that, “[i]n any series of elements to be controlled, a selected small fraction, in terms of numbers of elements, always accounts for a large fraction, in terms of effect.” J.M. Juran, *Universals in Management Planning and Controlling*, 43 MGMT. REV. 748, 749 (1954) [hereinafter Juran, *Universals*]. See also J.M. JURAN, *The Non-Pareto Principle: Mea Culpa*, in JURAN ON QUALITY BY DESIGN 68 (1992) [hereinafter Juran, *The Non-Pareto Principle*]. Juran applied Pareto’s discussion of the unequal distribution of wealth (20% of the population owns 80% of the wealth) in a number of contexts to illustrate universal characteristics. See J.M. Juran, *Economics of Quality*, in QUALITY CONTROL HANDBOOK 1, 38–39 (J.M. Juran ed., 1951). Juran coined the term *vital few* to describe the small number of elements that account for the most effect and the term *trivial many* to describe the remaining elements that account for a small fraction of the effect. JURAN, *The Non-Pareto Principle*, *supra*, at 68, 70; see also Juran, *Universals*, *supra*. Richard Trueswell applied the Pareto principle, which he referred to as the 80/20 rule, to library collections. Richard Trueswell, *Some Behavioral Patterns of Library Users: The 80/20 Rule*, 43 WILSON LIBR. BULL. 458 (1969). Trueswell suggested using this analysis in determining which materials should be put into “core collections.” *Id.* at 459. See also Richard W. Trueswell, *Growing Libraries: Who Needs Them? A Statistical Basis for the No-Growth Collection*, in FAREWELL TO ALEXANDRIA: SOLUTIONS TO SPACE, GROWTH, AND PERFORMANCE PROBLEMS OF LIBRARIES 72 (Daniel Gore ed., 1976). A small portion of a collection (the “vital few”) accounts for the vast majority of collection usage, while a large portion (the “trivial many”) is rarely used. While the classic proportion is 80/20, some studies have shown the proportion to be even more skewed. For example, a study of circulation of books and manuscripts in a consortium comprising ninety institutions of higher education revealed that six percent of this collection accounted for eighty percent of the circulation. JULIA GAMMON & EDWARD T. O’NEILL, OHIOLINK COLLECTION BUILDING TASK FORCE, OHIOLINK–OCLC COLLECTION AND CIRCULATION ANALYSIS PROJECT 2011, at 31 (2011), available at <http://www.oclc.org/content/dam/research/publications/library/2011/2011-06.pdf>.

14. See sources cited *supra* note 13.

libraries to maintain collections to provide “just in time”<sup>15</sup> research support instead of maintaining large, often unused collections “just in case”<sup>16</sup> a researcher needs a work in the future. To support research needs, an individual library must consider alternatives to relying on its internal collection.

### Copyright Holders and Libraries: A History of Control Versus Access

¶7 One way a library can obtain materials that it does not have in its own collection is interlibrary loan. Many of the works that libraries request through interlibrary loan or provide in their collections, however, are under copyright protection. The development of interlibrary loan and of research support in general therefore has been intertwined with the concerns of copyright holders.<sup>17</sup> Copyright holders and libraries have sought various means of controlling the use of research materials on the one hand and of obtaining and providing access to those materials on the other. These means are (1) use of technological limitations and capabilities; (2) use of contracts and other private agreements; and (3) development of legal entitlements and exceptions.<sup>18</sup> While copyright holders and libraries have used the same means to further their interests, they do not share the same values or goals.<sup>19</sup> The history and current state of balancing these interests, particularly as library collec-

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15. Toyota Motor Company created the concept of “just in time” as a manufacturing strategy. Göran Svensson, *Just-In-Time: The Reincarnation of Past Theory and Practice*, 39 MGMT. DECISION 866, 867 (2001). “The basic concept of a just-in-time (JIT) system is that inventory is an undesirable asset, and should never be held if at all possible. Therefore, all goods are produced ‘just in time’ to meet demand.” Rajan Suri & Suzanne de Treville, *Getting from “Just-in-Case” to “Just-in-Time”: Insights from a Simple Model*, 6 J. OPERATIONS MGMT. 295, 295 (1986). A library with a just-in-time collection would hold only those materials in high demand.

16. The concept of “just in case” is a “precursor” to the just-in-time concept. Svensson, *supra* note 15, at 867. In manufacturing, a just-in-case approach would require maintaining a “substantial work-in-progress (WIP) inventory” to avoid any production delays and address changes in demand. Suri & de Treville, *supra* note 15, at 296. A library with a just-in-case collection would maintain a wide variety of materials “just in case” someone might happen to request them.

17. The “great bulk” of a research library’s work, in fact, “deals with accessing, storing, exhibiting, or providing access to copyrighted material.” ASS’N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 1 (2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

18. These categories are based on a taxonomy that Trotter Hardy outlined in Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217. Hardy describes a four-part taxonomy of incentives for the production of “informational works.” *Id.* at 218. These incentives focus on ways of assuring limits on copying. Assurances of copying limits come not just from legal protections, but also from contract protections, technical limitations and controls, and “state-of-the-art limitations.” *See id.* at 223. While Hardy focused on information producers, information users (such as libraries) use the same methods for gaining access to and using works. For example, libraries may prefer to negotiate with publishers rather than fight for changes in copyright law. Hardy notes that as one area, such as state-of-the-art technological limitations, decreases the level of protection from copying, information producers will seek to increase another area of coverage, such as trying to change copyright law. *See id.* at 226–28; I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2, ¶ 13 (1995).

19. *See* Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 115–17 (2000).

tions move from print to electronic, offer instruction as to future ways that libraries can ensure research support.

### The Beginnings of Interlibrary Loan: Limited Technology

¶8 Libraries in the United States have used interlibrary loan since the late 1800s.<sup>20</sup> By the late 1890s, the practice had become widespread.<sup>21</sup> During the early period of interlibrary loan in the United States, neither copyright holders nor libraries were concerned about defending their respective interests because of the limited technology available for making copies. Until the early twentieth century, the only way to provide materials was by physically sending a book or work to another library. Methods of copying were tedious (copying from a work by hand) or useful only for copying single pages (copy presses).<sup>22</sup> In the early twentieth century, new methods provided libraries and their users with a way to copy from books.<sup>23</sup> By 1913, the Photostat machine<sup>24</sup> was in use in libraries for several purposes, including interlibrary loan.<sup>25</sup> The American Library Association (ALA)

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20. Library publications from the late 1800s document the development of interlibrary loan in the United States as of that time. See Jurgen G. Raymond, *Interlibrary Loans*, 34 BULL. MED. LIBR. ASS'N. 189 (1946) (enumerating early discussions of interlibrary loan in library publications such as *Library Journal*). For example, in a letter published in the first issue of *Library Journal* in 1876, Samuel Green recommended that libraries "lend books to each other for short periods of time." Samuel S. Green, Letter to the Editor, *The Lending of Books to One Another by Libraries*, 1 LIBR. J. 15 (1876). The extent of the practice in the United States before the late nineteenth century is unclear.

21. In 1892, Melvil Dewey (using his preferred simplified spelling) noted: "Interlibrary loans, which wer a litl while ago almost unknown ar now of daily occurence." Melvil Dewey, *Inter-library Loans*, 3 LIBR. NOTES 405 (1892).

22. See generally BARBARA RHODES & WILLIAM WELLS STREETER, BEFORE PHOTOCOPYING: THE ART & HISTORY OF MECHANICAL COPYING, 1780–1938 (1999) (providing extensive documentation of early mechanical copying methods, particularly letterpresses). Early copying methods were useful for correspondence but required the making of a copy at the time of the creation of the document or soon after. JOANNE YATES, CONTROL THROUGH COMMUNICATION: THE RISE OF SYSTEM IN AMERICAN MANAGEMENT 54 (1989).

23. These methods were forms of photography. One type of equipment was the cameragraph, which was used to meet the demand resulting from a "recent increase in the request for books on inter-library loan." Charles J. Barr, *The Cameragraph*, 17 PUB. LIBR. 220, 220 (1912). See also Edward D. Tweedell, *The Use of the Cameragraph in the John Crerar Library*, 15 BIBLIOGRAPHICAL SOC'Y AM. PAPERS 22 (1921). In 1913, the St. Louis Public Library reported that it was providing library users with a "photograph room" to allow them to make copies from books, including those "that have been borrowed from other cities on interlibrary loan." The users were "expected to provide their own chemicals and plates or films" but the library had a camera they could borrow. *St. Louis (Mo.) P.L.*, 38 LIBR. J. 123, 123–24 (1913).

24. The Eastman Kodak Company manufactured the Photostat camera, which was the "dominant photographic copier in the early twentieth century." RHODES & STREETER, *supra* note 22, at 159. "Although not the first on the market, [the Photostat] . . . became the photoduplication process most commonly found in those libraries which could afford such a service." Hubbard W. Ballou, *Photography and the Library*, 5 LIBR. TRENDS 265, 269 (1956). By 1912, the Library of Congress had installed Photostat machines. James Benjamin Wilbur, *The Photostat*, in ESSAYS OFFERED TO HERBERT PUTNAM BY HIS COLLEAGUES ON HIS THIRTIETH ANNIVERSARY AS LIBRARIAN OF CONGRESS 520, 524 (William Warner Bishop & Andrew Keogh eds., 1929). See also REPORT OF THE LIBRARIAN OF CONGRESS . . . FOR THE FISCAL YEAR ENDING JUNE 30, 1912, at 114, 123 (1912) (listing \$626 for a Photostat and appropriation of \$600 for a Photostat operator). For a description of a Photostat machine and its use, see Luther D. Burlingame, *The Photostat and Its Use*, 21 MACHINERY 951 (1915).

25. In a 1913 article on interlibrary loan, Frederick Hicks noted: "Many libraries have . . . installed [Photostat] machines and are operating them economically, not only as a substitute for



adopted an interlibrary loan code in 1917.<sup>26</sup> This code referred to the use of photographic copies as a substitute for physical loans of a work<sup>27</sup> but did not mention compliance with the 1909 Copyright Act.<sup>28</sup> In the early twentieth century, copying by mechanical means was so unsophisticated that copyright holders perceived no threat from it.

### Technology Advances: The Search for Legislation or Agreement

¶9 As photographic copying improved and another form of copying (microfilm) developed, librarians became concerned that the 1909 Copyright Act might apply to copying of library materials.<sup>29</sup> Librarians were aware that the judicially developed doctrine of fair use<sup>30</sup> might permit copying, but the application of the doctrine was highly dependent on the facts of the each case. While there may have been uncertainty in the library community about the application of copyright law to library copying, it was not librarians who sought clarification. It was a committee representing scholars and researchers (the “Joint Committee”) that initially undertook the

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inter-library loans but to reduce the expense of copying generally.” Frederick C. Hicks, *Inter-Library Loans*, 38 LIBR. J. 67, 72 (1913). For a discussion of other uses of the Photostat in libraries, see Walter T. Swingle & Maude Kellerman Swingle, *The Utilization of Photographic Methods in Library Research Work, With Especial Reference to the Natural Sciences*, 10 BULL. AM. LIBR. ASS’N 194 (1916); Wilbur, *supra* note 24, at 525–27 (providing numerous examples of libraries making copies of rare and fragile materials and of historical publications).

26. *Code of Practice for Inter-library Loans*, 11 BULL. AM. LIBR. ASS’N 27 (1917).

27. The 1917 code stated: “When applying for a loan, librarians should state whether a photographic reproduction would be a satisfactory substitute.” *Id.* Although a lending library still had to physically provide the copy to a borrowing library, the original work continued to be available for use at the lending library. Also, the copy stayed with the requesting patron, so the borrowing library did not have to pay to ship the book back to the lending library. *Id.* at 27–28. The researcher benefited from being able to obtain materials without having to travel. A scholar working in one city might need a “copy of a title-page, or a few pages from a rare book, or an essay, or a print” that was located in another city. “No matter where one is working, he can send to any of the libraries and obtain photostat copies of the material he wishes to examine.” Wilbur, *supra* note 24, at 523–24.

28. Copyright Act of 1909, ch. 320, 35 Stat. 1075. The drafters of the 1909 Copyright Act did not consider photographic reproductions, although the technology was in existence at the time. For a discussion of the 1909 Copyright Act and libraries, see Laura N. Gasaway, *Libraries and Copyright at the Dawn of the Twentieth Century: The 1909 Copyright Act*, 11 N.C. J.L. & TECH. 419 (2010).

29. Verner W. Clapp, *Library Photocopying and Copyright: Recent Developments*, 55 LAW LIBR. J. 10, 11–12 (1962). Changes in the wording of the law raised this concern. For a discussion of how drafters of the 1909 Copyright Act, in revising the prior law, “inadvertently” expanded copyright to include the right to copy, see VERNER W. CLAPP, COPYRIGHT—A LIBRARIAN’S VIEW 2–3, 25–28 (1968).

30. In *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), Justice Story outlined the factors that would become the basis of the fair use doctrine. The factors to determine whether a party had engaged in fair use of a work were “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Id.* at 348. The term *fair use* first appeared in *Lawrence v. Dana*, 15 F. Cas. 26, 44 (C.C.D. Mass. 1869) (No. 8136). Barton Beebe, *An Empirical Study of U.S. Copyright Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 560 n.42 (2008); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1588 (2004). An advanced search in WestlawNext for “fair use” & DA(<01/01/1875) retrieved only *Lawrence v. Dana* as using this phrase in relation to copyright. Another author reports conducting a search with the same results. Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 MARQ. INTELL. PROP. L. REV. 1, 15 n.46 (2013).

task of determining the application of copyright law to libraries making copies for scholars.<sup>31</sup>

¶10 The Joint Committee considered litigation and the passage of legislation as possible means of obtaining clarification,<sup>32</sup> but ultimately these legal options did not seem workable. The Joint Committee therefore pursued negotiation with publishers.<sup>33</sup> The result was the Gentlemen's Agreement of 1935.<sup>34</sup> Robert C. Binkley, the chair of the Joint Committee, and W.W. Norton, the president of the National Association of Book Publishers, described the Gentlemen's Agreement as a "statement" addressing "the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction."<sup>35</sup> The parties involved in adopting the Gentlemen's Agreement did not broadly represent libraries, researchers, or publishers,<sup>36</sup> and there was later criticism of the agreement.<sup>37</sup> Despite these issues, the agreement was very influential on the development of guidelines for library copying<sup>38</sup> and remained so until enactment of the 1976 Copyright Act.

### Further Technological Advances Force a Legislative Solution

¶11 By the 1960s, the popularity of the Xerox copier<sup>39</sup> "had begun to make the old accommodation [the Gentlemen's Agreement] seem unsatisfactory to

31. Peter B. Hirtle extensively discusses the history of the Joint Committee's attempts to clarify the application of copyright law in the context of library copying for scholars in his article *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, 53 J. COPYRIGHT SOC'Y U.S.A. 545 (2006).

32. *Id.* at 563.

33. *Id.* at 565, 568, 573.

34. The text of the Gentlemen's Agreement is reproduced in several sources. In 1935 the text appeared in both *Library Journal* and *Publishers Weekly*. *Copyright in Photographic Reproductions*, 60 LIBR. J. 763, 763–64 (1935); *Copyright and Photostats*, 128 PUBLISHERS WKLY. 1665, 1666–67 (1935). The text and copies of some of the correspondence relating to the Gentlemen's Agreement were also later published in *The Gentlemen's Agreement and the Problem of Copyright*, 2 J. DOCUMENTARY REPRODUCTION 29 (1939). The text also appears in *REPROGRAPHY AND COPYRIGHT LAW* 157 (Lowell H. Hattery & George P. Bush eds., 1964). The history of the Gentlemen's Agreement is recounted in Jackson S. Saunders, *Origin of the "Gentlemen's Agreement" of 1935*, in *REPROGRAPHY AND COPYRIGHT LAW*, *supra*, at 159.

35. *Copyright in Photographic Reproductions*, *supra* note 34, at 763; *Copyright and Photostats*, *supra* note 34, at 1666.

36. See *PHOTODUPLICATION BY LIBRARIES*, *supra* note 5, at 51 n.9; Hirtle, *supra* note 31, at 548 (noting that the participants, including the librarian who negotiated the agreement, were not representative); Louis Charles Smith, *The Copying of Literary Property in Library Collections*, 46 LAW LIBR. J. 197, 203 editor's n. (1953) (stating that law book publishers were not involved in the agreement).

37. See Clapp, *supra* note 8, at 12–13.

38. Hirtle, *supra* note 31, at 546–48. For example, the language of a section of the 1952 revision of the *ALA Interlibrary Loan Code* was based on language in the Gentlemen's Agreement. Section IX.4 of the *General Interlibrary Loan Code* 1952 requires the person requesting a copy to sign a statement "attesting to his responsibility for observing copyright provisions." *General Interlibrary Loan Code* 1952, 13 C. & RES. LIBR. 350, 353 (1952). This responsibility derives from the sixth paragraph of the Gentlemen's Agreement directing "applicant[s] for photo-mechanical reproductions . . . to assume full responsibility for such copying." *Copyright in Photographic Reproductions*, *supra* note 34, at 764; see also *General Interlibrary Loan Code* 1952, *supra*, at 353 note \*. Other library associations, including the American Association of Law Libraries, also approved this code. *Id.* at 350. See also Margaret D. Uridge, *The General Interlibrary Loan Code 1952: An Explanation*, 46 LAW LIBR. J. 6 (1953).

39. See RHODES & STREETER, *supra* note 22, at 160–61 (discussing the development of xerography).



publishers.”<sup>40</sup> Yet relying on the 1909 Copyright Act was also not a satisfactory solution. Congress had adopted the act before the development and use of many new types of technology, and issues regarding these technologies challenged the courts.<sup>41</sup> Both copyright holders and libraries sought legislative relief, but they were far apart in their approaches.<sup>42</sup> After more than a decade of work,<sup>43</sup> Congress enacted the Copyright Act of 1976.<sup>44</sup>

¶12 The 1976 Copyright Act contains several provisions that cover library lending and copying. Section 109(a) permits libraries (and others) to sell and lend books that they own.<sup>45</sup> Section 107 codifies the fair use doctrine.<sup>46</sup> Section 108 provides exceptions for library photocopying in various circumstances, including interlibrary loan.<sup>47</sup> Under section 108(g)(2), making copies for interlibrary loan is permissible as long as these arrangements “do not have, as their purpose or effect, that the library or archives receiving such copies . . . does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”<sup>48</sup> To provide guidance regarding the meaning of the language in section 108(g)(2), Congress accepted the help of the National Commission on New Technological Uses of Copyrighted Works (CONTU). The commission produced the CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements.<sup>49</sup> These guidelines

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40. Louise Weinberg, *The Photocopying Revolution and the Copyright Crisis*, 38 PUB. INT. 99, 100 (1975). The dissatisfaction increased when publishers considered the use of copying for interlibrary loan. *Id.* at 101. See also Joseph E. Young, *Copyright and the New Technologies—The Case of Library Photocopying*, 28 COPYRIGHT L. SYMP. 51, 67 (1982) (“As technology improved and photocopying increased, publishers began to take a somewhat less tolerant position.”).

41. Weinberg, *supra* note 40, at 107 (listing some technology issues that were difficult to address under the 1909 Copyright Act). See also Young, *supra* note 40, at 61 (noting that the 1909 act “gave no clear solutions to the problems posed by technological innovation. . . . [T]he draftsmen failed to anticipate a variety of technologies which were later developed, and they neglected even to provide for the possibility of their development.”).

42. Young, *supra* note 40, at 67–70 (describing the vastly different views of publishers and librarians as to how to address library photocopying). Young also notes that publishers and libraries were “[u]nable to reach a private solution” and thus sought relief through litigation. *Id.* at 70. He was referring to (and discusses) *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d without opinion by equally divided court*, 420 U.S. 376 (1975).

43. Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey*, 84 LAW LIBR. J. 341, 352 (1992).

44. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C.).

45. 17 U.S.C. § 109(a) (2006). This is referred to as the right of “first sale.” This exception for lending (by libraries and others) was necessary because the act gives the copyright owner the exclusive right “to distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease or lending.” *Id.* § 106(3) (emphasis added). The 1909 Copyright Act gave the copyright holder the rights only to “print, reprint, publish, copy, and vend the copyrighted work.” Copyright Act of 1909, ch. 320 § 1(a), 35 Stat. 1075, 1075.

46. 17 U.S.C. § 107 (2006).

47. *Id.* § 108. In discussing the application of fair use to section 108, the House report states: “Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collection, where the user requests the reproduction for legitimate scholarly or research purposes.” H.R. REP. NO. 94-1476, at 78–79 (1976).

48. 17 U.S.C. § 108(g)(2) (2006).

49. NAT’L COMM’N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 54–55 (1979), available at <http://digital-law-online.info/CONTU/PDF/index.html>. These guidelines are also known as suggestions since they do not have the force of law.

provide, in part, that during a calendar year a library may borrow five copies of articles from the most recent five years of publication of a journal. Presumably, upon the sixth request, the library should consider whether it is substituting inter-library loan copies for a subscription. The guidelines do not apply to articles from journal issues published more than five years before the date of the request.<sup>50</sup> These guidelines were the work of an appointed commission and were not a negotiated agreement.<sup>51</sup> They do not have the force of law, although they were referenced in the conference report on the 1976 Copyright Act.<sup>52</sup>

### The Rise of Agreements and Technological Limitations

¶13 In recent years, the increasing ease with which digital works can be copied and transmitted has raised publisher and other copyright holder concerns to new levels. As a result, copyright holders began to impose technological limitations in the form of digital rights management controls. In addition, they were successful in changing copyright law<sup>53</sup> to provide penalties for anyone who circumvented these controls.<sup>54</sup> While there were some exceptions for libraries,<sup>55</sup> attempts to address library concerns for lending digital works failed. For example, an attempt to develop guidelines for interlibrary loan of digital works was unsuccessful due to irreconcilable differences between publishers and libraries.<sup>56</sup> For even greater control of digital works, copyright holders began using licenses and contracts.

### Loss of Control: The Effect of Licensing and Contracts

¶14 The rise in the use of digital works has permitted copyright holders to change the model of providing materials to libraries. This change has allowed publishers to fundamentally alter libraries' ability to obtain and provide journals and books for researchers through interlibrary loan or even from within their own collections. Academic libraries now operate in what John Palfrey called a "world of 'digital plus.'"<sup>57</sup> While academic collections are a "hybrid . . . of print and digital materials,"<sup>58</sup> expenditures on electronic resources are increasing.<sup>59</sup> These digital

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50. *Id.* at 55.

51. See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 624–25 (2001) (discussing the nature of the CONTU guidelines in comparison to other guidelines for copyright enforcement).

52. H.R. REP. NO. 94-1733, at 71–74 (1976) (Conf. Rep.).

53. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

54. 17 U.S.C. § 1201 (2006).

55. See Gasaway, *supra* note 19, at 137–41.

56. See Laura N. Gasaway, *Guidelines for Distance Learning and Interlibrary Loan: Doomed and More Doomed*, 50 J. AM. SOC'Y INFO. SCI. 1337, 1339–41 (1999) (reporting on the Conference on Fair Use (CONFU) discussions of interlibrary loan that occurred between 1994 and 1998).

57. John Palfrey, *Cornerstones of Law Libraries for an Era of Digital-Plus*, 102 LAW LIBR. J. 171, 175, 2010 LAW LIBR. J. 11, ¶ 14.

58. *Id.* at 172, ¶ 4. Palfrey describes how in this hybrid world, "print and other analog formats will not disappear," but "[t]he dominant mode of information creation and access will continue its shift from analog to digital." *Id.* at 175, ¶¶ 15, 14.

59. See Taylor Fitchett et al., *Law Library Budgets in Hard Times*, 103 LAW LIBR. J. 91, 94, 2011 LAW LIBR. J. 5, ¶ 10. Association of Research Libraries (ARL) statistics indicate that for

works may contain the same content as their print counterparts, but the ability of libraries to provide access to these materials is quite different. Publishers primarily control the copyright to these works.<sup>60</sup> They have preferred to license, rather than sell, e-journals and e-books to libraries.

¶15 A shift to digital format did not require a licensing model.<sup>61</sup> Digital works, however, provide something that print works do not: a means to control use.<sup>62</sup> Once a print work is on the shelf, a publisher cannot control how a library and its patrons might use this work. Digital technology offers ways to control use. If the publisher sold the digital work to the library, it would give up the ability to exercise this control.<sup>63</sup> By licensing the work, the publisher retains control over the work while simply providing access.

¶16 An additional incentive to adopt a licensing model is that licensing allows a publisher to limit the reach of copyright law. Copyright law governing library copying and lending operates in a print-based world where libraries own the materials.<sup>64</sup> On the other hand, contract law, not copyright, governs licensed materials. For publishers, licensing provides “absolute control” of a work.<sup>65</sup> This control can yield a better return on their investment.<sup>66</sup> Publishers who license rather than sell to libraries are no longer fettered with section 108 exceptions and can ignore the first sale doctrine. They can even create restrictions that essentially eliminate fair use.<sup>67</sup> Library exceptions for copying under section 108 and for lending under section

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2010–11, in the surveyed academic libraries, electronic resources expenditures accounted on average for sixty-two percent of total materials expenditures. By comparison, in 2000–01 electronic resources accounted for sixteen percent of total materials expenditures. Electronic Resources vs Total Materials Expenditures—Yearly Increases in Average Expenditures 1993–2011, <http://www.arl.org/focus-areas/statistics-assessment/statistical-trends> (click on XLS link) (percentages calculated from spreadsheet amounts). Interestingly, an FAQ provided in 2011 for the statistics questionnaire explained that when counting unique serial titles, libraries should count only the electronic version if the library held both a print and an electronic version. The reason was that “as serials move to electronic form and become the version of record, a count for electronic titles is more representative of library collections.” Statistics FAQ (Aug. 1, 2011), <http://www.libqual.org/documents/admin/11statisfaq.pdf>. The 2012 Survey of Ebook Usage in U.S. Academic Libraries reported that ninety-five percent of reporting academic libraries provided e-books, with the two most frequently held categories being reference materials and scholarly monographs. LIBRARY JOURNAL & SCH. LIBRARY JOURNAL, 2012 EBOOK USAGE IN U.S. ACADEMIC LIBRARIES: THIRD ANNUAL SURVEY 5, 35 (2012), available at <http://www.library.arkansas.gov/PublicLibraryServices/Documents/Ebook-Usage-Report-Academic.pdf>.

60. See L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 187–89 (1991) (discussing issues arising from publisher ownership of copyrights).

61. Scott Matheson, *Access Versus Ownership: A Changing Model of Intellectual Property*, 21 LEGAL REFERENCE SERVICES Q., nos. 2/3, 2002, at 153, 157.

62. See Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 78 (2003).

63. For example, if the library purchased a journal and downloaded the contents to its own server when each issue arrived, the library would control this issue of the journal much like a print journal.

64. Even if a library cancels a subscription to a journal, it still owns the back issues.

65. Bartow, *supra* note 62, at 16.

66. Matheson, *supra* note 61, at 157. Publishers can repeatedly charge for access to the same material rather than receiving a one-time payment. *Id.* at 159.

67. For example, prohibiting interlibrary loans of electronic books or journals not only eliminates the section 108 interlibrary loan exception, it also eliminates the ability of the library to claim the fair use exception.

109(a) do not apply when a copyright holder licenses a work to a library. Under section 108(f)(4), contract provisions override the exceptions for library copying.<sup>68</sup> Section 109(d) provides that the first sale exception does not apply to anyone who has not acquired ownership of a work.<sup>69</sup> Within this world of licensing, libraries often find their ability to lend and borrow materials for researchers restricted or even prohibited. This change from a “property-based system . . . governed by copyright law to a contract-based system . . . governed by whatever terms the market will bear”<sup>70</sup> jeopardizes the ability of academic libraries to support research and the advancement of knowledge.

### Interlibrary Loan

¶17 Licensing terms determine whether libraries can provide copies of e-journal articles and lend e-books through interlibrary loan. Provisions in licenses can vary from publisher to publisher and even for different titles held by one publisher,<sup>71</sup> making it difficult for libraries to determine the scope of their rights. Many agreements place limits on the number of loans that the subscribing library can make.<sup>72</sup> These restrictions on interlibrary loan of e-journal articles often mimic the language of the CONTU guidelines.<sup>73</sup> The publisher restrictions, for example, may refer to “five (5) free article copies”<sup>74</sup> for interlibrary loan, which sounds similar to the suggestion of five copies in the guidelines. The publishers, however, pervert the purpose of section 108(g)(2) and the CONTU guidelines by

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68. 17 U.S.C. § 108(f)(4) (2006).

69. *Id.* § 109(d). See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010) (“The first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as a licensee.”); Anne Klinefelter, *Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services*, 19 LEGAL REFERENCE SERVICES Q., nos. 3/4, 2001, at 175, 178. Section 109(d) states that first sale does not apply if a person “has acquired possession of the copy . . . by rental, lease, loan, or otherwise, without acquiring ownership of it.” It is questionable whether a library that licenses content even has “possession,” given that the materials are stored on a server that the library does not own or control.

70. Kathleen K. Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL’Y 83, 88 (2006).

71. Lynn N. Wiley, *License to Deny? Publisher Restrictions on Document Delivery from E-Licensed Journals*, 32 INTERLENDING & DOCUMENT SUPPLY 94, 97 (2004) (“There are as many licenses as there are vendors and as many again for the products the vendors provide and are applied variously to the buyer of that product.”). A 2012 survey of clauses in research library licensing agreements showed that with regard to interlibrary loan provisions, there was “a lack of consistency among publishers and even among libraries that may have signed agreements with the same publisher.” Karla L. Strieb & Julia C. Blixrud, *The State of Large-Publisher Bundles in 2012*, RES. LIBR. ISSUES, no. 282, at 13, 18 (2013), <http://publications.arl.org/rli282/13>. The Liblicense web site (<http://liblicense.crl.edu>) is helpful for finding information about licenses, including links to various publishers’ licensing agreements.

72. See TOMAS A. LIPINSKI, THE LIBRARIAN’S LEGAL COMPANION FOR LICENSING INFORMATION RESOURCES AND SERVICES 467–68 (2013).

73. *Id.* The restrictions also can be broader than the CONTU guidelines by not allowing for fair use exceptions and counting any source (rather than a particular source) toward the allowable number of articles. One example is in the American Chemical Society license: Am. Chemical Soc’y, Pub. Div., Online Products Institutional Access Agreement, [http://pubs.acs.org/userimages/ContentEditor/1367593694540/ACS\\_Institutional\\_Access\\_Agreement\\_Academic.pdf](http://pubs.acs.org/userimages/ContentEditor/1367593694540/ACS_Institutional_Access_Agreement_Academic.pdf) [hereinafter ACS License]. See LIPINSKI, *supra* note 72, at 467, for a discussion of this license.

74. ACS License, *supra* note 73.

applying their restrictions to the *lending* library rather than to the *borrowing* library. The lending library, which licenses the work, can provide only five copies and must pay a royalty fee if it exceeds the limit.<sup>75</sup> The CONTU guidelines apply to the *borrowing* library. These publisher restrictions have completely reversed the application of the CONTU guidelines.

¶18 The intent of the CONTU guidelines was to assist a borrowing library in determining whether it needed to subscribe to a publication rather than continue using interlibrary loan. If the borrowing library needed to request additional articles beyond the number suggested in the guidelines, then it might determine that it should obtain a subscription. The publisher restrictions apply to the lending library, *which already has a subscription*.<sup>76</sup> Publishers' use of language similar to that of the CONTU guidelines therefore has no real relationship to the purpose of section 108(g)(2). No matter how many times the lending library provides a copy of an article, it is not substituting interlibrary loan for a subscription. Publishers cannot control the borrowing library, but they can control the lending library through the license. These provisions are simply a way for publishers to charge for use while creating the illusion that they are complying with the CONTU guidelines.

¶19 Some license agreements go further and prohibit all interlibrary loans. This can force libraries whose patrons need articles to pay high fees in order to obtain one-time uses. These types of restrictions diminish or eliminate the ability of libraries to obtain needed materials for scholars.<sup>77</sup> Libraries are unable to lend or to borrow.<sup>78</sup>

¶20 Publisher agreements regarding e-books are also very restrictive. A library can physically lend an entire print book under the first sale doctrine because the library owns the book. Using e-books for interlibrary loan is appealing to libraries since it eliminates the costs and time associated with physically shipping the borrowed book.<sup>79</sup> Publishers, by licensing e-books, can determine whether a library can lend an e-book under the terms of the license agreement. Publishers either prohibit any interlibrary loan of e-books or they restrict loans to printouts of chapters.<sup>80</sup> These restrictions severely limit the ability of libraries to support research needs.

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75. *Id.*

76. Gasaway notes that these provisions reflect publisher attempts during the Conference on Fair Use to twist the CONTU suggestions and impose them on the lending library. Publishers also expressed their determination to eliminate interlibrary loan. Gasaway, *supra* note 19, at 148.

77. See Klinefelter, *supra* note 69, at 185.

78. A recent example of the problems a locked collection creates is as follows: A law school faculty member requested an article from a journal. The law library did not have access to the journal either through its own subscription or through the university library. The law library would not subscribe to this journal since it was not appropriate for the collection. There was merely a one-time need for an article. Other libraries had only electronic access and could not, due to licensing restrictions, provide a copy. The only option was to obtain a copy of this article from the publisher at a cost of \$30.

79. Bronwen Woods & Michael Ireland, *eBook Loans: An E-Twist on a Classic Interlending Service*, 36 INTERLENDING & DOCUMENT SUPPLY 105, 106 (2008).

80. Becky Albitz & David Brennan, *Licensing of E-Books*, in BUILDING AND MANAGING E-BOOK COLLECTIONS 75, 79–80 (Richard Kaplan ed., 2012); see also William Gee, *The Conundrum of eBooks and Interlibrary Loan*, AGAINST THE GRAIN, Apr. 2007, at 22, 24 (discussing how libraries are forced to reject interlibrary loan requests for e-books because the books “are locked behind proprietary licensed interfaces that prohibit loans or copying”). Publishers also restrict authorized users of a library in



## Pricing

¶21 The cost of digital works is yet another issue confronting libraries. They may be unable to provide access to needed materials because the publisher will license to the library only at a very high cost (often higher than the price for individuals) or not at all.<sup>81</sup> Until recently many larger publishers would not license to libraries, and once they decided to license to libraries they imposed licensing restrictions and charged higher prices.<sup>82</sup> Some publishers refuse to work with libraries to establish consortial acquisitions of e-books.<sup>83</sup> A continuing issue regarding e-journals is the practice of “bundling” individual titles or journal databases on a take-it-or-leave-it basis. This means that a library cannot subscribe to an individual title or selected group of resources. It must either subscribe to the bundle or forgo access to the materials.<sup>84</sup>

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their usage of the work. For example, they limit how much a user can copy and paste from an e-book within a limited time period. Albitz & Brennan, *Licensing of E-Books*, *supra*, at 80 (reprinting portions of a Cambridge University Press contract).

81. See Douglas Cnty. Libraries, Pricing Comparison as of May 2, 2013, <http://www.americanlibrariesmagazine.org/sites/americanlibrariesmagazine.org/files/DCL%20Pricing%20Comparison%205-2-13.pdf>. This report shows that some e-book prices for libraries are as much as eleven times the consumer price. For a discussion of the report, see Christopher Harris, *DCL May Ebook Price Report: The Devil Is in the Details*, AM. LIBRARIES, <http://www.americanlibrariesmagazine.org/blog/dcl-may-ebook-price-report-devil-details> (last visited Aug. 20, 2013).

82. As of September 2012, only a few of the big six publishers would license e-books to libraries. See *An Open Letter to America's Publishers from ALA President Maureen Sullivan*, AM. LIBRARY ASS'N (Sept. 28, 2012), <http://www.ala.org/news/2012/09/open-letter-america%E2%80%99s-publishers-ala-president-maureen-sullivan> (discussing refusal of certain publishers to sell to public libraries). By May 2013, all of the big six publishers had some form of e-book licensing for libraries. Andrew Albanese, *Hachette Makes Full E-book Catalogue Available to Libraries*, PUBLISHERS WEEKLY .COM (May 1, 2013), <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/57049-hachette-makes-full-e-book-catalogue-available-to-libraries.html> (noting that “all of the big six publishers are now enabling library e-book lending”). As revealed in the Douglas County Libraries pricing comparison, however, many top-selling books are not available for licensing. See Douglas Cnty. Libraries, *supra* note 81. Also, there are restrictions on loan length and the length of the licenses. Anthony W. Marx, Op-Ed., *E-Books and Democracy*, N.Y. TIMES, May 1, 2013, at A25 (discussing some of the limitations on e-book lending). The ALA Digital Content and Libraries Working Group maintains a chart on the big six publishers and library lending that notes restrictions. See Rob Maier, *DCWG Big Six Matrix for Ebook License Comparisons*, AM. LIBRARIES, <http://www.americanlibrariesmagazine.org/blog/dcwg-big-six-matrix-ebook-license-comparisons> (last visited Aug. 22, 2013) (describing and linking to chart). See also *Frequently Asked Questions Regarding E-books and U.S. Libraries*, TRANSFORMING LIBRARIES, <http://www.ala.org/transforminglibraries/frequently-asked-questions-e-books-us-libraries> (last updated Aug. 16, 2013).

83. Jill Emery, *The Demand Driven Acquisitions Pilot Project by the Orbis Cascade Alliance: An Interview with Members of the Demand Driven Acquisitions Implementation Team*, 38 SERIALS REV. 132, 133 (2012).

84. See PETER SUBER, OPEN ACCESS 32 (2012); Timothy Gowers, *Elsevier—My Part in Its Downfall*, GOWERS'S WEBLOG (Jan. 21, 2012, 5:30 P.M.), <https://gowers.wordpress.com/2012/01/21/elsevier-my-part-in-its-downfall/> (discussing the problems for libraries caused by bundling). As an example, while individuals can subscribe to a print and online version of just the *American Journal of Bioethics*, libraries cannot. Libraries can only subscribe to this journal as part of a journal “pack.” *The American Journal of Bioethics*, TAYLOR & FRANCIS ONLINE, <http://www.tandfonline.com/pricing/journal/uajb20> (last visited Aug. 16, 2013). The price for an individual subscription to the journal (print and online) is \$200. It costs \$1479 for a library to obtain an online-only subscription and \$1690 for a print and online subscription. *Id.* The difference in price reflects that the library must also subscribe to two

### Pay-per-View

¶22 A concern about publisher pricing of e-resources is that technology can support digital tracking and management of individual titles. This means that “library activities . . . that were essentially unmonitorable in the offline world become ascertainable and quantifiable when conducted online.”<sup>85</sup> Pay-per-view is an illustration of this troubling aspect of some business models for e-journals and e-books. Under this model, a library has no ongoing subscriptions or licenses. Instead, there is a charge each time a library user accesses an article or book.<sup>86</sup> The library does not own the book, and serves merely as a conduit between the user and the publisher. It is the publisher that will profit from the use. If the library owned the book, users could read the book many times for free. The publishers are essentially imposing a license or a tax to read.<sup>87</sup>

¶23 This arrangement may seem attractive to some libraries as smaller budgets force them to cut both their print and electronic collections.<sup>88</sup> One service even ties pay-per-view to interlibrary loan to facilitate acquiring articles after a library has requested its five articles under the CONTU guidelines.<sup>89</sup> It is easy for libraries to make this automatic payment without considering whether fair use or another exception would apply. If the library does not identify the exception, it will be lost. The system simply tracks a use and does not assess whether there is an exception.<sup>90</sup>

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other journals as well as the *American Journal of Bioethics*. If these publications are not appropriate for the library’s collection, it does not matter. If the library wants to subscribe, it must pay for all journals in the bundle. Libraries will also find that although this publication is available in certain “aggregator” databases such as CINAHL, those databases do not provide access to issues published during the most recent eighteen months. So, if the library cannot or will not pay the high price for the bundle, then it cannot provide access at all. There is the option to purchase articles from the publisher’s web site for \$37 per article. Purchases of online articles are designed for individual payment by credit card, which can be difficult for libraries.

85. Bartow, *supra* note 62, at 91.

86. Regina Koury, *Coping with Economic Issues and a Paradigm Shift in Collections*, in MANAGING ELECTRONIC RESOURCES 17, 24–25 (Ryan O. Weir ed., 2012) (discussing use of pay-per-view for e-journal articles). See also Patrick L. Carr & Maria Collins, *Acquiring Articles Through Unmediated, User-Initiated Pay-Per-View Transactions: An Assessment of Current Practices*, 35 SERIALS REV. 272 (2009) (discussing use of pay-per-view as an alternative to e-journal publisher-packaged subscriptions).

87. This arrangement is a “user’s tax . . . on learning materials.” L. Ray Patterson, *Understanding Fair Use*, LAW & CONTEMP. PROBS., Spring 1992, at 249, 263.

88. A library could use pay-per-view to replace interlibrary loan, with the payment going to the publisher. See Heather L. Brown, *Pay-Per-View in Interlibrary Loan: A Case Study*, 100 J. MED. LIBR. ASS’N 98 (2012).

89. The Copyright Clearance Center’s Get It Now service allows libraries to order an article immediately and pay for that single article. This service is available through the ILLiad interlibrary loan service that many libraries use. It can be tempting for a library to use the service rather than considering fair use options. *Id.* at 101. See also JAMES S. HELLER, PAUL HELLYER & BENJAMIN J. KEELE, *THE LIBRARIAN’S COPYRIGHT COMPANION* 86 (2d ed. 2012) (discussing concerns about the Get It Now service).

90. Penny Hazelton, in discussing pay-per-view arrangements for e-books, notes that “this model fails to take into account the way researchers use information from books in any format. Researchers search for relevant information without always knowing where the information might be located. They might look at a table of contents or index before rejecting the work as irrelevant.” Penny A. Hazelton, *Law Students and the New Law Library: An Old Paradigm*, in LEGAL EDUCATION IN THE

¶24 Libraries may believe pay-per-view simply provides users with quick and convenient access to materials, “[b]ut in the quest for more responsive customer services, libraries must not overlook the longer-term societal goals and cultural missions.”<sup>91</sup> Engaging in a pattern that eliminates consideration of fair use ultimately can be detrimental to preserving that right.<sup>92</sup> As L. Ray Patterson warned: “At issue here is access to learning, endangered by the efforts of copyright owners to make a commodity of all the knowledge in the land for the purpose of obtaining private fortunes.”<sup>93</sup>

¶25 Publishers may also use technological capabilities to track an individual’s e-book use and then charge for that usage. The technology is available to track individual, incremental use. An article in the *Wall Street Journal* titled *Your E-Book is Reading You* discusses the ways that publishers, through e-readers, track reader usage.<sup>94</sup> If publishers can track these bits of information for marketing purposes, they can track the same information bits to assess fees. For example, if users can copy portions and save them, publishers could impose a charge each time something is copied. Charging for granular use would dispense with the most basic form of fair use, which is the making of personal notes. All of these limitations, whether charged for or not, put the publishers in control of the use of publications.

### Preservation

¶26 The licensing of e-resources also has long-term consequences for scholarship because it hampers the ability of libraries to preserve information. Licensing arrangements can offer short-term benefits to libraries that provide just-in-time services. Since the libraries do not own these materials, however, future availability of these materials is in doubt. Sometimes publishers decide to stop including certain works in library subscriptions. Many licenses provide that a library loses all access to the materials, including back issues, if the subscription ends. This decrease in library ownership jeopardizes the availability of works for future research needs. The archiving of and future access to works will be left to publishers and database vendors.<sup>95</sup>

¶27 Even a library that obtains “perpetual access” to materials may find it difficult to provide access if it ends its relationship with the publisher or distributor.<sup>96</sup>

DIGITAL AGE 158, 169 (Edward Rubin ed., 2012).

91. Clifford Lynch, *The Battle to Define the Future of the Book in the Digital World*, 6 FIRST MONDAY, no. 6, 2001, <http://firstmonday.org/ojs/index.php/fm/article/view/864/773>.

92. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

93. Patterson, *supra* note 87, at 266.

94. Alexandra Alter, *Your E-Book Is Reading You*, WALL ST. J., June 29, 2012, at D1 (noting the kind of tracking that companies can do through e-readers). For example, the Kindle user’s agreement grants Amazon permission to capture and store information from the device. This information includes the last page the user read as well as the user’s “annotations, bookmarks, notes, highlights, or similar markings.” *Kindle Terms of Use*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html/?nodeId=200506200> (last updated Sept. 6, 2012). Amazon then provides some of this information, in aggregate form, for the public to view. Alter, *supra*.

95. See Klinefelter, *supra* note 69, at 180, 184.

96. For e-journals, an agreement might provide long-term access to contents through “archive” provisions. See LIPINSKI, *supra* note 72, at 399–403. Perpetual access is a common model for e-books.



Once a library severs the relationship, it might possess only bare data files and will need to figure out how to provide an interface and an appropriate platform.<sup>97</sup> Another concern is whether publishers that have locked copyrighted resources will relinquish and release these materials once the copyrights expire.<sup>98</sup> Given the lengthy terms of copyrights, this scenario is far in the future for many works. Will this control by publishers bar locked works from ever entering the public domain?

¶28 These arrangements create a very uncertain future for the availability of the scholarly record. As one author notes: “Persistent access to licensed content is a serious issue. Scholarship requires the ability to check sources and verify information . . . weeks, months and often years after publication or creation.”<sup>99</sup> Research libraries are conservators<sup>100</sup> and stewards<sup>101</sup> of the record of scholarship. “If librarians abdicate their stewardship responsibility for creating the archive of the scholarly record, and yield that responsibility to publishers instead,”<sup>102</sup> they are relinquishing the future of the scholarly record into the hands of those who are interested in maintaining resources for profit, not for the promotion and advancement of knowledge.

### Options for Ensuring Research Support

¶29 The licensing model for e-journals and e-books can severely restrict an academic library’s ability to support its faculty researchers and preserve the scholarly record. Addressing this problem requires examination of the same approaches that have governed library and copyright-holder relations in the past: development

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LIBRARY JOURNAL & SCH. LIBRARY JOURNAL, *supra* note 59, at 7 (83% of survey respondents obtained perpetual access for e-books). Perpetual access agreements for e-books allow the library to “pay[] for the book once with an additional small annual platform fee to use the book at the publisher’s website with customized and updated software.” Joanne Doucette & Amy Lewontin, *Selecting E-Books*, in BUILDING AND MANAGING E-BOOK COLLECTIONS, *supra* note 80, at 51, 61; *see also* David R. O’Brien, Urs Gasser & John Palfrey, *E-Books in Libraries: A Briefing Document Developed in Preparation for a Workshop on E-Lending in Libraries* 14–15 (Berkman Ctr. Res. Pub. No. 2012-15, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2111396](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111396). Doucette and Lewontin caution that it is important to understand what perpetual access means if a library ends a relationship with a vendor or the vendor goes out of business. Doucette & Lewontin, *supra*, at 61 (“Will your books be hosted on a third-party electronic archival website . . . or will you be receiving a stack of CD-ROMs in the mail?”).

97. In a recent article, law librarians discussed the challenges in developing a delivery platform when they decided to end the “access” portion of a “purchase plus access” arrangement. Sallie Smith, Susanna Leers & Patricia Roncovich, *Database Ownership: Myth or Reality?*, 103 LAW LIBR. J. 233, 2011 LAW LIBR. J. 15. Under the purchase-plus-access model, the library “pays a lump sum for content ownership and an annual subscription fee for access to that content and its search interface on the database provider’s remote servers.” *Id.* at 234, ¶ 2. *See* Simon Canick, *The Ownership Delusion: When Law Libraries “Buy” Electronic Documents, Are They Getting More, or Simply Paying More?*, AALL SPECTRUM, Feb. 2008, at 30, 31, for a discussion of purchase plus access.

98. *See* Olson, *supra* note 70, at 88.

99. Sharon Farb, *Libraries, Licensing and the Challenge of Stewardship*, 11 FIRST MONDAY, no. 7, 2006, <http://firstmonday.org/ojs/index.php/fm/article/view/1364/1283>.

100. SMITH, *supra* note 4, at 7–8.

101. Farb, *supra* note 99.

102. Rachel Miller, *Acts of Vision: The Practice of Licensing*, 32 COLLECTION MGMT. 173, 183 (2007).

of legal entitlements and exceptions, use of contracts and other private agreements, and use of technology.

### Legal Entitlements and Exceptions

¶30 Changing copyright law is one possible way of ensuring scholarly access to digital materials. It is, however, “especially difficult to pass useful legislation in the copyright sphere.”<sup>103</sup> The 1976 Copyright Act was the product of “compromises negotiated among those with economic interests in copyright.”<sup>104</sup> Revisions in the current law are unlikely because of the irreconcilable nature of the differences between stakeholders. Achieving any change will involve a lengthy process. With the recent movement toward copyright reform,<sup>105</sup> however, it is worth assessing which areas might hold promise for improving research support and are likely to receive congressional attention.

### Revisions to Section 108

¶31 In 2008, the Section 108 Study Group<sup>106</sup> completed a review of 17 U.S.C. § 108.<sup>107</sup> The group’s review of provisions related to interlibrary loan yielded no definite recommendations.<sup>108</sup> Overall the group’s report “gives a helpful account of the problems faced by libraries and other institutions operating under current law, but it is unlikely that any such process will yield helpful substantive fixes in the near future.”<sup>109</sup>

103. PRUDENCE ADLER ET AL., ASS’N OF RESEARCH LIBRARIES, RESOURCE PACKET ON ORPHAN WORKS: LEGAL AND POLICY ISSUES FOR RESEARCH LIBRARIES 3 (2011), *available at* [http://www.arl.org/storage/documents/publications/resource\\_orphanworks\\_13sept11.pdf](http://www.arl.org/storage/documents/publications/resource_orphanworks_13sept11.pdf).

104. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 869 (1987).

105. In April 2013, the chairman of the House Judiciary Committee announced that the committee would “conduct a comprehensive review of U.S. copyright law.” Press Release, Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), [http://judiciary.house.gov/news/2013/04242013\\_2.html](http://judiciary.house.gov/news/2013/04242013_2.html). In May 2013, a subcommittee of the House Judiciary Committee began a series of hearings related to this review. Press Release, Comm. on the Judiciary, Subcommittee to Hold First Hearing on Comprehensive Copyright Review (May 15, 2013), [http://www.judiciary.house.gov/news/2013/05152013\\_2.html](http://www.judiciary.house.gov/news/2013/05152013_2.html).

106. The Library of Congress National Digital Information Infrastructure and Preservation Program and the U.S. Copyright Office sponsored the nineteen-member Section 108 Study Group to “conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of the changes wrought by digital media.” Press Release, Section 108 Study Group, Section 108 Study Group Convenes to Discuss Exceptions to Copyright Law for Libraries and Archives (May 13, 2005), [http://www.section108.gov/release\\_051305.html](http://www.section108.gov/release_051305.html). For more information see THE SECTION 108 STUDY GROUP, <http://www.section108.gov/index.html> (last visited July 26, 2013).

107. THE SECTION 108 STUDY GROUP REPORT (2008), *available at* <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

108. *See id.* at x–xi, 95–106.

109. ASS’N OF RESEARCH LIBRARIES, FAIR USE FAQ FOR LIBRARIANS/GENERAL OVERVIEW 4 (2012), *available at* <http://www.arl.org/storage/documents/publications/fair-use-code-faq-librarians.pdf>. *See also* KENNETH D. CREWS, COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS 99 (3d ed. 2012) (“The current prospect for passage of [the Section 108 Study Group’s proposals] in Congress is meager, although the work of the study group has drawn further attention to the deficiencies of the law and the need for improvements.”). In 2011, the Copyright Office identified “exceptions for libraries” as

¶32 Whatever revisions to section 108 there might be to address the use of digital copies for interlibrary loan, copyright holders can override those provisions through licensing and contract terms.<sup>110</sup> As long as section 108 allows contracts to control, changes to section 108 will not affect limitations on interlibrary loan of digital articles. Current licensing terms in many agreements already contradict section 108(g)(2) by placing restrictions on the lending library when the concern in section 108(g)(2) was with a requesting library obtaining interlibrary loan copies to substitute for a subscription. The Section 108 Study Group discussed section 108(f)(4), which provides that nothing in section 108 “in any way affects . . . any contractual obligations.”<sup>111</sup> The group agreed that section 108(f)(4) should apply to negotiated agreements, but disagreed on the application to nonnegotiable agreements.<sup>112</sup> “Negotiated” agreements supposedly allow the parties to arrive at terms they bargained for. Yet these agreements do not affect only the two parties. They affect anyone who wants to borrow the work if there is a limitation on lending, and thus they affect a broader public interest.<sup>113</sup> As long as publishers’ contractual terms can override section 108 provisions, revisions to section 108, even if passed, will be hollow.

### CONTU Guidelines

¶33 Libraries refer to the CONTU guidelines<sup>114</sup> when requesting copies of articles through interlibrary loan.<sup>115</sup> These guidelines are not the law, but a “reasonable

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a priority. MARIA A. PALLANTE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE, OCTOBER 2011–OCTOBER 2013, at 8 (2011), available at <http://www.copyright.gov/docs/priorities.pdf>. The report states that the Copyright Office would provide preliminary recommendations in 2012, but as of fall 2013 the Copyright Office has not provided recommendations or a discussion document on section 108.

While there have been no formal recommendations regarding section 108, it remains a subject of concern within the context of copyright reform. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 333 (2013) (noting that section 108 is “the subject of ongoing public inquiries, symposia and recommendations”). Pallante, the Register of Copyrights, in a statement to the House Subcommittee on Courts, Intellectual Property and the Internet, indicated that there were studies available on topics under consideration for copyright reform, including library exceptions. *The Register’s Call for Updates to U.S. Copyright Law, Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7 (2013). A recent symposium on Copyright Exceptions for Libraries in the Digital Age focused on section 108 reform. See *Section 108 Reform*, COLUMBIA LAW SCH. (Feb. 8, 2013), <http://web.law.columbia.edu/kernochan/symposia/section-108-reform>. At a hearing of the House subcommittee on May 16, 2013, one witness, Laura Gasaway, discussed section 108 extensively. *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013), available at [http://judiciary.house.gov/hearings/113th/hear\\_05162013.html](http://judiciary.house.gov/hearings/113th/hear_05162013.html).

110. Licensing terms, for example, can provide that a lending library must send a print or fax copy of an online article.

111. 17 U.S.C. § 108(f)(4) (2006).

112. THE SECTION 108 GROUP STUDY REPORT, *supra* note 107, at xii. One approach suggested was to amend section 108(f)(4) to state that “rights and privileges granted under section 108 may not be waived by a non-negotiable contract.” *Id.* at 122. The opposing view was to rely on “existing legal tools [i.e., state law and judicial opinions] . . . to address contractual issues among libraries and archives and rights holders.” *Id.*

113. See JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 110–11 (2011).

114. See *supra* ¶ 12.

115. The ALA *Interlibrary Loan Code* states that in making copy requests, “the requesting

interpretation.”<sup>116</sup> The guidelines have remained unchanged since their creation, and it is improbable that there will be any change in the near future.<sup>117</sup> They remain a guide for a requesting library’s evaluation of its requests. These guidelines serve as an alert for a library to evaluate requests it makes.<sup>118</sup> They provide no bright-line determination of what action a library should take if it reaches the suggested limit. The conference committee report on the 1976 Copyright Act, in discussing the CONTU guidelines, stated: “[T]he guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future.”<sup>119</sup> A library, having made five requests that fit within the CONTU guidelines, can evaluate any additional requests. It might determine that the requests indicate that the library should obtain a subscription or pay a fee for single requests. Alternatively, the library could determine that the additional request does not trigger a need to subscribe or pay.<sup>120</sup>

¶34 Research librarians should consider their options each time they make a request rather than automatically paying a license fee. Unfortunately, an Association of Research Libraries (ARL) survey of the application of fair use in academic research libraries noted that interviewees rarely consider fair use when making interlibrary loan decisions.<sup>121</sup> Routinely paying fees when, for example, a library could rely on fair use, entrenches copyright-holder control. As James Gibson noted: “If a rights-holder . . . routinely issues licenses for a given use, then copyright law views that use as properly falling within the rights-holder’s control. . . . [T]he practice of licensing within gray areas eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use.”<sup>122</sup> Sometimes it may seem easier to pay than to make an evaluation. Librarians should not be lured by convenience into simply making payments without any evaluation.

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library must comply with the U.S. copyright law . . . and its accompanying guidelines.” AM. LIBRARY ASS’N, REFERENCE & USER SERVS. ASS’N, INTERLIBRARY LOAN CODE FOR THE UNITED STATES § 4.7 (rev. 2008), <http://www.ala.org/rusa/resources/guidelines/interlibrary>.

116. H.R. REP. NO. 94-1733, at 72 (1976) (Conf. Rep.).

117. An attempt to develop guidelines for interlibrary loan that would address the use of digital works resulted in “a complete failure to reach agreement.” Gasaway, *supra* note 56, at 1340. These discussions occurred during the Conference on Fair Use. *Id.* at 1339–40.

118. See CREWS, *supra* note 109, at 98.

119. H.R. REP. NO. 94-1733, at 71.

120. See HELLER, HELLYER & KEELE, *supra* note 88, at 101–02 (describing a scenario in which a visiting professor needs articles for a short-term project). A law library might also be justified in ordering additional articles over the CONTU limit when a law review is producing a symposium issue on a specialized topic. Many of the authors might have cited articles from a specific journal or journals that the library does not have. The requests, which are for citation verification only, do not reasonably indicate that the library should acquire an ongoing subscription to a journal.

121. ASS’N OF RESEARCH LIBRARIES, *supra* note 1, at 13 (noting reliance instead on the CONTU guidelines).

122. Gibson, *supra* note 92, at 884; see also William M. Cross, *Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship*, 104 LAW LIBR. J. 195, 208, 2012 LAW LIBR. J. 18, ¶ 52. Establishing a community pattern of fair use, on the other hand, can support library decisions not to pay fees. See Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1624–25 (2004).

### Section 109(a)

¶35 Adding coverage for digital works under section 109(a) (the first sale provision) does not address the problem of publishers' licensing rather than selling e-resources. Section 109(a) applies when a library owns a work.<sup>123</sup> When libraries license works, they do not have possession of the work because it is usually housed on a remote server controlled by a third party. The copyright holder in these situations controls whether a library can lend the work in whole or in part.

¶36 Libraries that actually own digital works (such as e-book files) and house them on their own servers<sup>124</sup> arguably meet the requirements of section 109(a), since they own the work and possess the file. If they make loans to one person at a time, this arrangement should meet the requirements of section 109(a).<sup>125</sup> It is unclear, however, whether section 109(a) applies to digital works even if they are owned.<sup>126</sup> Legislation may be necessary to clarify that section 109(a) applies to the sale or other disposal (such as lending) of owned digital works.

### Orphan Works

¶37 Research libraries want to digitize print works for preservation and wider availability. This is part of their mission to preserve "accrued knowledge" and foster access to it.<sup>127</sup> In considering works for digitization, however, libraries are encountering the problem of "orphan works." The Copyright Office has described this problem as "the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner."<sup>128</sup> Uncertainty about orphan works

123. See 17 U.S.C. § 109(d) (2006) (stating that § 109 does not apply to nonowners).

124. Some libraries have this arrangement for e-books under the Douglas County model. See *infra* ¶ 52.

125. There is a question of whether lending the work requires making a copy that the library then lends. If it does not, there is not an issue. If there is a copy, there might be an exception for this incidental copy. The section 109(a) exception applies only to the distribution right in 17 U.S.C. § 106(3), not to the reproduction right in § 106(1).

126. In a recent case involving the resale of digital sound recordings by owners who had legally paid for and downloaded music files, the court held that section 109(a) did not apply to the sale of digital works. *Capitol Records v. ReDigi*, No. 12 Civ. 95 (RJS), 2013 WL 1286134 \*11 (S.D.N.Y. Mar. 30, 2013). See Kevin Smith, *We're Not Done with First Sale*, SCHOLARLY COMMUNICATIONS @ DUKE (Apr. 2, 2013), <http://blogs.library.duke.edu/scholcomm/2013/04/02/were-not-done-with-first-sale/> (discussing *ReDigi* and recommending congressional action). Other courts have not addressed the issue, and the question of how section 109(a) applies to digital works is still very much an open one.

127. See JENNIFER URBAN ET AL., REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS 1 (2013), available at [http://www.centerforsocialmedia.org/sites/default/files/documents/report\\_on\\_orphan\\_works\\_challenges.pdf](http://www.centerforsocialmedia.org/sites/default/files/documents/report_on_orphan_works_challenges.pdf). Obtaining access to a digital version of a work can take the place of interlibrary loan of the physical work. While interlibrary loan facilitates access to print works, it is still a slow process with many of the same challenges as it had a hundred years ago: shipping costs, delivery delays, and difficulties in lending fragile and rare materials.

128. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>. See also David R. Hansen, *Orphan Works: Definitional Issues* (Berkeley Digital Library Copyright Project, White Paper No. 1, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1974614](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974614) (discussing the various definitions of orphan works). Orphan works discussions focus on print format works, but there could be digital orphans, particularly as the



inhibits libraries in digitization since “they face the perceived risk of costly infringement suits from copyright owners who might later emerge.”<sup>129</sup> This uncertainty can also “obscure uses that libraries could make under fair use or under other copyright limitations.”<sup>130</sup>

¶38 Concerns about orphan works led to a report from the Register of Copyrights<sup>131</sup> and proposed legislation in the latter part of the last decade. The legislative efforts failed.<sup>132</sup> In 2012, the Copyright Office revived the issue by soliciting comments.<sup>133</sup> A review of the comments received indicates a strong interest in a resolution. Some commentators favor legislation,<sup>134</sup> while others argue that the fair use doctrine is adequate.<sup>135</sup> The Copyright Office has not issued any further notices.

¶39 In the meantime, the 2013 *Report on Orphan Works Challenges for Libraries, Archives, and Other Memory Institutions* encourages libraries to develop “best practices in orphan works use,” promote “better documentation and information-sharing among community members about their experiences using orphan works,” and enhance support “to understand the copyright challenges and to identify when solutions unrelated to orphan works status might apply.”<sup>136</sup> This report recognizes the *ARL Code of Best Practices in Fair Use for Academic and Research Libraries*<sup>137</sup> as a good example of community development of best practices that can help com-

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number of e-books increases. The orphan works problem has developed due to changes in copyright law that eliminated registration and notice requirements and that extended the duration of copyright. Orphan Works and Mass Digitization, 77 Fed. Reg. 64555, 64555–56 (Oct. 22, 2012). *See also* David R. Hansen, *Orphan Works: Causes of the Problem* (Berkeley Digital Library Copyright Project, White Paper No. 3, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038068](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038068) (tracing the development of the orphan works problem); Keith Porcaro, *Private Ordering and Orphan Works: Our Least Worst Hope?*, 2010 DUKE L. & TECH. REV. 15, ¶¶ 5–7, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1210&context=dltr>.

129. URBAN ET AL., *supra* note 127, at 1.

130. *Id.*

131. U.S. COPYRIGHT OFFICE, *supra* note 128.

132. Proposals included the Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); the Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and the Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008). For a discussion of these proposals, see David R. Hansen, *Orphan Works: Mapping the Possible Solution Spaces* 5–8 (Berkeley Digital Library Copyright Project, White Paper No. 2, 2012), <http://ssrn.com/abstract=2019121>.

133. The notice stated: “The U.S. Copyright office is reviewing the problem of orphan works . . . in continuation of its previous work on the subject and in order to advise Congress as to possible next steps for the United States.” Orphan Works and Mass Digitization, 77 Fed. Reg. at 64555.

134. *See, e.g.*, Letter from Jean M. Wenger, President, Am. Ass’n of Law Libraries, Carla J. Funk, Exec. Dir., Med. Library Ass’n, & Douglas Newcomb, Deputy Chief Exec. Officer, Special Libraries Ass’n, to Maria Pallante, Register of Copyrights (Feb. 1, 2013), *available at* [http://www.copyright.gov/orphan/comments/noi\\_10222012/American-Association-Law-Libraries.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/American-Association-Law-Libraries.pdf) (supporting legislation).

135. *See, e.g.*, Comments of the Library Copyright Alliance in Response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization 1 (Jan. 14, 2013), [http://www.copyright.gov/orphan/comments/noi\\_10222012/Library-Copyright-Alliance.pdf](http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf) (“[S]ignificant changes in the copyright landscape over the past seven years convince us that libraries no longer need legislative reform in order to make appropriate uses of orphan works.”).

136. URBAN ET AL., *supra* note 127, at 2, 14.

137. ASS’N OF RESEARCH LIBRARIES, *supra* note 17.

munity members address copyright issues.<sup>138</sup> Librarians should be engaged in addressing the orphan works issue by tracking and commenting on proposed legislation and following the suggestions in the *Report on Orphan Works Challenges*.

### Contracts and Private Agreements

¶40 Private agreements have increasingly controlled the relationships between libraries and copyright holders, particularly in the absence of clear legal rules. One strategy for ensuring research support is to negotiate favorable terms in the licenses and contracts that govern e-books and e-journals. It is unclear how successful libraries are in negotiating terms of licenses and contracts, and many of these agreements (or at least their core terms) are nonnegotiable. Still, libraries should review and understand the terms of their existing agreements and seek opportunities to negotiate new ones. A library may negotiate its own agreements or it may rely on consortial representation.<sup>139</sup> As e-resources begin to dominate a library's collection, librarians must know the terms that govern these resources and must work to ensure that the agreements do not diminish or hamper research support.<sup>140</sup>

¶41 The negotiation environment is different for e-journals than for e-books. E-journals have been available under licensing for many years, and libraries often merely renew prior agreements. Since the early use of license agreements for e-resources in the 1980s and 1990s, librarians have used negotiation to alter terms that restrict or prohibit important library services such as interlibrary loan and to support library values such as fair use.<sup>141</sup>

¶42 The Section 108 Study Group suggested that, given the uncertainty of changing or clarifying the law, "the best near-term solution" is for libraries "to develop and negotiate model terms and informal guidelines."<sup>142</sup> There are numerous resources available to assist libraries in understanding and negotiating licenses and agreements for e-journals and databases.<sup>143</sup> Model licenses, standards, and licensing principles also provide guidance and are helpful for understanding licensing.<sup>144</sup> It is unclear how much libraries and publishers actually rely on these guiding

138. See URBAN ET AL., *supra* note 127, at 13, 14.

139. Consortial negotiation may be more successful due to the stronger bargaining power of a number of libraries.

140. Maintaining a primarily digital collection requires rethinking management of many library functions. Staffing in particular is an area that library managers need to review. See Kathe S. Obrig, *Changing Library Staffing Models to Manage E-Collections—George Washington University*, in BUILDING AND MANAGING E-BOOK COLLECTIONS, *supra* note 80, at 159, for a good discussion of position modifications and staffing needed to manage an increasingly electronic collection.

141. See Miller, *supra* note 102, at 174 (discussing the development of librarian expertise in negotiating licenses).

142. THE SECTION 108 STUDY GROUP REPORT, *supra* note 107, at 122.

143. See, e.g., LIPINSKI, *supra* note 72 (an outstanding resource on all aspects of licensing); LESLEY ELLEN HARRIS, LICENSING DIGITAL CONTENT: A PRACTICAL GUIDE FOR LIBRARIANS (2d ed. 2009); Ryan O. Weir, *Licensing Electronic Resources and Contract Negotiation*, in MANAGING ELECTRONIC RESOURCES, *supra* note 86, at 53.

144. See, e.g., LIBLICENSE, <http://liblicense.crl.edu> (last visited July 31, 2013) (web site with many types of resources including model licenses and actual publishers' licenses); NAT'L INFO. STANDARDS ORG., SERU: A SHARED ELECTRONIC RESOURCE UNDERSTANDING (May 2012), [http://www.niso.org/publications/rp/RP-7-2012\\_SERU.pdf](http://www.niso.org/publications/rp/RP-7-2012_SERU.pdf) (outlining best practices for creating a shared understanding,

documents, particularly stated principles, in their agreements. It is important to support and apply principles, not merely to state them. Librarians should demand agreements that meet these principles.

¶43 E-books are much newer than e-journals, and the business models are experimental.<sup>145</sup> Libraries must consider how the choice of a business model for e-books will ultimately affect research and preservation of the scholarly record. Some models, while they may be tempting as ways to support just-in-time service, contradict library values such as fair use. One author argues that “libraries must demand license concessions before purchasing or subscribing to content.”<sup>146</sup> E-book usage and business models are still in development in academic libraries, particularly in academic law libraries. In this “volatile period,”<sup>147</sup> librarians must not be anxious to immediately embrace certain business models when negotiating e-book arrangements.<sup>148</sup> Many aspects of current business models run counter to library values and missions and inhibit important services. Pricing may be exorbitantly out of line with prices individuals pay.<sup>149</sup> Publishers are exploring models

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rather than a license, between a publisher and a library); *Procurement Toolkit and Code of Best Practices For Licensing Electronic Resources*, AM. ASS'N OF LAW LIBRARIES, <http://www.aallnet.org/main-menu/Advocacy/vendorrelations/docs/procurement-toolkit.html> (approved Apr. 2013); *IFLA Licensing Principles* (2001), IFLA, <http://www.ifla.org/publications/ifla-licensing-principles-2001> (last updated Dec. 14, 2012). See also HARRIS, *supra* note 143, at 8–13 (discussing model licenses, standard agreements, and licensing principles and their use); Kristen M. Cichocki, *Unlocking the Future of Public Libraries: Digital Licensing That Preserves Access*, 16 U. BALT. INTELL. PROP. L.J. 29, 56–59 (2007–2008) (discussing standards and model licenses).

145. AM. LIBRARY ASS'N, *EBOOK BUSINESS MODELS FOR PUBLIC LIBRARIES* (Aug. 8, 2012), [http://americanlibrariesmagazine.org/sites/default/files/EbookBusinessModelsPublicLibs\\_ALA.pdf](http://americanlibrariesmagazine.org/sites/default/files/EbookBusinessModelsPublicLibs_ALA.pdf) [hereinafter ALA EBOOK MODELS]. There are some resources that discuss current models and options. ALA has developed some guidance materials for public libraries. AM. LIBRARY ASS'N, *EBOOK BUSINESS MODELS: A SCORECARD FOR PUBLIC LIBRARIES* (Jan. 25, 2013), [http://www.districtdispatch.org/wp-content/uploads/2013/01/Ebook\\_Scorecard.pdf](http://www.districtdispatch.org/wp-content/uploads/2013/01/Ebook_Scorecard.pdf). The International Federation of Library Associations (IFLA) recently developed principles for library e-lending. *IFLA Principles for Library eLending*, IFLA (rev. Aug. 16, 2013), <http://www.ifla.org/node/7418>. IFLA provides several helpful documents that discuss underlying principles for the terms of library e-lending agreements. Civic Agenda, *The Thinkpiece “Libraries, eLending, and the Future of Public Access to Digital Content,”* available at <http://www.ifla.org/files/assets/hq/topics/e-lending/thinkpiece-on-libraries-elending.pdf> (last visited July 9, 2013). A matrix accompanying this document outlines models of access. Civic Agenda, *Matrix: Models of Accessing Digital Content*, available at <http://www.ifla.org/files/assets/hq/topics/e-lending/thinkpiece-matrix.pdf> (last visited July 9, 2013). See also IFLA, *IFLA E-Lending Background Paper*, <http://www.ifla.org/files/assets/clm/publications/ifla-background-paper-e-lending-en.pdf> (last visited July 9, 2013). For a general discussion of current e-book models, see Albitz & Brennan, *supra* note 80, at 75; Becky Albitz & David Brennan, *Budgeting for E-Books*, in *BUILDING AND MANAGING E-BOOK COLLECTIONS*, *supra* note 80, at 85; Doucette & Lewontin, *supra* note 96, at 51, 60–62.

146. Gee, *supra* note 80, at 28.

147. ALA EBOOK MODELS, *supra* note 145, at 1.

148. The ALA EBook Business Models report urges libraries to negotiate aggressively for the most favorable and flexible terms possible in e-book agreements. The concern is that any models adopted at this time will lock in the future. *Id.* Walking away is another approach that keeps unfavorable models from becoming the norm.

149. See sources cited *supra* note 81.



that are commercially focused.<sup>150</sup> Libraries need to ensure that the models are values focused.<sup>151</sup>

¶44 The current e-book environment is contentious, creating librarian frustration over prices, restrictions, and publishers' changes in terms. Some librarians urge that libraries reject e-books and "[s]top buying [them] across the board, at any price, under any terms."<sup>152</sup> Sarah Houghton declared that

eBooks in libraries are a non-starter, their path has been set for the foreseeable future, and their future is determined by people who are not us. . . . [Publishers] have attempted to salvage their failing business model with high prices, limited licensing policies, and technology so locked down that it remains impenetrable to many people.<sup>153</sup>

Her recommendation is simple: "Walk away, my friend. Walk away."<sup>154</sup> Another librarian offers the same sentiment and advocates "an ideology centered around *not* wasting time, energy, and resources on deals that don't serve the library as an institution, the community as a dependable and enduring resource, and our stakeholders as a wise investment."<sup>155</sup> These librarians are discussing e-books in the public library context, but the same approach applies to academic libraries and e-books. Walking away may be the best way to approach e-books if the contract terms violate library values.

¶45 A library can "walk away" from bad e-book business models by not entering into or severing relationships that require licensing through a distributor. A library can instead purchase and manage content on its own. The pioneering and best-known example for this approach is the Douglas County model. This model is named for the program that the Douglas County Libraries in Colorado implemented to address concerns and frustrations with providing e-books through an aggregator platform.<sup>156</sup> The intent in adopting this model was to "regain control of

150. For example, preservation of scholarship is an important value of research libraries. Publishers may decide to drop works that they don't deem profitable, or they might sell a publishing division. They may raise prices excessively, which could jeopardize the ability of a library to continue the relationship. They may provide "perpetual access" without concern as to how practical it really is. See *supra* ¶ 27. All of these actions could be good commercial decisions, but they do not support the library's values.

151. See IFLA, *IFLA E-Lending Background Paper*, *supra* note 145, at 5, 8; Mike Shatzkin, *Libraries and Publishers Don't Have Symmetrical Interest in a Conversation*, THE SHATZKIN FILES (Feb. 22, 2012, 4:21 P.M.), <http://www.idealogue.com/blog/libraries-and-publishers-dont-have-symmetrical-interest-in-a-conversation/>.

152. Guy LeCharles Gonzalez, *Ebooks and Libraries: Is it Worth the Effort?*, LOUDPOET.COM: BLOGGING IT LIKE IT IS SINCE 2003 (Mar. 6, 2012), <http://loudpoet.com/2012/03/06/ebooks-and-libraries-is-it-worth-the-effort>. See also Andrew Richard Albanese, *Life with E-Books*, PUBLISHERS WEEKLY.COM (Aug. 24, 2012), <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/53703-life-with-e-books.html> (discussion of librarians' mixed attitudes to collecting e-books).

153. Sarah Houghton, *I'm Breaking Up with eBooks (and You Can Too)*, LIBRARIAN IN BLACK (Aug. 1, 2012), <http://librarianinblack.net/librarianinblack/2012/08/ebookssuckitude.html>.

154. *Id.*

155. Andy Woodworth, *Libraries and eBook Publishers: Friend Zone Level 300*, AGNOSTIC, MAYBE (Aug. 13, 2012), <http://agnosticmaybe.wordpress.com/2012/08/13/libraries-and-ebook-publishers-friend-zone-level-300>.

156. For discussion of this model, and the rationale for adopting it, see James LaRue, *The Last One Standing*, PUB. LIBR., Jan./Feb. 2012, at 28; Monique Sendze, *The E-Book Experiment*, PUB. LIBR., Jan./Feb. 2012, at 34. Other libraries and library consortia are following the Douglas County

the content.”<sup>157</sup> Under this model, the library negotiates directly with publishers to purchase e-book files that the library owns and hosts on its own server.<sup>158</sup> The founders of the Douglas County model urge libraries to “fight to regain control of the content and establish . . . rules that will benefit the library patron most.”<sup>159</sup> The underlying premise of this model should inspire librarians to take control and not simply follow whatever path publishers choose. Addressing licensing and contract agreement terms is a direct way for a library to control the provision of research support.

### Collaboration

¶46 Libraries may be unable to negotiate favorable terms in all their agreements with publishers. Pricing and other limitations may realistically preclude access to some resources. Restrictions on lending, borrowing, and licensing e-journals and e-books force libraries to seek other arrangements to ensure access for researchers to a wide range of scholarly works. As one alternative, libraries can expand access for their patrons by participating in collaborative licensing and purchasing with other libraries. In this type of arrangement, participants provide funding for shared resources. There are no lending and borrowing issues because there is joint licensing or ownership. All users of participating libraries have access. This collaboration can greatly expand the diversity and amount of accessible materials for individual libraries. Because of increased market power, representatives of a group or partnership may be able to negotiate considerably more favorable pricing and terms than individual libraries could. Collaborative funding, licensing, and ownership can help libraries overcome limitations on accessing and providing e-resources.

### Examples of Collaborative Collections

¶47 *Collaborative Database Collections.* A powerful means of procuring access to electronic materials is through a consortium. The OhioLINK consortium has long been a model of library collaboration, including collaborative funding for shared e-resources.<sup>160</sup> Membership encompasses almost ninety Ohio libraries from

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model. Matt Enis, *Momentum Builds for DCL's eBook Model*, DIGITAL SHIFT (May 9, 2012), <http://www.thedigitalshift.com/2012/05/ebooks/momentum-builds-for-dcls-ebook-model>. See also Sue Polanka, *Trailblazers: Moving the Library Upstream in the Digital Distribution Process*, ONLINE, July/Aug. 2012, at 53.

157. Sendze, *supra* note 156, at 35.

158. Publishers usually do not sell e-book files to libraries, instead providing e-books through an aggregator (distributor). STANLEY M. BESEN & SHEILA NATARAJ KIRBY, E-BOOKS AND LIBRARIES: AN ECONOMIC PERSPECTIVE 6 (2012), [http://www.ala.org/offices/sites/ala.org.offices/files/content/oitp/publications/booksstudies/ebooks\\_libraries\\_economic\\_perspective.pdf](http://www.ala.org/offices/sites/ala.org.offices/files/content/oitp/publications/booksstudies/ebooks_libraries_economic_perspective.pdf). The publisher licenses a right of distribution to the aggregator. The aggregator then sublicenses to libraries and hosts the e-books on its proprietary software platform. O'Brien, Gasser & Palfrey, *supra* note 96, at 11. The publisher usually dictates the terms of the sublicense. *Id.* at 12.

159. Sendze, *supra* note 156, at 35. “DCL believes that no contract should be signed without the right to own a copy of the e-book file, to lend that e-book to our users for as long as we decide, and to receive the e-book in an EPUB format.” *Id.*

160. OhioLINK celebrated its twentieth anniversary in 2012. Press Release, Univ. System of Ohio, OhioLINK Celebrates 20th Anniversary of Shared Services (Nov. 1, 2012), <https://www.ohiohighered.org/press/ohiolink-celebrates-20th-anniversary-shared-services>. OhioLINK services for all members include statewide borrowing and delivery among all member institutions. See *The*

a broad range of institutions of higher education, both public and private.<sup>161</sup> Collaborative funding and licensing<sup>162</sup> provide member faculty, staff, and students with access to over one hundred research databases and almost ten thousand e-journals.<sup>163</sup> This access and the scope of the materials is far beyond what individual member institutions could provide in either electronic or print format.<sup>164</sup>

¶48 *Collaborative E-book Collections.* In recent years, libraries have also partnered to fund shared e-book collections. These partnerships illustrate how collaboration can provide access to otherwise unavailable e-resources and allow a library to better support research needs. Rather than maintaining individual locked collections, the participants can all access a wider range of resources. Due to the extensive coordination needed to develop and provide shared e-book collections,<sup>165</sup> the partners are often members of established library consortia that are expanding their collaboration. On the other hand, a few libraries with shared interests can also establish a collaborative e-book collection. The following examples illustrate the organization and models of three collaborative e-book collections.

¶49 One library consortium that has recently developed a successful shared e-book program is the Orbis Cascade Alliance (Orbis), which has thirty-seven academic library members, primarily in Washington and Oregon.<sup>166</sup> Orbis members share the print resources of the individual members by maintaining a union catalog, giving borrowing privileges to all member library users, and providing a courier

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*Ohio Library and Information Network, OHIOLINK*, <http://www.ohiolink.edu/about/what-is-ol.html> (last updated Jan. 4, 2013).

161. *The Ohio Library and Information Network*, *supra* note 160. The number of libraries participating in OhioLINK is actually much greater than ninety because many institutions have multiple libraries. The consortium also includes the State Library of Ohio. For a list of members, see *OhioLINK Member Libraries*, OHIOLINK, <http://www.ohiolink.edu/members-info/> (last visited Aug. 17, 2013).

162. Although OhioLINK receives state funding, members provide most of the funding for e-resources. See OHIOLINK, *SNAPSHOT 2008: SUPPORTING TEACHING, LEARNING AND RESEARCH 11* (2008), available at <http://www.ohiolink.edu/about/snapshot2008.pdf> (member libraries provide \$22.3 million of the consortium's \$26.7 million budget). OhioLINK negotiates group license fees. Member funding is through a combination of funding models. In one model, OhioLINK pays a portion of the cost and the members pay a portion of the remaining cost based on the number of their FTE users. If a limited number of members are interested in a database, they can each "pay to play" and only their users will have access. If enough member institutions are interested so that the cost for them all to pay to play is equal to or greater than the group license, then OhioLINK will use the pooled funds to obtain a group license. All members then have access to the database. This model is called the NPR model since, like National Public Radio, a few pay and many benefit. See Rocki Strader & Sandy Hurd, *Complicated, Constant, and Consortial: Managing Electronic Resources at The Ohio State University*, PowerPoint presentation at North Carolina Serials Conference, Apr. 15–16, 2004, available at <http://www.nccuslis.org/conted/serials2004/StraderHurd.ppt> (slides 23–24).

163. *The Ohio Library and Information Network*, *supra* note 160.

164. *Snapshot 2008: Supporting Teaching, Learning and Research*, *supra* note 162, at 4.

165. See James Bunnelle, *Pilot to Program: Demand Driven E-books at the Orbis-Cascade Consortium, 1 Year Later*, AGAINST THE GRAIN, Nov. 2012, at 24, for a discussion of some of the logistics involved in establishing a collaborative e-book arrangement.

166. ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org> (last updated Aug. 2, 2013). A list of members is available at *Members*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/member-institutions> (last updated Aug. 28, 2013).

system for delivery of requests.<sup>167</sup> When members began to acquire e-books for their individual collections, however, they determined that they could not provide access to the e-books for the users of other consortium libraries.<sup>168</sup> Rather than maintain separate, locked e-book collections, the libraries chose to develop shared funding<sup>169</sup> as well as shared development of the collection.<sup>170</sup>

¶50 The Orbis e-book project illustrates how “a diverse group of academic libraries across two states, with vastly different missions, financial situations, and FTEs”<sup>171</sup> expanded its collaborative model to include collective funding and acquisitions.<sup>172</sup> Users of all member libraries can access the e-books, providing a benefit to the individual libraries that they would otherwise not have if they maintained only their own e-book collections.

¶51 Even without a formal consortial agreement, two or more libraries with similar collections and focus can partner to develop and share an e-book collection. For example, the University of Florida Levin College of Law Legal Information Center and the Florida State University College of Law Research Center have agreed to develop and share an e-book collection. Each library contributed equal funding for the acquisitions. Users from both libraries have access to the selected e-books, with a maximum of three simultaneous users from either law library for any particular book. Both law libraries have perpetual ownership of the selected books.<sup>173</sup>

¶52 A consortium interested in sharing an e-book collection could use the Douglas County model. Under this model, the consortium would purchase e-book files from the publisher and maintain them on its own server. An example of a consortium using this type of model is the Califa Library Group, which is an

167. *About the Alliance*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/about-the-alliance> (last updated Nov. 30, 2012).

168. Emery, *supra* note 83 at 133. One librarian observed that Orbis members were concerned about “how our consortium would continue meeting the needs of our users as each library purchased e-books that could not be shared within the Alliance.” *Id.* at 136.

169. *See id.* at 134.

170. The development of the e-book collection is through a demand-driven acquisitions (DDA) model (also known as patron-driven acquisitions (PDA)). In this model, librarians decide on titles that will be available for user selection, but it is a user’s selection of the title that will trigger a purchase. Emily McElroy & Susan Hinken, *Pioneering Partnerships: Building a Demand-Driven Consortium eBook Collection*, AGAINST THE GRAIN, June 2011, at 34, 36. Orbis partnered with YBP and EBL to develop the Orbis model. The system allows the first few uses of a book to be short-term loans. After a threshold number of users have accessed the book, the book is purchased. *Id.* For more discussion of the Orbis DDA model, see *FAQ: Orbis-Cascade’s DDA Program*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/orbis-cascade-alliance-ebook-working-group> (under FAQ and Related Documents, click on Orbis Cascade’s Demand Driven Project) (last updated Oct. 16, 2012).

171. Emery, *supra* note 83, at 136.

172. Each member contributes funds based on a formula. *See Board Meeting Minutes 2012 February 17*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/board-meeting-minutes-2012-february-17> (last updated July 2, 2012).

173. *Seminoles and Gators: Can Shared Patron-Driven Acquisitions of E-books Overcome the Rivalry?*, program presented at the Annual Meeting of the Am. Ass’n of Law Libraries, Boston, Mass., July 23, 2012 (audio on file with author). The university libraries of the two institutions have a cooperative partnership. The selection of books is through PDA, which means that the library users from either library select the books for purchase. Once users from either library access a title through the catalog, the e-book is purchased for the combined collection.

alliance of more than 220 libraries.<sup>174</sup> In May 2013, Califa launched the Enki Library<sup>175</sup> using a model similar to the Douglas County model.<sup>176</sup> The project manager noted that small libraries would have difficulty adopting the Douglas County model on their own, but “through working together cooperatively, they will have the same results.”<sup>177</sup> This model could work well in a consortium or partnership of libraries that can share the resource management.

### *Implications of Adopting a Collaborative Collection Model*

¶53 Collaborative licensing and ownership of collections require joint responsibility for a shared collection, while cooperative lending requires sharing resources from separate collections. This distinction necessitates a shift away from the traditional view of libraries. In cooperative lending arrangements, there is extensive sharing of resources as users from participating libraries borrow materials from individual collections.<sup>178</sup> Underlying these efforts is a “view of the research library as an independent and self-sustaining organization.”<sup>179</sup> Libraries share their resources, but each develops, funds, and maintains its own collection. Research libraries have developed collections “separately . . . and even competitively.”<sup>180</sup>

¶54 To support research in an electronic environment, libraries must “forge alliances with the larger community” despite “tension between collaboration and self interest.”<sup>181</sup> Libraries must move from “sharing of resources” to “sharing of dependencies.”<sup>182</sup> Ultimately, the collaboration creates “new value”<sup>183</sup> as the shared collection is stronger. Shared collections, whether licensed or owned, make it difficult to distinguish how one collection is “better” than another. The strength of each library collection lies, in part, in the combined resources and access. It is possible that the continuing development of collaborative collections could affect assessment measures for libraries, since those measures often compare individual collections.

174. *Membership FAQ*, CALIFA, <http://califa.org/members/faq/member-faq/> (last visited Sept. 7, 2013).

175. *Ebooks*, CALIFA, <http://califa.org/ebooks/> (last visited Aug. 17, 2013).

176. Matt Enis, *Declaring Independence*, DIGITAL SHIFT (July 26, 2013), <http://www.thedigitalshift.com/2013/07/ebooks/declaring-independence/>.

177. Michael Kelley, *Large California Consortium Joins Movement Toward Library Ebook Ownership*, DIGITAL SHIFT (Mar. 12, 2012), <http://www.thedigitalshift.com/2012/03/ebooks/large-california-consortium-joins-movement-toward-library-ebook-ownership> (quoting Heather Teysko, Califa project manager).

178. Cooperative lending arrangements can include using a union catalog, granting borrowing privileges for users of participating libraries, and maintaining pickup and delivery services for borrowed materials.

179. James G. Neal, *Advancing from Kumbaya to Radical Collaboration: Redefining the Future Research Library*, 51 J. LIBR. ADMIN. 66, 66 (2011).

180. SMITH, *supra* note 4, at 43.

181. COUNCIL ON LIBRARY & INFO. RESOURCES, NO BRIEF CANDLE: RECONCEIVING RESEARCH LIBRARIES FOR THE 21ST CENTURY 6 (Aug. 2008), available at <http://www.clir.org/pubs/reports/pub142/reports/pub142/pub142.pdf>.

182. Patricia Battin, *Research Libraries in the Network Environment: The Case for Cooperation*, 6 J. ACAD. LIBRARIANSHIP 68, 70 (1980).

183. Rosabeth Moss Kanter, *Collaborative Advantage: The Art of Alliances*, HARV. BUS. REV., July/Aug. 1994, at 96, 97 (defining collaboration).

¶55 Participation in sharing collaborative electronic collections can significantly benefit member libraries by expanding direct access to works and providing materials at a more favorable price. Members would not be able to own or even borrow many of these works if they did not participate. In most cases, however, the participants are also working within “the system” by operating within parameters still largely controlled by publishers.<sup>184</sup> For example, they may not be able to lend some works outside of the consortium. It is the participants in these arrangements that primarily benefit, while the research community as a whole may not. The control of publishers over the works in the system still limits the wider community of libraries in supporting the research needs of scholars.

### Using Technology to Gain Control: Open Access

¶56 Access to scholarly material is decreasing despite the technological capacity to provide information on a global scale.<sup>185</sup> The suggestions in earlier sections can help ameliorate shrinking access to scholarly works. Ultimately, however, success in ensuring research support lies in gaining control over the ownership and distribution of scholarly works. Institutions, scholars, and libraries can use technology to gain this control.

¶57 Publishers are engaged in “know-biz,” that is, managing scholarly works as a commodity.<sup>186</sup> Publishers are businesses and will manage their assets to maximize profits. This approach focuses on the competitive value of knowledge and information. It ignores, however, that the knowledge captured in scholarly works has another value, the “accumulative value.”<sup>187</sup> As Peter Johan Lor and Johannes Britz describe, “[K]nowledge is created cumulatively. Knowledge is needed to create new knowledge. This gives rise to [another] value: the value of knowledge for the further development of science and scholarship.”<sup>188</sup> Scholars write not only to be read, but to “influence more new writing.”<sup>189</sup> This scholarly work comes with a duty. John Willinsky discusses what he calls the “access principle,” which is that “a commitment to the value and quality of research carries with it a responsibility to extend the circulation of this work as far as possible, and ideally to all who are interested in it and all who might profit by it.”<sup>190</sup> Kathleen Fitzpatrick describes the scholarly duty as “paying forward knowledge that one likewise received as a gift.”<sup>191</sup>

184. The exception would be libraries participating in a Douglas County model of collaborative collections. This model could enhance libraries’ ability to contribute to a wider community.

185. JOHN WILLINSKY, *THE ACCESS PRINCIPLE* 17 (2006).

186. *Id.* See Peter Johan Lor & Johannes Britz, *Knowledge Production from an African Perspective: International Information Flows and Intellectual Property*, 37 INT’L INFO. & LIBR. REV. 61, 65 (2005) (“[W]e are seeing the focus of journal publishers shift from the journal as a unit, to the individual article as the sellable commodity.”).

187. Lor & Britz, *supra* note 186.

188. *Id.* at 63. Lor and Britz point out that knowledge, if it is a commodity, is not the same as other commodities. It has six different values, five of which are public values. It is only the competitive value that is private. *Id.* at 63–64.

189. Kathleen Fitzpatrick, *Giving It Away: Sharing and the Future of Scholarly Communication*, PLANNED OBSOLESCENCE (Jan. 12, 2012), <http://www.plannedobsolescence.net/blog/giving-it-away>.

190. WILLINSKY, *supra* note 185, at 5 (emphasis omitted).

191. Fitzpatrick, *supra* note 189.



Publisher business models do not support these values and often work at cross-purposes to them.<sup>192</sup>

¶58 In the past, publishers were essential for disseminating scholarly works, but changes in technology have allowed scholars to elect other options for publishing.<sup>193</sup> One alternative model of publishing and distribution is open access. Open access is a transformation in the scholarly communication system.<sup>194</sup> Authors retain control of their works and can disseminate them in a way that maximizes their accumulative value. Open access works are scholarly works that are freely available online with minimal or no restrictions on use.<sup>195</sup> Two primary vehicles for open access works are open access journals and open access repositories.<sup>196</sup> There are now also open access e-book collections.<sup>197</sup> “Barrier-free access” to these works

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192. Publishers may even decide to abandon publishing academic works. See JOHN B. THOMPSON, *BOOKS IN THE DIGITAL AGE* 97–98 (2005); Fitzpatrick, *supra* note 189. See also Jennifer Smith, *Thomson Reuters Bids Adieu to Law School Publishing*, PRIVATE EQUITY BEAT (Feb. 4, 2013), <http://blogs.wsj.com/privateequity/2013/02/04/thomson-reuters-bids-adieu-to-law-school-publishing> (discussing Thomson Reuters’ sale of its law school publishing division).

193. See Gowers, *supra* note 84. Gowers initiated a boycott against the publisher Elsevier: “Why can’t we just tell Elsevier that we no longer wish to publish with them? Well, part of the answer is that we *can*. . . [W]e have much greater bargaining power than we are wielding at the moment, for the very simple reason that we don’t actually *need* their services.” Gowers noted that Elsevier’s actions were business decisions. It was up to scholars to choose not to publish with Elsevier because working with Elsevier was “making it easier for Elsevier to take action that harms academic institutions.” *Id.* See also Stacy Johnson, *Why Do E-Books Cost So Much?*, CHRISTIAN SCI. MONITOR (Jan. 12, 2013), <http://www.csmonitor.com/Business/Saving-Money/2013/0112/Why-do-e-books-cost-so-much> (discussing how authors can now publish and promote books themselves without the need for publishers).

194. See Charles W. Bailey, Jr., *What is Open Access*, in OPEN ACCESS: KEY STRATEGIC, TECHNICAL AND ECONOMIC ASPECTS 13, 13 (Neil Jacobs ed., 2006). For a general discussion of the open access movement, see Peter Suber, *Opening Access to Research*, BERFROIS (Aug. 24, 2012), <http://www.berfrois.com/2012/08/peter-suber-opening-access-to-research> [hereinafter Suber, *Opening Access to Research*]; Peter Suber, *Open Access Overview*, <http://legacy.earlham.edu/~peters/fos/overview.htm> (last updated Aug. 12, 2013) [hereinafter Suber, *Open Access Overview*]. For a discussion of the open access movement and open access as it relates to legal scholarship, see Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship*, 37 N.M. L. REV. 431 (2007).

195. See Suber, *Open Access Overview*, *supra* note 194. The 2002 Budapest Open Access Initiative contains the well-known definition of open access for scholarly literature:

The literature that should be freely accessible online is that which scholars give to the world without expectation of payment. . . . By “open access” to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.

BUDAPEST OPEN ACCESS INITIATIVE (Feb. 14, 2002), <http://www.opensocietyfoundations.org/open-access/read>.

196. Suber, *Open Access Overview*, *supra* note 194. Repositories can contain many types of scholarly works, including “gray literature,” which encompasses works such as conference presentations that may not otherwise be published. Jennifer Howard, *Academic Libraries Expand Their Publishing Services, but with Limited Resources*, WIRED CAMPUS (Nov. 1, 2011, 9:11 P.M.), <http://chronicle.com/blogs/wiredcampus/academic-libraries-expand-their-publishing-services-but-with-limited-resources/34086> (quoting Charles Watkinson, director of Purdue University Press).

197. See, e.g., AMHERST COLL. PRESS, <https://www.amherst.edu/library/press> (last visited July 31, 2013); *Frequently Asked Questions*, AMHERST COLL. PRESS, <https://www.amherst.edu/library/press/faq> (last visited Sept. 7, 2013).

“helps readers find and retrieve the research they need, and helps authors reach readers who can apply, cite and build on their work.”<sup>198</sup>

¶59 Open access works and collections allow libraries to address what Peter Suber calls the “permission crisis.” This arises out of the control the publishers exert over scholarly works through licensing and technological controls.<sup>199</sup> Along with the “pricing crisis,” the permission crisis “severely impedes research.”<sup>200</sup> Suber views open access as the solution to both of these crises for libraries. He argues that “[i]f we had to persuade publishers to give up their revenue streams, or legislatures to reform copyright law” then we would make no headway.<sup>201</sup> Open access provides both free access (which addresses pricing) and unrestricted use (which addresses permission). With open access, the copyright holder controls pricing and permissions. When publishers hold copyrights, they “create pricing and permission barriers.”<sup>202</sup> Suber stresses: “The key to open access is not to abolish or violate copyright, but to keep copyright in the hands of . . . authors who retain copyright” or who transfer their rights “to open access publishers.”<sup>203</sup> It is open access that will ultimately ensure and even expand research support and the accumulated value of knowledge.

### *The Role of Libraries*

¶60 Research libraries should play a “proactive role . . . in increasing access to . . . knowledge”<sup>204</sup> by enabling and supporting open access. There is a “remarkable harmony” between the skills of research librarians and the skills needed to support open access efforts such as the development of repositories.<sup>205</sup> An ARL task force in 2009 noted that while “[r]epository management will not be the sole purview of libraries . . . libraries have key strengths and missions requiring them to undertake various roles in repository service development.”<sup>206</sup>

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198. Suber, *Opening Access to Research*, *supra* note 194.

199. Peter Suber, *Removing the Barriers to Research: An Introduction to Open Access for Librarians*, 64 C. & RES. LIBR. NEWS 92, 92 (2003).

200. *Id.* at 93.

201. *Id.*

202. *Id.*

203. *Id.*

204. JOHN WILLINSKY, *THE ACCESS PRINCIPLE*, at xv (paperback ed. 2009).

205. Charles W. Bailey, Jr., *Open Access and Libraries*, 32 COLLECTION MGMT. 351, 372 (2006). See also Richard A. Danner, *Supporting Scholarship: Thoughts on the Role of the Academic Law Librarian*, 39 J.L. & EDUC. 365, 385 (2010) (noting the “specialized skills” that law librarians can bring to supporting open access).

206. ASS’N OF RESEARCH LIBRARIES, *THE RESEARCH LIBRARY’S ROLE IN DIGITAL REPOSITORY SERVICES* 10 (2009), available at <http://www.arl.org/storage/documents/publications/repository-services-report-jan09.pdf>. The task force considered “delivering repository services” to be “a crucial function of research libraries.” *Id.* at 9. The task force report also discussed areas where research libraries should seek to make contributions. *Id.* at 35–37.



¶61 There are numerous roles for libraries in supporting and facilitating open access.<sup>207</sup> Key areas of library involvement are preservation<sup>208</sup> and curation.<sup>209</sup> Law libraries can not only assist in developing repositories,<sup>210</sup> but they can also deeply engage in support of scholarship because law reviews are student edited and under the sponsorship of law schools.<sup>211</sup>

¶62 Research libraries are already supporting open access efforts at institutions of higher education. These libraries are “contribut[ing] actively to the evolution of scholarly communication”<sup>212</sup> and are “no longer simply consumers of scholarly information.”<sup>213</sup> One area of library activism is digital publishing. According to a 2012 report on library publishing services, academic libraries are actively involved with scholarly publishing.<sup>214</sup> Fifty-five percent of the respondents “indicated having or developing library publishing services.”<sup>215</sup>

207. Bailey, *supra* note 205, at 370–75. These activities include digitizing public domain works, providing enhanced access to open access works, preserving open access works, and engaging in digital publishing. *Id.*

208. See COUNCIL ON LIBRARY & INFO. RESOURCES, *supra* note 181, at 43; Richard A. Danner, Kelly Leong & Wayne V. Miller, *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 LAW LIBR. J. 39, 52–54, 2011 LAW LIBR. J. 2, ¶¶ 43–45 (discussing preservation of e-journals in law). In 2005, ARL endorsed a statement regarding the urgent need to preserve e-journals. Press Release, Ass’n of Research Libraries, ARL Endorses Call for Action to Preserve E-Journals (Oct. 31, 2005), <http://old.arl.org/news/pr/presvejrnl0ct05~print.shtml>. The statement noted: “[A]s the creation and use of digital information accelerate, responsibility for preservation is diffuse, and the responsible parties . . . have been slow to identify and invest in the necessary infrastructure to ensure that the published scholarly record represented in electronic formats remains intact over the long-term.” There was concern for the proliferation of publisher-controlled works. The statement urged the development of “trusted archives in which the published scholarly record in electronic form can persist outside of the exclusive control of publishers, and in the control of entities that value long-term persistence.” *Urgent Action Needed to Preserve Scholarly Electronic Journals* 1–2, <http://www.arl.org/storage/documents/publications/ejournal-preservation-15oct05.pdf>. The statement’s focus was on e-journals still under publisher control, but the concerns are equally applicable to open access journals.

209. One writer noted the confusion arising from the proliferation of repositories: “Repository fatigue is setting in: publisher repositories, disciplinary repositories, academic unit repositories, institutional repositories, individual repositories, government repositories, national repositories, preservation repositories . . . . What is the authoritative, official and citable version? . . . How do we work together to integrate and rationalize repositories and the open-access agenda into the system of scholarly communication and collection development in our libraries?” Neal, *supra* note 179, at 70.

210. Danner, *supra* note 205, at 385.

211. Benjamin Keele and Michelle Pearse have provided an extensive list and discussion of how law libraries can be more engaged in assisting law reviews. Keele & Pearse, *supra* note 2. These suggestions go beyond traditional library support by involving librarians in key aspects of law review production, both print and electronic.

212. RAYM CROW, THE CASE FOR INSTITUTIONAL REPOSITORIES: A SPARC POSITION PAPER 20 (2002), available at [http://works.bepress.com/ir\\_research/7/](http://works.bepress.com/ir_research/7/).

213. Bailey, *supra* note 205, at 371.

214. CROW ET AL., *supra* note 3. A version of the report on the SPARC web site (<http://wp.sparc.arl.org/lps>) also contains substantial appendixes. For additional discussion of developments in library publishing, see sources cited in Keele & Pearse, *supra* note 2 at 384 n.8. See also KARLA L. HAHN, RESEARCH LIBRARY PUBLISHING SERVICES: NEW OPTIONS FOR UNIVERSITY PUBLISHING (2008), <http://www.arl.org/storage/documents/publications/research-library-publishing-services-mar08.pdf> (discussing the results of a 2007 survey of ARL members regarding library publishing services). The report noted that “[p]ublishing services are rapidly becoming a norm for research libraries, particularly journal publishing services.” HAHN, *supra*, at 7.

215. CROW ET AL., *supra* note 3, at 6. One example of a library publisher is the Amherst College Press. Their web site notes: “In addition to the library’s traditional role of collecting

¶63 Of these programs, almost ninety percent “were launched in order to contribute to change in the scholarly publishing system.”<sup>216</sup> Bryn Geffert, in discussing the formation of the Amherst College Press, which is affiliated with the college’s library, wrote: “We cannot provide those we serve with what they need. Perhaps it is time to produce ourselves what we can no longer afford to purchase; to use personnel and financial resources from our libraries, even our small libraries, to save and revive academic publishing of high quality.”<sup>217</sup>

¶64 Kathleen Fitzpatrick, in discussing the problems arising from the current publishing model, declared: “We can’t beat them, and we can’t join them; what we can do is change the game entirely. One clear way of changing the game, dramatically and unequivocally, is a move toward the full embrace of open access modes of digital publishing.”<sup>218</sup> Academic libraries should be proactive in assuming a pivotal role in not only the production and preservation of knowledge, but also the development of new modes of scholarly publishing.<sup>219</sup> These new modes allow scholars to gain control of scholarly works and their dissemination. Gaining control of works ensures increases in the accumulative value of knowledge and promotes the access principle.

## Conclusion

¶65 The advanced technology that supports publisher domination over scholarly works also now allows institutions, scholars, and libraries to control those works and expand availability of them to all.<sup>220</sup> Open access for scholarly works supports the core values of scholarship and also promotes the furtherance of knowledge, the underlying principle of copyright law.<sup>221</sup> The development of open

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knowledge, it will begin *producing* knowledge and facilitating the free, electronic distribution of high-quality literature and scholarship.” AMHERST COLL. PRESS, *supra* note 197. See also Scott Jaschik, *New (Kind of) Scholarly Press*, INSIDE HIGHER ED (Dec. 6, 2012), <http://www.insidehighered.com/news/2012/12/06/amherst-college-launches-open-access-scholarly-press> (discussing the launch of Amherst College Press). For more on library publishing, see KATHLEEN FITZPATRICK, *PLANNED OBSOLESCENCE: PUBLISHING, TECHNOLOGY, AND THE FUTURE OF THE ACADEMY* 167–69 (2011); Adeline Koh, *Are You a Press or Are You a Library? An Interview with NYU’s Monica McCormick*, CHRON. OF HIGHER EDUC.: PROFHACKER (Mar. 27, 2012, 11:00 A.M.), <http://chronicle.com/blogs/profhacker/press-or-library/39216>; Press Release, Utah State Univ., Utah State University Press Merges With Merrill-Cazier Library (Nov. 2, 2009), <http://www.usu.edu/ust/index.cfm?article=40291>.

216. CROW ET AL., *supra* note 3, at 6. As Bryn Geffert, Amherst College Librarian, stated with regard to the creation of the Amherst College Press: “Current models of scholarly publishing do far more to lock down than to disseminate it to those who need it.” Press Release, Amherst Coll., Amherst College to Launch First Open-Access, Digital Academic Press Devoted to the Liberal Arts (Dec. 5, 2012), <https://www.amherst.edu/library/press/news>.

217. Bryn Geffert, *Libraries, Publishers, and a Plea for Shotgun Weddings*, CHRONICLE REVIEW (Mar. 20, 2011), <http://chronicle.com/article/Libraries-Publishinga/126755/>.

218. FITZPATRICK, *supra* note 215, at 159–60.

219. Fitzpatrick argues that libraries may have the “key position in the scholarly publishing program of the future.” *Id.* at 169.

220. See WILLINSKY, *supra* note 185, at 39. Willinsky notes that the “technology that is used by journal publishers to . . . exploit and enforce their ownership of scholarly literature” is the same technology used “by researchers to make their work available through open e-print archives.” *Id.*

221. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “To *promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” (emphasis added)).

access requires committed action from institutions, scholars, and libraries. Institutions must support open access and alternative publishing. Scholars must also embrace this reform, including publishing their works through open access.<sup>222</sup> Libraries must assume a substantial role in this reform of the scholarly communication system.

¶66 As libraries take on this vital role in supporting faculty publishing, “the best approach is to engage staff as soon as possible, to help them envision themselves in an open access future.”<sup>223</sup> Some libraries will not have the resources to immediately engage in actions that involve control of digital works, such as publishing open access works, digitizing and maintaining open access archives, or owning e-resource files in a Douglas County model. Initiating and participating in consortial and other group arrangements and agreements for these services is therefore critical to making advances.<sup>224</sup>

¶67 Although the open access movement is progressing, vast numbers of works are already locked under publisher control, and that number is increasing every day. Publishers have become “choke points in the distribution of knowledge.”<sup>225</sup> Limitations and prohibitions on library use of materials for research support continue. New models do not “address the problem of accessing copyrighted material that has not been disseminated under an open access model.”<sup>226</sup> Gaining control of scholarly works through open access and ownership models cannot be the only path to ensuring research support. Libraries must vigorously pursue other strategies.

¶68 Libraries should focus their efforts on influencing and changing licenses, contracts, and business models for e-collections. Libraries can increase their negotiating power and the scope of their access to works through consortial efforts. Whether acting individually or as a group, libraries must not simply accept publisher proposed arrangements, even if those arrangements are financially tempting. They must not be lulled into accepting licensing and usage arrangements that eliminate fair use and other rights. Libraries must be aware of when exercise of these rights is appropriate and not merely assume that they do not apply.

¶69 Many libraries have been complacent in accepting publisher arrangements for e-resources. Going forward, libraries should review all current agreements and consider carefully any new arrangements, particularly business models for e-books. In some cases, a library will need a particular resource and will not be able to walk

222. When scholars cling to traditional methods of publication, they help perpetuate the current system and turn their works into restricted commodities. Joseph J. Branin & Mary Case, *Reforming Scholarly Publishing in the Sciences: A Librarian Perspective*, 45 NOTICES OF THE AMS 475, 485 (1998).

223. Heather Morrison, *Rethinking Collections—Libraries and Librarians in an Open Age: A Theoretical View*, 12 FIRST MONDAY, no. 10, Oct. 2007, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1965/1841>.

224. HathiTrust is an example of a partnership among research institutions and libraries that collaboratively develop, own, and maintain a digital repository. See *About*, HATHITRUST, <http://www.hathitrust.org/about> (last visited July 9, 2013).

225. Peter Ludlow, *Aaron Swartz Was Right*, CHRONICLE REVIEW (Feb. 25, 2013), <http://chronicle.com/article/Aaron-Swartz-Was-Right/137425/>.

226. ASS'N OF RESEARCH LIBRARIES, *supra* note 1, at 11.

away or negotiate favorable terms. Still, libraries should assertively make an ongoing effort, revisiting arrangements on a regular basis. Academic libraries must focus on their mission to “promote the creation and diffusion of knowledge and to preserve it for the long term”<sup>227</sup> as they acquire and maintain e-collections.

¶70 It is imperative that academic libraries act to protect research support. Just discussing what to do is not enough. Jamie LaRue describes people who “talk the talk but don’t walk it, who have plenty to say but never get around to doing anything” as “all hat, no cattle.”<sup>228</sup> He urges that librarians “corral some cattle” and take action “to provide access to the intellectual content of our culture.”<sup>229</sup> Library engagement will involve considerable work and require in many cases that librarians move outside of traditional roles. In pursuing these options, libraries “must preserve traditional library values, not traditional library institutions, processes, and services.”<sup>230</sup> Taking action requires more than merely adapting to change as digital collections increase. Librarians must do more than react to change. They “must be more willing not just to accept change, but to become its agents.”<sup>231</sup>

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227. Mullins et al., *supra* note 3, at 1.

228. Jamie LaRue, *All Hat, No Cattle: A Call for Libraries to Transform Before It's Too Late*, LIBR. J., Aug. 2012, at 32, 32.

229. *Id.* at 34.

230. Eric Van de Velde, *Annealing the Library*, SCITECH SOCIETY (Apr. 17, 2012), <http://scitechsociety.blogspot.com/2012/04/annealing-library.html#!/2012/04/annealing-library.html>.

231. FREDERICK G. KILGOUR, *BEYOND BIBLIOGRAPHY* 5 (1985). Kilgour, a leading agent of change, founded OCLC (Online Computer Library Center), the world’s largest international library network. Margalit Fox, *Frederick G. Kilgour, Innovative Librarian, Dies at 92*, N.Y. TIMES, Aug. 2, 2006, at B8; Press Release, Frederick G. Kilgour, Founder of OCLC, Dies at 92, OCLC (Aug. 1, 2006), <http://worldcat.org/arcviewer/2/OCC/2010/05/07/H1273247331100/viewer/file442.htm>.

## A View from the Flip Side: Using the “Inverted Classroom” to Enhance the Legal Information Literacy of the International LL.M. Student\*

Catherine A. Lemmer\*\*

*International students enrolled in LL.M. programs in U.S. law schools come with a wide variety of legal experience. As part of their introduction to U.S. law, students take a legal research course to prepare them to competently undertake the research necessary to complete a master’s thesis and to perform legal research in clinics, internships, externships, and U.S. law firms and legal departments. This article argues that the “flipped” classroom pedagogical model is a better method for developing legal information literacy in international LL.M. students than the traditional classroom model. In support of this, it presents the author’s experiences in implementing the flipped classroom to teach legal research in an international graduate law program and offers guidance to others seeking to use the flipped classroom model to teach legal research.*

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Introduction

¶1 International students enrolled in LL.M. programs in U.S. law schools, such as the one at the Indiana University Robert H. McKinney School of Law,<sup>1</sup> come to these programs with a wide variety of legal experiences. Most students have undergraduate law degrees from their home countries, and many have practiced law or worked in law-related jobs before coming to study in the United States.<sup>2</sup> However, their legal education, training, and experience are very different from that taught in U.S. law schools and engaged in by attorneys practicing in the United States.

¶2 As part of their introduction to U.S. law, students in the LL.M. program at the McKinney School of Law are required to take a one-credit legal research course<sup>3</sup> to prepare them to competently undertake the research necessary to complete a master's thesis and to perform legal research in clinics, internships, externships, and U.S. law firms and legal departments.<sup>4</sup> Our legal research instruction seeks to develop the legal information literacy of law students; that is, the ability to find,

1. *Master of Laws (LL.M.) Program Tracks: American Law for Foreign Lawyers*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF LAW, <http://mckinneylaw.iu.edu/degrees/llm/program-tracks/american/index.html> (last visited Aug. 11, 2013).

2. Carole Silver, *States Side Story: Career Paths of International LL.M. Students, or "I Like To Be in America,"* 80 FORDHAM L. REV. 2383, 2384 (2012).

3. I taught the fourteen-week, one-credit course in the LL.M. program at the Indiana University Robert H. McKinney School of Law for the first time in the spring semester of 2011. During two semesters, I concurrently taught a required online asynchronous legal research course to second-year J.D. students. Simultaneously teaching a traditional, face-to-face podium course and an online course provided an opportunity to evaluate and ultimately find wanting the traditional classroom model for teaching legal research to international graduate law students. In the spring of 2012, I did not teach the international LL.M. legal research course and used the time to significantly rework the course using the flipped classroom model for the fall semester of 2012. That experience is detailed in the case study described in this article.

4. *Master of Laws (LL.M.) Program Tracks: American Law for Foreign Lawyers, Curriculum*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF LAW, <http://mckinneylaw.iu.edu/degrees/llm/program-tracks/american/curriculum.html> (last visited Aug. 1, 2013).



retrieve, analyze, and use legal information.<sup>5</sup> Lawyers, and those preparing for the practice of law, must possess highly developed legal information literacy skills to be competent legal researchers.

¶3 Despite prior successful legal education and practice experiences in their home countries, international students in LL.M. programs often become frustrated when doing research using U.S. legal information. Their prior legal research and practice experiences have not prepared them for the complexities of research using U.S. legal information. This is not to imply that U.S. legal education is superior to foreign legal education.<sup>6</sup> It is simply to acknowledge that different legal systems require different approaches and skills. Most international LL.M. students "come from code-based civil law countries, where the sources of law are less numerous and varied than in the U.S. common law system."<sup>7</sup> The U.S. legal system, which includes both federal and state jurisdictions and relies on the theories of precedent and *stare decisis*, is bound to frustrate students who, in many instances, are able to complete legal research in their home countries by looking up a civil code on an official government web site.<sup>8</sup> This frustration often results in less than optimal development of the requisite legal information literacy by the international graduate law student. The goal for those of us who teach legal research to international graduate law students is to develop their legal information literacy, preventing this debilitating frustration and preparing them to successfully complete legal research using the broad array of U.S. legal and nonlegal materials and information.

¶4 The "inverted" or "flipped" classroom is a pedagogical model supported by theories of active learning that replaces the traditional in-class lecture format with predelivered instructional materials and an in-class learning lab.<sup>9</sup> In the legal research course, class time is repurposed into a learning lab where students test their skills in applying the knowledge acquired from the readings and other instructional materials by researching a hypothetical situation. The flipped classroom pedagogical model is preferable to the traditional classroom for developing legal information literacy in international LL.M. students, as it provides students with the opportunity to work in teams and apply knowledge to challenging research hypotheticals in a directed and guided environment.

¶5 This article presents a case study on using the flipped classroom model to teach legal research to international graduate law students (hereinafter LL.M. students). It first discusses the flipped classroom and recent research findings regarding the

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5. Information literacy is defined by the Association of College and Research Libraries as a "set of abilities requiring individuals to recognize when information is needed and have the ability to locate, evaluate, and use effectively the needed information." ASS'N OF COLL. & RESEARCH LIBRARIES, INFORMATION LITERACY COMPETENCY STANDARDS FOR HIGHER EDUCATION 2 (2000), available at <http://www.ala.org/acrl/sites/ala.org.acrl/files/content/standards/standards.pdf>.

6. Matthew A. Edwards, *Teaching Foreign LL.M. Students About U.S. Legal Scholarship*, 51 J. LEGAL EDUC. 520, 521 (2001).

7. Elizabeth L. Inglehart, *Teaching U.S. Legal Research Skills to International LL.M. Students: What and How*, 15 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 180, 180 (2007).

8. *Id.*

9. See generally JONATHAN BERGMANN & AARON SAMS, *FLIP YOUR CLASSROOM* (2012). See also Amy Erin Borovoy, *Five-Minute Film Festival: Flipped Classroom* (Jul. 13, 2012), <http://www.edutopia.org/blog/film-festival-flipped-classroom> (providing a series of introductory and example videos).

model's pedagogical effectiveness. It then examines the elements to consider when designing a legal research curriculum and presents a discussion of legal information literacy and its primacy in curriculum development. Next, it looks at the flipped classroom model's response to pedagogical needs in the legal education context. Finally, the article describes the experience of implementing the flipped classroom to teach legal research in an LL.M. program and offers guidance to others seeking to use the flipped classroom model to teach legal research.

### An Introduction to the Flipped Classroom

¶6 Students today expect more from a classroom experience than a passive learning opportunity that consists mostly of one-way communication with limited student interaction.<sup>10</sup> Instead, they prefer classroom experiences that encourage and help them “develop knowledge for themselves.”<sup>11</sup> As a result, “modern learning is reinventing how instructors use course material, structure their time, and more effectively drive results.”<sup>12</sup> The flipped classroom responds to the needs of modern learning and provides an effective model of “reinvention.”

¶7 Legal research instruction has traditionally involved a classroom lecture packed with instructional information and concepts and a research assignment to be completed outside of class time. This structure typically provides little opportunity for the student to fully understand difficult concepts presented in class, even though the student will be required to apply those concepts in order to successfully complete the research assignment. Due to the graded nature of the course, these assignments must be completed without consultation with classmates. This structure does not respond to the goals of today's students who want to develop knowledge and skills and apply them to solve problems, often in group and team settings.<sup>13</sup>

¶8 In the modern learning environment, “the whole point is to use the class time well.”<sup>14</sup> The flipped classroom, with its use of web-based and e-learning technologies, offers the legal research professor the chance to do just that by reserving classroom time for meaningful analytical and critical thinking activities.<sup>15</sup> Pioneered

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10. Ctr. for Digital Educ., *Issue Brief: The Flipped Classroom: Increasing Instructional Effectiveness in Higher Education With Blended Learning Technology*, available at <http://resources.echo360.com/flipped-classroom-pr> (last visited Aug. 1, 2013).

11. *Id.*

12. Press Release, Echo 360, Echo 360 Highlights Benefits of “Flipped Classroom” Practice Using Blended Learning Technology (Mar. 14, 2012) (quoting John Halpin, Vice Pres. of Strategic Progs., Ctr. for Digital Educ.), <http://echo360.com/press-release/echo360-highlights-benefits-%E2%80%9898flipped-classroom%E2%80%9999-practice-using-blended-learning>.

13. Ctr. for Digital Educ., *supra* note 10.

14. Kenneth A. Connor, *Goodbye, Podium: An Engineering Course Puts Theory into Practice*, CHRON. HIGHER EDUC., Oct. 5, 2012, at B30.

15. The flipped classroom and the traditional classroom models share the same expectation that the students will prepare for class by reading the instructional materials and come to class prepared to discuss the material with their classmates. The flipped classroom goes one step further by ensuring that all the students are engaged with the material during class time. In a typical doctrinal law class, the professor interacts with a few students in the Socratic method. In addition, students are often told when they will be required to present in class. These two factors permit the rest of the students in the class to be less engaged with the material. See Sarah Glassmeyer, *Notes from a Class Observation*, CALI

by Colorado high school science teachers Jonathan Bergmann and Aaron Sams,<sup>16</sup> and made mainstream through the Khan Academy,<sup>17</sup> flipped classrooms use technology to invert the traditional teaching environment.<sup>18</sup> Although there is no single model, the term is generally used for those class structures that use technology to deliver online instructional materials as preclass homework and then repurpose class time for individual or group lab work.<sup>19</sup> The instructional materials become a study aid to help students complete the research assignment in the lab.<sup>20</sup> During lab sessions, the professor serves as a coach or advisor, encouraging students in individual or collaborative efforts.<sup>21</sup> Students receive the same instructional content the professor would give in person, but "the focus is on doing things with the information [in a lab setting] rather than sitting passively and watching someone else demonstrate."<sup>22</sup>

¶9 The legal academy is not immune to the widespread pressures to develop cost-effective education delivery systems that are redefining other disciplines in higher education.<sup>23</sup> Similarly, the legal academy must respond to calls to better educate our students to engage with technology and manage the ever-expanding role technology plays in legal practice.<sup>24</sup> These pressures can easily lead to the wholesale adoption of technology in legal education. Although technology can have lasting value when educating adults, it is not the answer to all problems.<sup>25</sup> Technology is a tool, and like any other tool "should fill a need or solve a problem."<sup>26</sup>

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(Dec. 4, 2012, 1:50 P.M.), <http://www.cali.org/blog/2012/12/04/notes-class-observation>. Therefore the flipped classroom, particularly in the legal research context, provides the professor with an opportunity to engage all the students in the class and explore the class material more deeply because the students have already been given the instructional content.

16. BERGMANN & SAMS, *supra* note 9. See also EDUCAUSE, *Seven Things You Should Know About . . . Flipped Classrooms* (Feb. 2012), <http://net.educause.edu/ir/library/pdf/ELI7081.pdf> (providing a summary of the flipped classroom model).

17. *About*, KHAN ACADEMY, <http://www.khanacademy.org/about> (last visited Aug. 1, 2013). See also Salman Khan, *Let's Use Video to Reinvent Education*, TED TALKS (Mar. 2011), [http://www.ted.com/talks/salman\\_khan\\_let\\_s\\_use\\_video\\_to\\_reinvent\\_education.html](http://www.ted.com/talks/salman_khan_let_s_use_video_to_reinvent_education.html).

18. See Dean N. Shimamoto, *Implementing a Flipped Classroom: An Instructional Module*, <http://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/22527/ETEC690-FinalPaper.pdf?sequence=1> (instructional module is at <http://www.kokuamai.com/test/flipped>) (last visited Sept. 9, 2013).

19. See generally EDUCAUSE, *supra* note 16; Bill Tucker, *The Flipped Classroom: Online Instruction at Home Frees Class Time for Learning*, EDUC. NEXT, Winter 2012, at 82. See also Ctr. for Digital Educ., *supra* note 10 (discussing flipped classroom experiences in higher education).

20. Connor, *supra* note 14.

21. BERGMANN & SAMS, *supra* note 9, at 70–71.

22. Connor, *supra* note 14.

23. Rita Shackel, *Beyond the Whiteboard: E-Learning in the Law Curriculum*, 12 QUEENSLAND U. TECH L. & JUST. J. 105, 105 (2012).

24. See generally EDUCATING THE DIGITAL LAWYER (Oliver Goodenough & Marc Lauritsen eds., 2012), available at [http://www.law.harvard.edu/programs/plp/pages/digital\\_lawyer\\_book.php](http://www.law.harvard.edu/programs/plp/pages/digital_lawyer_book.php); MITCH KOWALSKI, AVOIDING EXTINCTION: REIMAGINING LEGAL SERVICES FOR THE 21ST CENTURY (2012); RICHARD E. SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (2008); RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE (2013); William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373 (2011).

25. See MICHELLE BOULE, MOB RULE LEARNING: CAMPS, UNCONFERENCES, AND TRASHING THE TALKING HEAD 110 (2011).

26. *Id.* See also Tanya Roscorla, *Flipped Classes: Dispelling Myths and Sharing What Works*, CTR. FOR DIGITAL EDUC. (June 28, 2012), <http://www.centerdigitaled.com/classtech/Flipped-Class-QA.html> (discussing the use of a flipped classroom that employs a variety of teaching strategies and stressing the importance of ensuring that the pedagogy drives the use of technology and not the reverse).

Therefore, the same considerations that apply to the adoption of any teaching strategy must also apply to the adoption of e-learning strategies and tools. These considerations include (1) ensuring that pedagogical goals drive the use of technology, and not vice versa; and (2) understanding how technology supports identified course learning objectives and desired outcomes, and how it enhances or supplements, rather than simply supplanting, the traditional teaching strategy.<sup>27</sup> “If caution is exercised and if technology and its limitations are well understood, then e-based learning tools undoubtedly provide a platform for innovative pathways to learning, which can serve to better prepare law students for the modern professional marketplace.”<sup>28</sup>

¶10 An examination of the flipped classroom model, when properly implemented, refutes the notion that cool technology is supplanting traditional podium teaching at the expense of pedagogy. In September 2010, the U.S. Department of Education released a report on the comparative effectiveness of online and face-to-face teaching.<sup>29</sup> Based on the analysis of more than fifty empirical studies of online learning conducted between 1996 and 2008, the report found purely online education “as effective as classroom instruction, but no better.”<sup>30</sup> The research results vary, however, in studies comparing a blend of online and face-to-face instruction with purely face-to-face conventional classroom instruction. The researchers found an average of thirty-five percent stronger learning outcomes for students taught in a blended format.<sup>31</sup> The report noted that there is nothing about a blend of online and face-to-face instruction per se that should improve student learning.<sup>32</sup> Rather, the significantly improved outcomes for students taught in blended settings may flow simply from the fact that those students are exposed to more instructional materials than students whose primary encounters take place in a classroom.<sup>33</sup>

¶11 Flipped classrooms blend e-learning and in-class learning. More recent research suggests that courses based on a “blended” teaching strategy, that is, those that provide a combination of opportunities for e-learning and face-to-face teaching, are “more successful and increase student satisfaction with the learning experience.”<sup>34</sup> More important, not only do blended courses increase student satisfaction, some evidence suggests that such courses “generate deeper learning experi-

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27. Shackel, *supra* note 23, at 114.

28. *Id.*

29. See BARBARA MEANS ET AL., U.S. DEP’T OF EDUC., EVALUATION OF EVIDENCE-BASED PRACTICES IN ONLINE LEARNING (2010), available at <http://www2.ed.gov/rschstat/eval/tech/evidence-based-practices/finalreport.pdf>. See also Todd E. Pettys, *The Analytic Classroom*, 60 BUFF. L. REV. 1255, 1303–05 (2012), for a discussion of the empirical data in a legal education context.

30. MEANS ET AL., *supra* note 29, at 18.

31. *Id.* at 19.

32. *Id.* at 52.

33. *Id.*

34. Shackel, *supra* note 23, at 109–10. See also Ed Hahn, *Video Lectures Help Enhance Online Information Literacy Course*, 40 REFERENCE SERVICES REV. 49 (2012); Gordon E. McCray, *The Hybrid Course: Merging On-line Instruction and the Traditional Classroom*, 1 INFO. TECH. & MGMT. 307 (2000); Robert Talbert, *Inverted Classroom*, COLLEAGUES, Fall 2012, at 18; Dan Berrett, *How “Flipping” the Classroom Can Improve the Traditional Lecture*, CHRON. HIGHER EDUC., Feb. 24, 2012, at A16–A18.

ences for the students.”<sup>35</sup> Researchers have also identified other advantages of blending learning environments, including

that such learning may encourage deeper levels of understanding; the ability it offers to more carefully consider responses due to the asynchronous nature of the medium; and the minimization of the power differential between the student and teacher as well as power differentials between students, which may surface in the classroom and impact individual learning.<sup>36</sup>

¶12 Given these substantial research findings, the adoption of the flipped classroom model to teach legal research should not raise the specter of technology for technology’s sake or the wholesale dumping of pedagogy for the newest “shiny object.” As a blended e-learning environment, the flipped classroom model represents an appropriate use of technology in a legal research teaching strategy that is designed to prepare students for the evolving legal, business, and technological environments in which lawyers work.

## Elements to Consider When Designing a Legal Research Course

### Responding to the Cultural Needs of the LL.M. Student

¶13 Deciding the how and what of teaching legal research is a challenge for anyone designing a legal research course. It is all the more challenging when designing and teaching a course for LL.M. students.<sup>37</sup> We anticipate that the students will struggle with the fundamental differences in legal systems and design our courses appropriately.<sup>38</sup> However, we do not always adequately respond to the struggles these students face in understanding cultural differences, informal English, cultural references in the classroom, classroom conventions, and the pace of spoken English in the classroom.<sup>39</sup>

¶14 LL.M. students face these language and cultural barriers and complications despite high English-language proficiency test scores.<sup>40</sup> English proficiency exams do not test, and therefore cannot measure, an understanding of the cultural aspects of the U.S. legal system or the U.S. law school classroom and its norms.<sup>41</sup> LL.M. students therefore must adjust to unfamiliar social and cultural norms in everyday life in the United States, the legal education classroom, and U.S. law and legal

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35. Shackel, *supra* note 23, at 109–10.

36. *Id.* at 110.

37. Inglehart, *supra* note 7, at 180.

38. Most legal research professors include basic civics instruction and basic legal concepts in courses taught to LL.M. students. For example, when I use a research hypothetical involving shareholder liability (piercing the corporate veil), a short description of corporate structure is provided in the instructional materials and reviewed in the short orientation held at the beginning of each lab session.

39. See Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 INT’L. J. LEGAL. INFO. 396, 421 (2007).

40. *Id.* at 414.

41. See *id.* at 415 (discussing the premise of contrastive rhetoric, i.e., that language and culture are reciprocal).

practice.<sup>42</sup> Unlike some of their home country environments, all three of these environments in the United States value “individual opinion, critical thinking, and questioning authority.”<sup>43</sup>

¶15 We need to provide our students (even those who are practicing attorneys in their home countries) with training and exposure to the “U.S. legal sociolinguistic and cultural norms”<sup>44</sup> as a way to assist them in adjusting to these norms. This training comes from reading legal texts, writing documents, and researching the law.<sup>45</sup> The training should also incorporate learning opportunities that reflect the real-life practice of law. This substantive and professional exposure to U.S. legal English and legal culture is what students seek in U.S. LL.M. programs.<sup>46</sup> Ironically, this is the very experience many international LL.M. programs fail to deliver.<sup>47</sup>

¶16 The flipped classroom legal research course provides students with an opportunity to read, interpret, and apply U.S. legal principles to solve a research hypothetical in a practice-like setting. In doing research, students learn the organizational and analytical norms associated with U.S. law.<sup>48</sup> Placing this training and exposure in a safe environment such as the flipped classroom encourages the student to experiment, challenge, and in turn, gain a deeper understanding of the U.S. legal system. This deeper learning experience gives the LL.M. student the expertise and confidence to successfully engage in legal practice in the United States and elsewhere.

### Bringing Legal Research Out of the Hidden Curriculum

¶17 A legal research course in an LL.M. program often suffers from the same “hidden curriculum” issues a legal research course faces in the J.D. program. The “hidden curriculum” is the “socialization process where students pick up messages through the experience of being in school and interacting with faculty and peers, not just from things that they are formally taught.”<sup>49</sup> Despite its fundamental role in the practice of law,<sup>50</sup> J.D. and LL.M. students alike rapidly come to dismiss the legal research course as something less than a doctrinal course. The delivery of the legal research course curriculum often involves teaching by non-tenure-track faculty in class meetings tacked onto or inserted into legal writing classes. Some programs may require attendance at vendor-administered “training sessions” that

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42. *Id.* at 424.

43. *Id.* at 435.

44. *Id.* at 419.

45. *Id.*

46. *See id.* at 426. *See also* Carole Silver, *Holding onto “Too Many Lawyers”: Bringing International Graduate Students to the Front of the Class*, 3 Oñati Socio-Legal Series 543–44 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2298682](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2298682).

47. Spanbauer, *supra* note 39, at 429.

48. *Id.* at 435.

49. John Lande, *Reforming Legal Education to Prepare Law Students Optimally for Real-World Practice*, 2013 J. DISP. RESOL. (forthcoming 2013) (manuscript at 15), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2214989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2214989).

50. *See* Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research*, 103 LAW. LIBR. J. 359, 369, 2011 LAW. LIBR. J. 23, ¶ 39 (discussing legal research as “a cornerstone of the legal process and the development of the law”).



suggest legal research is less about careful analysis and the application of law to fact than it is about using the algorithm to find that one sentence in that one case that will win the day for the client. In addition, the courses are typically assigned fewer (or no) credit hours than doctrinal courses and may be taught on a pass-fail basis. "Nobody doubts that legal research is a skill that permeates nearly all other legal skills,"<sup>51</sup> yet all of these factors send signals to students that time spent on a legal research assignment is time not spent on the more valuable work to be done for doctrinal courses. The pedagogical model chosen for use in teaching legal research to LL.M. students should reflect the importance of legal research. In addition, the research assignments and group learning setting should provide meaningful opportunities to engage in lawyerlike activities.

### Responding to Technological Advances

¶18 Most agree that the days of teaching students how to conduct legal research using print materials are gone,<sup>52</sup> as students increasingly express an unsurprising preference for online resources.<sup>53</sup> Methods of accessing and using legal information resources have been profoundly changed by technology. "In the last thirty-five to forty years, legal research has moved from being a thoughtfully conceived all-print endeavor, to a query-based electronic venture, to a 'Google for lawyers enterprise.'"<sup>54</sup> In addition, LoisLawConnect, Bloomberg Law, WestlawNext, and Lexis Advance are merely the latest iterations of vendor platforms.<sup>55</sup> The quality and quantity of free legal information on the Internet continues to expand rapidly. In addition, mobile technology drives a demand for new applications and interfaces daily, in all arenas, including higher education and legal research.<sup>56</sup>

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51. Matthew C. Cordon, *Task Mastery in Legal Research Instruction*, 103 LAW LIBR. J. 395, 396, 2011 LAW LIBR. J. 25, ¶ 2.

52. Ellie Margolis & Kristen E. Murray, *Say Goodbye to the Books: Information Literacy as the New Legal Research Paradigm*, 38 U. DAYTON L. REV. 117, 117 (2012). See also Sanford N. Greenberg, *Legal Research Training: Preparing Students for a Rapidly Changing Research Environment*, 13 LEGAL WRITING: J. LEGAL WRITING INST. 241, 246–50 (2007); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 109 (2007).

53. See Margolis & Murray, *supra* note 52, at 126 (discussing student comfort levels with electronic resources versus print resources and student preferences for online sources); Michelle M. Wu & Leslie A. Lee, *An Empirical Study on the Research and Critical Evaluation Skills of Law Students*, 31 LEGAL REFERENCE SERVICES Q. 205, 222–23 (2012).

54. Anna P. Hemingway, *Accomplishing Your Scholarly Agenda While Maximizing Students' Learning (a.k.a., How to Teach Legal Methods and Have Time to Write Too)*, 50 DUQ. L. REV. 545, 555 (2012).

55. John O. McGinnis & Steven Wasick, *Law: An Information Technology* 24–28 (2012), [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=john\\_mcginnis](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=john_mcginnis) (providing a history of the development of vendor-based computerized legal research).

56. See *Transforming Higher Education: 4 Key Mobility Trends for Instructional Technologists to Watch*, available at [http://forms.lenovo.com/forms/4\\_Key\\_Mobility\\_Trends](http://forms.lenovo.com/forms/4_Key_Mobility_Trends) (last visited Aug. 1, 2013) (free site registration required) (noting that 55% of public universities launched mobile applications in 2011, up from 32.5% in 2010); Joanna Brenner, *Pew Internet: Mobile*, PEW INTERNET (June 6, 2013), <http://www.pewinternet.org/Commentary/2012/February/Pew-Internet-Mobile.aspx> (discussing the increasing use of smart phones for web searching); Kristen Purcell, *The Rise of Apps Culture*, PEW INTERNET (Sept. 14, 2010), <http://pewinternet.org/Reports/2010/The-Rise-of-Apps-Culture.aspx>.

¶19 In the legal research professor's "new normal," it is clear that no legal research curriculum can teach students everything they need to know about every information resource, Internet option, or vendor platform. It is also abundantly clear that there is no going back. We can continue to lament the loss of resource selection and all the other features that we used in past versions of vendor platforms, and we can continue to list all the potential downsides of the Google interface. However, our students have already moved on, and we must as well. Rather than lamenting the past, we must design a research curriculum that gives our students the tools to enable them to effectively interact with legal information in any setting.

¶20 Furthermore, we must provide our students with the tools in a pedagogical environment that does not discourage them at the outset. A focus on the ever-evolving nature and complexity of legal research technologies can be daunting. "When students hear the message that legal research is so intricate that it will take years to master, it hardly provides incentive for them to take the time to master the skill."<sup>57</sup> We want to create confidence and develop good research habits in our students by using a classroom model that includes sound instruction and opportunities for hands-on practice and guided experimentation.<sup>58</sup>

### Responding to Calls for Changes in Legal Education

¶21 In addition to the needs of our LL.M. students and the impact of the hidden curriculum and technological factors, recent proposals demanding changes in legal education must also be considered when designing a legal research course. These proposals are based in part on an allegation that law schools are falling short in their goal to equip law students with the analytical abilities necessary to become successful members of the legal community.<sup>59</sup> These allegations are not new. The MacCrate Report,<sup>60</sup> published in 1992, and the Carnegie Report,<sup>61</sup> published in 2007, "taken together stand for the proposition that our system of legal education and professional development has been underserving law students for generations."<sup>62</sup> More pedagogically damning is the allegation that the legal education system, as currently structured, with its focus on the educational objectives of comprehension, analysis, and

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57. Cordon, *supra* note 51, at 403, ¶ 21.

58. *Id.* at 399–402, ¶¶ 11–19 (discussing the habits of a good researcher). The seven habits for successful and efficient research Cordon identifies and explains are: (1) practice makes perfect; (2) being curious, confident, creative, and competitive; (3) using effective strategies and seeing the big picture; (4) covering the details; (5) passion for knowledge, writing, advocacy, and technology; (6) cost-consciousness; and (7) savvy use of sources.

59. See David McGowan, *Making Law School More Useful* (San Diego Legal Studies Paper No. 13-102, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2181793](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2181793); Pettys, *supra* note 29, at 1256.

60. 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).

61. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

62. Dennis Kim-Prieto, *The Road Not Yet Taken: How Law Student Information Literacy Standards Address Identified Issues in Legal Research Education and Training*, 103 LAW LIBR. J. 605, 614; 2011 LAW LIBR. J. 37, ¶ 20.

simple application, gives short shrift to more sophisticated forms of application, synthesis, and evaluation, thus limiting the expectations of law schools and their students.<sup>63</sup>

¶22 Others within the legal academy posit that what is missing is "an educational environment that provides students with resources and the situations with which they can best learn."<sup>64</sup> "Law schools cannot help students cultivate practical wisdom or judgment unless they give students opportunities to engage in legal problem-solving activities."<sup>65</sup> The best way to increase students' abilities to engage in legal problem-solving activities is to increase the number of clinical and externship opportunities.<sup>66</sup> A second option would be to increase instruction in important legal skills such as legal research and legal writing.<sup>67</sup> "When given appropriate instruction, nearly all law students can achieve mastery—not merely competence—of the skills of the novice lawyer."<sup>68</sup>

¶23 Although these charges are aimed primarily at doctrinal law classes utilizing the Socratic method of teaching, the findings are equally relevant to traditionally taught legal research classes that focus on search instruction and treasure hunt questions. In both circumstances, we have limited our students' expectations and set them up to fail by not engaging and motivating them with the proper pedagogical strategies.<sup>69</sup> If we want to successfully teach students to think and reason like lawyers, legal research instruction must create a context that replicates what lawyers actually do.<sup>70</sup>

### Responding to the Goals of the International LL.M. Student

¶24 International students "constitute nearly all of the applicants for many law schools' one-year LL.M. programs."<sup>71</sup> As a result, they are an increasingly important part of the student tuition revenue for many U.S. law schools. This revenue stream is not without risk or cost. Students applying for admission to LL.M. programs are encouraged to fully vet the graduate law program on many levels, including its delivery of meaningful experiential educational and cultural opportunities.<sup>72</sup> In addition, U.S. law schools are facing strong competition from other English-speaking common law countries for international students at the same time U.S. law schools are seeking to increase enrollments and market share to support declining tuition revenues from traditional J.D. students.<sup>73</sup> If U.S. law schools want to

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63. Edwin S. Fruehwald, *How to Become an Expert Law Teacher by Understanding the Neurobiology of Learning* 2–3 (July 23, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2115768](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115768).

64. *Id.* at 2.

65. *Id.*

66. Lande, *supra* note 49, at 20.

67. *Id.*

68. Fruehwald, *supra* note 63, at 2.

69. *See id.* at 2–3.

70. *Id.* at 2.

71. Silver, *supra* note 2, at 2387.

72. GEORGE E. EDWARDS, LL.M. ROADMAP: AN INTERNATIONAL STUDENT'S GUIDE TO U.S. LAW SCHOOL PROGRAMS 71–74 (2011).

73. Silver, *supra* note 46, at 535–38; Silver, *supra* note 2, at 2434.

continue to rely on this revenue, they must respond to and satisfy the goals of international students.<sup>74</sup>

¶25 Carole Silver has summarized the goals and motivations of the LL.M. student as the acquisition of a “global legal literacy, which includes the ability to communicate with those whose first language is different, cultural fluency—particularly with regard to professional legal culture, an appreciation for the ways in which the roles of lawyers differ in particular countries, and an awareness of basic variations regarding national law.”<sup>75</sup> To satisfy the goals of the LL.M. student, U.S. legal education programs must provide “an educational framework that enables meaningful interaction with an internationally diverse peer group, including U.S. JD students, and one that offers exposure to practice experiences, too.”<sup>76</sup>

¶26 Ironically, the legal research course stands at the crux of any program seeking to offer practice experiences to the LL.M. student. The chance to participate in an internship, externship, clerkship, or secure employment in a law firm or legal department requires legal research competency in the U.S. legal system. Even those students who are practicing attorneys in their home countries do not bring these skills to the table.<sup>77</sup> The legal research process exposes students to the structure and content (both primary and secondary) of the U.S. legal system. More important, it provides an opportunity, if instruction is delivered properly, to develop the analytical and critical thinking skills necessary to successfully practice in the U.S. legal system.<sup>78</sup> In short, the legal research process informs their understanding of both U.S. law and its unique sociocultural aspects.

¶27 Researchers have noted the frustration of LL.M. students with the fact that U.S. law schools fail to provide meaningful practical legal experiences and intercultural experiences.<sup>79</sup> Due to the nature of legal research instruction, a legal research course is well positioned to respond to this frustration and other needs of the LL.M. students seeking to study at U.S. law schools. Using a flipped classroom model built on working groups researching and responding analytically to complex legal issues more accurately reflects U.S. legal practice, and better prepares students to participate in internships, externships, and other experiential learning opportunities during law school and in the practice of law in the U.S. after graduation.

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74. Silver, *supra* note 46, at 543.

75. *Id.* at 547. See also Spanbauer, *supra* note 39, at 426 (discussing the need for exposure to “U.S. legal English, and legal culture, including the norms of the various documents produced in different practice areas and the litigation system and appellate process. . . . [S]tudents need to be taught about this aspect of U.S. legal culture because they need to experience this differing cultural preference for articulating knowledge so that they can become conversant in it.”).

76. Silver, *supra* note 46, at 550. See also Spanbauer, *supra* note 39, at 431–32.

77. This is not to dispute that practicing attorneys and students from other countries bring other valuable skills to the law school classroom. These skills may include negotiation, deal structuring, subject expertise, and political knowledge, to name just a few.

78. For example, I have used criminal law research assignments to introduce concepts such as plea bargaining and aggressive prosecutorial charging in a political campaign context. Students should consider these external factors when advising their hypothetical clients.

79. Spanbauer, *supra* note 39, at 429; see also Silver, *supra* note 46, at 543–49.

### The Redesigned LL.M. Legal Research Course

¶28 The redesign of the legal research course at the McKinney School of Law was prompted by the need to provide opportunities for analytical legal work in settings that encouraged and supported learning and mimicked the context of what lawyers actually do. The legal research course, as currently taught, is a required (and demanding) one-credit course. It consists of fourteen class sessions, readings from a textbook and other sources, online tutorials and instructional materials, and weekly hypothetical research assignments. The course consists of several introductory in-class sessions<sup>80</sup> followed by eleven weekly lab sessions.

¶29 Students prepare for the lab sessions by completing reading assignments and viewing web-delivered instructional materials. They come to the lab sessions ready to work collaboratively on research hypotheticals that often require advising a client. The labs provide opportunities for students to work in small groups that change weekly.<sup>81</sup> The work on the research hypothetical continues outside the lab and is due the following week. In the lab sessions, the focus is less on the particular interface and more on interacting as a team to respond to the research hypothetical. The labs are less about the “right answer,” and more about learning in an encouraging and confidence-building environment.<sup>82</sup>

¶30 The online tutorials and instructional materials are updated each semester as necessary to stay both current and interesting. The research hypotheticals span topics from criminal to corporate law. An ancillary purpose of the research hypothetical is to introduce the LL.M. students to aspects of American life, in particular those aspects of American culture that might not be familiar to them. For example, a research hypothetical may involve issues related to the Native American Graves and Repatriation Act.<sup>83</sup> This introduces the students to an understanding of American culture that extends beyond the borders of New York, Chicago, and Los Angeles. The research hypotheticals are re-created each semester to reflect changes in the law and incorporate evolving legal topics.

¶31 In summary, the flipped classroom model meets the curriculum requirement to develop a legal research course that responds to the sociocultural needs of the LL.M. student, removes the stigma of the hidden curriculum, responds to technological advances, answers the call for changes in legal education, and lastly, satisfies the goals and motivations of the LL.M. student at a time when U.S. law schools are seeking to further develop this revenue stream. Given this, the next question to

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80. These explain the structure of the course, including such basics as accessing the course platform, and provide instruction on the fundamentals of the U.S. legal system and research basics to address any educational gap experienced by international LL.M. students. See Susan C. Wawrose, Academic and Cultural Support for International LL.M. Students: Four Suggestions to Help Students Succeed 3 (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2189830](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189830), for ideas and topics to include in the introductory sessions.

81. The groups are randomly assigned and change each week to encourage different students to experience different team roles. The optimal group size appears to be three students.

82. One of the goals of the research assignments is to reinforce that there is not always a “right” answer; instead there are often two or more competing options that must be weighed and advocated.

83. Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified as amended at 25 U.S.C. §§ 3001–3013 (2006) and 18 U.S.C. § 1170 (2006)).

ask is, “Does the flipped classroom model reflect the pedagogical goals of a legal research curriculum?”

## Informed Learning as the Basis for Design

### Overview

¶32 In addition to reacting to calls for changes in legal education that reduce expenses and provide practical educational experiences, changes in the legal research curriculum must also further the goal of developing students who are better able to practice in a changing technological, legal, and business environment. Therefore the legal research courses we design and deliver in response to this opportunity must support and reflect the principles of information literacy, including legal information literacy.

¶33 Students must be able to effectively engage with legal and nonlegal information<sup>84</sup> when learning in different contexts in order to be considered information literate.<sup>85</sup> Despite the changes wrought by technology, fundamental legal information literacy has not changed.<sup>86</sup> When doing legal research, students must be able to locate the relevant facts, identify the relevant primary law, locate and use appropriate secondary sources for background information as needed, analyze and apply the law to the client’s situation, and update their research. Teaching legal information literacy in a rapidly and relentlessly evolving technological, legal, and business environment poses a daily challenge to legal research professors.

### Understanding Information Literacy in the Context of Informed Learning

¶34 The goal to transform our students into “informed learners”<sup>87</sup> for the twenty-first century should frame our response to this pedagogical challenge. The

84. See McGowan, *supra* note 59, at 21 (suggesting that law students receive additional education and competent training in factual investigation, that is, in gathering and analyzing facts).

85. See Christine Bruce & Hilary Hughes, *Informed Learning: A Pedagogical Construct Attending Simultaneously to Information Use and Learning*, 32 LIBR. & INFO. SCI. RES., at A2 (2010).

86. Cindy Guyer, *Experiential Learning: Context and Connections for Legal Research—A Case Study*, 32 LEGAL REFERENCE SERVICES Q. (forthcoming 2013) (manuscript at 10), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2170086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170086).

87. Informed learning is based on nine principles that may be interpreted and applied in different manners according to the needs of the particular information context. Researchers have identified three information contexts in society: education, workplace, and community settings. The nine principles are as follows:

1. Foster Informed Learning;
2. Promote Critical, Creative, and Reflective Information Use in Learning;
3. Recognize That the Experience of Information Literacy May Vary across Different Cultures and Communities;
4. Explore and Celebrate the Diversity of User Communities in Order to Support Their Information and Learning Needs;
5. Advocate for the Disadvantaged and Disempowered;
6. Develop Informed Learning Environments for People of Diverse Generations, Learning Styles, and Cultural Heritages;
7. Pursue the Potential of Technological Innovation and Learning Space Design for Informed Learning;
8. Collaborate to Support Informed Learning; and
9. Broaden the Recognition of Educator to Include Information Professionals such as Academic and Public Librarians, Museum Curators, and Others.



concept of informed learning "refocuses attention on using information to learn and [the] learners' awareness of their information experiences as they go about learning."<sup>88</sup> Informed learning has been described as

using information, creatively and reflectively in order to learn. It is learning that draws on the different ways in which we use information in academic professional and community life, and it is learning that draws on emerging understandings of our varied experiences of using information to learn.<sup>89</sup>

Informed learning is "simultaneously about information use and learning."<sup>90</sup> In short, informed learning is "learning through engaging with or interacting with information."<sup>91</sup> "Informed learning" or "using information to learn" therefore brings a broader, "learner-centered, experiential, and reflective [approach] to the information literacy agenda."<sup>92</sup>

¶35 Before we can understand the role of informed learning in teaching legal research, it is necessary to understand how informed learning expands and deepens our understanding of information literacy. Information literacy is defined as "recogniz[ing] when information is needed and [knowing how] to locate, evaluate, and use [it] effectively."<sup>93</sup> Information literacy skills include the ability to

- determine the extent of information needed
- access the needed information effectively and efficiently
- evaluate information and its sources critically
- incorporate selected information into one's knowledge base
- use information effectively to accomplish a specific purpose
- understand the economic, legal, and social issues surrounding the use of information; and access and use information ethically and legally<sup>94</sup>

¶36 Developed by the Association of College & Research Libraries (ACRL), these standards have been used in college and university libraries for purposes of, among other things, assessment and curricular development.<sup>95</sup> As a result of this focus on measurable skill sets, library or research instruction often concentrated on search techniques and tools and the use of information technology.<sup>96</sup> A similar emphasis was evident in the manner in which legal research was taught in the print environment. "Traditionally, legal research was taught through bibliographic instruction—explaining what materials were contained in various case reporters, code books, other primary legal sources, etc. and then teaching how to access these materials through digests, annotations, secondary sources and the like."<sup>97</sup>

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Christine Bruce et al., *Supporting Informed Learners in the Twenty-first Century*, 60 LIBR. TRENDS 522, 541–43 (2012).

88. *Id.* at 524.

89. Bruce & Hughes, *supra* note 85, at A2.

90. *Id.*

91. Bruce et al., *supra* note 87, at 524.

92. Anne R. Diekema et al., *Re-framing Information Literacy: Problem-Based Learning as Informed Learning*, 33 LIBR. & INFO. SCI. RES. 261, 261 (2011).

93. *Presidential Committee on Information Literacy: Final Report*, ACRL: ASS'N OF COLL. & RESEARCH LIBRARIES (1989), <http://www.ala.org/acrl/publications/whitepapers/presidential>.

94. ASS'N OF COLL. & RESEARCH LIBRARIES, *supra* note 5, at 2–3.

95. Kim-Prieto, *supra* note 62, at 608, ¶ 5.

96. Diekema et al., *supra* note 92, at 261.

97. Margolis & Murray, *supra* note 52, at 118.

¶37 Informed learning advocates criticize this approach to information literacy as a “practice that tends to privilege easily-defined skills, often in a linear model that emphasizes the search component of the research process.”<sup>98</sup> In the end, “confining information literacy to such skills denies learners the rich potential that may be gained from broader attention to different ways of experiencing information use in the disciplines, the professions, and community.”<sup>99</sup>

¶38 Informed learning is contextual, with different strategies for different contexts. Researchers typically measure learning strategies and outcome assessments in one of three contexts: academic, professional, or life in general.<sup>100</sup> Informed scholars are informed learners who engage with information to learn in formal education environments, such as schools, universities, and research centers.<sup>101</sup> An informed workforce is adaptable and innovative and uses information creatively and wisely for a wide variety of purposes.<sup>102</sup> An informed citizenry uses information effectively to learn for health, financial, educational, recreational, political, and other purposes.<sup>103</sup>

¶39 Informed learning requires that learners be given a supportive environment that provides the opportunity for enhancing existing information skills as well as learning new information skills.<sup>104</sup> Creating such an environment requires an understanding of what constitutes information and informed literacy in a particular context.<sup>105</sup> The learners themselves should participate in the design of the learning environment.<sup>106</sup> Elements of such an environment include “reflective learning, which promotes inquiry, reflection, and problem solving; thoughtful and effective management of information resources; self-directed learning individually and in teams; research-based learning that activates and extends prior learning; and curriculum that encourages reflection on the implications for self and others of learning.”<sup>107</sup>

¶40 In addition, informed learning pedagogical models require informed educators. Informed instructors act as

learning guides and consultants to their students, fostering independent research and co-creation of new knowledge. They ensure [that] students are equipped with . . . [the] capabilities to take advantage of a range of established and emerging technologies and to interact safely, responsibly, and productively . . . . Informed educators embrace social and cultural diversity, creating inclusive learning environments that enable students to share varied knowledge and experiences and so develop rich, inquiring, and mutually respectful world views.<sup>108</sup>

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98. Diekema et al., *supra* note 92, at 261.

99. *Id.*

100. Bruce et al., *supra* note 87, at 525–26.

101. *Id.* at 526.

102. *Id.* at 527.

103. *Id.*

104. *Id.* at 534.

105. *Id.*

106. *Id.* at 534–35.

107. *Id.* at 535–36.

108. *Id.* at 536.

For students in supportive academic environments with informed educators, researchers have identified seven levels of informed learning experiences: information awareness, sources, process, control, knowledge construction, knowledge extension, and wisdom.<sup>109</sup>

¶41 "A key role of informed learning in scholarly contexts at all levels is to activate and heighten awareness of [these] information experiences."<sup>110</sup> In so doing, students engage with different information resources at different points in their academic lives. Each interaction creates a new learning point that is expanded and developed by the student. Informed learning seeks to make "explicit awareness of . . . different forms of information and their use, as well as make explicit the various activities through which information is interpreted and understood."<sup>111</sup>

¶42 Legal research professors can work to ensure that students develop the requisite legal information literacy to be considered informed scholars in the academic environment. They can develop a curriculum that supports informed learning, provide the requisite supportive learning environment, and serve as informed educators. However, a solid pedagogy must also take into account external assessments.<sup>112</sup> Thus, in developing an informed learning curriculum for legal research it is important to look to external legal research competency standards, which were established to prepare students for the practice of law. When incorporating external standards into pedagogy, legal research professors should determine how these externally developed standards assess and measure their work in order to develop law students into informed learners ready to function as informed workers in the legal workplace.

### Constructing Legal Information Literacy in the Context of Informed Learning

¶43 In July 2012, the executive board of the American Association of Law Libraries (AALL) approved Legal Research Competencies and Standards for Law Student Information Literacy.<sup>113</sup> The standards were later revised and renamed Principles and Standards for Legal Research Competency.<sup>114</sup> The principles are "[intended] to foster best practices in law school curriculum development and design; to inform law firm planning, training and articulation of core competencies; to encourage bar admission committee evaluation of applicants' research skills; to inspire continuing education program development; and to impact law school accreditation standards review."<sup>115</sup> A review of the principles indicates that they support an informed learner curriculum since they envision a curriculum

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109. *Id.* at 527.

110. *Id.*

111. *Id.*

112. Vicenç Feliú & Helen Frazer, *Outcomes Assessment and Legal Research Pedagogy*, 31 LEGAL REFERENCE SERVICES Q. 184, 189 (2012).

113. AALL *Legal Research Competencies and Standards for Law Student Information Literacy*, AM. ASS'N OF LAW LIBRARIES (2012), <http://www.aallnet.org/Archived/Leadership-Governance/policies/PublicPolicies/policy-lawstu.html>.

114. *Principles and Standards for Legal Research Competency*, AM. ASS'N OF LAW LIBRARIES (approved July 11, 2013), <http://www.aallnet.org/main-menu/Leadership-Governance/policies/PublicPolicies/policy-legalrescompetency.html>.

115. *Id.*

dedicated to equipping law students with the skills necessary to become independent lifelong informed learners.

¶44 The principles identify five core competencies of the legal-information-literate researcher. For each core principle there is a list of related standards and competencies.<sup>116</sup> The five principles require that a legal-information-literate researcher

- I . . . possesses foundational knowledge of the legal system and legal information sources
- II . . . gathers information through effective and efficient research strategies
- III . . . critically evaluates information
- IV . . . applies information effectively to resolve a specific issue or need
- V . . . distinguishes between ethical and unethical uses of information, and understands the legal issues associated with the discovery, use, or application of information.<sup>117</sup>

¶45 Based in part upon the ACRL Information Literacy Standards,<sup>118</sup> the principles are “tailored to fit the skills, tools, and work product that we train law students to acquire, use, and create.”<sup>119</sup> What are these skills and tools? In the print environment, the process of legal research focused on finding the law. It was relatively straightforward and appropriately bibliographic because of the similarity between the structure of the resources and the manner in which the material was presented.<sup>120</sup> “In the era before computerization of the law, one could become proficient in legal research by relying on the bibliographic structure of the law. Law could be comprehended simply by the organization of volume sets on library shelves.”<sup>121</sup>

¶46 “Legal search is experiencing a revolution in capability”<sup>122</sup> that will continue. In this environment, researchers no longer worry about finding the law. The availability of electronic resources, both proprietary and free, has changed the skills we want students to acquire. In the decontextualized electronic environment, legal researchers must now understand how to develop appropriate searches and effectively and efficiently identify and select the needed information from vast numbers of results.<sup>123</sup> Finally, they must be able to analyze and apply their research findings to resolve a client’s problem. Thus, the current legal environment demands that we move from a “let’s find it” and “click here” approach to a more pedagogical

116. *Id.*

117. *Id.*

118. *Id.* See also Kim-Prieto, *supra* note 62, at 609–11, ¶¶ 7–10 (discussing the historical development of the literacy standards (now called principles) and their relationship to the ACRL standards).

119. Kim-Prieto, *supra* note 62, at 609, ¶ 7.

120. Margolis & Murray, *supra* note 52, at 122.

121. Brian Donnelly, *What Does “Digital Lawyer” Mean?*, in EDUCATING THE DIGITAL LAWYER, *supra* note 24, at 1-1, 1-14.

122. McGinnis & Wasick, *supra* note 55, at 78 (suggesting that law is itself an information technology). Viewing the law as an information technology reflects that the law both distributes information and is itself influenced by the infusion of more information from the outside world. This view argues that “the information revolution can substantially improve our ability to find the law and with that greater capacity can mold a law that better serves both its objectives of providing information to [the] community and gathering information from the world.” *Id.*

123. These skills require that legal researchers continue to understand and differentiate among sources, as well as know when it is appropriate to use a particular resource.

approach in order to teach legal research in a way that engages students in an analytical transformative process.

¶47 The AALL principles reflect this pedagogical shift<sup>124</sup> from thinking about legal information literacy as a bibliographic skill with easily defined tasks that emphasize the search component of the research process,<sup>125</sup> to one of informed learning, by recognizing that "[h]ighly competent research skills, effective problem solving skills, and critical thinking skills are keys to success in all areas of legal practices of today and the future."<sup>126</sup> For example, principle IV states: "A successful legal researcher applies information effectively to resolve a specific issue or need." This includes a competency that an information-literate student must understand "research as a recursive process" and be able to "reflect on the successes or failures of prior strategies."<sup>127</sup> To be an information-literate law student, the student must be an informed learner who learns through engaging and interacting with legal information. The principles and related standards therefore support the importance of a broader and deeper understanding of information literacy in the legal context.

¶48 Our students have embraced this new environment and moved forward past traditional legal instruction.<sup>128</sup> In determining what we want our students to learn and how they want to learn in this environment, we need to "differentiate between (1) the skills associated with using information in an ever-expanding range of contexts, representing a functional view of information and information literacy; and (2) the process of using information to learn, including communicating and creating in these contexts, representing transformative interpretations of information and information literacy."<sup>129</sup> It is imperative that legal research professors also focus on the broader informed learning platform that the principles envision when designing a legal research curriculum.

¶49 Law students should leave the legal research course with a level of information literacy that will enable them to work successfully with any information structure, proprietary or open, because they understand how to leverage what they know into skills for use in any new information environment.<sup>130</sup> Legal research professors should prepare students to adjust and succeed in an evolving legal environment that demands that lawyers bring new and changing skills to the table.<sup>131</sup>

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124. See Margolis & Murray, *supra* note 52, at 130 (discussing the principles as the basis for rethinking the way traditional legal research courses are taught).

125. See Diekema et al., *supra* note 92, at 261.

126. *Principles and Standards for Legal Research Competency*, *supra* note 114.

127. *Id.*

128. Margolis & Murray, *supra* note 52, at 150.

129. Bruce et al., *supra* note 87, at 524.

130. Bruce & Hughes, *supra* note 85, at A3 (noting that "[information literacy] is grounded in a program of research which has illuminated the experience of using information to learn in many contexts").

131. See EDUCATING THE DIGITAL LAWYER, *supra* note 24 (discussing need for education in information technology and its impact on the development of law); KOWALSKI, *supra* note 24 (stressing importance of project management and knowledge management skills); Henderson, *supra* note 24 (discussing need for project management skills).

¶50 The AALL principles provide the “groundwork for rethinking the way the traditional legal research course . . . is taught”<sup>132</sup> and a means to identify student competencies and create assessments<sup>133</sup> to deliver a legal research program in touch with “the realities of the legal field.”<sup>134</sup> The realities of the legal field require that the practical training law schools give their students must go beyond the “knowledge of the law and writing and trial skills.”<sup>135</sup> This training must “extend to the development of students’ emotional intelligence, professionalism, and sense of accountability and ownership.”<sup>136</sup> Law schools can

ensure that their graduates are ready to “hit the ground running” not only by teaching law students substantive law and certain technical aspects of [legal] practice but also by focusing on their students’ contributions to the learning process, thereby making self-assessment, self-learning, responsibility, and ownership second nature to all law graduates.<sup>137</sup>

In short, legal research courses that challenge students with research hypotheticals and group learning opportunities where learning is collaborative, self-driven, and ongoing will better position students for success in today’s legal environment.

¶51 Therefore, using informed learning in legal research curriculum development enables us to move beyond a discussion of a curriculum that develops technological skills and library skills to one that focuses on how students use information to learn in the particular context of law.<sup>138</sup> The challenge for legal research professors is to develop a curriculum that goes beyond “click here” and treasure hunt questions in an academic environment that speaks of the need to develop practical and analytical skills in our students, but may not always recognize or support the best method to achieve this goal.

## How the Flipped Classroom Supports an Informed Learning Objective

### Understanding Student Expectations and Motivations

¶52 Although we know very little about how law students actually learn, we do know that law students’ perceptions of the mode of delivery affects their learning.<sup>139</sup> A recent study of the factors that influence law students’ assessments of their professional and academic development indicates that students report greater academic and professional gains when the course emphasizes analysis, synthesis, and higher-order learning approaches.<sup>140</sup> These research results reflect findings about students in general. Students increasingly expect a classroom experience that pro-

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132. Margolis & Murray, *supra* note 52, at 130.

133. See Kim-Prieto, *supra* note 62, at 615, ¶ 21.

134. *Principles and Standards for Legal Research Competency*, *supra* note 114.

135. Cassandra L. Hill, *The Elephant in the Law School Assessment Room: The Role of Student Responsibility and Motivating Our Students to Learn*, 56 *How. L.J.* 447, 488 (2013).

136. *Id.*

137. *Id.* at 489.

138. See Bruce et al., *supra* note 87, at 543.

139. Shackel, *supra* note 23, at 112.

140. Carole Silver et al., *Gaining from the System: Lessons from the Law School Survey of Student Engagement About How Students Benefit from Law School*, 11 *U. ST. THOMAS L.J.* (forthcoming 2013) (manuscript at 31), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2196073](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196073).



vides an opportunity to actively engage with the course content and develop knowledge for themselves.<sup>141</sup>

¶53 Furthermore, "[t]here is no point in helping students develop deep learning skills if the educational environment is giving them the message that surface ones are rewarded."<sup>142</sup> Law professors need to consider the method of delivery and avoid teaching strategies that promote a "linear or step-by-step approach [to learning]" as this would defeat the concept of professional problems being complex and requiring a range of approaches to solve."<sup>143</sup> In addition, we must recognize that lawyers must know "how to do more than just analysis."<sup>144</sup> The use of research hypotheticals that require students to determine the relevant facts, identify the legal issues, construct an efficient search, choose and use the best resource available in their search results, and *ultimately* advise the client challenge students to think like lawyers. Using research hypotheticals that require the students to assess the client's situation and provide advice creates a bridge to practice that gets students to move from an academic manner of thinking to that of a problem-solving lawyer.<sup>145</sup>

¶54 The flipped classroom model creates an educational environment that responds to how students want to structure their particular learning environments. It also motivates students to achieve more through the use of group work and research hypotheticals that raise performance expectations by requiring students to think and interact like lawyers.

### Replacing Linear Techniques and Tools with Researching Hypotheticals and Devising Client Solutions

¶55 The flipped classroom model responds to the call for a legal research curriculum that embraces a deeper understanding of information literacy. Researchers report that law students have already moved beyond an interest in being taught a linear, do-it-this-way skill set.<sup>146</sup> They experience no difficulty in finding the law and, in most instances, ignore planning, preferring instead to jump in and start researching.<sup>147</sup> The most effective teaching strategy for these students is to provide instruction and hands-on research opportunities in a guided environment. Such instruction will help students understand the difference between resources, efficiently analyze and process results in the electronic environment, and gain confidence in their developing research abilities.<sup>148</sup>

¶56 In addition, research assignments should reflect that students no longer need instruction in how to find the law. In our LL.M. legal research course, the preclass instructional materials include a variety of research examples that alert students to the complexity and changing nature of legal research. The research

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141. Ctr. for Digital Educ., *supra* note 10.

142. Shackel, *supra* note 23, at 112.

143. *Id.* See also Tracy A. Thomas, *Teaching Remedies as Problem-Solving: Keeping it Real*, 57 ST. LOUIS U. L.J. 673 (2013).

144. Thomas, *supra* note 143, at 676.

145. *Id.* at 685.

146. See Margolis & Murray, *supra* note 52, at 150.

147. *Id.* at 151.

148. See *id.* at 152.

hypotheticals reinforce this as well. For example, the research hypothetical may deliberately include such twists as researching a code section that has just undergone legislative renumbering and, as a result, includes no related case annotations or secondary sources. To properly resolve this research obstacle, students must apply additional research skills based on an understanding of how to interpret a statutory section. Whereas students who were taught only that “the next step is to click here to find the case annotations” would have exhausted their research skills, informed learners can apply learned skills to new situations.

¶57 The transition to a pedagogy based on informed learning requires an increased focus on hands-on research<sup>149</sup> as “[i]nstruction is likely to be more successful and more easily mastered when it is based on an experiential, learn-by-doing pedagogy.”<sup>150</sup> The flipped classroom model, based on active learning, provides the needed hands-on research opportunities. Active learning activities “require students to be more than passive learners and are founded on the premise that students learn the best when they take responsibility for their own education.”<sup>151</sup> Therefore, adopting a pedagogy that uses active learning techniques in the classroom develops a student’s responsibility for learning and motivates that learning.<sup>152</sup>

¶58 Dispensing with the talking-head face-to-face conventional classroom lecture opens the way for activities such as problem-based learning (PBL) that keep students engaged in class.<sup>153</sup> PBL is an active learning process that requires a student to analyze the problem presented, identify information needed to devise a solution, locate and study the needed information, and apply the newly acquired knowledge to the problem.<sup>154</sup> PBL also “recognizes that students need to develop core skills in responding to and managing unique situations, which are ill defined, in which they have no previous experience and which often have no clear solution.”<sup>155</sup> “Legal research instruction lends itself particularly well to this paradigm.”<sup>156</sup>

¶59 In our redesigned LL.M. legal research course, students work collaboratively in a PBL lab setting to research and devise solutions to a research hypothetical. The research assignments often include questions that do not have a “right” answer, which challenges students to think critically when applying their research.<sup>157</sup>

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149. *Id.* at 154.

150. Feliú & Frazer, *supra* note 112, at 188–89.

151. Hill, *supra* note 135, at 499. *See also* MARY E. HUBA & JANN E. FREED, LEARNER-CENTERED ASSESSMENT ON COLLEGE CAMPUSES 36 (2000) (addressing active involvement of learners); Tom Cobb, *Public Interest Research, Collaboration, and the Promise of Wikis*, 16 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 1, 5 (2007) (advising faculty to add active learning techniques to their classes); Gregory S. Munro, *How Do We Know If We Are Achieving Our Goals? Strategies for Assessing the Outcome of Curricular Innovation*, 1 J. ASS’N LEGAL WRITING DIRECTORS 229, 235 (2002) (“Law students should be active participants in their education.”).

152. *See* Hill, *supra* note 135, at 499.

153. *Id.* at 501.

154. Shackel, *supra* note 23, at 112–13.

155. *Id.* at 112.

156. Feliú & Frazer, *supra* note 112, at 189.

157. For help with designing problems, see Barbara Ferrer Kennedy, *Revitalizing the One-Shot Instruction Session Using Problem-Based Learning*, 47 REFERENCE & USER SERVICES Q. 386 (2008) (providing guidance on developing authentic hypotheticals for PBL labs); Alexius Smith Macklin,

Thus the PBL lab sessions “[work] to facilitate a deeper learning of the law,” which develops in the student the ability to take learning from one setting and apply it to the next problem.<sup>158</sup> The use of PBL, with its “emphasis on autonomy and collaborative, active learning, . . . appears to be one way to encourage students . . . to develop the skills needed to deal with the dynamic complexity with which they are increasingly confronted and which they will need to continue to navigate in the course of legal practice.”<sup>159</sup>

### Creating Collaborative Learning Opportunities

¶60 Flipped classrooms that use group work also operate as “learning communities” that “enhance confidence and relationship building” and “encourage cooperative and collaborative learning.”<sup>160</sup> In a cooperative learning environment, students create individual work products.<sup>161</sup> In a collaborative learning environment, students create one final shared product.<sup>162</sup> The advantages of cooperative learning include “improved attitudes towards the subject matter being studied, increased critical thinking skills, and overall higher achievement.”<sup>163</sup> Collaborative work produces a better final product as a result of the group’s interactions<sup>164</sup> and has a profound impact on learning.<sup>165</sup> When students have to combine their ideas, skills, and experiences to create a shared product, they do more than master the material and produce a product.<sup>166</sup> “They also learn about their biases and assumptions, strengths and weaknesses, and their ability to help others succeed.”<sup>167</sup> As a result, collaborative work develops the interpersonal, strong problem-solving, organization, communication, leadership, and team-building skills that lawyers use<sup>168</sup> but that are not often taught in law schools.<sup>169</sup>

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*Integrating Information Literacy Using Problem-Based Learning*, 29 REFERENCE SERVICES REV. 306 (2001). See also Deborah E. Allen et al., *Problem-Based Learning*, NEW DIRECTIONS FOR TEACHING & LEARNING, no. 128, Winter 2011, at 21 (examining effectiveness of PBL in graduate academic environments).

158. Thomas, *supra* note 143, at 686.

159. Shackel, *supra* note 23, at 113.

160. Learning communities are popular in the undergraduate arena and serve a variety of functions. Typically the goal with undergraduates is to provide students with the necessary tools and support to help them transition from high school to university. Oscar J. Salinas, *Law School Learning Communities: A Community of Learners for the Benefit of All Learners*, LAW TCHR., Fall 2012, at 28, 29. Similarly, learning communities in the LL.M. program work to ease students’ transition to a new learning environment.

161. Hemingway, *supra* note 54, at 561.

162. *Id.*

163. *Id.* at 562.

164. *Id.* at 557.

165. ROBIN NEIDORF, *TEACH BEYOND YOUR REACH: AN INSTRUCTOR’S GUIDE TO DEVELOPING AND RUNNING SUCCESSFUL DISTANCE LEARNING CLASSES, WORKSHOPS, TRAINING SESSIONS, AND MORE* 168 (2d ed. 2012).

166. *Id.*

167. *Id.*

168. See Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 LAW & SOC. INQUIRY 620, 624–27 (2011) (discussing and summarizing research on the characteristics possessed by successful lawyers); Sophie M. Sparrow, *Can They Work Well on a Team? Assessing Students’ Collaborative Skills*, 38 WM. MITCHELL L. REV. 1162 (2012).

169. See Hemingway, *supra* note 54, at 558.

¶61 Group research assignments that start in the lab setting and are completed after class provide a safe and encouraging environment for all learning styles. By starting the research assignment in the lab, the students are able to contribute to a collaborative effort in an environment that includes a safety net—professor verification of research strategies, assistance with difficult material, and redirection if necessary. As the professor moves among the groups, asking for or receiving assistance is less intimidating and less demoralizing. The atmosphere in the LL.M. legal research course is nonthreatening and supportive of learning. Students are comfortable and may even lapse into their native languages to help one of their teammates understand the research process or the issue at hand.

¶62 Work that requires students to prepare prior to class and work collaboratively in a team setting during class to solve a client's legal problem motivates students to learn and to take responsibility for their own learning.<sup>170</sup> Problem solving in a team setting also requires students to be prepared for class or be ready to explain the lack of preparation to a team member.<sup>171</sup> In addition, due to the shared grade on the research project, the students are more likely to hold their coworkers accountable for the timely completion and quality of the work.

¶63 In this regard, the PBL group research assignments mimic a real-life legal work environment<sup>172</sup> by encouraging cooperative and collaborative learning and accountability in groups that change weekly. This environment produces a shared outcome along with opportunities for the leadership role in the group to flow from student to student based on each individual's particular skills. In such a setting, students learn to rely less on the professor and "instead appreciate the collective wisdom of the group and their peers."<sup>173</sup>

¶64 In this problem-solving setting, "[s]tudents not only acquire skills and knowledge as they solve problems, but also become responsible for their own learning, which enhances their motivation and self-efficacy."<sup>174</sup> Developing these capacities in law school means students will, as informed learners, "acquire and maintain a capacity to sustain their continuing professional development" when they are practicing law.<sup>175</sup>

¶65 Carole Silver's recent research results indicate that one of the primary motivations for LL.M. students, in addition to gaining an understanding of U.S. law, is the ability to learn about and interact with other future lawyers, and, in particular, American J.D. students.<sup>176</sup> A legal research course taught according to the flipped classroom model with PBL labs offers opportunities to explore this type of interaction. Ideas to explore include using J.D. students in research simulations,

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170. Hill, *supra* note 135, at 501.

171. *Id.*

172. For a discussion of group learning in law schools and the role of interpersonal skills in associate evaluations in the legal profession, see Verna Monson & Michelle Tichy, *Turning Legal Classrooms Upside Down: The Pragmatic and Moral Power of Cooperation to Foster Ethical Professional Identity in Legal Education* (2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2021455](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021455).

173. Thomas, *supra* note 143, at 679.

174. Hill, *supra* note 135, at 501.

175. *Id.* at 502.

176. Silver, *supra* note 46, at 549.

or as peer mentors, legal research tutors, or coordinators of the work outside the classroom. Such interactions can only help to improve the experience and satisfaction of the LL.M. student with the LL.M. program and enhance the global literacy of J.D. and LL.M. students alike.

### Serving a Variety of Learning Styles

¶66 In the traditional podium classroom, "students often try to capture what is being said at the instant the speaker says it. They cannot stop to reflect upon what is being said, and they may miss significant points because they are trying to transcribe the instructor's view."<sup>177</sup> This situation is further exacerbated when the student is a nonnative English speaker dealing with unfamiliar legal education classroom norms.

¶67 Teaching LL.M. students also involves teaching adult learners. Understanding adult learners requires that we acknowledge that their personal history and experience, preferred learning styles, motivations for learning, and psychological states are going to affect the learning environment.<sup>178</sup> Neidorf suggests that despite the complexities of teaching adult learners, it is possible to create a rich and rigorous learning environment by providing the following five elements:

- "A little TLC: Care about your students" and project that you do care by exhibiting a warm and encouraging attitude.
- "Cheerleading and coaching: Celebrate success and find the teachable elements of failure." Encourage your students to contact you for help and make yourself available when contacted for additional help.
- "Collaborative projects: Teamwork pushes learning to new level" as students discover as much as about themselves as they do about the material. Group work also offers opportunities to develop supportive learning communities.
- "Flexibility": As an instructor, be open to "different learning methods, timeframes, or approaches to the material."
- "Practical usage: . . . Demonstrate the practical value of the knowledge . . ."<sup>179</sup>

¶68 Adult LL.M. students are less likely to acknowledge that they do not understand or to admit frustration with the learning environment. It is valuable to be able to deliver the instructional material outside of the classroom for these students to process at their own pace. These materials, whether they are short videos or interactive tutorials, may be stopped and replayed or watched in their entirety numerous times by the student.<sup>180</sup> Preparing the instructional content units by, for example, dividing a fifty-minute lecture into five ten-minute segments that include examples as well as the instructional content, enables students to process the information concept by concept at their own pace.

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177. EDUCAUSE, *supra* note 16, at 2.

178. Neidorf, *supra* note 165, at 41–61.

179. *Id.* at 60.

180. This ability to stop and replay is particularly useful for the nonnative English speaker.

¶69 Teaching law students is, in some respects, no different than teaching any other students. The students who tend to get our attention are the best and brightest, the ones who readily grasp the material and who ask the most challenging questions.<sup>181</sup> The legal research professor in a flipped classroom model PBL lab, however, immediately becomes aware of students who are struggling and may need extra help with the material. As the professor moves from group to group in the PBL lab, he or she can spend time reviewing a concept with a group or a few students without delaying those students who understand and are ready to move forward. These short individual and small-group interactions provide the professor with the opportunity to coach and, more important, find teachable moments.

### Presenting Opportunities for Formative Assessment

¶70 For internal assessment<sup>182</sup> to be meaningful it must be aligned with the teaching objectives, be relevant to the instructional activities, and include formative as well as summative assessments.<sup>183</sup> Formative assessment focuses on improving student learning during the process of learning.<sup>184</sup> For formative assessment to be successful in improving learning, it must be delivered while there is still time for the student to make learning style adjustments or the professor to make instructional adjustments.<sup>185</sup> In the flipped classroom model, legal research professors have two distinct opportunities to engage in formative assessment. One is reviewing the feedback on the weekly research assignments. The other arises in the PBL labs. During the PBL lab sessions, the professor is able to view the information world through the eyes of the learner and observe the “learners’ way of using information.”<sup>186</sup> This allows the professor to engage in immediate formative assessment of students’ performance.<sup>187</sup> Repurposing class time into PBL labs provides the legal research professor with the opportunity to correct misunderstandings and encourage experimentation in a safe environment. The immediacy of the informal formative assessment, combined with feedback on the weekly assignments, gives students multiple chances to measure their understanding of the material. Students who have multiple formative assessment opportunities to measure their progress “will, generally, master the material and perform better in the final analysis.”<sup>188</sup>

### Understanding the Role of Technology in Our Students’ Lives

¶71 Our students live and interact conspicuously with technology, but that does not guarantee informed learning and, in some instances, may hinder the acquisition of knowledge.<sup>189</sup> We recognize that our students come to law school

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181. BERGMANN & SAMS, *supra* note 9, at 23.

182. See generally Feliú & Frazer, *supra* note 112 (providing a discussion of external assessment standards of the American Bar Association and others).

183. *Id.* at 188.

184. *Id.*

185. *Id.*

186. Bruce & Hughes, *supra* note 85, at A3.

187. See Thomas, *supra* note 143, at 684 (discussing formative assessment in PBL labs).

188. *Id.*

189. See Bruce et al., *supra* note 87, at 539.



with "high level consumer technical skills and low level professional technical skills."<sup>190</sup> A common issue for legal research professors is that students who adroitly use smartphones, tablets, and sophisticated software are unable to recognize the various legal information resources in the electronic environment.<sup>191</sup> We also recognize that our students "attempt to develop legal research skills by adding to their existing knowledge of research sources and process, which may include the likes of Google and Wikipedia."<sup>192</sup> The inability of students to distinguish among resources in the ever expanding electronic universe without "informed learning or information skills of the conceptual kind may mean that [they] become poor learners."<sup>193</sup>

¶72 At this point in the evolution of legal education, it is the legal research professor who most often confronts the challenge of educating students about how technology contributes to the practice of law.<sup>194</sup> The flipped classroom PBL labs provide a rich informed learning experience for students to learn about information in the online environment. For example, the professor can step back and allow different groups to approach the hypothetical differently. The varying results are then discussed and the students determine why one search strategy worked better than another. The exercise requires students to examine the information in a particular source and explain its value or deficiency in responding to the hypothetical. In the end, the students have not only identified and used information critically, but they have also gained an understanding of the differences in the available information that may not be readily apparent from a long list of search results.

### Preparing the Digital Lawyer

¶73 The focus of this article has been on identifying the best pedagogical model to use in transforming law students into informed learners and developing within them the ancillary professional skills of emotional intelligence, professionalism, and a sense of accountability and ownership. However, the flipped classroom model also responds to increasing calls from within the legal academy that we must educate our students in information technology. Our students will practice in a world in which "legal work is increasingly done by machines."<sup>195</sup> Competent lawyers in the digital environment will not only understand how to search and efficiently retrieve information from large and varied databases, they will also know and understand such things as the design and capabilities of the search engine, database structure, metadata, web coding, e-discovery, and knowledge management.<sup>196</sup>

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190. Jeanne Eicks, *Educating Superior Legal Professionals: Successful Modern Curricula Join Law and Technology*, in EDUCATING THE DIGITAL LAWYER, *supra* note 24, at 5-1, 5-3.

191. For example, a specific question to locate, apply, and provide the citation to a statute may result in answers that include citations to the *Code of Federal Regulations* or a statute from an inappropriate jurisdiction because such sources are near the top of search results. Similarly, students may fail to see particular resources because they are found in a different pane of the web page than the one displaying the results.

192. Cordon, *supra* note 51, at 403, ¶ 21.

193. Bruce et al., *supra* note 87, at 539.

194. Eicks, *supra* note 190, at 5-3.

195. Marc Lauritsen, *Lawyering in an Age of Intelligent Machines*, in EDUCATING THE DIGITAL LAWYER, *supra* note 24, at 2-1, 2-1.

196. Donnelly, *supra* note 121, at 1-27.

¶74 The flipped classroom's PBL labs present an opportunity to work with students to further prepare them for the practice of law in a digital environment. PBL labs allow the professor to introduce search algorithms, relevance and ranking, metadata, and other aspects of information technology.<sup>197</sup> Legal research courses are one of the few places in law school where students actively interact with information technology, which makes legal research professors uniquely positioned to teach students about the digital environment.

### Using the Flipped Classroom to Teach Legal Research

¶75 The legal research course in the international LL.M. program at the McKinney School of Law was taught as a flipped classroom for the first time in the fall semester of 2012, and continued as a flipped classroom in the spring semester of 2013. The decision to move to the flipped classroom model was an evolutionary one. In earlier semesters, LL.M. students often asked for the classroom lecture PowerPoint presentation at the conclusion of the class period. In response, the slide notes were cleaned up and in some instances expanded, and the presentation converted to a PDF to enable its use on any device. The PowerPoint was then loaded to a course web site for the students to refer to as they completed the weekly research assignment.

¶76 Two thoughts came to mind after doing this activity for a few weeks into my first semester of teaching the LL.M. legal research course in the spring of 2011: First, I recognized that a PowerPoint presentation with notes converted into a PDF simply added to the reading load of graduate law students for whom English was not the first language. Second, notes cannot explain everything, and often the interactivity from the live in-class presentation<sup>198</sup> was lost in the move to create a universal PDF. Shortly thereafter I moved to narrating the PowerPoint presentations after class using the PowerPoint Presenter add-on and posting the presentation to the course management system (CMS) after class. This essentially gave me an opportunity to extend the class period. I often added additional explanatory content or examples in those areas that appeared to have caused the students difficulty during the in-class session. In addition, I created PowerPoint presentations as feedback for the weekly research assignments. At some point I realized that I was duplicating work for myself and the students and that the feedback would be much more meaningful if it could be immediate and in-person.

¶77 In the fall semester of 2011, I reduced the lecture sessions and introduced four PBL lab sessions. A combination of what I was already doing and a sense that there was a better alternative led to my decision to flip the legal research course. In

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197. See Letter from Jean M. Wenger, President, & Kate Hagan, Exec. Dir., Am. Ass'n of Law Libraries, to Hon. Randall T. Shepard, Chief Justice, Chair, ABA Task Force on the Future of Legal Educ., & Art Gawin, Dep. Dir., ABA Ctr. for Prof. Resp. (Feb. 6, 2013), *available at* <http://www.aallnet.org/main-menu/Leadership-Governance/committee/cmte-final-reports/2012-2013/flertf.pdf> (emphasizing the ability of law librarians to educate law students in information technology, knowledge management, and competitive intelligence).

198. Interactivity that was often lost in the conversion to PDF included features such as the overlaying of screen shots, live links, and animations.

the fall semester of 2012, I flipped the LL.M. legal research class for the first time. Since I was already teaching a second-year J.D. legal research course online (and was comfortable with teaching online), I was prepared for the usual technological challenges and the additional time commitment.<sup>199</sup> What I was not prepared for was the increased student involvement in the class. Student interest increased with the use of more detailed research hypotheticals.<sup>200</sup> Classroom camaraderie and deeper professor-student relationships developed as a result of the lab interactions. Even more important was that the lab sessions provided instant feedback to me about what was working or needed tweaking in the instructional materials.

¶78 I reserve the first few class sessions of the legal research course to cover general U.S. legal topics. The number of sessions may vary depending on where the students are in their understanding of the U.S. legal system or whether the course is taught in the first or second semester of the program. Before the class moves to the lab sessions, the methodology is thoroughly explained to the students. A significant part of one class period is dedicated to explaining to students the CMS, the predelivered instructional materials, the structure of the PBL lab sessions (including the use of ever-changing groups), and that the work on the research hypothetical will extend beyond the fifty-five-minute lab. Each lab session starts with a few minutes of introduction that includes a general review of the instructional materials and the research hypothetical before the students convene their groups and start the work.

¶79 Hypotheticals involve the typical legal research subject areas of U.S. federal and state statutory, regulatory (including agency web sites), and case law. The course also covers international law, free and low-cost online resources, and secondary sources, including model practitioner forms and typical court documents.<sup>201</sup> The online tutorials and instructional materials are updated each semester as necessary to stay current, relevant, and interesting. The research hypotheticals are detailed and require the students to identify the relevant facts and legal issues. The legal issues become more complex as the semester advances and typically require the students to provide advice to the fictional client in situations. Often these situations have no "right" answer.

¶80 The use of technology "enables professors to be much more creative in their efforts to convey information in a manner aimed at awakening student interest and laying the foundation for higher-analytical work."<sup>202</sup> Fortunately, unlike many technological teaching innovations that "rock" the higher education arena,

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199. I am one of four legal research instructors who collaborated to design and implement an online legal research course at the McKinney School of Law in the fall of 2010. The course, a required, full-semester, graded, one-credit course in our second-year J.D. curriculum, is taught entirely online and the instructional and assessment materials continue to be modified each semester.

200. In the fall semester of 2012, all the research hypotheticals involved the same corporate client. Using the same client allowed for more complicated fact patterns since the students retained the basic knowledge of the client throughout the entire semester.

201. See Donnelly, *supra* note 121, at 1-15 (criticizing legal research instruction that does not include coverage of materials many lawyers use on a daily basis, such as model forms and typical court documents).

202. Pettys, *supra* note 29, at 1309.

the flipped classroom requires little financial investment.<sup>203</sup> The technology for creating predelivered lectures and tutorials is widely available, relatively inexpensive, and for the most part easy to learn and use.<sup>204</sup> I use the Articulate product, Storyline, and PowerPoint Presenter to create the web-delivered instructional materials and presentations. The legal research presentations include avatars, animated text, quizzes, short exercises, and embedded tutorial videos. I can require students to interact with the tutorials by typing answers into text boxes and responding to self-assessment questions in the presentations. Storyline includes the ability to name and index the slides. This feature allows students to move quickly to the point in the presentation that they may want to replay for additional review. The Indiana University CMS also offers the ability to track when students log in and measure how long they engage with the material, although I have not utilized this feature.

¶81 Though a small sample, the students taking the class in the fall of 2012 gave the flipped classroom model relatively high marks.<sup>205</sup> The anonymous student course evaluations included, among others, the following statements and responses:<sup>206</sup>

- This course increased my analytical and problem solving skills: 100% strongly agree.
- I found the group work helpful in understanding the practice of law: 100% strongly agree.
- This course emphasized important lawyering skills: 100% strongly agree.
- The professor helped students apply theory to solve problems: 92.9% strongly agree.
- I would enjoy taking another course taught this way: 83.3% strongly agree, 16.7% agree.

¶82 In some areas there might be a tendency to require less work from LL.M. students. It is easy to imagine legal research instruction becoming one of those areas. Teaching an LL.M. legal research course is more challenging and requires more work for the legal research professor than teaching a J.D. legal research course. In addition, few of the students stay in the United States to practice law.<sup>207</sup>

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203. This statement does not include the financial cost in terms of faculty time. See Lawrence A. Tomei, *The Impact of Online Teaching on Faculty Load: Computing the Ideal Class Size for Online Courses*, 14 J. TECH. & TCHR. EDUC. 531 (2006) (discussing research findings that online courses significantly increased faculty workload for all three elements of teaching: instructional content, counseling, and student assessment; and increased by fourteen percent the time devoted to online teaching).

204. Academic licenses are available for Articulate Storyline, Adobe Presenter, Camtasia Studio, and other software. See Tawnya K. Plumb, *Creating Electronic Tutorials: On Your Mark, Get Set, Go!*, 22 J. ELEC. RESOURCES LIBRARIANSHIP 49 (2010) (reviewing nine software options for creating e-tutorials).

205. Sixteen students completed the course evaluations at the conclusion of the course in the fall of 2012. The students were asked to respond to twenty-four questions about the course and the professor. The course evaluations are on file with the author.

206. Course evaluations are administered at the last meeting of the course. The professor is not in the classroom at the time the evaluations are completed. In addition, the evaluations are collected and delivered to the law school administrator by someone other than the professor.

207. Silver, *supra* note 2, at 2394–99 (noting the difficulty of determining how many students stay in the United States after graduation, but estimating the number to be slightly more than 18%).

I, however, never considered making the course easier. Instead, my design of the legal research course for the LL.M. students was greatly influenced by the following story from a Chinese-speaking writing professor in reflecting about her own efforts to learn English:

As I think about what we might do to complicate the external and internal scenes of our students' writing, I hear my parents and teachers saying: "Not now. Keep them from the wrangle of the marketplace until they have acquired discourse and are skilled at using it." And I answer: "Don't teach them to 'survive' the whirlpool of crosscurrents by avoiding it. Use the classroom to moderate the currents. Moderate the currents, but teach them to struggle from the beginning."<sup>208</sup>

## Conclusion

¶83 Legal educators must acknowledge that "the university . . . like all other human institutions . . . is not outside but inside the general social fabric of a given era." Accordingly, law students must be equipped with the knowledge and skills enabling them to compete and to survive as players in the "knowledge economy"; to participate as intelligent citizens in a globalizing polity; and to serve as ethical professionals in the changing and uncertain world of globalized practice.<sup>209</sup>

Expert and efficient delivery of legal research instruction will become even more relevant as law schools seek to redefine legal education to better equip students to work in a global practice environment.

¶84 It is unclear whether the legal academy, in its quest to understand how to better prepare students for the practice of law, will redefine itself as radically as some researchers have suggested.<sup>210</sup> However, after all the budget reductions and restructurings, the legal academy must be "something better" than simply a smaller and less expensive version of its former self. Teaching legal research to LL.M. students using the flipped classroom model moves the academy toward that "something better." The flipped classroom effectively prepares students for the practice of law and further scholarly work. It provides an opportunity for students to work collaboratively and for faculty to engage more closely with students by developing deeper professional relationships. Law students must transform themselves into informed learners to be successful lawyers, judges, and academicians. Teaching pedagogies such as the flipped classroom support and advance this transformation.

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208. Min-zhan Lu, *From Silence to Words: Writing as Struggle*, in NEGOTIATING ACADEMIC LITERACIES: TEACHING AND LEARNING ACROSS LANGUAGES AND CULTURES 71, 82 (Vivian Zamel & Ruth Spack eds., 1998).

209. Shackel, *supra* note 23, at 111.

210. See Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177 (2012) (noting that the current cost structure of legal education is unsustainable and questioning the efficacy of the three-year graduate law school model); Thomas D. Morgan, *The Changing Face of Legal Education: Its Impact on What It Means to Be a Lawyer*, 45 AKRON L. REV. 811 (2012). Campos suggests that legal education reform should mirror the structure of legal education in other countries around the world. "This more comprehensive approach to reform assumes that learning to think deeply about law is a skill and habit that future lawyers should be given every chance to acquire as undergraduate students studying law as a subject of concentration in a general liberal arts degree program. It further assumes that postgraduate legal education for future lawyers should consist of vocational training that takes place in explicitly vocational contexts, such as supervised apprenticeship and externship programs." Campos, *supra*, at 221.

# Responsibility of International Organizations

*Essays in Memory of Sir Ian Brownlie*

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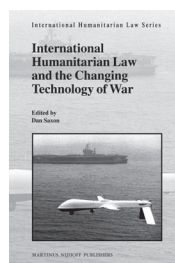


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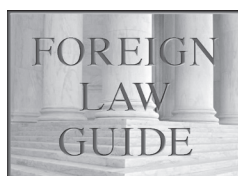
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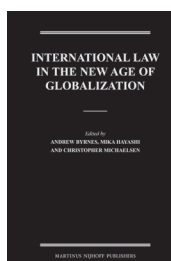
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## Oh My Blawg! Who Will Save the Legal Blogs?\*

Caroline Young\*\*

*Legal professionals continue to need access to legal blogs for their scholarly, historical, and practical research. However, at this time there is no concrete solution guaranteeing the continued availability of the wide range of legal blogs. Without immediate action, the essential content of legal blogs may be lost forever. This article provides an overview of the state of legal blog preservation and suggests a blueprint for creating an optimal process to ensure continuing access to vital legal blogs.*

### Introduction

¶1 Legal blogs (sometimes referred to as “blawgs”)<sup>1</sup> face a dire future because there is as yet no adequate process for archiving, preserving, and maintaining access to them. And without a formal process for preserving these blogs, it will become impossible to access references and citations to them. Although there have been a number of projects that have supported the preservation of blogs, none has been successful enough to be a model for the future.<sup>2</sup> Law libraries must take responsibility for blogs that are essential to their collections and determine how they will ensure continued access to them. This article considers the issues and describes a blueprint of best practices for law libraries to follow in beginning the process of selecting, aggregating, archiving, and managing a blog collection.

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1. A “blawg” is a blog that covers law-related topics. Carolyn Elefant, *It’s a Blog World After All*, LEGAL TIMES, Feb. 24, 2004, available at [http://www.law.com/jsp/article.jsp?id=900005538060&Its\\_a\\_Blog\\_World\\_After\\_All&slreturn=20130625145920](http://www.law.com/jsp/article.jsp?id=900005538060&Its_a_Blog_World_After_All&slreturn=20130625145920).

2. In 2009, a symposium in honor of the late Robert L. Oakley, The Future of Today’s Legal Scholarship, took place at the Georgetown Law Library. The symposium included a national panel of experts on the issues associated with blog preservation. See *The Future of Today’s Legal Scholarship Symposium*, GEORGETOWN LAW, <http://apps.law.georgetown.edu/webcasts/eventDetail.cfm?eventID=872> (last visited Aug. 2, 2013) (links to webcasts of symposium panel discussions). The symposium finished with a working group breakout session to produce a uniform standard for the preservation of blogs for bloggers and librarians. However, the level of complexity associated with blog preservation is high, and four years later there are still no best practice standards specific to blogs.

## Blogs Are Valuable, Citable Resources

¶2 Blogs contain valuable content that should not be lost. It is generally accepted that blogs can be cited to in scholarly articles and by judges in court opinions. For example, a search for the terms *blog*, *weblog*, *blawg*, or *microblog* in law review footnotes in 2012 found more than 3000 instances of those terms.<sup>3</sup> The *Bluebook* has had a rule on how to cite to blogs since the eighteenth edition was published in 2005.<sup>4</sup>

¶3 In addition to the increased citation of legal blogs in law review articles, there has also been an increase in the number of courts citing to blogs. In 2006, twenty-seven cases were found that cited to blogs.<sup>5</sup> More recently, a study done by Lee Peoples found 287 court opinions between 2004 and 2009 that cited blogs. Forty-five out of the 287 opinions fell into one of the following categories: “citing blogs as secondary authority to support the court’s reasoning or analysis, . . . cit[ing] blogs for factual information, or . . . cit[ing] blogs as the source of documents.”<sup>6</sup> Since these citations generally include a link to a URL that contains the blog post, the chances of the citation becoming inaccessible due to link rot is extremely high.<sup>7</sup> Without a formal process for preserving blogs, it will become impossible to access these citations in the future.

¶4 Legal blogs often provide a concise summary and analysis of law for the guidance of judges and practitioners, especially when they are written by a practitioner. Blogs provide the opportunity for the swift distribution of commentary on recent events or newly decided decisions focusing on the significance of these events to a practitioner. The information is fresh because the blogging process bypasses the delays associated with traditional article publishing.<sup>8</sup> They also have long-term usefulness. Attorneys and judges need reliable access to these commentaries for as long as they are relevant. Researchers will review these commentaries for real-time impressions of historical events. Permanent access to blogs is necessary, but it cannot be ensured without a formal archiving process.

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3. When a search for **FOOTNOTE-1(blog OR weblog OR blawg OR microblog)** was conducted in the Law Reviews & Journals database of Lexis.com on Aug. 5, 2013, it produced the response: “This search (FOOTNOTE-1(blog OR weblog OR blawg OR microblog)) has been interrupted because it will return more than 3000 results.” There were more than 1800 hits for a search of articles from 2013.

4. The current rule is in *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* R. 18.2.2 (19th ed. 2010).

5. *Cases Citing Legal Blogs—Updated List*, LAW X.0 (Aug. 6, 2006), [http://3lepiphany.typepad.com/3l\\_epiphany/2006/08/cases\\_citing\\_le.html](http://3lepiphany.typepad.com/3l_epiphany/2006/08/cases_citing_le.html).

6. Lee F. Peoples, *The Citation of Blogs in Judicial Opinions*, 13 TUL. J. TECH. & INTELL. PROP. 39, 42 (2010).

7. “Link rot refers to the loss or removal of content at a particular Uniform Resource Locator (URL) over time.” Sarah Rhodes, *Breaking Down Link Rot: The Chesapeake Project Legal Information Archive’s Examination of URL Stability*, 102 LAW LIBR. J. 581, 581, 2010 LAW LIBR. J. 33, ¶ 2.

8. Stephanie L. Plotin, *Legal Scholarship, Electronic Publishing, and Open Access: Transformation or Steadfast Stagnation?*, 101 LAW LIBR. J. 31, 55–56, 2009 LAW LIBR. J. 2, ¶ 67.

## If Nothing Is Done, Blogs Will Disappear

¶5 How can law librarians ensure continued access to blogs and their posts? A number of programs have been developed to try to answer this question. Unfortunately, none of them has been truly successful. Some of these programs will be described in this article, but first there are some assumptions about the continued access to blogs that need to be addressed. Some people may assume that the creators of or contributors to a particular blog will archive their own posts. Unfortunately, this is not the case. Most bloggers do not think about preserving their entries in the long term. Thus we can assume that at some point in time most blogs will disappear due to disuse, as the statistics for other web pages have shown.<sup>9</sup> Fortunately, most bloggers are supportive of having an institution preserve their blogs even if they are not willing to make the effort themselves.<sup>10</sup> This means, however, that most blogs will not be preserved unless those who are concerned about the scholarly record intervene.

¶6 Others may believe that major commercial databases like LexisNexis and Westlaw are archiving and providing access to the full text of most blogs, but they are not. At this time, their blog coverage is dependent on a third-party compiler, and neither company provides information as to the exact contents of its blog database.<sup>11</sup>

¶7 There are also programs for blog preservation that have started and then essentially failed. These include PANDORA and ArchivePress. PANDORA is the web archive of the National Library of Australia.<sup>12</sup> PANDORA was the first to make an effort in the direction of blog preservation, in 2004. Initially it archived only one blog. By April 2011, the library had increased the number of blogs preserved to twelve.<sup>13</sup> As of August 2013, 531 titles were listed. However, PANDORA includes only a few captures of each blog, and in many cases only one day's worth of posting in an entire year. At this point PANDORA lacks the robust collection necessary to consider it a success in the area of blog preservation.

¶8 ArchivePress is a blog-archiving project started by the University of London Computer Centre and the British Library Digital Preservation department.<sup>14</sup> A number of attempts were made by ArchivePress to preserve blogs by using RSS feeds to archive those portions of blogs considered to be most important.

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9. Rhodes, *supra* note 7, at 589–90, ¶¶ 34–35. Rhodes examined URL stability over a three-year period, looking at the original URLs for law-and-policy-related materials published to the web and archived through the Chesapeake Project. The results showed an increase in link rot over time, from 8.3% in 2008 to 27.6% in 2010.

10. Michael J. Paulus, Jr., *Blogging for the Record: A Study of Blogging from an Archival Point of View*, 4 J. ARCHIVAL ORG., nos. 3/4, 2006, at 31, 39.

11. Both WestlawNext and Lexis Advance contain some legal blog entries compiled by Newstex, LLC, but there is no information provided about the depth of coverage or how far back the archive goes.

12. PANDORA: AUSTRALIA'S WEB ARCHIVE, <http://pandora.nla.gov.au> (last visited Aug. 2, 2013).

13. S. ARANGO-DOCIO ET AL., BLOGFOREVER: D2.1 SURVEY IMPLEMENTATION REPORT 12 (2011), available at [http://blogforever.eu/wp-content/uploads/2011/11/BlogForever\\_D2\\_1WeblogsSurveyReport.pdf](http://blogforever.eu/wp-content/uploads/2011/11/BlogForever_D2_1WeblogsSurveyReport.pdf).

14. ARCHIVEPRESS, <http://archivepress.ulcc.ac.uk> (last visited Aug. 2, 2013).

Unfortunately, there were many problems with using feeds for preserving content,<sup>15</sup> and the project became inactive in November 2010.<sup>16</sup>

¶9 BlogForever is currently developing an open source software platform that is intended to allow aggregation, preservation, management, and dissemination of blogs.<sup>17</sup> According to its web site, “Any user or organization will be able to use the BlogForever software and guidelines to create a digital repository containing their own selection of blogs.”<sup>18</sup> The software is designed to preserve the content, layout, comments, metadata, and links to external resources.<sup>19</sup> However, at this time it is not fully available.<sup>20</sup>

¶10 The Law Library of Congress has a legal blog archive, which is part of the Library of Congress Web Archives.<sup>21</sup> Their process of archiving includes using the Internet Archive<sup>22</sup> and provides an impressive example of programs that use the Internet Archive to capture web pages.<sup>23</sup> They use open source and custom-developed software to manage various phases of the complete workflow.<sup>24</sup> At this time, it is the best legal blog archive available and is a true service to the legal community. The Law Library of Congress started harvesting legal blogs in 2007. Their collection is active and continues to expand. It contains over one hundred blogs covering a wide range of legal topics. The blogs can be searched by key word, name, or title, or browsed by subject.<sup>25</sup>

¶11 The Legal Blawgs Archive is part of the greater web archiving initiative at the Library of Congress, and their overall blog archiving process does not differ

15. ARANGO-DOCIO ET AL., *supra* note 13, at 12.

16. The last post on the ArchivePress blog was Nov. 5, 2010. Richard M. Davis, *ArchivePress End of Project: Last Post*, ARCHIVEPRESS BLOG (Nov. 5, 2010), <http://archivepress.ulcc.ac.uk/2010/11/05/archivepress-end-of-project-last-post/>.

17. BLOGFOREVER, <http://blogforever.eu/> (last visited Aug. 2, 2013).

18. *Id.*

19. BlogForever will have two main software components: the “weblog spider . . . based on CyberWatcher’s web monitoring software” and the “digital repository . . . built on CERN’s Invenio digital library web application.” *BlogForever FAQ*, BLOGFOREVER, <http://blogforever.eu/blog/2011/06/06/blogforever-faq/> (last visited Aug. 2, 2013).

20. Only a portion of the software, a blog spider prototype, is available. *Test the Blog Spider Prototype*, BLOGFOREVER (Dec. 13, 2011), <http://blogforever.eu/blog/tag/spider-crawler-download/>. No updates since 2011 appear on the BlogForever web site.

21. *Legal Blawgs Web Archive*, LIBRARY OF CONG., <http://www.loc.gov/collection/legal-blawgs-website-archives/about-this-collection/> (last visited Aug. 2, 2013). The Legal Blawgs archive is part of a larger collection of Library of Congress web archives. See *Web Archive Collections*, LIBRARY OF CONG., <http://www.loc.gov/webarchiving/collections.html> (last visited Aug. 2, 2013).

22. “[W]eb archive replay is enabled by a local installation of the Wayback Machine.” *Web Archiving, Technical Information*, LIBRARY OF CONG., <http://www.loc.gov/webarchiving/technical.html> (last visited Aug. 9, 2013). The Wayback Machine “is an open source java implementation of . . . The Internet Archive Wayback Machine.” *Wayback, Introduction*, <http://archive-access.sourceforge.net/projects/wayback/> (last visited Aug. 9, 2013).

23. Another project that has used a similar process to archive blogs using the Internet Archive to crawl web sites is the Web Archive Collection Service at Harvard University, known as WAX. *Web Archive Collection Service*, HARVARD UNIV. LIBRARY, <http://wax.lib.harvard.edu/collections/about.do?kind=about> (last visited Aug. 2, 2013).

24. *Web Archiving, Technical Information*, *supra* note 22.

25. *Legal Blawg Archive*, LIBRARY OF CONG., <http://www.loc.gov/law/find/web-archive/legal-blawgs.php> (last updated Aug. 16, 2013).

from their web archiving process. This process has some deficiencies as a blog archiving tool, because it does not account for the rapidly changing posts on the blogs, nor does it address the interactive quality of the links and comments on blogs. Currently many blogs have fewer than ten captures per year. In more recent years, there are frequently no captures at all. A blog may have several content changes in the course of one day, making this level of capture inadequate. As previously noted, there simply is no effective standard for archiving and preserving blogs of any type at this time. Without a standardized blog archiving process that will preserve important blogs, they will become irretrievable with time, succumbing to the same fate as web pages and other electronic resources.

### **Best Practices in Preserving Blogs: A Blueprint**

¶12 Because there is currently no overarching legal blog preservation program, law librarians must take either individual or collective action to preserve legal blogs. Each law library, at a minimum, should be preserving and archiving blogs that are essential to its individual collection. For academic libraries, that may be the blogs written by their faculty or journals. For law firm libraries, it may be the blogs written by their attorneys. Each law library must decide which blogs to preserve and what method will be used.

¶13 A search of the literature for information on best practices in the preservation of blogs for law libraries revealed little information on the topic, although general awareness in the area of archiving and preserving more complicated formats such as blogs and other social media is increasing. There are currently no established best practices and no effective solutions for blog archiving, digital preservation, and management. Thus, this article provides one possible solution, based on the Law Library of Congress model and taking into account both its strengths and the shortcomings of preserving blogs as if they were simple web pages.

¶14 The process begins with selecting blogs, gaining permission, and crawling the Internet, followed by processing and cataloging (or enabling other finding tools). It may be appropriate to choose a web archiving workflow management application to help support these processes.<sup>26</sup> Decisions about end-user presentation and access must also be made. These procedures must then be developed into archiving policies that cover capture, permissions, and replay. The best tools (technological or human) must be identified to put these policies into practice.<sup>27</sup> Further,

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26. NetarchiveSuite and Web Curator Tool are two applications that might be considered. The NetarchiveSuite software is open source and was initially developed in 2004 by the national depository libraries in Denmark: the Royal Library and the State and University Library. It is a free, "complete web archiving software package . . . to plan, schedule and run web harvests of parts of the Internet . . . [It] is built around the Heritrix web crawler." NETARCHIVESUITE, <https://sbforge.org/display/NAS/NetarchiveSuite> (last update Oct. 11, 2012).

Web Curator Tool is also free and open source and was created in 2006 by the National Library of New Zealand and the British Library. It is a "workflow management application for selective web archiving," and it "supports . . . permissions, job scheduling, harvesting, quality review, and the collection of descriptive metadata." WEB CURATOR TOOL, <http://webcurator.sourceforge.net/> (last visited Aug. 9, 2013).

27. See Nicholas Taylor, Web and Twitter Archiving at the Library of Congress, presentation at the Web Archive Globalization Workshop, June 16, 2011, <http://www.ctrnet.net/sites/default/files/webandtwitterarchivingatthelibraryofcongress-110614202159-phpapp01.pdf>.

the blog archiving process requires the same considerations as digital preservation. Similar to other digital materials, blog preservation activities can be separated into three major areas: content aggregation, archiving, and management.<sup>28</sup>

### Content Aggregation

¶15 For the purposes of this article, content aggregation will be considered as the entire process that leads up to the harvesting of content, including blog selection, permissions, and gathering. Blogs can include various types of visual and textual files, the origin and ownership of which may be unclear. How do you determine how much of the blog you are going to preserve? Does blog preservation include the comments from others and simple links to other web pages, for example?<sup>29</sup> When and how often should blogs be captured?<sup>30</sup> Each law library must answer these questions in a way that is consistent with its mission.

¶16 A collection development librarian or other person or group with collection development responsibilities must identify and select blog sites for inclusion in the project. These will constitute the list of blog web sites that will be crawled at various points in time to capture their contents. The Library of Congress uses the following selection criteria for their web archiving projects: variety, authoritative-ness, and sites that have been nominated. Authoritativeness is based on how frequently a blog is cited, how widely it is read, and whether it has received any honors or awards.<sup>31</sup> Each organization has to decide which collection development criteria are appropriate to them and how these criteria fit into their overriding collection development policies. For example, an academic institution whose repository policies specify collecting and preserving its faculty's scholarly production should be collecting its faculty's blogs.<sup>32</sup>

¶17 There may be collection development reasons to include individual blog posts from a greater variety of blogs on a particular topic, but not necessarily every blog post from a particular list of blogs. For example, there might be a desire to cover a narrower subject, a particular momentous event, or posts by a particular author across multiple blogs. The possibilities are endless. At this point in time, there is no useful automated process for this, so a librarian or other staff member would have to review individual blog posts for inclusion in such a collection.

¶18 If the number of blogs to be preserved is small enough, it may be possible to use RSS feeds from those blogs and have a person collect other individual blog posts for manual addition to the archive. If the goal is to cover a specific subject in depth, a much larger number of blogs would need to be included on the list. Then someone could identify the blog posts that are relevant to the particular topic for

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28. Vangelis Banos et al., Trends in Blog Preservation, at [4], <http://delab.csd.auth.gr/papers/ICEIS2012bbm.pdf>.

29. See Patsy Baudoin, *On Preserving Blogs for Future Generations*, 53 SERIALS LIBRARIAN, no. 4, 2008, at 59, 60.

30. See Paulus, *supra* note 10, at 40.

31. Donna Scheeder, Legal Blawgs: Collecting for the Future, PowerPoint presentation at The Future of Today's Legal Scholarship symposium, July 25, 2009, available at [http://scholarship.law.georgetown.edu/future\\_scholarship/2009/blog\\_preservation/5/](http://scholarship.law.georgetown.edu/future_scholarship/2009/blog_preservation/5/) (slide 6).

32. See Baudoin, *supra* note 29, at 61.



inclusion in the collection. (Perhaps in the future a program could be developed to handle this task.)

¶19 You will then need to determine how often the selected blogs will be crawled and what software or process will be used, and enter those parameters, along with the list of blog sites, into the crawling software. Ideally, a blog would be crawled or captured every time a change was made, although technology to do this efficiently for a whole collection of blogs is lacking at this time. The Library of Congress uses the Internet Archive as its crawling software, which is not ideal because it does not capture the blog every time a change is made.

¶20 Once you have selected the blogs to be included in your collection and determined how often they will be captured, you must address who needs to be contacted for permissions. The Library of Congress handles copyright issues in a variety of ways. First of all, it does not collect anything that is not freely available to the public on the Internet. The library also directly contacts the bloggers for permission using a tracking system.<sup>33</sup> Bloggers are contacted and given a URL to go to along with a unique code for access. They can then select their permissions online. Usually the bloggers are pleased and flattered that the Library of Congress thinks their blog is important enough to add to its archival collection, so it is not generally difficult to get permissions.<sup>34</sup> Once permission is obtained, a permission plan is set up that stipulates to the crawler what content should be captured, what links should be followed, and how deeply the blog should be crawled.<sup>35</sup> There do appear to be web pages of which the Library of Congress has collected snapshots and then failed to get permission for one reason or another. All is not lost in that at least they are able to provide an index to the content.

¶21 Now you are ready to choose a harvesting method. Whether you choose to use software or to harvest blog content manually, there are two wide-ranging technical methods for content aggregation. One approach, which chooses and reproduces individual web sites, is used by the Web Capture Initiative. Then there are other approaches that “use crawler programs to automatically gather and store large sets of publicly available web sites,” such as the Internet Archive, which has been doing this since 1996. “These initiatives are usually complemented by deposit approaches, where owners or administrators of websites choose to deposit the web content they are producing to the repository.”<sup>36</sup> Both of these methods result in problems when it comes to preserving blogs; the frequency with which these methods take their snapshots of web pages cannot keep up with the frequent updates, comments, and discussions transpiring on a blog even if the snapshots are taken on

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33. See E-mail from [webcapture@loc.gov](mailto:webcapture@loc.gov) to [janegenova@att.net](mailto:janegenova@att.net) (Aug. 11, 2010, 3:11 P.M.), available at <http://lawandmore.typepad.com/files/libraryofcongress-3.pdf> (example of a Library of Congress permission request).

34. [Meeting Notes], Citizen Journalists and Community News: Archiving for Today and Tomorrow, Library of Cong., Nov. 3–4, 2010, at 4, available at [http://www.digitalpreservation.gov/meetings/documents/othermeetings/CitizenJournalismNotes\\_final.pdf](http://www.digitalpreservation.gov/meetings/documents/othermeetings/CitizenJournalismNotes_final.pdf).

35. See *id.*

36. Banos et al., *supra* note 28, at [4].

a daily basis.<sup>37</sup> As a result, you will probably also need to add deposit harvesting to your workflow.

¶22 Something to keep in mind when doing manual harvesting is that blogs support smart content aggregation by alerting third-party applications when there is a content submission or alteration. These notifications could be used by existing web preservation initiatives, but are not. Two technologies that can be used are blog ping and PubSubHubbub.<sup>38</sup> Additionally, most “quality assurance checking is performed manually or in a semi-automatic way for web preservation projects.”<sup>39</sup>

### Archiving

¶23 Archiving or preservation refers to the lasting storage of and access to digital or digitized content, and it requires useful, extensible tagging such as metadata. Current common web archiving solutions have various preservation-related shortcomings that make them less than ideal for blog archiving. For example, these archiving tools are designed to aggregate and preserve single files representing a web page and not complex information objects, such as blogs. For the most part, these files do not include page elements, such as page title, headers, content, author information, metadata, and RSS feeds. You will thus need to have a second process to capture the metadata associated with the blog entry.

¶24 In the case of the Internet Archive, the files are captured as WARC files.<sup>40</sup> A list of metadata fields (such as MODS)<sup>41</sup> must be determined manually and a template created. The template will then be submitted to the web crawler for metadata

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37. *See id.*

38. *Id.* Blog ping is a process for notifying search engines, blogs, and RSS directories that your blog has been updated or created. There are many services that do this for free. For information on Google’s PubSubHubbub, see PUBSUBHUBBUB, <https://code.google.com/p/pubsubhubbub/> (last visited Aug. 5, 2013).

39. Banos et al., *supra* note 28, at [4]. Two well-known tools that require human interaction include the Web Curator Tool and PANDORA Archive’s quality-checking process. Web Curator Tool has built into its user manual a quality review process for manually reviewing harvests and diagnosing problems. *See* WEB CURATOR TOOL USER MANUAL, VERSION 1.3, at 43–55 (2008), *available at* <http://webcurator.sourceforge.net/docs/1.3/wct-1.3.0-manual.pdf>. PANDORA is similar, requiring that captured resources be reviewed for quality assurance. *Processing Gathered Instances for Quality Assurance*, PANDORA, <http://pandora.nla.gov.au/manual/pandas3/processing.html> (last visited Aug. 10, 2013).

40. *See* WARC, *Web ARChive file format*, LIBRARY OF CONG., <http://www.digitalpreservation.gov/formats/fdd/fdd000236.shtml> (last updated July 26, 2013):

The WARC (Web ARChive) format specifies a method for combining multiple digital resources into an aggregate archival file together with related information. The WARC format is a revision of the Internet Archive’s ARC File Format [ARC\_IA] . . . that has traditionally been used to store “web crawls” as sequences of content blocks harvested from the World Wide Web. The WARC format generalizes the older format to better support the harvesting, access, and exchange needs of archiving organizations. Besides the primary content currently recorded, the revision accommodates related secondary content, such as assigned metadata, abbreviated duplicate detection events, and later-date transformations.

41. MODS stands for Metadata Object Description Schema. It is a standard schema for a bibliographic element set. MODS is maintained by the Network Development and MARC Standards Office of the Library of Congress with input from users. *MODS: Metadata Object Description Schema*, LIBRARY OF CONG., <http://www.loc.gov/standards/mods/> (last updated July 9, 2013).

extraction.<sup>42</sup> The web crawler will remove the metadata from the files it has created and put them into the metadata template.<sup>43</sup> The metadata that are extracted constitute an initial metadata record for each archived blog site. In the case of the Library of Congress, XML records are produced for review and enhancement.<sup>44</sup> Then a librarian (or other data expert) improves the record by reviewing the metadata values and revising them as appropriate.

¶25 As a general principle, it is best to include as much pertinent metadata as possible in the metadata template. Then subject cataloging, language expertise, and controlled vocabularies can be used to add subject access.<sup>45</sup> The inclusion of these metadata is useful both for the long-term preservation of the archival collection and for its short-term retrievability (discussed in the next section). The goal is to optimize searching and browsing of records and allow for integration with other collections.<sup>46</sup> Again, each law library will need to determine its own process and how much time and expense can be allotted to end-user searching capabilities.

### Management

¶26 Management refers to the current ability of searchers to retrieve relevant results from the blog archive and manage the search results. Irrespective of the method by which a blog is archived, existing solutions do not deliver meaningful management features for the material. For example, the Internet Archive stores blogs as basic documents, simply listing one post after another. Additionally, most national web archiving collections do not support full-text searching, alphabetic browsing, or topical browsing. The most common search feature in blog archives is searching by URL,<sup>47</sup> which is a poor option for accessing archived blog content. It would be extremely difficult to find all relevant blog posts by typing URLs without being able to execute additional types of searching, as described below.

¶27 When planning end-user search capabilities, ask how you want your users to be able to search the collection—On the collection level? On the blog web site level? On the level of individual blog posts? Will blog archives be searchable by key word, subject, etc.? Will they be retrievable from the Internet, from a catalog, from a separate archive, or from some combination thereof?

¶28 The Library of Congress legal blog archive has a fairly robust search capability. After creating metadata records for each archived blog site, they add these records to a database that is very similar in appearance to a traditional catalog, but is actually a lot more powerful in a number of ways. For example, the item records

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42. Tracy Meehleib, *Access to Individual Harvested Sites in a Web Archive*, PowerPoint presentation at the DLF Fall Forum, Providence, R.I., Nov. 13, 2008, *available at* <http://www.loc.gov/standards/mods/mods-resources.html> (click on title of presentation) (slide 10). HTML metadata extraction is done using cURL at the Library of Congress. *Web Archiving, Technical Information*, *supra* note 22.

43. Meehleib, *supra* note 42 (slide 10).

44. Meeting Notes, *supra* note 34, at 4.

45. See Tracy Meehleib, *Providing Access to Archived Web Sites in the Library of Congress Web Archives (LCWA)*, PowerPoint presentation at Digital Library Seminar Series, Columbia Univ., June 30, 2010, *available at* [https://library.columbia.edu/bts/ldp/digital\\_seminars/2010/2010-06-30.html](https://library.columbia.edu/bts/ldp/digital_seminars/2010/2010-06-30.html) (slide 14).

46. Meeting Notes, *supra* note 34, at 4.

47. Banos et al., *supra* note 28, at [5].

are directly accessible by an Internet search—users do not have to search a catalog. This requires that item-level handles (or other persistent identifiers) be registered.<sup>48</sup> Registering persistent IDs/handles allows for site-level stable citations. This way the item records are “portable”—they will fit into both current and future searching and browsing systems.<sup>49</sup>

¶29 Once you have loaded your metadata records onto a server, you will need to index them and create an item-level search and browse feature. Another excellent feature of the Library of Congress’s system is that the data for the item records are in MODS XML format, making the records completely extensible for use with future systems, and thus adding to their viability for long-term preservation.<sup>50</sup> Finally, you must create a collection-level record and register a collection-level handle.<sup>51</sup>

¶30 General information about the Library of Congress’s legal blog archive is accessible by searching the Internet or the Library of Congress’s own system, which includes the ability to browse by subject, name, or title. Each blog site is accessible through searching or browsing within the individual archival collections, across all of the archived collections, or through an Internet search engine. The archive collection can be found by searching or browsing the catalog, searching across all of the archived collections, or using an Internet search engine. This is an impressive level of access, although it could be slightly improved by also having the individual blog sites accessible through the catalog.

¶31 The real downside is that there is no direct way to search for the individual blog posts, because the Internet Archive uses the WARC file format to store web archives.<sup>52</sup> WARC files can be problematic when one is accessing them by key word. The result is that collection information is searchable by key word in the same way that a traditional catalog allows searches by key word based on the limited information available in a catalog entry. However, there is no information about the subject of the individual blog posts. This is akin to having a database for electronic journals that only provides information about the subjects that a particular journal covers, with no way of finding articles on a specific subject without reading

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48. See *Handle System*, CORP. FOR NAT’L RESEARCH INITIATIVES, <http://www.handle.net/index.html> (last visited Aug. 5, 2013):

The Handle System provides efficient, extensible, and secure resolution services for unique and persistent identifiers of digital objects, and is a component of CNRI’s [Corporation for National Research Initiatives] Digital Object Architecture. Digital Object Architecture provides a means of managing digital information in a network environment. A digital object has a machine and platform independent structure that allows it to be identified, accessed and protected, as appropriate. A digital object may incorporate not only informational elements, . . . but also the unique identifier of the digital object and other metadata about the digital object. The metadata may include restrictions on access to digital objects, notices of ownership, and identifiers for licensing agreements, if appropriate.

49. Meehleib, *supra* note 45 (slide 13).

50. See Sally H. McCallum, *An Introduction to the Metadata Object Description Schema*, 22 LIBRARY HI TECH 82, 83 (2004). The item record that the searcher sees is a user-friendly interface of the MODS record created with a style sheet. Meehleib, *supra* note 45 (slide 23).

51. Meehleib, *supra* note 42 (slide 11).

52. The upside is that WARC is an ISO standard and carries metadata. However, search access to web sites in WARC files is limited. Meehleib, *supra* note 45 (slide 13).

through the table of contents. It is to be hoped that better technology and processes will enable libraries to find a way to put their blog posts into a repository that allows for full-text searching, in addition to being searchable on the Internet and having full extensibility.

### **Conclusion**

¶32 The time has come for law librarians to work to find a solution to the problem of blog preservation. There is no acceptable program for archiving, preserving, and maintaining access to important blogs. As time passes, access to references to blogs will disappear. A solution to the problem of blog preservation must be found. Each law library must start by choosing the blogs that are most important to its collection and undertaking the process of aggregating, archiving, and managing those blogs. Then we must come together and share best practice models that we find and continually try to improve. Without further action, important blogs face the likelihood of being lost forever.





**Analytical Research Guide to Federal Indian Tax Law\***

M. Christian Clark\*\*

*As tribal economic growth impacts non-Indian interests, the need for Indian tax law research inevitably increases. Federal Indian law’s jurisprudential nature and constitutional ambiguity create unique challenges for tax professionals. This article is a guide to Indian tax law for both the legal academy and tax practitioners.*

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Introduction

¶1 Federal Indian tax law is uniquely dependent on both judicial lawmaking and historical policy.<sup>1</sup> Recently, tribal economic development has created novel tax conflicts among federal, state, and tribal governments.<sup>2</sup> Inadequate federal legislation opened the door for judicial policy making and ambiguous doctrinal law.<sup>3</sup> Courts are struggling to craft a balanced approach for double taxation and tax rate competition between tribes and states.<sup>4</sup> Such tax conflicts increase the demand for Indian tax law research, especially as tribal businesses attract more on-reservation spending by non-Indians.<sup>5</sup>

¶2 Several Indian law research guides exist, but none are tax specific or combine Indian jurisprudence with practical tax concepts. Law libraries may be ill equipped for intensive Indian tax research because most law schools do not teach Indian law.<sup>6</sup> However, several schools offer an Indian law concentration, and some bar exams now include Indian law questions.<sup>7</sup> These trends improve the Indian tax law field, but several obstacles remain. Notably, most Indian land lies within a few states,<sup>8</sup> few schools teach Indian tax law, research may require locating rare documents,<sup>9</sup> and many researchers incorrectly assume Indians are exempt from taxation.

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1. Researchers new to Indian law should look first to the section on terminology and search terms, *infra* ¶¶ 25–27, as this article uses terms in a manner specific to federal law. *Native American* broadly refers to a native of North or South America. (*American*) *Indian* refers to an individual member of a federally recognized tribe in the contiguous forty-eight states. Discussion is limited to recognized Indian tribes and their members because Native Alaskans and Hawaiians are subject to a more recent body of law.

2. See, e.g., *Nevada v. Hicks*, 533 U.S. 353, 395 (2001) (O’Connor, J., concurring in part and in the judgment); cf. Proclamation No. 8749, 3 C.F.R. 173 (2012) (declaring tribal prosperity a federal policy).

3. See Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 485 (2005).

4. See Mark J. Cowan, *Double Taxation in Indian Country: Unpacking the Problem and Analyzing the Role of the Federal Government in Protecting Tribal Governmental Revenues*, 2 PITT. TAX REV. 93, 101–23 (2005).

5. See Matthew L.M. Fletcher, *Indian Tribal Businesses and the Off-Reservation Market*, 12 LEWIS & CLARK L. REV. 1047, 1059–64 (2008) (discussing barriers tribal economies face in drawing off-reservation funds into tribal economies via on-reservation spending).

6. See *infra* Appendix for a list of law schools offering courses on Indian law.

7. Gabriel S. Galanda, *Indian Law on the Bar Exam: No Family Left Behind*, INDIAN LAW, Spring 2009, at 10, 10.

8. See Indian Reservations in the Continental United States, <http://www.nps.gov/nagpra/documents/reserv.pdf> (last visited July 9, 2013).

9. See Charles D. Bernholz, *Federal Indian Law Internet Tools: Indian Territory Cases at the Oklahoma State Courts Network and Kappler’s Indian Affairs: Laws and Treaties at the Oklahoma State University*, 30 J. GOV’T INFO. 637 (2004) (discussing efforts to digitize these rare documents).

## Scope and Organization

¶3 The goal of this article is to provide an efficient framework for Indian tax law research and analysis. The focus is on federal taxation of Indian tribes and their members. Indian tax law is a component of federal Indian law, which developed over centuries of conflict known as the federal-tribal relationship. An understanding of such historical policy is essential to Indian tax law research, since many pre-twentieth-century laws and precedents remain valid today. The article is organized into three parts: (1) a brief overview of federal Indian law, with an emphasis on its tax-related aspects; (2) the framework of Indian tax law; and (3) sources for researching Indian tax law.

## Federal Indian Law and Policy

¶4 Federal Indian law is applied to each tribe, along with various federal, state, and tribal laws that affect non-Indians when they do business in Indian country.<sup>10</sup> Since the American Revolution, the federal government has controlled Indian nations through both a preconstitutional national power<sup>11</sup> and Congress's plenary power under the Indian Commerce Clause.<sup>12</sup> Congress exercises its power by enacting laws limiting tribal sovereignty and state jurisdiction in Indian country.<sup>13</sup> However, not all Indian nations retain even limited sovereignty—federal Indian law only applies to federally recognized tribes.<sup>14</sup> Each tribe's sovereign powers are individually determined under tribal laws, treaties, executive orders, enabling acts, federal legislation, and case precedent. The federal Indian laws that apply to a tribe also extend to the tribe's organizational entities and individual members.

¶5 Although the *Federal Register* lists each recognized tribe,<sup>15</sup> determining tribal membership involves a two-pronged test: An Indian must (1) have some degree of Indian ancestry and (2) be an enrolled tribal member.<sup>16</sup> This second prong is based

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10. "Indian country" includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust." *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (using definition in 18 U.S.C. § 1151).

11. See *United States v. Lara*, 541 U.S. 193, 201 (2004); Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 510–11 (2007) (describing the dicta in *Lara* as an extraconstitutional "Indian Affairs Power").

12. U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes") (emphasis added).

13. For an exhaustive analysis of the Indian Commerce Clause and state preemption, see Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 922–45 (2010).

14. See Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. §§ 479a to a-1 (2006)). Some states grant special rights to unrecognized Indian nations. Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79, 84 (2008); see also Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427 (1995).

15. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26,384 (May 6, 2013).

16. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[1] (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK].

on the tribe's traditional membership rules.<sup>17</sup> Although the discriminatory nature of some tribal customs may present constitutional concerns, courts generally defer to tribal autonomy.<sup>18</sup> The traditional accuracy of tribal rules may also be difficult for courts to assess due to cultural erosion and judicial bias.<sup>19</sup> Indeed, conforming common tax concepts with tribal sovereignty and seemingly odd laws based on distinct Indian cultures presents a rare challenge for both the legal academy and tax practitioners.

### Federal Indian Law

¶6 Federal Indian law is drawn from treaties and federal legislation, but it develops within an “intricate web of judicially made Indian law.”<sup>20</sup> Each federal branch of government has played varying roles over the course of the historical relationship. The Supreme Court established the fundamental legal basis for federal power over Indian affairs in three seminal cases known as the Marshall Trilogy.<sup>21</sup> In these cases, the Marshall Court crafted Indian law's three bedrock tenets: (1) federal preemption of state law in Indian affairs,<sup>22</sup> (2) inherent tribal sovereignty limited only by Congress,<sup>23</sup> and (3) the federal-Indian trust relationship.<sup>24</sup> Initially, federal power was effected mainly by the executive through military intervention, executive orders, and treaties. By the twentieth century, the executive's role in resolving tribal conflicts was replaced by litigation and legislation. Today, the executive delegates its Indian affairs powers to the Department of the Interior and the Bureau of Indian Affairs (BIA).<sup>25</sup> Congress issues Indian laws under title 25 (Indians) and, to a lesser extent, other titles of the *United States Code*.<sup>26</sup> Courts construe Indian laws under special Indian canons of interpretation

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17. *Montana v. United States*, 450 U.S. 544, 564 (1981) (upholding tribe's “power to determine tribal membership”).

18. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (upholding tribe's patrilineal rules denying membership to female member's child).

19. See Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 705–09 (1989).

20. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

21. The cases are *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). For a description of the cases and their influence on modern Indian law, see Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 628 (2006).

22. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 18–19; *Worcester*, 31 U.S. (6 Pet.) at 561 (“[I]nter-course between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States.”).

23. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17 (“[A tribe is] a distinct political society, separated from others, capable of managing its own affairs and governing itself.”); *Worcester*, 31 U.S. (6 Pet.) at 561 (“[A] weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.”).

24. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18 (describing the federal government as a “guardian” of Indian “ward[s]” and tribes as “domestic dependent nations”); *Worcester*, 31 U.S. (6 Pet.) at 552 (“Protection does not imply the destruction of the protected.”).

25. 25 U.S.C. § 9 (2006) (authorizing President to regulate Indian affairs); 43 U.S.C. § 1457 (2006) (charging Secretary of the Interior with supervision of Indian affairs); 25 U.S.C. § 1a (2006) (authorizing Secretary of the Interior to delegate regulatory power to BIA commissioner).

26. E.g., 42 U.S.C. § 10138 (2006) (nuclear waste disposal in Indian country).

originating from the Marshall Trilogy.<sup>27</sup> Judicial policy making has, however, eroded the force and effect of many fundamental Indian law doctrines.<sup>28</sup>

### *Tribal Sovereignty*

¶7 Tribal sovereignty is a fundamental doctrine and is the threshold issue in federal Indian law because tribal powers are not constitutionally derived.<sup>29</sup> The Constitution does not directly address tribal or Indian powers, unlike the powers reserved to the states by the Tenth Amendment.<sup>30</sup> The Constitution mentions “Indians” only twice—in passing—and “tribes” once, under the Indian Commerce Clause.<sup>31</sup> However, Indian treaties are viewed as statutory equivalents under the Supremacy Clause<sup>32</sup> and may act as a substitute for the Tenth Amendment.<sup>33</sup> And because the Constitution does not restrain tribal governance of its members, Congress has provided some civil rights protections to prevent persecution.<sup>34</sup> Rather than grant tribes power, Congress only limits the extent to which tribal sovereignty is retained.<sup>35</sup>

### *Federal-Tribal Historical Relationship*

¶8 Knowledge of the federal-tribal historical relationship is vital to understanding both federal Indian law and tax jurisdiction in Indian country. Until the 1960s, cultural eradication—and extermination<sup>36</sup>—was a central goal, with tactics that alternated between separatism and assimilation.<sup>37</sup> Control over Indian trade and land was an important concern of the Continental Congress.<sup>38</sup> One of Congress’s first acts was an express grant of federal control over Indian relations and trade.<sup>39</sup> Believing the Indian problem would simply disappear, Congress initially relied on

27. See, e.g., *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (“For nearly two centuries now, we have recognized Indian tribes as ‘distinct, independent political communities.’” (quoting *Worcester*, 31 U.S. (6 Pet.) at 559)).

28. See generally Matthew L.M. Fletcher, *The Supreme Court and the Rule of Law: Case Studies in Indian Law*, FED. LAW., Mar./Apr. 2008, at 26.

29. Rather, they predate the Constitution. 25 U.S.C. § 1301(2) (2006) (defining some tribal powers as “inherent”); *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 172 (1973) (stating that “[tribal] sovereignty long predates that of our own Government”).

30. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 168 n.17 (1982).

31. U.S. CONST. art. I, § 2, cl. 3; art. I, § 8, cl. 3; amend. XIV, § 2.

32. U.S. CONST. art. VI, cl. 2.

33. Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 972 (1996).

34. Indian Civil Rights Act of 1968 (ICRA), Pub. L. No. 90-284, tit. II, 82 Stat. 73, 77 (codified at 25 U.S.C. §§ 1301–1341 (2006 & Supp. V 2011); 25 C.F.R. §§ 11.100–11.1214 (2013)). See also COHEN’S HANDBOOK, *supra* note 16, at § 14.04[2] (contrasting the Bill of Rights with ICRA).

35. See *United States v. Lara*, 541 U.S. 193, 202 (2004).

36. See Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492, 515 n.73 (1993) (noting that 24% of Indian women had been sterilized by 1976).

37. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 139–40 (1977).

38. Pomp, *supra* note 13, at 932–46 (containing extensive analysis of constitutional debates); see also Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 225–30 (2007).

39. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

the executive to remove Indians to barren western lands using coercive treaties and military force.<sup>40</sup> The Georgia-Cherokee conflicts of the 1830s prompted Congress to formally adopt “removal” to resolve state-tribal conflict.<sup>41</sup> Congress created the BIA within the War Department to carry out its new policy with military support.<sup>42</sup> The BIA’s goal was to “civilize” removed Indians through confinement to reservations and Christian assimilation.<sup>43</sup>

¶9 By the late nineteenth century, Congress’s reliance on the executive’s Indian powers diminished as tribal populations and resistance were all but eradicated. Congress ended executive treaty making in 1871 and shifted to an assimilation policy by privatizing Indian country.<sup>44</sup> It enacted the General Allotment Act as a new strategy to assimilate Indians by providing them with citizenship and land ownership.<sup>45</sup> Under the act, each adult male was allotted a 40-, 80-, or 160-acre parcel of tribal land.<sup>46</sup> Members of landless tribes were allotted surplus Indian land or new reservation land created by executive order.<sup>47</sup> The fee patent of each parcel was held in federal trust for twenty-five years, until the allottee was considered “competent” to manage his own affairs.<sup>48</sup> Indian allottees then became U.S. citizens upon fee-patent conveyance.<sup>49</sup> In 1924, Congress formally conferred citizenship on all Indians.<sup>50</sup>

¶10 The 1928 Meriam Report<sup>51</sup> exposed the disastrous failure of the allotment acts, which had resulted in most allotted Indian land being transferred to non-Indians.<sup>52</sup> Congress reacted to the Meriam Report by enacting the Indian Reorganization Act (IRA).<sup>53</sup> The IRA prevented further land loss and Americanized tribal governments by allowing them to enact written tribal constitutions.<sup>54</sup>

40. See Fletcher, *supra* note 11, at 559–61.

41. Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

42. Act of June 30, 1834, ch. 162, 4 Stat. 735. See also Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 4 n.1 (2004) (describing earlier origins of the BIA).

43. See ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 386–87 (1848), available at <http://digital.library.wisc.edu/1711.dl/History.AnnRep4650> (click on link to report for 1848); S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 80 (1973) (discussing use of military in reservation strategy).

44. Indian Appropriations Act, ch. 120, 16 Stat. 544 (1871) (codified as amended at 25 U.S.C. § 71 (2006)). See also David P. Currie, *Indian Treaties*, 10 GREEN BAG 2d 445 (2007).

45. General Allotment Act of 1887, ch. 119, 24 Stat. 388.

46. *Id.* § 1 (one section is equal to 640 acres or one square mile).

47. *Id.* § 4, 24 Stat. at 389.

48. *Id.* § 5.

49. *Id.* § 6, 24 Stat. at 390. The Burke Act, ch. 2348, 34 Stat. 182 (1906), removed the mandatory twenty-five-year trust period but retained the competency requirement.

50. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)).

51. LEWIS MERIAM ET AL., THE PROBLEM OF INDIAN ADMINISTRATION (1928).

52. COHEN’S HANDBOOK, *supra* note 16, § 1.04, at 74; see also Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 12 (1995) (noting many transfers were involuntary).

53. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified in scattered sections of 25 U.S.C.); see also Oklahoma Indian Welfare Act (OIWA), ch. 831, 49 Stat. 1967 (1936) (codified at 25 U.S.C. §§ 501–510 (2006)) (extending certain provisions of the IRA to Oklahoma tribes).

54. 25 U.S.C. § 476 (2006).



However, the organizational provisions were optional,<sup>55</sup> and about forty percent of the Indian population opted out.<sup>56</sup> By the 1970s, Indian policy entered the current era of self-determination,<sup>57</sup> providing for a measured separatism that included tribal preservation<sup>58</sup> and economic independence.<sup>59</sup>

### Indian Country

¶11 Indian country comprises over fifty-six million acres,<sup>60</sup> and many areas contain abundant natural resources. Private exploitation of tribal resources and conflicting tribal-state jurisdictions have led to significant litigation.<sup>61</sup> Gaming and mineral extraction sparked tribal economies, resulting in billions in state and federal tax revenues in addition to tribal revenues.<sup>62</sup> Congress has clearly expressed its “twin goals of economic self-sufficiency and political self-determination” for tribes.<sup>63</sup> To further these goals, it strives to make certain resources more available, including the “private market[,], adequate capital[,], and technical expertise.”<sup>64</sup> However, poverty limits tribal revenues, and most tribes cannot draw outside revenue to their isolated locations.<sup>65</sup> Rural locations also limit tribal access to capital markets and private equity.<sup>66</sup>

### Indian Land Claims

¶12 Indian land claims arose from Indian removal, land cession by successive treaties, and allotment acts.<sup>67</sup> Tribal land cessions from successive treaties resulted in several Indian land claims for Takings Clause violations.<sup>68</sup> The allotment formulas spawned severe fractionation, with individuals owning almost unimaginably small pieces of land.<sup>69</sup> The IRA prevented further land loss by outlawing transfers

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55. 25 U.S.C. §§ 478 (IRA), 503 (OIWA) (2006).

56. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 964–65 (1984).

57. See Indian Self-Determination Act, Pub. L. No. 93-638, 88 Stat. 2206 (1975); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 988–89 (1981).

58. See, e.g., 25 U.S.C. § 1301(2) (2006) (allowing tribes to “exercise criminal jurisdiction over all Indians”); *Morton v. Mancari*, 417 U.S. 535 (1974) (allowing employment preference for Indians within the BIA).

59. Wilkinson & Biggs, *supra* note 37, at 163–65.

60. U.S. FOREST SERV., NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS 6 (1997), available at <http://www.fs.fed.us/people/tribal>. This does not include the almost forty-four million acres held by Alaska Natives. *Id.*

61. See generally Cowan, *supra* note 4.

62. See, e.g., Gabriel S. Galanda, *Getting Commercial in Indian Country*, BUS. L. TODAY, July/Aug. 2003, at 49, 49.

63. 25 U.S.C. § 4301(a)(12) (2006).

64. *Id.*

65. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 293 (2003–2004) (explaining that most tribal businesses struggle because few are near urban centers).

66. Gavin Clarkson, *Accredited Indians: Increasing the Flow of Private Equity into Indian Country as a Domestic Emerging Market*, 80 U. COLO. L. REV. 285, 300 (2009).

67. Indian land claim settlements and the applicable tax rules are codified at 25 U.S.C. §§ 1701–1780p (2006).

68. See, e.g., *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946).

69. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 713 (1987) (noting forty-acre \$8000 parcel with 439 co-owners).

of land to individual tribal members, restoring some land to certain tribes, and extending the trust period indefinitely.<sup>70</sup> Ultimately, Congress created the Indian Claims Commission in 1946 to settle Indian land claims accruing before that date.<sup>71</sup> The commission's success was limited, however, by the overwhelming number of claims, inadequate resources, and inefficient procedures.<sup>72</sup> The recent Cobell settlement seeks to eliminate highly fractionated Indian land under a buyback program by using a \$1.9 billion fund to buy and hold such land in trust (exempt from tax).<sup>73</sup>

### Indian Tax Law

¶13 Federal Indian law's jurisprudential nature adds unconventional complexities to tax research and analysis.<sup>74</sup> The courts are trapped in an endless cycle of reconciling nineteenth-century precedent with modern laws as new federal legislation often conflicts with treaty and sovereign tax rights.<sup>75</sup> The interpretive process is rooted in constitutionalism, but the Constitution's limited application to Indian law hinders clear rules.<sup>76</sup> This morass of legal ambiguity and contradictory policies works against tax predictability.

### Indian Tax Law's Distinctive Aspects

¶14 Contrary to popular belief, individual Indians are "subject to federal income tax just like every other American."<sup>77</sup> Although several tax exemptions exist for tribal members, there is no constitutional exemption or reparations credit.<sup>78</sup> In contrast, a recognized tribe's income is exempt from most federal tax as a matter of administrative policy, and may become taxable only when distributed to tribal members as individual income.<sup>79</sup> Tribal and state taxation in Indian country is subject to a more complex body of judicial law.<sup>80</sup> Indian country's coexistence

70. 25 U.S.C. § 461–463 (2006).

71. Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (repealed 1975). Claims arising after Aug. 13, 1946, may be brought in the Court of Federal Claims. Act of May 24, 1949, ch. 139 § 89, 63 Stat. 89, 102 (codified at 28 U.S.C. § 1505 (2006)). Section 15 of the IRA expressly excluded impairing any existing Indian claims. 25 U.S.C. § 475 (2006).

72. PRUCHA, *supra* note 56, at 1021. For example, in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 423 (1980), the Lakota litigated an 1877 treaty land cession from 1923 to 1942, and again from 1950 until 1979. Finally, in 1980, the Supreme Court ruled that the Lakota were entitled to compensation plus interest from 1877 to the present.

73. *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009). See also *Land Buy-Back Program for Tribal Nations*, U.S. DEP'T OF THE INTERIOR, <http://www.doi.gov/buybackprogram> (last visited July 8, 2013).

74. See Pomp, *supra* note 13, at 909 nn.14–15.

75. Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 131 (2006) (arguing that the Supreme Court's broad Indian policy making "contravene[s] explicit congressional policy").

76. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 412–15 (1993).

77. Rev. Rul. 2006-20, 2006-1 C.B. 746.

78. *Id.*; Rev. Rul. 2004-33, 2004-1 C.B. 628 (labeling reparations tax credit claims as frivolous).

79. Rev. Rul. 67-284, 1967-2 C.B. 55, 58 ("Income tax statutes do not tax Indian tribes.").

80. Many cases decided regarding Indian law in general are relevant to tax law. For example, in *Olipphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the Court held that tribal courts had no criminal jurisdiction over non-Indians, even if they resided within Indian country. While *Olipphant's*

within state lines exacerbates tax issues, especially when tribes tax nonmembers or states tax nonmembers in Indian country.<sup>81</sup> A promising trend is to negotiate tax procedures and authority through tribal-state tax compacts.<sup>82</sup>

¶15 Tax jurisdiction is the extent to which a government may adjudicate disputes and impose taxes. Federal and state governments and recognized tribes all possess certain taxation and conflict-resolution powers. The extent of state and tribal tax jurisdictions in Indian country are determined under federal Indian law.<sup>83</sup> Taxed parties may be separated into three categories: individual members, tribes, and nonmembers.<sup>84</sup> Notably, a state and a tribe may impose concurrent taxes on a person who is subject to both tribal and state taxation.<sup>85</sup>

¶16 The federal policy of measured separatism is evident in how Indian tax laws are enacted.<sup>86</sup> Most Indian tax laws are incorporated in laws issued under title 25 (Indians), especially when state or tribal tax issues are implicated.<sup>87</sup> Exceptions to specific federal taxes<sup>88</sup> and situations where tribes are treated as states for federal tax purposes are issued under the Internal Revenue Code (IRC) (title 26).<sup>89</sup> By issuing most statutory Indian tax laws and exceptions under title 25,<sup>90</sup> the Department of the Interior retains significant tax regulatory and enforcement powers.<sup>91</sup> Thus, the Treasury's legislative authority is limited in Indian country, although the Internal Revenue Service (IRS) remains a primary tax-enforcement arm.<sup>92</sup>

### *Construing Indian Tax Law*

¶17 Courts generally construe treaties and statutes under liberal Indian interpretive canons in order to prevent judicial erosion of inherent Indian rights.<sup>93</sup> Absent Congress's express intent, the "Indian canon" prevents the application of

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crime was not tax-related, the holding affects the power of tribal courts to prosecute non-Indians for unpaid taxes or fees.

81. See Erik M. Jensen, *Taxation and Doing Business in Indian Country*, 60 ME. L. REV. 1, 7–8 (2008).

82. See Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy and the Michigan Tribal-State Tax Agreements*, 82 U. DET. MERCY L. REV. 1, 4 (2004).

83. State-tribal taxation is beyond the scope of this article. For in-depth coverage, see Pomp, *supra* note 13 (providing a chronological discussion of seminal cases related to state-tribal tax law).

84. This article assumes federal incorporation when discussing tribal businesses.

85. See, e.g., *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–92 (1989) (upholding tribal and state severance tax on non-Indian lessee).

86. Measured separatism is described in Wilkinson & Biggs, *supra* note 37, at 139.

87. See, e.g., 25 U.S.C. § 2210 (2006) (exempting consolidated trust land from "Federal, State and local taxation").

88. See, e.g., I.R.C. § 139D(a) (2006) (excluding Indian health care benefits from gross income).

89. E.g., I.R.C. § 7871 (2006) (treating tribes as states for certain deduction purposes).

90. The IRC provides only two major Indian exceptions. See *id.*; I.R.C. § 7873 (2006) (excepting fishing and hunting rights income).

91. See, e.g., 25 U.S.C. § 398 (2006) (directing Interior to "cause" tribal payment of state royalty taxes on reservations leased for mining); Act of July 9, 1832, ch. 174, 4 Stat. 564 (giving Treasury powers to the Commissioner for Indian Affairs).

92. As discussed *infra* ¶ 19, the IRC generally applies to individual Indians, subject to exceptions in treaties and other federal laws.

93. See Frickey, *supra* note 76, at 398, 413–15.

general laws to Indians<sup>94</sup> and preempts state jurisdiction in Indian country.<sup>95</sup> Any textual ambiguities are liberally construed to the tribe's benefit,<sup>96</sup> with treaty terms interpreted "as the Indians themselves would have understood them" at the time the treaty was made.<sup>97</sup> The reasoning is that treaty making was coercive because Indians were given a Hobson's choice between death or land cession.<sup>98</sup> Since treaties are viewed as federal laws, Congress may unilaterally abrogate a treaty or specific treaty right under the last-in-time doctrine.<sup>99</sup> However, courts typically require "clear and plain" congressional intent to invalidate a treaty right.<sup>100</sup> Importantly, a successive treaty only supersedes the prior treaty rights that are specifically extinguished by the succeeding treaty.<sup>101</sup> When federal tax revenue is at stake, however, the courts tend to strictly construe statutes involving individual Indians.<sup>102</sup> Since all treaties were entered into long before the enactment of the IRC, courts often struggle to assess whether taxation was contemplated when entering into a treaty.<sup>103</sup> Despite the Indian canon's recognition for "more than a hundred years,"<sup>104</sup> the Supreme Court recently resolved an ambiguous title 25 provision by inferring that the law was intended to apply to tribes.<sup>105</sup>

### Federal Taxation in Indian Country

¶18 Generally, tribes are presumed tax exempt while members are presumed taxable absent Congress's express intent. Federal taxation of members is based on well-settled statutory rules. Taxation of tribes, however, is less clearly articulated because it developed primarily through judicial and administrative policy.

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94. *Elk v. Wilkins*, 112 U.S. 94, 100 (1884).

95. *E.g., In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866) (holding that Kansas could not tax the Miami tribe).

96. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

97. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999).

98. See Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 617–18 (1975) (arguing that treaties have been and should be treated like adhesion contracts).

99. *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty").

100. See, e.g., *United States v. Dion*, 476 U.S. 734, 738 (1986).

101. See *Mille Lacs Band*, 526 U.S. at 196–202 (finding that a tribe's hunting and fishing treaty rights were not extinguished by a later treaty that abrogated the prior treaty right to possess the land).

102. For a better understanding of the issues surrounding Indian tax law interpretation, see WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 286–331 (5th ed. 2009); Jensen, *supra* note 81, at 28–40; John Lentz, *When Canons Go to War in Indian Country, Guess Who Wins?* Barrett v. United States: *Tax Canons and Canons of Construction in the Federal Taxation of American Indians*, 35 AM. INDIAN L. REV. 211, 215–19 (2010–2011).

103. *Compare* *Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878, 882 (9th Cir. 1982) (requiring express tax exemption in treaty terms), *with* *Holt v. Comm'r*, 364 F.2d 38, 40 (8th Cir. 1966) (interpreting tax exemption for tribal land by inference).

104. *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

105. *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (reasoning that "canons are not mandatory rules").

### *Taxation of Individual Tribal Members*

¶19 Normally, a tribe's income is taxable to the recipient upon distribution or constructive receipt.<sup>106</sup> However, Indian members are expressly given several tax exemptions, and certain tribal distributions may be excluded from income under a general welfare exclusion.<sup>107</sup> Member-owned land held in federal trust is exempt from *any* tax, including on income derived from the land.<sup>108</sup> Funds distributed from federal-tribal settlements are tax exempt under a general rule,<sup>109</sup> so any tribe-specific exceptions must be expressly stated.<sup>110</sup> The IRC also provides some deductions, and title 25 excludes most exempt income from federal social benefits calculations.<sup>111</sup>

### *Direct Federal Taxation of Tribes*

¶20 The first explicit recognition of the tribal tax exemption is a 1967 Revenue Ruling stating: "Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity."<sup>112</sup> Commentators have been puzzled by this, because no prior express statement on this can be located, but such a rule does conform with the inherent sovereignty doctrine.<sup>113</sup> Since tribes retain sovereignty except as limited by Congress, an express intent to impose a tax on a tribe or limit a tribe's taxing powers should be required, because such taxes would hinder the tribe's sovereign revenue-raising power. However, the IRS has also ruled that there is no implied exemption from federal excise tax.<sup>114</sup>

¶21 Tribal income is exempt from most federal taxes if earned by a tribal business that is unincorporated or federally chartered under sections 477 or 503 of title 25.<sup>115</sup> The IRC provides a general definition for "Indian tribal government,"<sup>116</sup> and federal recognition is treated as a bright-line rule in order to qualify as a tribal government under the IRC.<sup>117</sup> Other tribal entities are defined either directly or by reference to specific sections.<sup>118</sup>

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106. Rev. Rul. 67-284, 1967-2 C.B. 55, 58.

107. Application of the General Welfare Exclusion to Indian Tribal Government Programs that Provide Benefits to Tribal Members, I.R.S. Notice 2012-75, 2012-51 I.R.B. 715.

108. 25 U.S.C. § 2210 (2006); Rev. Rul. 67-284, 1967-2 C.B. 55 (providing five-pronged test for exempting income derived from land).

109. 25 U.S.C. § 1407 (2006).

110. See Internal Revenue Manual § 22.41.1.6 (2011) (nonbinding internal guidance listing the four types of exempt individual member income, including income received from land claim settlements).

111. See, e.g., 25 U.S.C. § 1407 (2006) (exempting income from federal claims settlements).

112. Rev. Rul. 67-284, 1967-2 C.B. 55, 58.

113. See, e.g., Mark J. Cowan, *Leaving Money on the Table(s): An Examination of Federal Income Tax Policy Towards Indian Tribes*, 6 FLA. TAX REV. 345, 355-57 (2004); Jensen, *supra* note 81, at 41-44.

114. Rev. Rul. 94-81, 1994-2 C.B. 412.

115. Rev. Rul. 94-16, 1994-1 C.B. 19 (IRA § 17 [25 U.S.C. § 477] incorporation); Rev. Rul. 94-65, 1994-2 C.B. 14 (extending Rev. Rul. 94-16 to Oklahoma tribes).

116. I.R.C. § 7701(a)(40) (2006); Treas. Reg. § 305.7701-1(a) (1984).

117. Rev. Proc. 2008-55, 2008-2 C.B. 768.

118. See Jensen, *supra* note 81, at 43-44.

### *Indirect Federal Taxation of Tribes*

¶22 Despite their general exemption from taxation, tribes must withhold excise and occupancy taxes, including tax on casino patrons' winnings. Tribes must also withhold federal income and FICA taxes from wages paid to employees.<sup>119</sup> Certain excise taxes are imposed on tribal governments and entities if transactions do not meet a governmental purpose test.<sup>120</sup> A tribal government is exempt from excise tax on transactions that serve an "essential governmental function."<sup>121</sup> A tribal government's "political subdivisions" only qualify for treatment like states if exercising "substantial" government functions.<sup>122</sup>

### **Indian Tax Law Practice and Procedure**

¶23 As discussed above, Indian tax law is structured in a way that removes much of the Treasury's control over major tax regulation. However, the Treasury enforces tax on nonexempt income earned by members and, importantly, on tax withheld by tribal government entities. As an Article I court, the tax court's jurisdiction is limited to its statutory authority, namely tax deficiencies prior to assessment and collection due process review.<sup>123</sup> Employment taxes and "excise taxes collected by return" do not fall under the tax court's jurisdiction.<sup>124</sup> Thus, tribes must pay disputed taxes and then sue for a refund in U.S. District Court.<sup>125</sup>

¶24 Essentially, employment taxes are withheld from employee wages and excise taxes are collected from customers. The tribe holds the tax in trust for the U.S. government as "trust funds."<sup>126</sup> For instance, federal excise taxes on gambling winnings are "deemed paid" to the tribal casino and held in trust.<sup>127</sup> If not paid, the IRS may collect from the tribe, tribal council members, or other "responsible persons" on a joint and several basis.<sup>128</sup> To collect unpaid trust fund money, the IRS assesses a trust fund recovery penalty (TFRP).<sup>129</sup> The TFRP creates significant issues for tribes because the actions of council members and nonmember employees may affect the tribe's financial well-being, regardless of whether or not the tribe is incorporated.<sup>130</sup>

119. See I.R.C. §§ 3402(a)(1), 3102(a) (2006) (no exclusions for Indian tribes); I.R.C. § 3121(a)(21) (Supp. V 2011) (Indian fishing income exclusion from FICA).

120. I.R.C. § 7871(a)(2), (b), (d)–(e) (2006); Cowan, *supra* note 113, at 363–64.

121. I.R.C. § 7871(a)(2), (b), (e) (2006) ("[C]ustomarily performed by State and local governments with general taxing powers"); Treas. Reg. § 305.7871-1(d) (1984).

122. I.R.C. § 7871(d) (2006).

123. *Id.* §§ 7441 (establishing the Tax Court), 7442 (limiting tax court jurisdiction to the IRC); MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* ¶ 1.06[1] (Westlaw updated through 2013).

124. Treas. Reg. § 601.102(b)(2) (1967).

125. *Id.* § 601.102(b)(3).

126. I.R.C. § 7501(a) (2006). These "trust funds" should not be confused with funds and property held in trust by the federal government on behalf of members and tribes.

127. See *id.* § 3402(r).

128. See *id.* § 6672(a).

129. The penalty is simply the amount of unpaid tax, not an additional civil penalty, although other penalties may be imposed. See *Monday v. United States*, 421 F.2d 1210, 1214–16 (7th Cir. 1970).

130. *Sokaogon Chippewa Cmty. Tribal Council v. United States*, 959 F. Supp. 1032 (E.D. Wis. 1997); see also Treas. Reg. § 301.7701-1(a)(3) (1967) (treating tribal corporations as an entity not separate from the tribe).



## Indian Tax Research Methods, Resources, and Issues

### Terminology and Search Terms

¶25 Federal Indian tax law uses terminology that may be confusing or offensive to the uninitiated. For example, *savages* was not necessarily racist in itself prior to the twentieth century, as it also referred to people living in a primal state of nature.<sup>131</sup> Likewise, *Indian problem* may or may not be derogatory depending on the issue referred to, such as Indian poverty or state-tribal conflicts.<sup>132</sup> However, it does imply an “us versus them” mentality.

¶26 Minor word differences may impart subtle legal nuances or unintentionally limit search results. Title 25 is itself simply entitled “Indians,” while recognized tribes are referred to as both *Indian tribe* and *Indian tribal government* in the IRC. The *Federal Register* uses the term *Indian entities* in lieu of *tribes* in the recognized tribes list.<sup>133</sup> *Indian law*, *federal Indian law*, and *American Indian law* are interchangeable, and including the word *tax* narrows the search results substantially. An *Indian nation* is any tribe of the contiguous forty-eight states regardless of federal recognition. *Enrolled members* are Indians accepted into and by a recognized tribe. Specific Native American members and nations use the term *Native* before or after a geographic location (e.g., Native Hawaiian and Alaska Native). Indian law literature may use terms that are legally ambiguous, such as *Native American* for a member of a federally recognized tribe of Oklahoma.

¶27 Scholars label historical eras differently depending on the depth of treatment or to differentiate policies of varying importance.<sup>134</sup> However, time frames are often an estimate of when the policy itself shifted, regardless of statutes.<sup>135</sup> The IRC distinguishes between Indians and other natives by referring to enrolled tribal members as *Indians*. Thus, great care must be taken when searching and evaluating resources.

### Research Issues

¶28 Indian law developed into a complex body of historical law and precedent. Hundreds of eighteenth- and nineteenth-century Indian treaties remain a fundamental source of federal Indian law today.<sup>136</sup> Courts must examine historical

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131. PRUCHA, *supra* note 56, at 7 n.3.

132. See, e.g., *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 355 (1945) (Jackson, J., concurring) (“The Indian problem is essentially a sociological problem, not a legal one.”); *White Eagle v. One Feather*, 478 F.2d 1311, 1313 (8th Cir. 1973) (“The Indian Civil Rights Act was the result of several years of hearings respecting the Indian problem.”); *United States v. Boylan*, 265 F. 165, 175 (2d Cir. 1920) (Ward, J., dissenting) (discussing a state’s “Indian problem”).

133. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26,384 (May 6, 2013).

134. Compare COHEN’S HANDBOOK, *supra* note 16, § 1.01, at 7–8 (dividing history into six eras), with Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CALIF. L. REV. 981, 983 n.4 (1994) (defining a single era from the sixteenth through the eighteenth century).

135. For Indian tax law, the following division may be useful: Confederal (1776–1789), Treaty (1789–1871), Trust Land Allotment (1871–1934), Reorganization (1934–1942), Termination (1942–1962), and Self-Determination (1962–).

136. See, e.g., *United States v. Lara*, 541 U.S. 193, 201 (2004) (explaining 25 U.S.C. § 71 as having “saved existing treaties from being ‘invalidated or impaired’”).

records to construe treaty terms as Indians would have understood them.<sup>137</sup> This requires an understanding of specific tribal cultures and the unique federal terminology used in federal Indian law.<sup>138</sup> Successive treaties involve multiple points in history, and state enabling acts—legislation admitting a territory into the Union—may reveal conflicting state and federal intentions.<sup>139</sup> Likewise, courts determine the legislative intent behind ambiguous terms by considering the law's intended effect based on the federal Indian policy at the time of enactment.<sup>140</sup> The language used in treaties and older laws often fails to exclude Indians from tax expressly because federal and Indian taxation was not at issue. Treaty terms that restrict, limit, or prevent certain government actions often require tax exemption to ensure the terms are not breached, such as preventing the tax seizure of restricted property.<sup>141</sup> Thus, research may require sifting through hard-to-find historical documents, such as treaties, enabling acts, tribal and state constitutions, court opinions, and official court records. Some Indian law research guides are useful for navigating the labyrinth of Indian tax law material, but many are redundant and use varying terminology.

## Statutory Research

### *Title 25, Indians*

¶29 Title 25 is a historical compilation of Indian legislation. It is organized into chapters based on subject matter. Sections of modern acts are subdivided and often issued under a single subtitle for a single act. In contrast, the wide variety of tribe-specific acts, amendments, and modifications over the centuries created disorganization among earlier acts. Some older subtitles consist of an assortment of reserved and repealed sections, oddly placed cross-references, and inconsistent labeling. The sheer number of and similarities between tribal names in mixed languages only add to the confusion. However, there is a certain logical consistency to older laws within title 25 that helps improve legal clarity.

¶30 Title 25 has not been enacted into positive law, but each section mirrors the *Statutes at Large*, minimizing potential inconsistencies. Thus, statements of nonimpairment and specific exceptions are usually expressed or referenced in each section. A general rule is usually followed by relevant exceptions within the same paragraph. Each exception is introduced by a prepositional phrase or word in

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137. See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201–02 (1999).

138. See, e.g., *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (“[T]he treaty must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.”).

139. See, e.g., *Mille Lacs Band*, 526 U.S. at 206–08 (finding that Congress was silent regarding Indian treaties in Minnesota’s state enabling act, despite the state’s assuming hunting and fishing rights were abrogated upon admittance, and thus the rights remained intact).

140. See, e.g., *Squire v. Capoeman*, 351 U.S. 1 (1956) (examining Congress’s perception of Indians in the 1800s to determine the intended effect of holding allotted parcels in trust).

141. E.g., *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 760–61 (1866) (determining that a treaty exempted Indians from tax since unpaid taxes could result in “levy, sale, and forfeiture,” which the treaty prohibited).

italics with broad statements introducing the first sentence.<sup>142</sup> The first two subtitles are BIA organizational provisions, with the Department of the Interior's Indian authority provided for in title 42. Chapter 19 is the codification of Indian land claims settlements with both the federal government and the states. Chapter 14 contains primarily tribe-specific laws, separated by subchapter. Both chapters 14 and 19 contain many state and federal tax provisions. The general allotment rules are given in chapter 9, but several related provisions are strewn among various chapters with cross-references to chapter 9. Although it is beyond the scope of this article, the Indian Gaming Regulatory Act (IGRA) is contained in chapter 29 and is one of the most litigated issues in Indian law.<sup>143</sup> Regulations issued in title 25 of the *Code of Federal Regulations* consist of seven chapters, most of which are procedural in nature. However, chapter 3 (Indian Gaming) and chapter 4 (Navajo and Hopi Relocation) substantively affect Indian affairs.

### *Title 26, Internal Revenue Code*

¶31 The IRC consists of eleven subtitles subdivided into chapters, parts, sections, paragraphs, and clauses. Chapters are consecutively numbered regardless of subtitle, with many provisions referencing specific chapters. Sections usually state a general rule, which is followed by exceptions. Some sections are so complex that it can be difficult to recognize the root of a specific rule. Subtitles A–D are each a different type of tax (income, estate and gift, employment, excise). Subtitle E contains special excise taxes, such as tobacco and alcohol. Subtitle F contains procedural rules for Treasury and IRS administration. The other subtitles are far less voluminous and, aside from subtitle G (Joint Committee on Taxation), are of little consequence to Indian tax law. One distinctive aspect of Indian tax law is that Indian trust obligations are in title 25 of the *United States Code* in order to retain the federal-Indian trust relationship within the purview of the Department of the Interior and the BIA. Other federal trust obligations are issued under IRC subtitle I (Trust Fund Code). Treasury regulations are provided *Chevron* deference—as “legislative” regulations—if the respective IRC section expressly authorizes it.<sup>144</sup> Courts are split as to the amount of deference to give “interpretive” regulations issued under the Treasury’s general authority.<sup>145</sup>

¶32 The two major Indian laws of the IRC are procedural rules issued under subchapter C of chapter 80 (general rules).<sup>146</sup> Indian tribal government is the only

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142. See, e.g., 25 U.S.C. §§ 4111(d) (“Notwithstanding any other provision of this chapter . . .”); 398c (“*Provided*, That such taxes shall not . . .”) (2006).

143. Indian Gaming Regulatory Act, §§ 2701–2721 (2006 & Supp. V 2011). IGRA is a heated topic of debate in taxation and state-tribal disputes. See generally COHEN’S HANDBOOK, *supra* note 16, § 12.02; Audrey Bryant Braccio, *How the Anti-Gaming Backlash Is Redefining Tribal Government Functions*, 34 AM. INDIAN L. REV. 171 (2009–2010); Mark J. Cowan, *Tax Issues in Indian Country: A Guide for Practitioners*, 106 J. TAX. 296 (2007).

144. For a better understanding of the types of tax regulations, see SALTZMAN, *supra* note 123, ¶ 3.02[3].

145. The authority for issuing regulations can be found in I.R.C. § 7805(a) (2006). See also SALTZMAN, *supra* note 123, ¶ 3.02[3] (discussing court interpretations of and deference to Treasury regulations).

146. I.R.C. §§ 7871 (tribes treated as states), 7873 (fishing rights exemption) (2006).

Indian law definition contained in chapter 79 (general definitions). Tribal governments may seek guidance through rulings and letters from the Director of Indian Tribal Governments (ITG) office.<sup>147</sup> The ITG office also provides useful guidance on its web site, with links to specific pronouncements and alerts.<sup>148</sup>

### Research Resources

¶33 Since Indian tax law is such a narrow field, tax-specific Indian law research resources are scarce. Many tribal governments are isolated from the public sphere and lack the requisite technology to provide public information concerning tribal legal materials. However, several organizations are digitizing and organizing tribal, state, and federal Indian materials. In addition to the references cited in the footnotes, the following are useful resources for researching and understanding Indian tax law.

### Web Sites and Databases

Indian Land Tenure Foundation. *Land Tenure History*. <http://www.iltf.org/resources/land-tenure-history>.

The Indian Land Tenure Foundation is an excellent resource for both historical and contemporary information on Indian allotments, including links to Internet sites for treaties, legislation, cases, and historical information. The foundation provides exhaustive tables for each BIA region, with details on Indian land allotments for each tribe.

*Intertribal Agriculture Council*. <http://www.indianaglink.com>.

The Intertribal Agriculture Council has a practical tax guide for Indian farmers and ranchers accessible for free as a PDF. The guide's conversational writing style presents definitions and examples to a nonlegal audience. Although the legal references are sparse and often outdated, a supplemental research study contains concise tables with extensive information on allotted Indian land.

Kappler, Charles J., ed. & comp. *Indian Affairs: Laws and Treaties*. <http://digital.library.okstate.edu/kappler/index.htm>.

The full texts of Indian statutes, executive orders, and treaties were originally compiled from the *Statutes at Large* by one government employee, Charles J. Kappler. This comprehensive collection was digitized in nonsearchable formats and organized in the same way as the original seven-volume print set, with annotations and cross-references. Volume 2 contains all 366 Indian treaties of the confederation and federal governments (1778–1883) that were published in the *Statutes at Large*. Volumes 1 and 3 to 7 contain statutes and executive orders (1871–1970). The Oklahoma State University Library Electronic Publishing Center recently digitized nine additional treaties entered into from 1722 to 1805.<sup>149</sup>

147. Rev. Proc. 2012-1, 2012-1 I.R.B. 1 §§ 3.07, 5.12.

148. *Tax Information for Indian Tribal Governments*, INTERNAL REVENUE SERV., <http://www.irs.gov/Government-Entities/Indian-Tribal-Governments> (last updated Sept. 4, 2013).

149. *Early Recognized Treaties with American Indian Nations*, AM. INDIANS TREATY PORTAL, <http://earlytreaties.unl.edu/index.html> (last visited July 21, 2013).

Native American Rights Fund. *National Indian Law Library*. <http://narf.org/nill/>.

Several organizations provide research services for tribal laws and cases, but there is no comprehensive tribal law reporter. The National Indian Law Library (NILL) provides comprehensive guidance and resources for researching Indian tax law, such as congressional materials, journal articles, books, news, law bulletins, and hard-to-find historical documents (e.g., the full text of the 1928 Meriam Report). The main page has links to updated Indian law research guides by David Selden and Monica Martens, which are an excellent starting point for nontax research.

*Turtle Talk: The Indigenous Law and Policy Center Blog*. <http://turtletalk.wordpress.com>.

Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort of the Indigenous Law and Policy Center at Michigan State University College of Law maintain *Turtle Talk*, a blog that updates readers on current Indian law issues. Fletcher has authored dozens of Indian law articles, including many concerning Indian tax law. The blog frequently includes the most cited sources on Indian law, which is highly useful for litigation, IRS administrative disputes, and assessing specific Indian issues. A weekly summary with analysis and case updates may be subscribed to by e-mail.

*United States Code: Popular Name Tool*. <http://uscode.house.gov/popularnames/popularnames.htm>.

Indian statutes are often difficult to research due to a wide range of citation formats used by courts and scholars over the centuries. The U.S. Office of the Law Revision Counsel provides a Popular Name table with citations for both the popular and billed names of each statute, including citations as codified in the *United States Code*. For example, searching (using CTRL-F) for the Curtis Act produces three Indian laws passed within a span of twelve years. Since there are three acts named for Curtis, the popular name is listed in parentheses next to each law (e.g., Five Civilized Tribes).

University of Arizona. *Indigenous Peoples Law and Policy Program*. <http://www.law.arizona.edu/depts/iplp/>.

The Indigenous Peoples Law and Policy Program provides updated links to domestic and international tax issues and cases on its web site. The University of Arizona's law school is a prominent center for Indian law, with perhaps the best faculty for Indian law, including several authors cited within this article.

### *Secondary Sources*

Bureau of National Affairs. *Miscellaneous Transactions, Income of Native Americans*. Tax Management Portfolio no. 501 § XII.

This BNA portfolio provides a useful tax law outline for transactions with Indian tribes and members. Although the portfolio is concise and helpful, many important jurisprudential aspects are ignored, and conventional legal terminology is used. Underlying Indian law policy and judicial doctrines are rarely discussed, and most cited cases do not include parentheticals or further analysis. Despite these shortcomings, it still provides a useful overview.

Canby, William C. *American Indian Law in a Nutshell*. St. Paul, Minn.: West, 2009.

Canby is a sitting judge on the Ninth Circuit Court of Appeals and former director of Indian Law at Arizona State University. As one of the foremost experts on Indian law, Canby's *Nutshell* provides an excellent introduction to federal Indian law. The concisely written book devotes a useful chapter to federal, state, and tribal taxation.

Getches, David H. *Cases and Materials on Federal Indian Law*. St. Paul, Minn.: Thomson/West, 2011.

This casebook provides a comprehensive review of federal Indian law, including taxation. Diverse perspectives on the historical relationship are presented in a balanced mix of article excerpts and case studies. It is organized chronologically with a heavier policy emphasis than most casebooks, which is appropriate given the topic's historical nature.

Newton, Nell Jessup, et al. eds. *Cohen's Handbook of Federal Indian Law*. New Providence, N.J.: LexisNexis, 2012.

*Cohen's Handbook* is the leading treatise on American Indian law and is currently edited by Nell Jessup Newton, dean of Notre Dame Law School. *Cohen's Handbook* was the first comprehensive text on federal Indian law; Felix Cohen wrote the first edition in 1941 while working at the BIA. Since then, its scope has continually broadened, but as a product of the federal government, its content and focus have reflected contemporary federal Indian policy. Initial revisions were biased, prompting many prominent Indian law scholars to reference the first edition. Beginning in the 1970s, though, several diverse scholars served as editors, creating a more balanced guide. The most recent 2005 and 2012 editions are more objective, containing discussions of contrasting views and references to works condemning federal Indian policy.

Pomp, Richard D. "The Unfulfilled Promise of the Indian Commerce Clause and State Taxation." *Tax Lawyer* 63 (Summer 2010): 897–1221.

Pomp, a notable tax law scholar, provides an exhaustive legal analysis of the constitutional basis for state and federal Indian taxation with thorough Indian tax law case studies. The text is concise, and much of the discussion is within the footnotes. The extensive discussion and citations are invaluable for Indian tax research and for understanding the subtler tax implications of many cases.

Prucha, Francis Paul. *The Great Father*. Lincoln: University of Nebraska Press, 1995.

Prucha is a respected Indian policy historian who has written dozens of detailed books. *The Great Father* is concisely written and intuitively organized, with detailed references to useful resources. The book allows researchers to quickly locate and understand the underlying historical policy that influences Indian tax law today. Prucha has also compiled a thorough collection of legislative and executive historical documents in full text.<sup>150</sup>

Tyler, S. Lyman. *A History of Indian Policy*. Washington, D.C.: Bureau of Indian Affairs, 1973.

Tyler compiled a succinct yet complete historical account of Indian policy from a BIA perspective. Many of the sources referenced are either hard-to-find documents or in nonsearchable digitized formats. Although content is not directly related to taxation, the information and resources cited are invaluable to performing any Indian tax law research.

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150. DOCUMENTS OF UNITED STATES INDIAN POLICY (Francis Paul Prucha ed., 3d ed. 2000).



## Appendix

### Law Schools Offering Indian Law Courses

The following law schools offer an Indian tax law course or substantial Indian law curriculum. Additional studies in Indian law are parenthetically listed as Dual Degree (JD/MS or JD/MA), LLM, Doctor of Juridical Science (SJD), Certificate (Cert.), Clinical Course (Clinic), or Journal.

- Arizona State University, College of Law, Indian Legal Program (JD/MS, LLM, Cert., Clinic)
- Gonzaga University, School of Law, Indian Law Program (Cert., Clinic)
- Kansas University, School of Law, Tribal Law and Government Center (JD/MA, Cert., Clinic)
- Michigan State University, College of Law, Indigenous Law and Policy Center (Cert.)
- Seattle University, School of Law, Center for Indian Law & Policy (Clinic)<sup>151</sup>
- UCLA, School of Law, Native Nations Law & Policy Center (JD/MA, Clinic)
- University of Arizona, College of Law, Indigenous Peoples Law & Policy Program (JD/MA, LLM, SJD, Cert., Clinic)
- University of Colorado Law School, American Indian Law Program (Cert., Clinic)
- University of Idaho, College of Law, Native Law Program (Cert.)
- University of Montana, School of Law, American Indian Law Program (Clinic)
- University of New Mexico, School of Law, American Indian Law Center (Cert., Clinic, Journal)
- University of North Dakota, School of Law (Cert.)
- University of Oklahoma, College of Law, Center for the Study of American Indian Law & Policy (JD/MA, LLM, Cert., Clinic, Journal)<sup>152</sup>
- University of Tulsa, College of Law, Native American Law Center (LLM, Cert.)<sup>153</sup>
- University of Washington, Native American Law Center (Clinic)
- William Mitchell College of Law (Cert., Clinic)

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151. This program emphasizes tribal dispute resolution and Indian estate and probate law.

152. The *American Indian Law Review* hosts an annual writing competition and is the only student-run Indian law journal. See 2013–2014 *Writing Competition Rules*, UNIV. OF OKLA. COLL. OF LAW, <http://www.law.ou.edu/content/writing-competition-1> (last visited Sept. 11, 2013).

153. The school also offers an online Master of Jurisprudence in Indian Law. *About the Program*, UNIV. OF TULSA COLL. OF LAW, <http://indianlawmj.org/about/> (last visited July 21, 2013).



## Marketing and Outreach in Law Libraries: A White Paper

ALL-SIS Task Force on Library Marketing and Outreach\*

*In recent years, libraries have turned to marketing and outreach to better educate library users about services and resources while gaining an understanding of their needs. Marketing and outreach are relatively new concepts in academic law libraries, and librarians tasked with these functions have found resources and examples of this type of work to be lacking. Though focused on academic law libraries, the article identifies the challenges facing all law libraries, explains why libraries need marketing and outreach plans, and provides examples of marketing and outreach successes.*

### Introduction

¶1 Law libraries are charged with providing services and access to information to a wide variety of users, including students, faculty, law school staff, attorneys, and the general public. Libraries constantly evolve in response to changes in teaching and learning styles, the format of information resources, methods of scholarly publishing, and the practice of law. These changes must be informed by the needs of our users; in turn, we need to inform users of the resulting improvements. Our services and resources are only valuable to our users if they are aware of them and able to use them successfully. While this white paper was originally written for academic law libraries, with services to law students in mind, most of its ideas and suggestions can be applied to any type of law library. It identifies the challenges facing law libraries, explains why libraries need marketing and outreach plans, and highlights examples of marketing and outreach successes.

### Why Libraries Need Marketing and Outreach

Library marketing is outreach. It is making people aware of what we can do for them, in a language they can understand. . . . We need to tell people we're here,

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\* The membership of the ALL-SIS Task Force on Library Marketing and Outreach included Amanda Runyon, Reference Librarian, University of Michigan Law Library (Chair); Carol A. Watson, Director of the Law Library, Alexander Campbell King Law Library, University of Georgia (Vice Chair); L. Cindy Dabney, Assistant Librarian for Outreach Services, Indiana University Law Library; Liz McCurry Johnson, Reference Librarian, Professional Center Library, Wake Forest University; Emily Lawson, Law Reference/Research Librarian, O'Quinn Law Library, University of Houston; Shira Megerman, Student Services Reference Librarian, Lawton Chiles Legal Information Center, University of Florida; Jamie Sommer, Research and Instructional Services Librarian, Pritzker Legal Research Center, Northwestern University; T.J. Striepe, Faculty Services Librarian, Alexander Campbell King Law Library, University of Georgia; and Michele Thomas, Catalog/Reference Librarian, William H. Bowen School of Law Library, University of Arkansas–Little Rock.

explain to them how we can help, and persuade them to come in through the doors, physical or virtual.<sup>1</sup>

¶2 Conversations about whether libraries will thrive or even exist in another twenty years are ubiquitous. Thanks to the Internet, users no longer see libraries as the predominant source of information. It is assumed that everything is available online or that Google searching leads to more efficient and effective research than using a library. As a result, “[p]ublic perception is at least ten years behind the reality of what we do and how we do it.”<sup>2</sup> Changing this perception will only happen through the hard work of librarians in designing and implementing high-quality marketing and outreach programs.

¶3 Students’ ease with locating information in their everyday life using Google or Wikipedia does not always translate to success in scholarly research, as they do not have the same familiarity with navigating scholarly information resources. Many, though, overestimate their research abilities. For example, Ian Gallacher’s 2006 survey of incoming law students found that 37.1% were “very confident,” and 44% were “somewhat confident” in their research ability.<sup>3</sup> Yet reports from supervisory practicing attorneys and law firm librarians indicate that new attorneys’ research skills need improvement.<sup>4</sup> Patrick Meyer concluded that in order for the research training of law students to remain in sync with the research needs of law firms, law school instruction should include print research components and ensure that students have “a thorough understanding of the database hierarchy, search query formulation, search strategy, and overall online navigation.”<sup>5</sup> Academic law librarians’ opportunities to increase students’ information literacy can be limited, however, because of students’ reluctance to seek out the assistance of librarians.

¶4 Recent studies of college students have shown that undergraduate students are not likely to seek help from the library with research tasks. These studies are relevant to our understanding of law students as well, since most law students are of the same generation as the college students evaluated in these studies and, unless they have other graduate school experience, are not likely to have gained the familiarity with academic libraries that would otherwise shape their opinion of scholarly research.

¶5 The nationwide Project Information Literacy (PIL) study surveyed college students about their information-seeking behaviors. Eight out of ten respondents reported rarely, if ever, seeking assistance from a librarian with course-related research assignments. Even when librarians provided initial training sessions on library resources and using scholarly databases during freshman orientation, students did not return to librarians to seek research help.<sup>6</sup> Students turn to instructors

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1. NED POTTER, *THE LIBRARY MARKETING TOOLKIT*, at xiv–xv (2012).

2. *Id.* at xv.

3. Ian Gallacher, *Who Are Those Guys? The Results of a Survey Studying the Information Literacy of Incoming Law Students*, 44 CAL. W. L. REV. 151, 178 (2007).

4. See Patrick Meyer, *Law Firm Legal Research Requirements of New Attorneys*, 101 LAW LIBR. J. 297, 305–06, 2009 LAW LIBR. J. 17, ¶¶ 25–27 (summarizing survey results).

5. *Id.* at 321, ¶ 72.

6. ALISON HEAD & MICHAEL B. EISENBERG, *LESSONS LEARNED: HOW COLLEGE STUDENTS SEEK INFORMATION IN THE DIGITAL AGE 3* (2009), available at [http://projectinfolit.org/pdfs/PIL\\_Fall2009\\_Year1Report\\_12\\_2009.pdf](http://projectinfolit.org/pdfs/PIL_Fall2009_Year1Report_12_2009.pdf).

rather than librarians for assistance because instructors are seen as experts in the field and they grade the assignments. Instructors were also valued for providing comprehensive assistance throughout the entire process—from developing a topic to writing drafts to editing final papers.<sup>7</sup>

¶6 A positive finding from the PIL project is that while students may not consult librarians, they do use library resources. Of the students surveyed, 84% used scholarly research databases, and 78% used their library's online catalog. However, even though students report using library resources, they also express frustrations with their use, beginning with difficulty knowing which database or resource to select.<sup>8</sup> Other reported difficulties include a general sense of "information overload," and an inability to locate needed information in an online search.<sup>9</sup>

¶7 The Ethnographic Research in Illinois Academic Libraries (ERIAL) project investigated the research habits of university students with the goal of adjusting library services to better meet students' needs. The study found that students did not consult librarians for assistance with research projects for many reasons, including not wanting to bother library staff and being fearful of appearing ignorant or foolish for not knowing how to do research. The study also found that students did not understand what kind of help librarians can offer, and that students assumed that librarians could only help with finding known items or providing directional assistance.<sup>10</sup>

¶8 One explanation for this reluctance to seek the assistance of librarians is the self-reliant nature of the Millennial generation. This generation of students is more likely to attempt to help themselves or to seek answers from the Internet before consulting an expert.<sup>11</sup> If a student's self-teaching behavior proves inadequate, her next step is likely to be to seek help from a peer. Students turn to their peers first because they have established relationships and are working on similar assignments, allowing them to compare progress on and understanding of course materials.<sup>12</sup>

¶9 The need for additional research training presents an opportunity for librarians. The current national spotlight on legal education is forcing law schools to address the high cost of attendance and the lack of jobs for new graduates. Law schools are under pressure to provide practical training and to lower costs, and these two goals are often at odds. Libraries can be part of the solution to this dilemma by offering their expertise and services, which in turn reinforce the library's value to the law school community. Legal research courses, taught by librarians, may be one of the most cost-effective ways for a law school to increase students' practical skills. An added benefit of building librarian-taught legal research courses into the curriculum

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7. See *id.* at 29–30.

8. *Id.* at 22.

9. *Id.* at 9.

10. See COLLEGE LIBRARIES AND STUDENT CULTURE: WHAT WE NOW KNOW 53 (Lynda Duke & Andrew Asher eds., 2012) [hereinafter COLLEGE LIBRARIES].

11. See *id.* at 63; Debbi A. Smith, *Strategic Marketing of Library Resources and Services*, 18 C. & UNDERGRADUATE LIBR. 333, 341 tbl.1 (2011).

12. See COLLEGE LIBRARIES, *supra* note 10, at 58–60.

is that students will see librarians as an integral part of their legal education and recognize them as a resource that can be consulted in the future.

### Changing the Conversation about Library Marketing and Outreach

Outreach has to be more than simply showing and telling. We have to cast aside the librarian-knows-best mentality . . . and instead treat our users as partners in the educational process. Our goal should be focused on the objective of student success.<sup>13</sup>

¶10 When trying to change how they are perceived, it is critical for libraries to focus on becoming “user-sensitive organizations.”<sup>14</sup> Reaching users in a way that demonstrates that library services are valuable to them requires libraries to make users their “partners in the educational process” instead of merely “spectators.”<sup>15</sup> Users cannot truly be partners unless libraries understand who they are and what they need. An important first step is to begin to distinguish between the different kinds of library users. It is important to make these distinctions—among students, professors, alumni, and so forth—because we cannot market to all of our users, even all of our student users, in the same ways.<sup>16</sup>

¶11 Librarians frequently rely on anecdotal evidence, surveys, suggestion boxes, feedback forms, and focus groups when trying to determine users’ needs. While valuable, these methods do not create relationships with users or make the library personal. Instead of making assumptions about what users need, librarians must engage in real conversations with users and collaborate with them to solve problems. By fully engaging in this process, librarians are more likely to get a better sense of the nuances of a user’s situation and to identify gaps in users’ knowledge.<sup>17</sup>

¶12 Another important step in becoming a user-sensitive library is to focus less on library processes and more on creating a library that helps users succeed.<sup>18</sup> It is important to remember that users are experiencing a constant barrage of information and are “less inclined to investigate something on the off-chance that it’s useful.”<sup>19</sup> As information experts, librarians can contribute to users’ success by showing them that we can help them do their work better—which “might mean quicker, more efficiently, more comprehensively, more cheaply,” or something else.<sup>20</sup> In short, librarians must show users where value lies.

¶13 In this way, marketing and outreach are natural extensions of what we already do as librarians; it is our job to figure out what “better” means for our users, and to explain to them exactly how the library can help them achieve better results. In order to accomplish this we must market services, not collections; benefits, not

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13. BRIAN MATHEWS, *MARKETING TODAY’S ACADEMIC LIBRARY* 8 (2009).

14. *Id.* at 2.

15. *Id.* at 8.

16. *Id.* at 12–13.

17. *See id.* at 2.

18. *See id.* at 8.

19. POTTER, *supra* note 1, at 2.

20. *Id.*



features; and results, not processes. We must also market *ourselves* as the experts who help users find the right information.<sup>21</sup>

### Marketing and Outreach Solutions

¶14 Now that we have identified why law libraries need to market to their users and the challenges inherent in such a process, we will describe best practices for marketing and outreach. Though on the surface marketing and outreach may seem to be the same thing, they are quite different. The primary difference is in the purpose or intent behind each method.

¶15 The goal of outreach is to connect with users in a meaningful manner that encourages future interactions with the library. Outreach is generally done with a specific cause in mind, such as meeting instructional goals within the legal academy. Outreach efforts typically elicit personal responses from people. An example of an outreach effort would be to create personal or embedded librarian programs to meet individual students' needs.

¶16 Marketing is promoting library resources and services more generally. Marketing can be more difficult, because it is critical to create the right message for each user group. It is highly unlikely that a single message will be effective for all types of users. If a group of people is already interested in your library and its services, it is more effective to focus your marketing efforts toward that group on specific services or benefits that will keep them coming back. But how do you get your marketing message across to those who are not yet interested in your library? Marketing strategies and messages must be unique and present something to that uninterested group that they would benefit from individually or be motivated to share with others.

¶17 While strategies used in outreach and marketing often overlap, the goal or purpose behind the methods are often completely different. To determine the best methods to meet your specific goals, your library should develop a marketing and outreach plan. This plan is a blueprint of a library's marketing objectives and strategies for its brand, services, and resources. The plan helps to identify the targeted audience(s), assess and identify effective strategies to be implemented by all library staff, develop metrics for evaluating the success of marketing campaigns, and save time and money for targeted projects. Having a strong marketing and outreach plan can make the difference between success and failure in marketing and outreach initiatives.

### Define Your Marketing and Outreach Objectives

¶18 Your library mission statement should be the foundation of your marketing and outreach objectives because it describes who you are, why your library exists, your library's primary functions and activities, who your stakeholders are, and what your library does to address the needs of its users. Reviewing and refining your mission statement will help you determine what you want your library to be known for.

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21. *Id.* at 2–3.

Your marketing and outreach objectives operationalize your mission. Sample marketing and outreach objectives might include increasing the number of patron visits to the library, the reference desk, or the circulation desk; encouraging repeat visitors to the library; promoting resources or services; and developing or improving your web site. When identifying objectives, make sure they are “SMART.”<sup>22</sup>

- *Specific*: Your objectives need to be specific. Each objective should address the five Ws (What, Why, Who, Where, and Which): What do you want to accomplish with the project? Why are you setting this objective and why does it benefit the library? Who is going to be involved? Where is it going to take place? Which constraints might you face in trying to achieve this objective?
- *Measurable*: Your objective needs to be measurable. That is, it should specify how much, how many, how often, and so forth, so that you will know whether the objective has been accomplished. In the era of library justification, it is extremely important to be able to show growth in concrete terms.
- *Attainable*: How will you accomplish the objective, and will you be able to accomplish it? Your objectives must be realistic and attainable. You want to set your library up for success. You do not want your objectives to be impossible or extreme. To reach your objectives, you may need to develop new attitudes, abilities, and skills. Determine whether the needed skills are available in-house, can be acquired through professional development, or require outside help.
- *Relevant*: Objectives must be relevant—they must matter. Objectives that are relevant to your boss, your library as a whole, and your law school take priority. Ask these questions in evaluating the relevance of your goals: Does this objective seem worthwhile given the full scope of the project? Is this the right time? Does it match our strategic plan or goals of the larger organization?
- *Time-bound*: Finally, you need to make sure that your objectives are contained within a specific time period. A strong commitment to a deadline will help a team maintain focus and ultimately facilitate completion. Your objectives should answer the following questions: What can we do today? What can we do six months from now?

Below we have detailed how to achieve SMART goals as you think about creating a marketing and outreach plan in your library.

### Gather Research and Background Information

¶19 As you are creating SMART goals, start by listing and evaluating your current marketing strategies. Are your new goals attainable using your current strategies? What are the pros and cons of the strategies your library has in place? Decide

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22. For more information on SMART goals, see *Locke's Goal Setting Theory: Understanding SMART Goal Setting*, MINDTOOLS, [http://www.mindtools.com/pages/article/newHTE\\_87.htm](http://www.mindtools.com/pages/article/newHTE_87.htm) (last visited Aug. 5, 2013); *Writing SMART Goals*, Univ. of Va. Human Resources, [http://www.hr.virginia.edu/uploads/documents/media/Writing\\_SMART\\_Goals.pdf](http://www.hr.virginia.edu/uploads/documents/media/Writing_SMART_Goals.pdf) (last visited Aug. 5, 2013).

whether your current marketing tactics are furthering your objectives, and do not be afraid to discontinue practices that have been successful in the past but have outlived their usefulness. Identify your target audience and describe its demographics. Make use of surveys, focus groups, and even circulation records to gather descriptors. Engage in real conversations with your users. Also, determine whether you can tweak your current goals to make them better and SMARTer rather than starting from scratch.

### **Brainstorm New Marketing Tactics**

¶20 Set aside your list of current strategies and have a brainstorming session to come up with new marketing tactics. Here are some ideas to get you started:

- Collect and use personal anecdotes from your patrons.
- Offer virtual library tours to reach new target audiences, such as users who are not local or do not use the physical library.
- Link instructional programs to law school events.
- Provide welcome kits for incoming students so they immediately experience the friendly nature of the library.
- Create a YouTube video or channel that is used solely to educate people about and promote library services.

### **Establish a Time Line and Budget; Assign Responsibility**

¶21 As you are setting SMART goals, make sure to set a completion date and assign a staff member to be responsible for each marketing strategy that you adopt. Create an itemized budget for marketing items such as giveaways, printing, and design.

### **Create a Marketing Checklist**

¶22 It is helpful to create a checklist of tasks that should be completed for every new marketing initiative. Following a checklist ensures that new programs or resources are promoted in a consistent manner, via every available avenue. Sample tasks might include designating a person to e-mail a broad target audience about special events; clearly identifying who will post events to all social media forums and when they will do so; establishing a task force for creating and posting new library signage; or committing to adding all library events to an openly accessible library or law school calendar.

### **Develop Measures for Success**

¶23 As you are creating new objectives, make sure that you establish metrics to evaluate whether your tactics are working. Here are some sample objectives with measurements built in: Improve awareness of the library's web site by increasing traffic by five percent in six months. Gather and analyze survey feedback on instructional sessions from the students or faculty who attended (either virtually or on paper). Compare database usage statistics at six-month intervals as you use web and in-person strategies to promote your databases.

¶24 After reviewing your library mission statement and creating marketing and outreach objectives that are Specific (S), Measurable (M), Attainable (A),

Relevant (R), and Time-bound (T), you are ready to develop specific strategies to achieve these objectives. To do that, consider the example marketing and outreach strategies that we have compiled below.

### **Ideas for Successful Outreach**

¶25 Over the course of the development of our profession, librarians have discovered many ways to reach out to the community. Some use new technologies such as social media. Another possibility is integrating librarians into the legal academy within classrooms and within the law school culture. Over time, the profession has evolved to establish librarians as networkers and collaborators of information, and the strategies that have been found to be most successful capitalize on those expert skills. Examples of outreach ideas can be found in the ALL-SIS Marketing and Outreach Toolkit ([allsistoolkit.wordpress.com](http://allsistoolkit.wordpress.com)).

#### **Social Media**

¶26 Because almost everyone uses at least one form of social media, it is a logical way to promote library services to patrons. However, libraries should not just post announcements to Facebook and Twitter regarding programs or new resources. Social media sites are meant to be forums for communication, so they are used most effectively when more than one person is taking part in the conversation. Libraries should strive to use social media as a tool to engage their patrons. For example, in addition to posing trivia questions for prizes or soliciting suggestions from students, libraries should also listen to what is being said about the library and the law school. Free programs such as HootSuite ([hootsuite.com](http://hootsuite.com)) or Buffer ([bufferapp.com](http://bufferapp.com)) allow you to create alerts for when a name or phrase is mentioned in a post. An added benefit of a service like HootSuite or Buffer is that you can schedule posts in advance and post to multiple social media sites at the same time. A library presence on LinkedIn may also be a good idea, since it is a more professional site. Many career services departments use it as a means of connecting alumni with potential employers and building the department's professional relationships. Social media accounts are easy to set up, and staff can be responsible for adding new content periodically.

¶27 A library might also consider engaging in more directed forms of social media. Library educational and promotional videos can be uploaded to a library YouTube channel. Library photos can be hosted on Flickr. All of these can then be linked to the library's Facebook page, so that you only have to post in one location, and your content is automatically published to all your accounts. Promote a giveaway from your social media sites to gauge use. For example, post a message about a free prize at the reference desk. If no one claims it, then no one saw it, and you need to reevaluate your marketing techniques.

#### **Hosting Celebrations, Open Houses, or Reception**

¶28 Libraries often have large physical spaces. If that is the case in your library, consider hosting an event in your space that highlights the collection. Or offer to let other departments use the space: this will not cost the library anything other than the time it takes to help set up or clean up. In addition to being a place of

learning and providing educational services, a library can also serve as a social hub for a school. Libraries seek to create spaces that are conducive to learning and that foster creativity and collaboration. Organizing social activities such as orientation festivals, coffee happy hours, ice cream socials, snacks during finals, movie screenings, yoga classes, and even stress-relief “puppy hours” are all ways that libraries can help promote a more humane and healthy law school experience.

### Embedded Librarians

¶29 Embedded librarians are a new hot topic of discussion within the profession. Think about your outreach goals; perhaps they should include starting a new program in which your librarians are a vital part of the clinical experience at your law school. Embedding a librarian into a classroom or clinical experience entails making in-class presentations on research issues, incorporating research assignments that correspond with curricular and clinical structures, and providing one-on-one research consultations for students.<sup>23</sup> Within this model, librarians can supplement the instructional experience in multiple mediums and formats, such as group presentations, group work, and individualized attention.

### Personal Librarians

¶30 Providing individualized service to students and faculty is a specialized and targeted way to increase the visibility of your library. The idea of personal librarians moves away from traditional reference desk interaction and invites the patrons into one-on-one conversations with information experts. Under such a program, all incoming students are assigned a librarian with whom they will hopefully develop a professional relationship. Librarians make the initial contact with the students as they begin their law school careers, as well as at strategic points in their academic experience. Implementing a personal librarian program can have huge positive effects on the reputation of your library within the law school community.<sup>24</sup>

### Classroom Sessions and Targeted Training Sessions

¶31 Giving a guest lecture in a substantive law course is a very useful way to inform students of the research resources that are available to them. Students will be more receptive to learning about resources if the research instruction is relevant to what they are studying in class. It is even more beneficial if you can tie your instruction to a specific course assignment. Do not assume that if professors want you to speak to their classes, they will ask. Effective outreach involves being proactive and informing faculty about what you can offer.

¶32 You may want to start by targeting professors teaching seminar or paper courses, because the kind of scholarly research and writing required in those classes is not typically covered in a traditional first-year research and writing program.

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23. See Brittany Kolonay & Gail Mathapo, *Experimenting with Embedding: A Law School Library Embeds Librarians in Clinics and Seminars*, AALL SPECTRUM, June 2012, at 18 (describing experiences with embedding librarians in courses at the University of the District of Columbia). See also Karen Westwood, *Deals and Dispute Resolution: Teaching Research Skills in a Short-Term Simulation Class*, AALL SPECTRUM, July 2012, at 12.

24. For more on personal librarians, see John B. Nann, *Personal Librarians—The Answer to Increasing Patron Contact May Be Simpler than We Think*, AALL SPECTRUM, June 2010, at 20.

Offering these instructional sessions is a key opportunity to teach students tricks and techniques for doing their own research, and it also allows students and faculty to get to know the librarians. People will be more likely to seek help from the library in the future if they have already developed a relationship with the library staff.

¶33 In addition to reaching out to faculty to offer research instruction lectures in a for-credit class, librarians can reach out to specific populations of students to provide research training. Groups of students for whom specialized training sessions may be appropriate include faculty research assistants, candidates for law reviews and journals, students working in a clinic, and persons competing in a moot court or trial advocacy competition.

¶34 Some academic libraries currently offer research certificate programs to supplement the instruction provided in legal research courses or in guest lectures in substantive law courses. These certificate programs can be short classes or exercises for which participants are awarded a certificate of completion. The library should also consider partnering with other departments in the law school to provide informal instruction sessions. For example, the library can work with career services to show students what resources are available to help them in their job search and interview preparation. Or the library can work with the Information Technology department to demonstrate new technologies or software that students can use in their classes or in law practice.

### Ideas for Successful Marketing

¶35 Marketing in libraries has changed drastically as new technologies have flooded the information-management community. Good marketing strategies include both web-based and in-person approaches. Using a combination of these methods may help you reach your marketing goals for the library. Examples of marketing ideas can be found in the ALL-SIS Marketing and Outreach Toolkit ([allsistoolkit.wordpress.com](http://allsistoolkit.wordpress.com)).

### Blogs

¶36 Blogs are ubiquitous these days. A great many of them languish without readership, but if blog editors spend the time and energy necessary to make a blog really good, it can be an effective marketing tool. Before starting a blog, the first step you should take is to determine what you hope to accomplish with it. Will it be a source for posting library news and information, or will the content be more in-depth? Once this decision is made, the next step is to make sure that the library staff really does have time and energy to devote to the blog. Make a plan with staff that includes commitments for updating the blog and standards for entries.

¶37 Jordan Steele and Ed Greenlee have written about the process of planning the *Biddle Blog* at the University of Pennsylvania Biddle Law Library.<sup>25</sup> The staff there “decided that all of the posts on the *Biddleblog* would provide substantive and thoughtful commentary and would not merely link to external information

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25. Jordon Steele & Ed Greenlee, *Thinking, Writing, Sharing, Blogging: Lessons Learned from Implementing a Law Library Blog*, 103 LAW LIBR. J. 113, 2011 LAW LIBR. J. 6.



sources.”<sup>26</sup> After deciding on a focus, they developed a list of topics the library staff could use when writing blog posts. The list included book reviews, reviews of online resources, highlights of special collections within the library, a behind-the-scenes look at the library, special exhibits or events, news items related to the law school community, and legal research tips.<sup>27</sup> To facilitate regular posting, the editors of the blog created a schedule for the librarians, with the goal of posting a new entry every one to two weeks during the academic year.<sup>28</sup>

¶38 After those commitments have been made by library staff, the next step is to choose the blogging platform that best suits the library. It is entirely possible that the larger entity of which the library is a part, particularly in academia, will already have a platform that it favors; it may even host its own platform. If that is the case, staff can get training and learn the ropes from in-house IT staff. If not, there are many choices of platform. A few of the major blog-hosting services are WordPress, Blogger, BlogSpot, and TypePad. Some platforms offer more customization options, making it easier to match the blog to the library web site. Other blogging platforms will be easier to get started on without too much fine-tuning, if you want to hit the ground running.

¶39 It is also important to consider which widgets to feature on the blog. Widgets are applications, or parts of a web site, that enable a user to perform a specific task, such as looking at the archives of a blog or reviewing a Twitter feed from a newspaper web site. You can use widgets to insert a banner with local news or to scroll job postings along the bottom of the blog. Different blogging platforms will provide different widgets, and it is a good idea to review the widgets that each platform provides before deciding where to host your blog. Take a look at other institutional blogs as well as personal favorites to see what kinds of widgets are most used and most useful. Some examples of law library blogs are available in the ALL-SIS Marketing and Outreach Toolkit. A more complete list of law library blogs is available on the CS-SIS wiki.<sup>29</sup>

### Annual Reports

¶40 An annual report is a comprehensive report on a library’s activities of the preceding year. Annual reports are intended to share information with interested parties about the library’s accomplishments. Library annual reports are similar to those of public companies, which provide information to stakeholders. Many libraries already have internal annual reports, but they may not cover the library’s marketing efforts. Adding statistics about library marketing events, giveaways, and patron responses can help libraries keep on top of marketing by figuring out which events or promotional products are popular and which are less successful.

¶41 Additionally, annual reports themselves can be an excellent way to communicate with library users. Users might be interested in the library budget or

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26. *Id.* at 117, ¶ 15.

27. *Id.* at 117, ¶ 19.

28. *Id.* at 117–18, ¶ 20.

29. *Law Library Blogs*, AALL COMPUTING SERVICES SIS, <http://aallcssis.pbworks.com/w/page/1189465/Law%20Library%20Blogs> (last updated July 23, 2013).

statistics, and an annual report would be a good place to have a recap of important library events. Including photos is a good idea, particularly of events in which patrons took part, so people can look for themselves. Annual reports are also an excellent way to recognize staff achievements, or even just to introduce staff members to library users.

### Newsletters

¶42 Newsletters can have some of the same effects that a good annual report does. They keep patrons up to date on library events and programs, are a good way to make contact directly with library patrons, offer reminders about library services, and let people know when events of interest are happening. There has been a trend away from library users actually wanting to speak with librarians and library staff. Offering personalizing information such as short biographies and photos in newsletters can make librarians seem more approachable. There are also less serious options, such as including biographies and photos of the pets of library staff, favorite movies or books, or baby photos. Newsletters can also be a good venue for writing about library participation in student, attorney, or local groups and events.

¶43 Many newsletters have been moving online recently, and there is an argument for replacing them with a library blog. But something that comes directly to the user on a recurring basis, either electronically or in hard copy, can be valuable because it serves as a reminder to those who might not otherwise remember to check a blog.

¶44 It is a good idea to have a standard template for a newsletter. This can be a heading and layout for a print newsletter, or a style sheet for an e-mail newsletter. There are many resources for librarians who wish to design a personalized style sheet, but chances are that some basic HTML coding skills will be required. Remember that a newsletter should be designed to display properly in different formats, and it is possible that the library will need a second style sheet for newsletters to be displayed on smart phones or tablets.

### Displays and Exhibits

¶45 Libraries are often commended for their displays. In addition to being educational, displays are an excellent way to promote library resources and programs. Library users can be shown interesting and unusual library books, or reminded of library services. Displays can be used to promote a special collection of the library or to advertise a new database or newly arrived books. Displays can also be an opportunity to work collaboratively with other groups. The library can create a display of recent faculty publications, host an exhibit of photos of a recent student organization event or trip, or put together a showcase of materials relevant to the subject matter of a famous or important case. Offering to create a display promoting a program sponsored by a department or student organization can be an initial outreach effort that may lead to more meaningful interactions in the future.

¶46 Think about incorporating QR codes into your displays to direct users to your research guides. Since they are multidimensional, QR codes can contain a lot

of information, including addresses, text, and telephone numbers.<sup>30</sup> As people use cell phones more frequently to access web sites, they appreciate not having to type in a web site address. Additionally, with a QR code, users do not need to search for (or write down or remember) the web site address for what they are viewing, because scanning the code takes them directly to the web site.<sup>31</sup>

¶47 When creating a display, do not just throw together a bunch of books on a theme. Creating displays and exhibits is just like designing a store window or “merchandising.” After a display is finished, observe the response to it and make notes. Remember that location can be critical. Think about where you get good foot traffic and what the display may be near. Repurpose book jackets and, most important, apply principles of design such as balance and simplicity. Readability is important. Draw a plan or layout for your display in advance. Grab attention by adding lighting, objects, or color if possible.

### Flyers, Banners, Posters, Signs, Brochures, and Pamphlets

¶48 Brochures and pamphlets are an excellent way to introduce the library and some of its most important services to users, and as such can be a simple way to get started in your marketing. While they may seem to have been overshadowed by digital marketing options these days, it is important not to underestimate the usefulness of a good brochure. They add color and appeal to a library desk, are relatively simple to make, and are easy to travel with and give out. Potential library users may forget what they read about online or have heard of by word of mouth, but they can be reminded by a physical item like a brochure. If you are lucky, a member of your library staff might already have some expertise in designing brochures, but there are also plenty of free or low-cost alternatives available online for designing a personalized pamphlet, including several templates from Microsoft. Remember that brochures and pamphlets should not be too text-heavy.

### Promotional Prizes and Giveaways

¶49 Giveaways are always popular. Anyone is happy to have a free pen, and if the pen reminds them of your library it is a win-win situation. When selecting promotional giveaways, choose functional items that fill a need or serve a purpose. It is hard to go wrong with the standard giveaway options—pens, pencils, Post-it notes, water bottles, and so forth. Other things to consider include highlighters, coffee mugs, earplugs, coasters, USB drives, mouse pads, and screen cleaners (all of these items are often cheaper in bulk). Edible items are another favorite: chocolates adorned with the library logo are a sure-fire hit. Putting a high-quality print of the library logo onto a standard label makes it easy to decorate chocolate wrappers, and your bonbons can look surprisingly professional. The best kind of giveaway is something unique that will get patrons talking.

¶50 In addition to smaller giveaway items that library users can simply take, it is also a good idea to have larger items that can be won or earned (e.g., gift cards or

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30. Darla W. Jackson, *Standard Bar Codes Beware—Smartphone Users May Prefer QR Codes*, 103 LAW LIBR. J. 153, 154, 2011 LAW LIBR. J. 9, ¶ 5.

31. *Id.* at 155, ¶ 9.

study guides). For example, students could receive prizes for answering reference questions, finding a hidden clue in the stacks, or tracking down a specific resource. Such a competition could be advertised on the law library blog, Twitter feed, Facebook page, or in the newsletter. The cost of giveaways may be hard to justify with tight library budgets, so consider soliciting coupons or vouchers from local businesses to use as prizes.

### Word of Mouth and Reputation

¶51 One of the strongest marketing strategies available is your library's reputation as it is spread by word of mouth.<sup>32</sup> Word of mouth marketing, at its core, means that your services are giving people a reason to talk about you and recommend your products and services. Word of mouth and reputation are built on strong relationships with your users and with your internal team. Develop a strong team message that you want to guide your audience in spreading. You may have a mission statement that you can prominently display in your library; alternatively, you could create a customer service statement to be posted throughout your library. Talk up your library to your constituencies and tell them about your success stories. Try adding a "wall of fame" in your library where users can post their own stories of successful encounters with library staff. The key is to make the conversation easy so that the positives of your library flow from one mouth to another without interruption.

### Conclusion

¶52 The ALL-SIS Task Force on Library Marketing and Outreach and this white paper were created because of a call from academic law librarians for a comprehensive discussion of marketing and outreach. We hope that we have contributed meaningfully to this discussion while providing all types of law librarians with ideas and strategies to use in marketing their libraries. Our primary goals were to identify the challenges that academic law libraries currently face, to dive deep into the literature and anecdotal conversations to find out why libraries need to develop marketing and outreach plans, and to compile and offer examples of marketing and outreach successes to allow other librarians to learn from one another. We have attempted to blend a theoretical approach to marketing and outreach with practical examples provided in the toolkit. Though this white paper is in no way comprehensive, we believe that it provides a solid foundation for a dynamic conversation that begins now and adapts with our profession. Readers should be sure to look at the toolkit on our web site ([allsistoolkit.wordpress.com](http://allsistoolkit.wordpress.com)) for specific examples to help them in their own libraries.

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32. See Cindy Spohr, *Let's Give Them Something to Talk About—Word of Mouth Is an Important Campaign to Add to Your Marketing Mix*, AALL SPECTRUM, May 2008, at 10.

## Keeping Up with New Legal Titles\*

Compiled by Benjamin J. Keele\*\* and Nick Sexton\*\*\*

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\* The books reviewed in this issue were published in 2012 and 2013. If you would like to review books for "Keeping Up with New Legal Titles," please send an e-mail to bkeele@indiana.edu and nsextton@email.unc.edu.

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Baker, H. Robert. *Prigg v. Pennsylvania: Slavery, the Supreme Court, and the Ambivalent Constitution*. Lawrence: University Press of Kansas, 2012. 202p. \$34.95.

*Reviewed by Susan David deMaine\**

¶1 In 1842, the Supreme Court issued a landmark decision in *Prigg v. Pennsylvania*,<sup>1</sup> resolving a dispute about fugitive slave rendition that had raged between the states for decades. H. Robert Baker's analysis of the decision and the events that led up to it is the first book-length work to investigate *Prigg* and its place in American history. Baker traces the development of fugitive slave laws and recounts the heart-wrenching story that lies behind *Prigg* to shed light on the Supreme Court's decision and the gradual clarification of American federalism.

¶2 Behind *Prigg v. Pennsylvania* is the dramatic narrative of Margaret Morgan, born in Maryland to slaves of John and Margaret Ashmore. According to the lengthy but surprisingly readable bibliographic essay included in the book, Baker consulted historical records, newspapers, and scholarly works to re-create the story. As Baker recounts, Margaret's status was unclear because John Ashmore allowed her parents to live as free people (though he never legally freed them) and laid no claim to Margaret. Margaret grew up, married a man named Jerry Morgan, and had several children. The Morgans then moved to Pennsylvania, where Margaret gave birth to another child. Several years later, John Ashmore died, leaving a will that said nothing about Margaret, her parents, or her children. The will neither

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\* © Susan David deMaine, 2013. Research and Instructional Services Librarian, Ruth Lilly Law Library, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana.

1. 41 U.S. (16 Pet.) 539 (1842).



claimed them as property nor emancipated them. For reasons we can only guess at, Ashmore's widow then hired Edward Prigg to go to Pennsylvania and capture Margaret. It is worth noting that the Supreme Court's opinion tells the story quite differently, characterizing Margaret Morgan as having "fled" Maryland, although this depiction has been criticized by other scholars.

¶3 When Prigg arrived in Pennsylvania, he obtained an arrest warrant from the local justice of the peace as required by Pennsylvania law. Prigg and his associates then arrested Margaret and her children despite the protests of Jerry Morgan that his family was free. Without waiting for the matter to be heard in Pennsylvania, Prigg took Margaret and her children to Maryland that night. A Maryland court then found Margaret to be a fugitive slave. Since Margaret was a slave, so were her children, although according to Baker the child born in Pennsylvania should have been deemed free under the law at the time. Regardless, Margaret and her children are rumored to have been sold further south, and that is the last that is known of them. Meanwhile, in a terrible twist of fate, Jerry drowned on his way home from Harrisburg, Pennsylvania, where he had gone to seek help in rescuing his family.

¶4 The state of Pennsylvania charged Prigg with kidnapping and sought his extradition from Maryland. Maryland refused. The ultimate question that went to the U.S. Supreme Court was which government—federal or state—had the right to control the rendition process under the Constitution and the Fugitive Slave Act. Northern states wanted to protect their free black citizens and their sovereignty, and abolitionists wanted to help fugitive slaves: they wanted control of the rendition process to remain with the states. Southern states were furious that the Northern states made rendition more difficult and interfered with Southerners' property interests. They wanted the federal government to control rendition. In *Prigg*, the Supreme Court handed the power to the federal government, but the implications for state sovereignty ultimately backfired against the South.

¶5 Baker presents the legal and historical complexity that culminated in *Prigg* with a clarity and ease not often seen in law-related texts. He traces different sources of law, beginning with the English common law and the stunning decision of *Somerset v. Stewart*, which held that slavery was so opposed to fundamental conceptions of liberty and equality that it could not exist under common law, but rather required positive legislation.<sup>2</sup> The decision undermined the rigidly hierarchical relationships that characterized British and colonial societies at the time and paved the way for the slow erosion of slavery.

¶6 Baker turns next to the Constitution in its nascent form. The *Somerset* decision, with its notion that slavery required positive law, threatened slaveholders and prompted them to insist on the inclusion of the Fugitive Slave Clause in the Constitution. Baker employs the stories of individual representatives to the Constitutional Convention to investigate how the Constitution strengthened slavery: three-fifths representation of slaves guaranteed Southern dominance in Congress; if requested by a state, the federal government had to aid in fending off invasion or insurrection (a provision aimed at slave rebellions); and the Fugitive Slave Clause required free states to enforce the rights of slaveholders. As Baker

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2. *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.); Lofft 1.

points out, the Constitution left open the question of which government could legislate to enforce the Fugitive Slave Clause.

¶7 This unresolved issue resulted in the Fugitive Slave Act of 1793, by which Congress directed rendition of fugitive slaves but did nothing to protect against the kidnapping of free blacks.<sup>3</sup> The states passed laws distinguishing rendition from kidnapping, further specifying the procedures to be followed by state judges and magistrates in implementing the Fugitive Slave Act. In the ensuing decades, the Northern states passed more stringent laws to protect their citizens, and Southern states passed laws further restricting the rights of free blacks. Baker highlights the irony that both kinds of laws relied on a federalism that gave considerable power to the states.

¶8 When *Prigg* reached the Supreme Court, the appropriate balance between the states and the federal government was the primary issue. To lay the groundwork, Baker considers the Supreme Court's prior decisions about slavery and what is known about the points raised at oral argument. He then probes each Justice's opinion in *Prigg*. In Justice Story's opinion for the Court, Pennsylvania's law was declared unconstitutional, and Congress was given exclusive jurisdiction over rendition under the Fugitive Slave Act. Concurring opinions took issue with the idea that Congress had exclusive jurisdiction. The dissent argued that states had the right to create laws to protect against kidnapping.

¶9 Baker reports that *Prigg* resulted in confusion more than anything else. Abolitionists became more radical. Mobs harassed slave catchers. State legislatures passed laws restraining state officials from giving any aid to slave renditions. State judges continued to apply state rendition and kidnapping laws. By 1850, *Prigg*'s attempt at resolution had failed. Congress passed a new fugitive slave act, but the Northern states, this time led by Wisconsin, continued to resist and recast *Prigg* in ways that allowed them to exert some control over fugitive slave renditions.

¶10 Throughout the book, Baker emphasizes the tensions between the states over slavery. Not only were there soul-searing moral questions, but also extraordinary political challenges in balancing property rights, liberty, and state sovereignty. While never detailing any particular horrors, he communicates the dreadfulness of chattel slavery and the many ripple effects it had. Baker also calls attention to the continuing relevance of *Prigg* to ongoing arguments about the boundaries of federalism in issues such as immigration enforcement, same-sex marriage, and abortion rights.

¶11 Baker's book is valuable as the only full-length treatment of *Prigg v. Pennsylvania*. That it is also artfully written, full of historical detail and color, and a fine contribution to the literature on slavery and federalism makes it all the more worthwhile.

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3. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

Banner, Stuart. *The Baseball Trust: A History of Baseball's Antitrust Exemption*. New York: Oxford University Press, 2013. 283p. \$29.95.

*Reviewed by Dana Rubin\**

¶12 With more than fifteen books on baseball coming out this year, there is no shortage of reading material for baseball fans.<sup>4</sup> For those interested in the intersection of law and baseball, there is *The Baseball Trust: A History of Baseball's Antitrust Exemption*. Stuart Banner, a law professor and noted legal historian, explores the history that led to baseball's being the only sport exempt from antitrust laws. Through the use of extensive primary materials, Banner leads the reader through the history of the decisions that ultimately led to "such a weird state of affairs" (p.xiii).

¶13 Banner begins with a discussion of the reserve clause, which essentially bound a player to a team for his entire career. The reserve clause started as an agreement among team owners that enabled them to reserve certain players for an ensuing season, thereby keeping costs down. It was later included in player contracts as an option for the team to renew for the following year. The reserve clause is the main thread of the book and of the many lawsuits the book discusses. Banner traces the early lawsuits over the reserve clause, which focused on contract law, to later suits based in antitrust. Banner describes both the lawsuits and the surrounding atmosphere in an engaging and dynamic fashion. Photographs of the baseball players and owners involved put a human face on the cases.

¶14 It is not until chapter 3 that baseball arrives at the Supreme Court. *Federal Baseball Club of Baltimore, Inc. v. National League*<sup>5</sup> was the first time the Supreme Court addressed whether baseball was subject to antitrust laws. Banner examines the legal landscape and earlier opinions that led to what has become a "widely ridiculed" decision (p.63). He considers the legal, political, and social maneuverings that led from the *Federal Baseball Club* holding that baseball was not interstate commerce to baseball's gaining an exemption from antitrust laws. He also discusses the rise of other team sports and the unsuccessful attempts to create similar exemptions for them. While Banner notes that the Supreme Court decisions surrounding baseball's antitrust exemption were often criticized and mocked, he explains how they fit into the context of the times. He shows less tolerance for Justice Blackmun's opinion in the final Supreme Court decision on the topic, *Flood v. Kuhn*,<sup>6</sup> which the author notes is basically an "ode to baseball" rather than an application of law to facts (p.208).

¶15 *The Baseball Trust* is a well-researched and entertaining look at how antitrust law has affected the national pastime. It is appropriate for academic law libraries and undergraduate libraries, particularly those with sports law collections.

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\* © Dana Rubin, 2013. Reference/Educational Services Librarian, New York University School of Law, New York, New York.

4. See Robert Birnbaum, *Too Many Baseball Books! The 15 Big Titles of 2013*, DAILY BEAST (May 1, 2013), <http://www.thedailybeast.com/articles/2013/05/01/too-many-baseball-books-the-15-big-titles-of-2013.html>.

5. 259 U.S. 200 (1922).

6. 407 U.S. 258 (1972).

Cass, Ronald A., and Keith H. Hylton. *Laws of Creation: Property Rights in the World of Ideas*. Cambridge, Mass.: Harvard University Press, 2013. 288p. \$55.

*Reviewed by Jennifer Wertkin\**

¶16 We are living in an age in which technology is moving more rapidly than ever before. Society reaps the benefits of innovative technological advances in many fields, such as pharmaceuticals, medicine, computing, and the arts. In light of these advances, many scholars have criticized current intellectual property (IP) laws as being too restrictive. However, in their book *Laws of Creation: Property Rights in the World of Ideas*, Ronald Cass and Keith Hylton make the case for a utilitarian approach to IP law. They assert that there are greater economic and social benefits to maintaining current IP protections and building upon them than to dismantling our current system.

¶17 The authors look to philosophies of property to provide a framework for their argument. According to Cass and Hylton, most practical questions regarding property rights can be boiled down to a cost-benefit analysis. They state that the effects of property rights are divided into “dynamic and static effects” (p.28). Dynamic effects include the incentives to create and build and, therefore, to continue to invest in the creation. Balanced against these dynamic effects are static costs, such as monopolizing and excluding. IP property rights are only justified where the costs of exclusion are outweighed by the benefits provided by an ongoing dynamic effect.

¶18 The middle chapters of the book apply Cass and Hylton’s philosophy to the four main areas of IP law: patents, trade secrets, copyright, and trademarks. They provide a short overview of each of these areas and conclude that, in general, the current laws and protections afforded IP owners, while flawed at times, are generally balanced and reasonable. This contravenes most current scholarship, which claims that IP laws are too strong and give too much control to the rights holder.

¶19 The book then considers current assumptions about IP law and shows that while many of these assumptions have a “kernel of truth” (p.173), most scholars’ suggestions for dismantling IP law move us further away from the common good. Cass and Hylton argue that some criticisms of IP statutes are better directed at common law precedents courts have made. For instance, it seems there should be tension between IP and antitrust laws; antitrust laws are used to break monopolies, while IP laws create monopolies. However, antitrust law has not been used to check IP rights, but has been applied only when IP agreements have been used to cloak collusive agreements. Also, as IP laws have been increasingly codified, rights holders’ rights have expanded, sometimes at the expense of the public. Cass and Hylton posit that these effects of IP laws are due to judicial precedents that, on a case-by-case basis, analyze the trade-offs between static and dynamic costs, an approach that they think “advances welfare in modern societies” (p.210).

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\* © Jennifer Wertkin, 2013. Head of Public Services, Arthur W. Diamond Law Library, Columbia Law School, New York, New York.

¶20 Although the book provides an economic analysis of IP law, it does not include much empirical evidence (e.g., cases or the outcomes of various disputes). The authors acknowledge this, but the fact remains that the book is largely based on ideas rather than evidence. This book would be best suited for an established, as opposed to a novice, audience. Although it covers the four major areas of IP law, it is not a good starting point for someone who has not done prior research in intellectual property.

¶21 This volume is well suited for academic law library collections as it provides a counterpoint to the majority of scholarship in the area of IP law. The endnotes include a number of citations to the legislation, cases, scholarship, and stories that make up the current landscape of IP law.

Crawford, Susan. *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age*. New Haven, Conn.: Yale University Press, 2013. 360p. \$30.

*Reviewed by L. Elliott Hibbler\**

¶22 After a recent move, I was in the enviable position of deciding on a television and Internet package. I had a choice of two companies, both with high-speed Internet, telephone service, and more television stations than I could watch or afford. Unfortunately, this choice among providers is available to only a minority of Americans, and Susan Crawford's *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age* explains why that is.

¶23 Crawford, a professor at Cardozo School of Law and author of numerous articles on the telecommunications industry, traces the concentration of monopoly power in telecommunications, using Comcast as the story's main character. The book's focus is the 2010 merger of Comcast and NBC, which tied several strands of the industry together.

¶24 Crawford begins her book with an early American network so monopolized by corporate interests that the government had to intervene: the railroads. She quickly moves from rail networks to communications networks, describing the development of cable in general and of Comcast in particular.

¶25 During the development of the communications industry, different types of content traveled via segregated channels. The telephone wires were for calls, antennas picked up broadcast TV, and coaxial cable was for cable channels. Today all of this content can be broken down into zeros and ones, and any content can go over any conduit. Generally speaking, it turned out that of all the transmission streams into the home, coaxial cable could carry the most data, putting companies like Comcast in a favorable position.

¶26 Comcast started as a small player that opportunistically scooped up cable monopolies in individual cities across the country. Several chapters of the book detail how its strength lay not in the service it provided, but in the way it navigated the regulatory environment to maximum advantage. As Comcast grew, Crawford

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argues, it was able to use its cable reach to make favorable deals for content, and it used exclusive content, like its network of regional sports programming, to lower demand for other companies' data services. The merger with NBC Universal only increased Comcast's power, even as it made small concessions to regulators to ensure the deal went through.

¶27 Crawford's book doubles as a manual on how the administrative apparatus of government operates. The give-and-take between the regulators and the regulated exemplifies how power can shift in Washington. Treating government agencies as actors with their own motivations, sometimes only nominally in the public interest, may sound cynical. But Crawford's portrayal of Comcast's executive team's extensive lobbying effort, combined with her own economic analysis of the industry, justifies skepticism that the public interest is truly being served.

¶28 The focus on Comcast does make the book's sections on wireless communication seem weaker by comparison. In part, this is because there has been no era-defining moment like the Comcast-NBC merger. In fact, the Department of Justice prevented a merger between AT&T and T-Mobile, the second- and fourth-largest cell phone carriers in the country, respectively, soon after the Comcast deal. Also, as Crawford points out, wireless Internet from cellular companies does not reach the one gigabit of data per second speed that she sets as a goal for the country. That means that wireless carriers are not providing as high-quality a service as they could, and she explains the economics behind their choices. Finally, there is a little more competition in the wireless industry, in that metropolitan areas usually provide at least some choice in carriers. It should be noted that Verizon installed fiber-optic cable in some areas of the country, but it has stopped that project. Now Comcast helps sell Verizon's wireless service. Readers interested in more information on the wireless industry may prefer Tim Wu's excellent 2010 book *The Master Switch: The Rise and Fall of Information Empires*.

¶29 *Captive Audience* serves as a well-researched history of the regulation of the cable industry, and to a lesser extent the telephone industry. It is highly recommended for academic and public law libraries. It could also be useful in getting practicing attorneys new to telecommunications up to speed on major trends in the industry.

Daily, James E., and Ryan M. Davidson. *The Law of Superheroes*. New York: Gotham Books, 2012. 304p. \$26.

*Reviewed by Jessica Wimer\**

¶30 In *The Law of Superheroes*, attorneys and self-described comic book nerds James E. Daily and Ryan M. Davidson consider the potential legal liabilities superheroes face when using their powers and interacting with others. If you have wondered what would happen if actual law and legal principles were applied to superheroes' actions, this is the book for you.

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¶31 A friend recommended *The Law of Superheroes*, but I was unsure what to expect, because my knowledge of comic books is limited to the well-known characters featured on TV and in the movies. As a child I envied their powers, and I dreamed of having the ability to fly and of owning their fantastic stuff, such as Wonder Woman's golden bracelets. Despite these dreams, I seldom read comic books. As an adult, the most thought I have recently given to them was a brief conversation expressing empathy for Wonder Woman because of the inconveniences that must come with flying an invisible plane.

¶32 When I picked up the book, I was just as interested in learning more about superheroes as I was in the legal analysis applied to their actions. I soon discovered their comic book existence is more robust and developed than I imagined. For example, it never occurred to me that superheroes could be called to testify in court, but it turns out this is not unusual. If you are Daily and Davidson, this raises a number of questions. Can superheroes legally testify in costume? How can the court guarantee that the costumed witness is the actual superhero? Doesn't the Confrontation Clause guarantee defendants the right to confront those who testify against them?

¶33 *The Law of Superheroes* is divided into thirteen chapters. The first eleven chapters cover major doctrinal areas such as constitutional law, criminal law, evidence, contracts, and international law; the final two chapters cover the superhero-specific topics of immortality, alter egos, resurrection, and nonhuman intelligences. Within each chapter, the authors describe legal principles and apply them to superhero actions in a number of situations, using examples from comic books when appropriate. For example, the chapter on constitutional law starts with a general discussion of relevant constitutional law principles before addressing some specific questions. Could the government use a superhero with psychic abilities to extract evidence from a witness who pleads the Fifth? Could the government pass hate crime laws to give mutants additional protections? Could the government regulate superpowers as weapons without violating the Second Amendment's right to bear arms?

¶34 In most situations, Daily and Davidson successfully make their analysis both understandable and engaging, although their success varies across topics. I especially enjoyed the chapters on criminal law, criminal procedure, and tort law and insurance because of the nature of the questions that arise in these areas: Can there be a murder or even an attempted murder if the victim does not stay dead? (Wolverine, apparently, is pretty indestructible.) Are superheroes state or private actors, and how does that affect their ability to legally stop the bad guys? Regarding insurance, who pays for the mass destruction that follows in the wake of many superhero activities? More complex topics, such as constitutional law, were less engaging, as the authors sometimes got bogged down in explaining the law. In these chapters, it might have been better to cover fewer issues and to provide more examples to keep the reader's attention and interest. Unfortunately, in an attempt to cover complex material while providing superhero examples, the book sometimes reads like a first-year law student's memo.

¶35 *The Law of Superheroes* grew from Daily and Davidson's blog *Law and the Multiverse*. While I enjoyed the book, I would recommend that interested readers

first spend some time with the blog. The blog format does not force the authors into the book's strict narrative style and allows the authors to engage in amusing debates and conversations with readers.

¶36 My biggest complaint about the book is that I could not determine its intended audience. From the viewpoint of a comic book novice, the book seems most appropriate for individuals who have a working knowledge of comic book characters and stories; such readers will understand many of the examples. What is harder to gauge is whether this book will appeal to both legal experts and novices. The authors provide enough introductory information for the legal novice, but perhaps not enough detail to keep a legal expert's attention. If Daily and Davidson want *The Law of Superheroes* to be better understood by most readers, it would have been very helpful to include an appendix that provided a brief description of all the superheroes mentioned in the book, and a second appendix with the relevant text of the laws discussed.

¶37 *The Law of Superheroes* is a fun book and appropriate for public and academic law libraries that offer casual reading material. However, it is not a book that provides an introduction to legal principles using superhero characters and stories, so it would not be an appropriate teaching tool, except as an entertaining example of how far active imaginations can take the study of law.

Gerrard, Michael B., and Gregory E. Wannier, eds. *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate*. New York: Cambridge University Press, 2013. 639p. \$140.

*Reviewed by Janet Lewis Reinke\**

¶38 *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* consists of seventeen chapters that deal with the various legal responses to rising seas that are endangering the habitability and even the existence of several small island nations, mostly in the Pacific and Indian Oceans. This is the first book to address the myriad legal issues posed by this situation.

¶39 The book had an interesting genesis. In 2009, Phillip H. Muller, the Ambassador of the Republic of the Marshall Islands to the United Nations, approached Columbia Law School's Center for Climate Change Law. He expressed his concern that the seas are rising and that soon his country of twenty-nine coral atolls and five islands located between Hawaii and Australia will be under water. This presented a number of legal questions. Michael Gerrard and Gregory Wannier, working at the center, could not answer all of them and thought an international conference of legal scholars was needed. Columbia University and the Republic of the Marshall Islands put on such a conference at Columbia in 2011.

¶40 This book is a collection of papers by speakers at that conference. All the chapters were written by lawyers, except for chapter 2, which was written by scientists. Chapter 2 discusses what is known about the nature and timing of sea level rise as it affects the islands in question. Chapters 3 to 7 cover sovereignty and

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territorial concerns; chapters 8 to 12 relate to resettlement protections and proposed solutions; and chapters 13 to 17 address accountability. The book has an adequate index, and there are twelve pages of color plates that illustrate different aspects of climate change.

¶41 Chapters 13 to 17 cover a number of legal theories under which the island nations could try to get redress from polluters and others for climate change that destroys their land. This is a subject that could be relevant for other countries adversely affected by rising seas. And the book does not just discuss rising tides. It also mentions other harmful symptoms of climate change, such as cyclones, droughts, and floods.

¶42 The book is clearly written, if dense. One drawback for the American reader is that some measurements are given using the metric system, with no U.S. customary equivalent. Thus, the reader cannot understand the extent of the climate change projected without using a conversion table. The subject of rising seas and climate change affects us all, even though it is unlikely that the entire United States will be under water during our lifetime, a circumstance that is anticipated by some island nations.

¶43 *Threatened Island Nations* highlights current legal authorities and then explains how they can be used. It aims to provide a comprehensive summary of the legal issues involved and of the legal options for the future, which can guide legal and political activities. It seems to accomplish this objective. Unfortunately, the short answer is that there is little legal redress for the harms of climate change under existing laws. However, island nations can plan for the migration of their inhabitants and the transportation of property.

¶44 This book could be beneficial to libraries that collect foreign and international materials and serve as a valuable addition to other treatises on the legal aspects of climate change. The book is arranged in an orderly manner and is attractive with a durable binding; it is worth the \$140 price. *Threatened Island Nations* is recommended for academic and government libraries, especially those with an environmental law focus.

He Weifang. *In the Name of Justice: Striving for the Rule of Law in China*. Washington, D.C.: Brookings Institution Press, 2012. 269p. \$34.95.

*Reviewed by Roy L. Sturgeon\**

¶45 For most of the last eighteen years, He Weifang has taught law at Beijing's prestigious Peking University. His specialties are legal history, both Chinese and foreign, and China's judicial system. He is a popular professor on campus, having won several law school and university teaching awards. Also, he has been a visiting scholar and given public talks in Europe, Japan, and the United States. Late last year he spoke in Washington, D.C., about judicial independence in China. His talk was part of a Brookings Institution event on the Chinese rule of law, which included

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U.S. Supreme Court Justice Stephen Breyer, former U.S. Ambassador to China and Republican presidential candidate Jon Huntsman, octogenarian New York University law professor and doyen of American China law scholars Jerome Cohen, and law professors from Harvard and Yale.<sup>7</sup> The event coincided with the launch of He's first English-language book, *In the Name of Justice: Striving for the Rule of Law in China*.

¶46 At least six other English-language books on the Chinese rule of law have been published so far this young century.<sup>8</sup> He's is special partly because he lives in the world's largest authoritarian state and is subject to its whims. Unlike most of his colleagues, but in accord with China's best indigenous traditions, he tests the rule of law there by publicly criticizing unjust government policies and officials. Sometimes success follows, as it did in 2003 when he and five other Beijing legal scholars petitioned the government to end two decades of legal discrimination against rural migrants to China's booming cities. Other attempts were not as successful; in 2008 He and 302 concerned citizens signed Charter 08, a manifesto calling for democracy, legal reforms, and protection of human rights in China. The government effectively banished him to remote Xinjiang in western China to teach for two years at an obscure school. Considering that the Chinese government often harasses, detains (legally and illegally), tortures, imprisons, disappears, and exiles citizen-critics as well as their families, his outspokenness is extraordinary. He is not just an "ivory tower" scholar, but a public intellectual who promotes basic judicial concepts. Domestically, his approach is called the "He Weifang" phenomenon. Internationally, he is ranked as one of the world's best minds.<sup>9</sup>

¶47 *In the Name of Justice* consists of eleven chapters. They are a representative mix of academic writings, media interviews, open letters, and public speeches spanning 2001 to 2011. Most were translated from Chinese into English especially for this volume, the third in the Thornton Center Chinese Thinkers Series by the Brookings Institution. The topics include judicial independence, the fourth-century B.C.E. Confucian philosopher Mencius, comparative constitutionalism, legal education, free speech, and capital punishment. The prologue features He's 2011 open letter to legal professionals in the southwestern megalopolis Chongqing, warning about the dangers to judicial independence and the rule of law when the controversial politician Bo Xilai was in charge. The letter shows non-Chinese what he and fellow Chinese are up against, what it is like to live in a rapidly developing country with a constitution but no constitutionalism, and what is at stake if the rule of law fails to take root there. It also sets the tone for the rest of his book, show-

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7. *Rule of Law in China*, C-SPAN VIDEO LIBRARY (Nov. 28, 2012), <http://www.c-spanvideo.org/event/211410>.

8. CHINA'S JOURNEY TOWARD THE RULE OF LAW (Cai Dingjian & Wang Chenguang eds., 2010); DEBATING POLITICAL REFORM IN CHINA: RULE OF LAW VS. DEMOCRATIZATION (Suisheng Zhao ed., 2006); YU KEPING, DEMOCRACY AND THE RULE OF LAW IN CHINA (2010); ZOU KEYUAN, CHINA'S LEGAL REFORM: TOWARDS THE RULE OF LAW (2006); THE LIMITS OF THE RULE OF LAW IN CHINA (Karen G. Turner et al. eds., 2000); RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

9. 100 Top Global Thinkers, FOREIGN POL'Y, Dec. 2011, at 34, 57 (He Weifang tied for number 19).

ing what has made him perhaps the most influential and admired law professor in China.

¶48 In addition to He's pieces, *In the Name of Justice* has helpful front matter by John L. Thornton and Cheng Li, both of Brookings, introducing readers to He and explaining the reasons for such a volume. The book ends with thirty pages of notes, a five-page bibliography (in simplified Chinese characters, pinyin romanization, and English translation) of his writings from 1984 to 2010, and a twelve-page index. This reviewer found the book learned but not pedantic, serious, and occasionally humorous. *In the Name of Justice* is a fascinating, inspiring read and highly recommended for law libraries that collect books on China.

Houppert, Karen. *Chasing Gideon: The Elusive Quest for Poor People's Justice*. New York: New Press, 2013. 275p. \$26.95.

*Reviewed by Clare Gaynor Willis\**

¶49 March 2013 marked the fiftieth anniversary of *Gideon v. Wainwright*, the U.S. Supreme Court case holding that states must appoint an attorney for criminal defendants facing significant prison terms.<sup>10</sup> Karen Houppert's book, *Chasing Gideon: The Elusive Quest for Poor People's Justice*, argues persuasively that access to an attorney does not mean justice. Although the book's dust jacket refers to "fifty years of trying to make good on the promise of indigent defense in *Gideon v. Wainwright*," Houppert focuses on indigent defense in the past decade, and only in four states. Houppert sacrifices completeness in order to make the story personal, and the resulting book is more powerful for it.

¶50 *Chasing Gideon* is arranged into chapters telling the personal stories of defendants and public defenders in Washington, Florida, Louisiana, and Georgia. Houppert bases these stories almost entirely on her own interviews. The book is an easy read, as the author seamlessly weaves the dry facts and statistics about indigent defense with the more entertaining personal stories. The only problem with this approach is that focusing on only four states may tempt the reader to think that indigent defense is problematic only in certain states, or in the South, despite Houppert's inclusion of a chapter on Washington State.

¶51 Houppert is somewhat coy about who is to blame for the problems with indigent defense. She does not seem to blame the law or lawyers. Even when Houppert does criticize a public defender, she is quick to note that systemic problems like paying attorneys a flat annual fee to defend all of a county's indigent accused are to blame, rather than the attorneys themselves. Without coming out and blaming the general public, it becomes clear that Houppert sees the wretched state of indigent defense as a political problem born of the public's lack of concern for accused criminals and the poor. As a Georgia attorney and activist explains, "[N]obody is going to get elected campaigning with a stump speech about the poor receiving ineffective counsel" (p.192). The personal stories emerge, therefore, as an

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10. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

answer to the public's lack of empathy. A judge active in the indigent defense movement says the way to reach the general public is to "make it personal for people, to say, 'let's talk about your own life and your family and community and those you know and love—and invariably you find . . . that they have friends or family who have gone through the justice system'" (p.172). Even if we have no such person in our family, Houppert's personal, empathic, and detailed portrayal of defendants makes us care about these people, and that makes the injustice of their deficient representation real.

¶52 Calling the book *Chasing Gideon* and including a chapter that retells the story of Clarence Gideon invites a comparison to Anthony Lewis's famous 1964 book *Gideon's Trumpet*<sup>11</sup> and the made-for-television movie based on it.<sup>12</sup> Houppert's summary of Gideon's story lacks the verve of Lewis's writing and only adds the new theory that a jailhouse lawyer wrote Gideon's petitions for him. This possible revelation contributes very little to her book. *Chasing Gideon* works better as a look at how states actually implemented the Court's requirement to provide a lawyer to indigent defendants. As recounted by Lewis, Abe Fortas, arguing for Gideon, was so optimistic about the states' ability to provide indigent defense that he argued to the Supreme Court that judges could say to the "occasional odd-ball" who wanted an attorney for a traffic case, "Yes, sir, go right down the hall to that door, that's the public defender's office, they'll see you."<sup>13</sup> Contrast that optimism with Houppert's description of the sixteen months that Clarence Jones sat in a New Orleans jail waiting for the judge to appoint him an attorney, and one gets a better sense of the reality that followed in the years after 1963.

¶53 The book is accessible to both lawyers and laypeople. It will surely appeal to law students and law faculty, particularly those interested in criminal defense. It will appeal to attorneys, too, especially public defenders, although there might be a certain amount of unwelcome preaching to the choir. *Chasing Gideon* is a powerful book in the hands of the right people, and the right people are probably the general public and their elected representatives. Houppert ends the book by describing the state of indigent defense as a place "where the players know what needs to be done . . . but no one can generate the political will necessary to change things" (p.252). I strongly recommend this book to law libraries, but I hope that public libraries acquire it as well.

Howarth, David. *Law as Engineering: Thinking About What Lawyers Do*. Cheltenham, U.K.: Edward Elgar, 2013. 237p. \$105.

*Reviewed by Alissa Black-Dorward\**

¶54 David Howarth began *Law as Engineering: Thinking About What Lawyers Do* as an article that attempted to answer the question "Is law one of the humanities?" (p.vi). In the process of answering that question, Howarth came to believe

11. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

12. *GIDEON'S TRUMPET* (Hallmark Hall of Fame 1980).

13. LEWIS, *supra* note 11, at 173–74.

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that law and engineering were similar, and he found that the comparison allowed him to examine some interesting questions about the nature of law as a profession, including how lawyers accomplish their work and how they should behave. Howarth is a Reader in Law in the Department of Land Economy at the University of Cambridge, and his interests include torts, comparative law, and the economic analysis of law. He was elected Member of Parliament for Cambridge in 2005 and acted as the Liberal Democrat Shadow Solicitor General and Shadow Secretary of State for Justice.

¶55 *Law as Engineering* is a concise volume with only six chapters. The introductory chapter gives a brief outline of what the book will cover and sets out a historical basis for the comparison between law and engineering. The substance of the book begins with chapter 2, as Howarth examines the kinds of work lawyers are engaged in; it is here that he concludes that the characterization that best fits what lawyers do is engineering. In the third chapter, Howarth begins to use the analogy of law as engineering to explore further questions about the nature of lawyering. For example, how does creativity work in each profession? Can lawyers become more effective in their creation of work product by using the methods of engineers? In chapter 4, Howarth explores how the ethics of engineering can shed light on the ethics of legal work, particularly transactional work. Chapter 5 examines the legal academy and what he calls its “crisis of identity” (p.5). He questions whether the purpose of the legal academy is to train lawyers. If it is not, he asks, then what is its purpose? Engineering, he argues, can offer some solutions to these issues. Finally, in chapter 6, Howarth assesses the benefits and deficits of the analogy between law and engineering, arguing that seeing law as a form of engineering is a way to save lawyers from repeating the part they played in the Great Crash of 2008.

¶56 The basis of Howarth’s analogy between law and engineering is his characterization of what lawyers actually do as transactional or drafting work. He argues that the popular image of lawyers focuses on litigation but that this image is inaccurate. He uses statistics to support his position, examining the number of solicitors working in criminal courts or offering litigation services and the number of lawyers in big firms involved in litigation and dispute resolution. He finds that a large number of lawyers deal with transactional work such as conveyances, business affairs, corporate finance, and mergers and acquisitions and examines the nature of that work. Howarth also discusses the number of lawyers who work in public service, characterizing their work as matters of “conflict-blocking and regulatory smoothing” (p.40), with very little of it involving litigation. Having characterized the work that most lawyers do as largely transactional, it is easy for Howarth to make the analogy between law and engineering, arguing that most lawyers’ work consists of making “something useful that works for their clients” (p.67) and problem solving, just as engineers’ work does.

¶57 Howarth’s focus on transactional legal work is a double-edged sword. It is refreshing to see a book about legal work that does not focus on the courtroom. However, especially in the first chapters, Howarth exaggerates the extent to which litigation and case law are irrelevant for most lawyers. He also devotes a number of pages to the work of what he calls “legislative lawyers” or legislative drafters. It may be that legislative lawyers occupy a greater role in the United Kingdom than they do

in the United States. However, for American audiences, to suggest that the work of litigators is less relevant to a discussion of what lawyers do than legislative drafters does not ring true. It is unfortunate that Howarth chooses to emphasize this point, especially in the first few chapters of his book, because his analogy of law to engineering does not have to exclude litigation work. Courtroom work is a small part of a litigator's job, with conflict blocking and problem resolution forming other important parts. Howarth's book would have been of more interest if he had analyzed the tasks involved in litigation and attempted to fit them into his scheme.

¶58 Overall, Howarth's analogy of law to engineering presents a new perspective to those interested in how we think about lawyers' work. His chapter on the role of legal research and teaching is thought-provoking, especially in this challenging time for legal education. This book would be an excellent addition to any academic law library, given that it engages in a philosophical discussion of what lawyers do and devotes a chapter to the legal academy. This book might also appeal to law firm libraries as a starting point for how lawyers can improve their problem-solving skills. Howarth's work is especially valuable for its focus on and analysis of the nature of transactional work, providing a framework for discussion on how lawyers work and how their methods can be improved.

Hudson, John. *The Oxford History of the Laws of England: Volume II, 871–1216*. New York: Oxford University Press, 2012. 956p. \$300.

*Reviewed by Joel Fishman\**

¶59 This volume is the fourth title in the Oxford History of the Laws of England series, an extremely high quality, well-written, in-depth study of the development of English law that will become the standard source for English legal history for the next generation of researchers, surpassing William Holdsworth's *A History of English Law*.

¶60 Hudson covers the Anglo-Saxon period, from Alfred the Great (871–899) to the end of King John's reign in 1216. The book is divided into three parts: late Anglo-Saxon England (871–1066), the Anglo-Norman period (1066–1154), and Angevin England (1154–1216). For each period Hudson writes chapters on kings and law, courts, procedure, land, movables, theft and violence, status, and marriage and family. The Anglo-Norman period adds a chapter on forest laws, while the final part includes chapters on procedures in land cases, agreements and debt, borough law, and the Magna Carta and common law.

¶61 Hudson's intimate knowledge of period documents leads him to draw a variety of conclusions, many of which are tentative and based on incomplete or an insufficient number of records. On the other hand, his wide-ranging account of topics provides the reader with an extensive overview of developments in multiple areas of English law.

¶62 The reign of Alfred began the expansion of the kings of Wessex over the whole of England. Hudson finds continuity and change over the two centuries

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between 975 and 1175. However, he does not find a radical change with the Norman Conquest. Continuities existed with the adoption of the Laws of Edward the Confessor by the Norman kings, and reforms in the church had an impact on procedures and marriage apart from the Conquest. Uniformity of custom and administration of justice varied across the kingdom, especially far away from central government. Developments in land law did provide an important contribution to the long-term development of English law.

¶63 Hudson's chronological description of Henry II's reign emphasizes the importance of the middle years of the 1160s, particularly the Assize of Clarendon in 1166, and a shift toward administrative reform beginning in the 1170s. He finds "no overall plan for Angevin reforms" (p.528). The expansion of the business of the king's court in its arrangement and functions led to changes in the courts, such as a reduction in the types of cases heard by the county courts. The treatise *Glanvill* helps Hudson discuss procedure in land cases that affected landholding. He finds some local varieties in land law at the knight's level, but he also finds a hardening of land law through clarification and standardization. The king's courts also expanded control over theft and violence in the criminal area. The chapter on borough law offers little evidence for pre-Conquest developments, so the impact of the Conquest is "impossible to assess" (p.813). Most of that chapter deals with a post-Conquest summary based on the standard chapter arrangement under each period.

¶64 In a concluding chapter on the Magna Carta, Hudson recognizes that political conditions, not legal disputes or the administration of justice, were the causes for the Magna Carta. A contemporary pamphlet published in Normandy in 1216 conveyed the basic disputes that were addressed in the Magna Carta: marriage and relief, forests, jurisdiction, and control of the king. Although it failed under John (who had it repudiated by the Pope), its reissue with changes under Henry III in 1216, 1217, and 1225 "furthered some of the characteristics and aspirations of the Angevin reforms . . . notably the use of writing, the adaptation and development of existing customs and practices, and the focus on regular provision of royal justice enforcing set rules" (p.853). In a discussion of the *ius commune* (common law), Hudson observes that English kings had more control over justice in England than in Normandy based on the developments from the Anglo-Saxon and Norman periods. Finally, the rise of the legal profession at the end of the volume will become more important for legal developments in later medieval centuries.

¶65 In the appendix, Hudson discusses the primary sources available for research, recognizing the growth and availability of various documents over the centuries. The Anglo-Saxon era's primary sources are ecclesiastic records, along with post-Conquest legislation (Laws of Edward the Confessor) and treatises like *Glanvill*. Writs and charters provide information for the first two periods of the book. Narrative sources include Asser's *Life of Alfred*, the *Anglo-Saxon Chronicle*, and works by Roger of Howden. Official records include the Domesday Book, Pipe Rolls (annual records of the Exchequer that document payments and debts to the king), plea rolls from the central courts, and, later, Close or Patent Rolls that expand our knowledge of the Angevin period. The work is completed by an extensive bibliography; an index of names, places, and nonlegal texts; and a subject index.

¶66 The Oxford series is especially important for academic law libraries because the volumes provide current, richly detailed accounts of the development of English law that also serve as background information to much of American legal history. Although each volume may seem expensive, the total cost is moderate when compared to today's legal treatises.

Liebert, Tobe. *Abortion in the United States: A Compilation of Federal and State Laws*. 2nd ed. Buffalo, N.Y.: William S. Hein & Co., 2013. 2v. 2000+p. \$265.

*Reviewed by Sara Sampson\**

¶67 *Abortion in the United States: A Compilation of Federal and State Laws* is a two-volume collection of resources about the ever-controversial topic of abortion. It builds upon the first edition published in 1991 and supplemented in 1993 and is part of the *Abortion in the United States* series, which includes many document compilations. Volume 1 consists of selected law review articles arranged by topic, reprints of state statutes, selected federal statutes, a topical index to state statutes, and an index to state and federal cases. The second volume reprints seventeen U.S. Supreme Court cases.

¶68 Before the Internet, books that compiled documents were heavily collected and used in libraries. Because much of the content included in this set is freely available online, the value of the set must come from both the editorial enhancements, such as selection, comprehensiveness, and indexing, and the need to preserve the documents.

¶69 This set provides a snapshot of the full text of all state (including the District of Columbia) abortion laws as they currently exist and some historical federal statutes. This includes the federal Hyde Amendment in its original (1976) and current (2011) forms. This is particularly helpful because, as provisions of appropriation acts, they do not appear in the *U.S. Code*. It also includes the vetoed Partial Birth Abortion Ban Act of 1995. While this compilation is convenient for today's users, it may be invaluable to future scholars. Finding superseded versions of statutes is no easy task. Even with increasing availability of such information (through, for example, HeinOnline's Session Law Library and State Statutes: A Historical Archive databases), it is difficult to find a source for historical codes and to find relevant sections without the contemporary index.

¶70 The indexing in the book is well done. Uniform terms are used throughout each state-by-state index and the topical state statute index. This is helpful both to users who want to focus on a jurisdiction and to those who want to focus on a topic. Different indexing terms are used for the law review, statute, and case law indexes. Some of the limitations of the indexing could be solved by making the book available online and, therefore, searchable.

¶71 I was skeptical about the value of this book when I considered purchasing it for my library's collection. I was certain that it would prove to be a valuable historical source, but I was concerned that patrons would not use a print resource

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\* © Sara Sampson, 2013. Deputy Director and Clinical Assistant Professor of Law, Kathrine R. Everett Law Library, University of North Carolina School of Law, Chapel Hill, North Carolina.

given all of the available online resources on this topic. My concerns were unfounded. Within weeks of arriving at our library, the first volume was checked out, and it was returned to the library only when the semester was over.

¶72 This book belongs in academic libraries that wish to maintain a comprehensive collection on the topic of abortion law, especially those that already have the *Abortion in the United States* series.

Selwyn, Laurie, and Virginia Eldridge. *Public Law Librarianship: Objectives, Challenges, and Solutions*. Hershey, Penn.: Information Science Reference, 2013. 319p. \$175.

*Reviewed by Benjamin T. Almoite\**

¶73 Laurie Selwyn is the retired county law librarian with the Grayson County District Attorney's Office in Texas. Virginia Eldridge is the current law librarian for Grayson County, Texas. Together, they have pooled their knowledge and experience to coauthor *Public Law Librarianship: Objectives, Challenges, and Solutions*. According to Selwyn and Eldridge, while "[r]epresenting the smallest special library category, public law libraries serve the largest and most widely diversified constituency" (p.1). *Public Law Librarianship* is a comprehensive book that introduces the reader to the subject and discusses the importance and relevance of this special category of librarianship.

¶74 Organized into ten chapters, the book covers important areas of public law librarianship, including patron base, governance and organizational structure, general library management, personnel, public relations, collection development, technology and electronic resources, technical services, and public services. *Public Law Librarianship* reads like a handbook, offering some interesting insights, future trends, and practical tools that law librarians can use to manage a public library. There are also eight appendixes, containing public law library survey summaries, funding and governance data from state and county law libraries, a pathfinder template, a sample core collection bibliography, procedures for dealing with jailed patrons, and sample job descriptions.

¶75 A nice feature of the book is that at the end of each chapter, Selwyn and Eldridge have compiled a list of references and additional reading. Along with the ten chapters, the book includes a glossary, short biographies of Selwyn and Eldridge, and an index. Also at the end of the book is an impressive compilation of references that readers can refer to when further researching topics related to public law librarianship.

¶76 Chapter 4 on general library management is a very important section of *Public Law Librarianship*. Since public law libraries are largely funded by state or federal agencies, it can be a challenge for these law libraries to plan, fund, and manage their budgets. Selwyn and Eldridge discuss methods for dealing with political realities, library funding, policies and procedures, and future trends.

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¶77 The section on patron bases in chapter 2 is one that definitely would have helped me in my first law library job. I used to work in a small public law library located in a county courthouse. I assisted the branch librarian, and I was nearly overwhelmed by trying to deal with the many different patrons who visited the library. I was fascinated with how my boss was able to help everyone—legal professionals, private law librarians, law enforcement, interns and students, laypeople, and pro se patrons. All of these patron categories are discussed in chapter 2. If *Public Law Librarianship* had existed back then, I would have been more aware of all the various public law library patrons and better prepared to serve them.

¶78 My former boss juggled different tasks and responsibilities, many of which are discussed in this book, in order to successfully manage her law library. Because of my personal experience with her, I was interested in reading *Public Law Librarianship*. She ultimately became a mentor to me, and there is no doubt that if I had continued working there I would have learned much more from her about public law librarianship. Selwyn and Eldridge, like mentors, offer readers great information and insight on public law librarianship, and provide guidance on how to best manage these special libraries.

¶79 *Public Law Librarianship* is a thorough work, and at only 319 pages it is well organized and readable, with clean pages and graphics. This book will certainly be useful for public law librarians. It would also be a welcome addition to any law library, and it can serve as a reference tool for law library managers and law librarians who serve the public in some capacity. Finally, *Public Law Librarianship* would be a great asset in the libraries of library and information science programs.

Sotomayor, Sonia. *My Beloved World*. New York: Alfred A. Knopf, 2013. 315p. \$27.95.

*Reviewed by Margaret Butler\**

¶80 According to recent news reports, U.S. Supreme Court Justice Sonia Sotomayor received a seven-figure advance for her memoir, *My Beloved World*.<sup>14</sup> Her success as an author is not surprising; Sotomayor tells a coherent story, drawing the reader in to share her life experience. She takes the reader through her life, beginning as a child with what was at the time thought to be a death sentence—a diagnosis of juvenile diabetes—and ending with her appointment to the federal district court. Throughout the journey, she offers insight into her own life and success, as well as a vision of possibility to inspire others.

¶81 Sotomayor tells her story in roughly chronological order, beginning with the memory of her parents arguing about who would administer her morning insulin shot, then taking the reader through elementary and high school, acceptance to Princeton and Yale Law School, her days as a fresh-faced attorney at the New York District Attorney's office, and ending with her move from private prac-

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\* © Margaret Butler, 2013. Associate Director for Public Services, Georgia State University College of Law Library, Atlanta, Georgia.

14. Jodi Kantor, *Sotomayor, a Star on the Book-Tour Circuit, Sees a New Niche for a Justice*, N.Y. TIMES, Feb. 4, 2013, at A12.



tice to an appointment as a federal district court judge. This review's bare recital of the stages of her life strips her narrative of its vivid charm. She offers brief vignettes that provide perspective on her life experience. For example, she tells of the day a fellow Princeton student asked why Sotomayor had put her Phi Beta Kappa invitation in the trash. Sotomayor explained that she had never heard of the organization. She also makes clear fortuity's role in her success, such as when she attended a career panel because she was tempted by the free cheese and crackers and ended up being invited to interview with the Manhattan District Attorney's office.

¶82 Frequent memoir readers may be familiar with a motif of the genre: the author draws lessons in the present from tales of past events. Sotomayor does not avoid this trope, closing a reflection on her elementary school experiences with the sentence, "Every generation has its own way of showing it cares" (p.88). Because the rest of the narrative so vividly reflects the time described, the reader may find these reflections a little disjointed. However, the conclusions Sotomayor draws feel real, not forced, and memoir readers may be accustomed to using such books to learn from the authors' experiences.

¶83 Sotomayor is not the first Justice to write a memoir. In the twenty-first century, Sandra Day O'Connor,<sup>15</sup> Clarence Thomas,<sup>16</sup> and John Paul Stevens<sup>17</sup> have published memoirs. Laura Krugman Ray, writing about Supreme Court autobiographies, notes: "The emergence of the Supreme Court Justice as an autobiographer of wide appeal reflects major changes in both the public's perception of the Court and the Justices' perception of their public role."<sup>18</sup>

¶84 Though some may, without reading *My Beloved World*, argue that this memoir was written for the purpose of self-promotion, that theory fails when tested. Instead of promoting herself, Sotomayor takes advantage of her public platform as a Supreme Court Justice to promote a sense of possibility in the world. She recalls early in the memoir that, upon her diagnosis of diabetes, she received a pamphlet indicating careers that diabetics could, and could not, pursue. As a child, she was told that the possibilities available to her were circumscribed by her diabetes. She notes near the end of her book, "I don't know whether they still give diabetic children a list of professions they can't aspire to, but I'm proud to offer living proof that big dreams are not out of bounds" (p.278).

¶85 Readers who are curious about the people who wear the robes and decide the law will be intrigued to learn more intimate details of Sotomayor's life. She does not overshare and is discreet in her disclosures. The book includes family photos, along with some honest admissions: "[W]hatever security or comfort I find in being single, a happy relationship remains an alluring alternative, and I'm actually optimistic about the chances of having one" (p.223). These moments provide the reader with a sense of Sotomayor as a whole person, not merely a figure sitting at the bench.

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15. SANDRA DAY O'CONNOR & H. ALAN DAY, *LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST* (2002).

16. CLARENCE THOMAS, *MY GRANDFATHER'S SON* (2007).

17. JOHN PAUL STEVENS, *FIVE CHIEFS: A SUPREME COURT MEMOIR* (2011).

18. Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 238 (2004).

¶86 Public libraries, general academic libraries, and law school libraries would all benefit from including this title in their collections. The narrative is compelling and the memoir is of high interest, and that interest will continue in the general public and among law students, faculty, and Supreme Court scholars.

*Practicing Reference . . .*

## Thanking and Being Thanked\*

Mary Whisner\*\*

*Ms. Whisner contemplates the process of expressing and receiving appreciation for favors and assistance provided by librarians, and considers when giving thanks publicly is appropriate.*

¶1 When friends do you favors or give you gifts, you generally thank them. Not only is it socially expected, but you really do want to let them know that you appreciate what they have done. And when you are the generous one, doing favors or giving gifts, you like your friends to thank you. It feels good to hear that they recognize and appreciate your thoughtfulness: you are pleased to have pleased them. We participate in these exchanges all the time, thanking and being thanked for assistance as slight as passing the salt or as substantial as tending the sick, fixing a roof, or giving someone a car.

¶2 Being involved in a commercial transaction doesn't shut out the impulse to thank or the pleasure of being thanked. For example, when I get my hair cut, I thank the stylist, even though he is just doing his job, for which I am paying. He thanks me for coming in, even though we both know I am coming in for my own benefit, not his. The thanks—and the small talk we engage in—help make the interaction seem friendly and warm.

¶3 Librarianship may not be as intimate as hair styling,<sup>1</sup> but it still involves relationships—relationships that can be made smoother with thanks and small talk. The relationship between reference librarian and patron is also not directly “pay to play.” The connection between transaction and payment is attenuated, on both sides. The students' tuition and the taxpayers' taxes pay my salary, but they don't have to pull out their wallets to ask a question. For my part, I know that I'm paid to do what I do, but the nexus between any reference service and the uptick in my checking account balance on payday is not at the top of my mind. Perhaps

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\* © Mary Whisner, 2013. I am grateful to the following colleagues and friends for helpful discussions and comments on a draft: Barbara Bintliff, Anna Endter, Grace Feldman, Mary Hotchkiss, Sherry Leysen, Elizabeth Porter, and Nancy Unger. Although it is not customary to thank the journal editor, I'd also like to express my appreciation of Janet Sinder, who ends her editorship of *Law Library Journal* with this issue. She has encouraged me and used her keen editorial eye to make each of my columns better.

\*\* Reference Librarian, Marian Gould Gallagher Law Library, University of Washington School of Law, Seattle, Washington.

1. There might be some intimate moments, as when a patron shares (perhaps too much) about a divorce or messy family situation. But we don't have our hands in their hair.

because they aren't the ones directly paying us, some patrons couch reference requests in social terms: "Could I ask you a favor?" But when the "favor" is showing them where *A.L.R. 6th* is or finding committee reports for a public law, it's not a favor at all, but squarely within my job description.<sup>2</sup>

¶4 For my part, I have a warm feeling toward many of the people I serve, particularly the students and faculty whom I get to know over time. When I come across an item related to a professor's research interests and send a note, it feels very much like when I send a similar note to a friend or post a link on Facebook. At its most basic, I saw something to share and I shared it. The difference is that keeping track of faculty interests is part of my job, while thinking about my friends is not. When I've retired, I'll probably still have friendly feelings toward many faculty members and might continue to see some socially—but I won't make it a point to keep up with who's teaching professional responsibility and who's writing about advertising or the Foreign Corrupt Practices Act.<sup>3</sup>

¶5 Thanking practices vary. I have been told that French people do not thank store clerks and waiters as much as Americans do. To the French, thanking a clerk for handing you your change would imply that you didn't expect her to do her job correctly; the same goes for thanking a waiter for bringing you your coffee and croissant.<sup>4</sup> Even in our culture of easy thanks, it would be possible to overdo it to the point of insult. I assume that my stylist likes it when I thank him for a good cut, but he would be offended if I thanked him profusely for not cutting my ear. (Why would I think he'd be so unskilled?)

¶6 We reference librarians are often thanked. Patrons who come to the desk frequently say "thanks" on their way out. These quick remarks are polite, but don't necessarily indicate much depth of appreciation.<sup>5</sup> (For our part, we probably have not done much to earn deep appreciation.) It is more meaningful when a researcher who has spent a few hours in the library stops by and expresses thanks: "Thank you for your help today. The sources you showed me were just what I needed." A thank you may even reach us from someone we haven't helped directly, as in this story from a prison librarian: "As I unlocked the library door to let my clerks in, an inmate I've never seen before walked up and said, 'I just want to tell you, I have had nothing but good reports on how you're running the library. Thank you.' He then walked away."<sup>6</sup>

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2. Sometimes it's "Can I bother you?" or "Am I interrupting?" They might indeed be bothering us or interrupting us, but if we're on duty in the reference office, our job is to welcome them: "It's true I'm working on something else, but that's just because I was waiting for someone like you to come ask me a question. Come on in!"

3. There are occasions when I send an item to both faculty and friends. A new case, a blog post, or a news story could very well interest both faculty at my school and my friends who practice law, teach elsewhere, or are simply well-read, interested people. I'm paid to help the former stay current but not the latter—but it's very easy to send one message to a mix of them.

4. This difference is one I believe I heard voiced during a June 2012 conversation with an American I know who lives in Paris.

5. "[A]pologies and thanks are used not only as expressions of [the speaker's] psychological state for regret or gratitude but also as customary speech acts, devoid of any genuine feelings of regret or gratitude." Hye Eun Lee & Hee Sun Park, *Why Koreans Are More Likely to Favor "Apology," While Americans Are More Likely to Favor "Thank You,"* 37 HUM. COMM. RES. 125, 127 (2011).

6. Brian L. Baker, Facebook status update, July 18, 2013 (on file with author) (quoted with permission).

¶7 When patrons give us more than a perfunctory “thanks,” I believe they mean more than, “Thank you for answering my question (which I’d expect, because I know it’s your job).” I think they mean something along the lines of, “Thank you for answering my question (which I’d expect) in a creative, thorough, speedy manner (which is a bonus).” I base this in part on my own feelings when I express thanks to someone at work. For example, when I thank our computer specialist for fixing my PC or showing me how to do something that has stumped me, I mean something like, “I know it’s your job, but I still appreciate that you came through for me and helped me do my job. I’m glad you were good-natured about it, too.”

¶8 Thank yous are unevenly distributed, in many ways. One librarian offering equally good service day after day might experience a shower of thanks or a dry spell with no expressions of appreciation. And within the library, some positions are more likely to receive thanks than others—just as some staff positions in restaurants get more tips than others. If diners enjoy their meal and the service, they give a nice tip to the server, not the dishwasher who cleaned the cutlery or the sous-chef who chopped the vegetables—let alone the people outside the restaurant whose efforts contributed to the experience, such as the laundry worker who starched the tablecloth and the baker who made the bread. Why? Because the server is the one they interact with the most. In our information restaurants (i.e., libraries), we reference librarians couldn’t serve up the information we do without the staff who select, order, process, shelve, and check out the material, but we’re the ones who talk to the patrons, so we get the thanks. Some restaurants have a system in which the servers pool their tips and give a cut to bussers, dishwashers, and others. We might follow their lead and pay forward the appreciation we get by showing appreciation to our colleagues and coworkers.

¶9 Our most challenging work is generally for faculty and staff. Not only do they ask tough questions, but we go much further in helping them. A student or member of the public will be told some good sources to try and left to sort through them alone. But a professor’s question will get a librarian’s full attention, and the professor will receive a bibliography, a stack of printouts, a set of downloaded articles, or whatever she requested. Some of these questions are fun because the topics are interesting and they call for creativity and perseverance. Others are equally challenging but not as much fun. *C’est la vie*.

¶10 Faculty responses to our work also fall along a continuum, with silence at one end and effusive praise and even gifts at the other, and the strength of the thanks is not always proportionate to the challenge of the assignment. If we receive profuse thanks for minimal effort, perhaps it is because the professor highly values the information, regardless of how hard we had to look for it. And if we don’t hear anything after we send the results of a project that required a lot of heavy lifting (figuratively speaking), maybe it’s because the professor didn’t realize how much work it would be, was confident we’d be able to find it, or just didn’t think to reply “Thanks! Got it!” Once, after we *Bluebooked* several papers for a symposium a professor organized, she gave us flowers for the reference office. The gesture let us know that she knew we’d done something extra for her (and that it was a somewhat tedious task, at that). This summer another professor bought us lunch in gratitude for the research we did for him as he worked on a Supreme Court brief. Even better

than the free lunch was the hour he spent with us discussing the brief and how he used our research.

¶11 All of the above examples have been private, or at most between the patron and the department. There are also public declarations. It is always nice to get a shout-out for reference and other library services during a professor's endowed lectureship or at the annual law review banquet. And, of course, there are the thanks in footnotes and book reviews. As always, it feels good to be appreciated. The public and permanent expression can be good for the department and the library. We always include these acknowledgments in our department's annual report. Our director can have them handy the day the dean asks (in effect): "What has the library done lately for the productivity of the faculty and the prestige of the law school?"<sup>7</sup> Those footnotes can be helpful to individual librarians as well, particularly less senior ones facing promotion review who need to build their files.<sup>8</sup> The footnotes also serve to market library services whenever other professors see them.

¶12 We can give as well as receive thanks in footnotes. When we publish, we can thank the people who helped us—but who, how many, and how lavishly? Proportionality is desirable. It's common to have two or more pages of acknowledgments in a book,<sup>9</sup> but not in a law review article. It's probably more appropriate to thank the colleague who read and commented on a draft than the one who picked up a coffee for you when she was at Starbucks. Both acts helped you with your writing, but the editing took more effort and expertise—and presumably made a bigger difference.

¶13 Arthur Austin has observed that, since the great majority of law journals are edited by law students, not faculty, the practice of thanking many prominent scholars in an author's note could be seen as a substitute for peer review: the student editors considering the article for publication would be more inclined to think it was good if it had been read (and presumably approved) by the experts.<sup>10</sup> And readers of the published article, despite knowing that it was only edited by law students, might feel reassured that *some* experts had seen it. Austin concludes, though, that the practice does more harm than good: it is self-serving and ethically doubtful, and it can mislead or pressure editors.<sup>11</sup> One should circulate one's drafts, but not use the author's note for name-dropping: "Private vetting by knowledgeable colleagues," Austin writes, "is still the honorable tradition."<sup>12</sup>

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7. The acknowledgments won't be the only evidence she has, of course—the library does a lot more than what is reflected in authors' footnotes.

8. For the same reason, a mention in a footnote can be helpful to a research assistant who wants to show potential employers that his work was valued.

9. For a few examples, see Mary Whisner, *Writing Buddies*, 103 LAW LIBR. J. 677, 2011 LAW LIBR. J. 40.

10. Arthur D. Austin, *The "Custom of Vetting" as a Substitute for Peer Review*, 32 ARIZ. L. REV. 1, 5 (1990).

11. *Id.* at 7.

12. *Id.* at 8. In a later article, Austin remarks that author's notes are seldom checked. Did all the people listed really review the article? Are they willing to have their names associated with it? Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1023–24 (1990). In response to Austin's critique, two authors made clear that they added their footnote thanking friends and colleagues only after their article was accepted for publication. Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 509 n.† (1992).



¶14 The problem with only conveying gratitude privately is that it obviates some of the benefits discussed above. Just as being thanked publicly by faculty is good for librarians and libraries, it can be good for people who help authors in other ways. If Established Scholar A says in a footnote that Visiting Assistant Professor B offered insightful comments about Topic X, that might help B get invited to participate in a symposium on X. In contrast, if I were to thank, say, Erwin Chemerinsky and Kathleen Sullivan for their help with my writing, it would not do a bit to improve their reputations as constitutional law scholars; if anything could burnish their reputations, it wouldn't be a word from me.<sup>13</sup> But if I thanked a librarian who is smart and thoughtful but not well known in the profession, it might be of help. Thanking the person who offered the writing opportunity, carefully critiqued several drafts, or helped the author place a piece is a sign of gratitude and respect for the assistance. Moreover, librarians and faculty who are going up for promotion sometimes need to demonstrate their service and involvement in the profession—both of which can be supported by acknowledgments in footnotes.

¶15 A sincere “thank you” can reinforce the relationship between the thanked and the thanker. The reverse is also true: failing to thank someone can damage the relationship. How much damage is done depends on the relationship, the individuals involved, and the size of the favor. I know someone who put a lot of effort into reviewing a younger scholar's work and was very disappointed at the lack of acknowledgment. The reviewer will be much less likely to lend a hand to the junior person in the future. On the other hand, I know that I have (regrettably) forgotten or neglected to thank a friend for a gift or a favor and yet had the friendship endure. A professional relationship in its early stages might need more careful tending than a friendship that has been forged over the course of many conversations, experiences, gifts, and favors.

¶16 In some contexts, “favors” or “gifts” become items of exchange. The recipient understands that the giver expects something in return. One study explored this dynamic, finding that gratitude diminished as indebtedness increased.<sup>14</sup> The authors found

a curious paradox of giving and gratitude. If gifts are given for the purpose of receiving return favours from the beneficiary, the beneficiary is less likely to feel grateful, and is less likely to feel like returning the favour. The more a benefit is received as a gift of grace, the more likely there will be a return of gratitude.<sup>15</sup>

¶17 Thanking has costs as well. Psychologists note that expressing thanks can threaten one's self-image by reducing one's credit for an achievement. “Thanking

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13. This is purely hypothetical. To the best of my knowledge, neither one of them has ever laid eyes on anything I've written.

14. As is often the case with psychology experiments, the subjects were undergraduates faced with hypothetical scenarios—one in which a classmate helped the student move (with, alternatively, no expectations, expectations of thanks, or expectations of help with the classmate's own move) and one in which a classmate shared notes (again, with different expectations). The authors use this quotation from Jean Jacques Rousseau as an epigraph: “Gratitude is a duty which ought to be paid, but which none have a right to expect.” Philip C. Watkins et al., *The Debt of Gratitude: Dissociating Gratitude and Indebtedness*, 20 COGNITION & EMOTION 217, 217 (2006).

15. *Id.* at 236.

others . . . contradicts the self-serving bias, as does any admission that one received help.”<sup>16</sup> Balancing this are “[n]orms of modesty and of credit sharing, as well as past experiences of being subjected to others’ anger for failing to express gratitude”<sup>17</sup>—and so people often do express thanks. The risk of seeming to be an ineffectual person who needs help can be offset by the bonus of seeming like a gracious person who is sensitive to others’ contributions.

¶18 In addition to asking whether footnote acknowledgments are expected, useful, or helpful, we might ask: Does anyone want to read that stuff? I can speak for myself: I do, within limits. In books, I enjoy getting a peek at the author’s process—what libraries he used, what writers’ colony she stayed at, who advised and helped and prodded. And in articles, I’m often happy to see the acknowledgment of the reviewers, research assistants, and (of course) librarians. If the author wants to thank a dog<sup>18</sup> or a cat, I’m happy to see that flash of personality.<sup>19</sup>

¶19 We receive thanks and we give thanks because we work among people. What we do is part of a social fabric as well as a way to support ourselves. Appreciate the thanks you get and remember to give thanks to others. Thank you very much for reading this.

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16. Roy F. Baumeister & Stacey A. Ilko, *Shallow Gratitude: Public and Private Acknowledgement of External Help in Accounts of Success*, 16 BASIC & APPLIED SOC. PSYCHOL. 191, 191 (1995).

17. *Id.* at 195. Baumeister and Ilko found that undergraduates asked to write about a success in their lives acknowledged help they received from others much more often when they believed that their statements would be read and discussed in a group. *Id.* at 201.

18. See, e.g., Austin, *supra* note 12, at 1010 n.2 (thanking a Saint Bernard named Colonel Mosby).

19. For a wonderful send-up of authors’ acknowledgments, see H.F. Ellis, *Without Whose Unfailing Encouragement*, NEW YORKER, Aug. 23, 1969, at 24, reprinted in DISQUIET PLEASE: MORE HUMOR WRITING FROM *THE NEW YORKER* 163 (David Remnick & Henry Finder eds., 2008).

## **Selected Readings on Diversity Issues: Part II\***

Raquel J. Gabriel\*\*

*In this final column of Diversity Dialogues, Ms. Gabriel highlights selected readings on library science education, diversity initiatives, mentoring and retention, standards and statistics, and on law librarianship and diversity, and she provides her concluding thoughts on the future of diversity in law librarianship.*

### **Introduction**

¶1 In the previous issue of *Law Library Journal*, I highlighted readings dealing with organizational culture, leadership, conflict management, and racial microaggression to help frame some of the larger issues that may come into play when dealing with diversity in the work environment.<sup>1</sup> For this column, I have selected readings that deal particularly with diversity initiatives within librarianship, including those in Master's of Library Science programs, and with issues surrounding mentoring and retention.<sup>2</sup> I have also included articles containing helpful statistics and a few articles that speak specifically to law librarianship. Coupled with the readings noted in my previous column, I hope to convince readers of several conclusions I have drawn from reading and writing about diversity issues in libraries and law librarianship over the past few years: (1) The profession of librarianship as a whole has an alarmingly low percentage of librarians considered to be "diverse" under historical definitions of race and gender, and this underrepresentation is even more apparent within the field of law librarianship. (2) While the profession continues to create opportunities for underrepresented populations, the efforts to

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1. Raquel J. Gabriel, *Diversity Dialogues: Selected Readings on Diversity Issues: Part I*, 105 LAW LIBR. J. 405, 2013 LAW LIBR. J. 21.

2. Readers will note that the selections deal almost exclusively with academic libraries, with the notable exception of material from the American Library Association. This may reflect the fact that tenure-track academic librarians, expected to produce scholarship, are the only ones who have the incentive or support to do such original research. Despite the limitations inherent in examining only one specific type of library environment, I believe that the overall observations made by the authors of the selected pieces are worthwhile for all law librarians, no matter the environment, as many touch upon the issues faced by the profession of librarianship as a whole.

do so are scattered and of limited value. (3) The failure to incorporate diverse populations into the profession may have a wider impact on the perceived value of libraries and librarians and may further marginalize librarians within the communities that need their services the most.

¶2 None of these statements is likely to surprise any librarian who has taken more than a cursory glance at the statistics regarding librarianship, or any librarian from a minority background. But it should be alarming that the same themes seem to repeat themselves over and over again within the literature: that there are not enough minority librarians, that there are limited options geared toward diversity available in library science education, and that the ways to further the careers and concerns of minority librarians are few and far between. The literature that speaks *specifically* to diversity within law librarianship is scarce and usually only discusses the issues as they apply within academia, rarely examining law firm or state, court, and county libraries.

### Education, Standards, and Statistics

¶3 Much of the scholarship about diversity and librarianship discusses the barriers within library and information science (LIS) education, whether it is about minority students finding courses that explore multicultural librarianship, or the shortage of minority candidates who wish to become LIS educators. Paired with the statistical information regarding the number of minority librarians from the American Library Association (ALA),<sup>3</sup> the articles below capture how difficult diversity is to achieve at what is the entry point to the library profession.

Adkins, Denice. "Latino Librarians on Becoming LIS Educators: An Exploratory Investigation of the Barriers in Recruiting Latino Faculty." *Journal of Education for Library and Information Science* 45 (2004): 149–61.

Adkins's article on the barriers to Latino librarians becoming faculty members in LIS programs points to four main causes: a sense of isolation from the academy, the lack of ethnic representation within library science education (both the faculty and the program), the cost of doctoral programs, and strongly correlating to that, family and personal concerns. Adkins notes that many Latino librarians chose to join the field because they had a nonminority role model, that library education is "primarily oriented toward a terminal master's degree" (p.149), and that "in each transition between levels of education—high school to a bachelor's program, bachelor's to master's, and master's to doctoral—students of color are lost" (p. 151). Drawing upon extensive interviews with eight Latino librarians, she points out that several felt unwelcome within their institutions while pursuing the library degree, and the sense of alienation and intimidation they felt while pursuing their master's degrees discouraged them from even wanting to be a

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3. In 2009–10, white librarians constituted 88% of credentialed librarians, African American librarians 5.2%, Asian Pacific Islanders 2.7%, and Latinos 3%. Librarians of two or more races counted for 0.9%, and Native American librarians accounted for only 0.15%. Table Series A: 2009–2010 American Community Survey Estimates Applied to Institute for Museum and Library Services and National Center for Education Statistics Data, <http://www.ala.org/offices/sites/ala.org/offices/files/content/diversity/diversitycounts/diversitycountstables2012.pdf> (percentages calculated from figures in table A-1).

part of a doctoral program or become a faculty member. The remarks from the experienced librarians in the article reaffirm that a problem for the larger field of librarianship in recruiting students from diverse backgrounds is the lack of role models or the sense that the communities they may be interested in serving will not be discussed in the curriculum.

Al-Qallaf, Charlene L., and Joseph J. Mika. "The Role of Multiculturalism and Diversity in Library and Information Science: LIS Education and the Job Market." *Libri: International Journal of Libraries and Information Services* 63 (2013): 1–19.

The authors examined the prevalence of multiculturalism and diversity-related information appearing in library school web sites and course descriptions. They also looked at the types of jobs, by institution and geographic location, that advertised for individuals with diversity qualifications. They found that an increasing number of positions are asking for candidates with qualifications that directly affect the ability to deal with diverse populations, with the largest category of jobs asking for such qualities in administrative positions. While finding that it would be in the best interest of LIS schools to continue to incorporate course work that clearly reflects multiculturalism, what may be of most interest to law librarians is the list of sample qualifications and language found in job descriptions. These could be of use for developing job descriptions for a law library.

American Library Association. Office for Research and Statistics and Office for Diversity. *Diversity Counts*. Chicago: American Library Association, 2007. [http://www.ala.org/offices/sites/ala.org.offices/files/content/diversity/diversitycounts/diversitycounts\\_rev0.pdf](http://www.ala.org/offices/sites/ala.org.offices/files/content/diversity/diversitycounts/diversitycounts_rev0.pdf).

In 2006, ALA's Office for Diversity commissioned an analysis of the 1990 and 2000 census data to provide "reliable estimates of employment in the profession and age, gender, and ethnicity figures for five types of libraries—public, academic, K–12, hospitals, legal libraries—and all other types of libraries reported as a single category" (p.4). Taking that information and comparing it to data from the National Center for Education Statistics (NCES), the study found that librarians of all types increased 21.6% between 1990 and 2000, with one of the highest increases in the percentage of librarians found in law libraries. The larger picture reflects that the "nearly 110,000 credentialed librarians in public, school and academic libraries are predominantly white regardless of age group or gender" (p.9), that a significant number of librarians under age forty-five were leaving the profession, and that "despite recent diversity recruitment measures, some racial and ethnic minority groups, notably African Americans and Latinos, are actually seeing a *decrease* in the number of credential[ed] librarians under age 45" (p.11; emphasis added). Even more sobering was the finding that the data suggested that the "persistent lag in diversity in our LIS schools . . . [and] the aging of racial and ethnic library workers . . . suggest[] a proportionally less diverse library workforce on the horizon" (p.18). The study is highly recommended as an overview of what challenges lie ahead for the entire field of librarianship and its recruitment of diverse members.<sup>4</sup>

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4. The ALA commissioned an update of this information in 2012. *Id.*

Association of College and Research Libraries. "Diversity Standards: Cultural Competency for Academic Libraries (2012)." <http://www.ala.org/acrl/standards/diversity>.

In April 2012, the Association of College and Research Libraries (ACRL) approved standards that define cultural competency "based on the 2001 National Association of Social Worker Standards for Cultural Competence in Social Work Practice." The Racial and Ethnic Diversity Committee, which drafted the standards, stated "that if libraries are to continue being indispensable organizations in their campus communities, they must reflect the communities they serve and provide quality services to their increasingly diverse constituencies." After defining *cultural competence* and related terms, ACRL articulates eleven standards for developing cultural competency within libraries primarily through librarians and library staff, and then provides comments interpreting each standard. Within the interpretations, examples show what each standard might look like if executed by library staff. The standards are highly recommended reading for those interested in identifying approaches and strategies for diversity, or looking for language to incorporate into a mission statement or strategic plan including diversity initiatives.

### Diversity Initiatives, Mentoring, and Retention

¶4 Once minority librarians enter the profession, retention may depend on an atmosphere that is supportive of their goals and that strives to integrate them into the organization. The failure to create an environment where diversity is a priority may isolate minority librarians and lead to job dissatisfaction. Although the following articles deal specifically with academic libraries, the methods they consider for constructing a more inclusive environment hold lessons for all types of library settings.

Alire, Camila A. "The New Beginnings Program: A Retention Program for Junior Faculty of Color." *Journal of Library Administration* 33 (2001): 21–30.

Former ALA President and Dean of University Libraries at both Colorado State University and the University of New Mexico, Alire sets out a model retention program for junior faculty of color. Alire describes seven areas covered in the programming aimed at junior minority faculty, which was accomplished with limited support and the use of senior faculty volunteers. Much of the programming could easily be adapted to other libraries needing to walk a junior faculty member through the tenure process, or be used as a blueprint to ensure current programs address all of the areas Alire lists.

Andrade, Ricardo, and Alexandra Rivera. "Developing a Diversity-Competent Workforce: The UA Libraries' Experience." *Journal of Library Administration* 51 (2011): 692–711.

Ten years after Alire published her article, Andrade and Rivera wrote a much more extensive one examining the process of creating a workforce more attuned to diversity concerns at the University of Arizona. After discussing a survey assessing the climate surrounding diversity in the university, the authors explain how they defined diversity and the development of diversity-related competencies for the university. Of particular value is the list of diversity competency descriptions, cleared by human resources and university officials, which define what it means



to have “entry level” and “mastery level” competency when it comes to diversity. Also covered are the approaches to position postings, candidate interview and reference questions, and tools for assessment of candidates. Finally, they discuss how the competencies and approaches were integrated into the university, as well as future plans. An appendix not only provides a reading list, it also includes the climate survey questions used to initially assess library staff, and a checklist to help evaluate diversity attitudes and behaviors.

Bonnette, Ashley E. “Mentoring Minority Librarians Up the Career Ladder.” *Library Administration and Management* 18 (2004): 135–39.

Bonnette briefly covers the benefits of mentoring for professional librarians, noting that “[m]any early to midcareer minority librarians struggle against low salaries, a lack of professional training, and ultimately, stagnating careers” (p.135). Mentoring benefits both minority librarians and the organizations that hire them, and Bonnette argues that “a truly diverse workforce is not fully present until it is represented throughout all levels of the organization, not only at entry and mid-level positions, but throughout the administrative ranks as well” (p.138). Overall, the article acts as strong support for a formal mentoring program within any type of library.

Damasco, Ione T., and Dracine Hodges. “Tenure and Promotion Experiences of Academic Librarians of Color.” *College and Research Libraries* 73 (2012): 279–301.

Damasco and Hodges undertook a survey examining the factors that might have an impact on librarians of color seeking tenure and promotion. Reviewing the literature, they found little that specifically focuses on minority librarians in this area; therefore, they drew analogies with teaching faculty of color. The article may be eye opening for some, due to the comments the authors share from the survey of minority librarians. Candid replies regarding the discrimination they faced are not always easy to read, particularly because the article was published in 2012, belying the comfortable assumption that blatant racism is on the wane in academia. Instead, the authors indicate that librarians of color may face inequitable treatment in pursuing a tenure-track position or seeking promotion, and that “mentoring or peer support groups that are designed to help junior faculty should engage in regular assessment to ensure such programs are actually effective” (p.300). The article is highly recommended for the personal reflections of the respondents and the detailed findings related in the survey.

## Law Librarianship

¶5 In 1998, *Law Library Journal*'s fall issue collected several articles into a special feature on diversity.<sup>5</sup> Since then, there has been very little written on diversity in law librarianship, and the lack of literature helped prompt the launch of this series of columns in 2010.<sup>6</sup> Two articles from the special feature are included here, but all are recommended reading for law librarians interested in diversity.

5. *Special Feature: “Focus on Diversity,”* 90 LAW LIBR. J. 541–614 (1998).

6. This is not to say that there has been complete silence on the subject. See, e.g., Nichelle J. Perry, *A New Look at Diversity: Caucuses and Committees Find Common Ground at Diversity Symposium*, AALL SPECTRUM, Sept./Oct. 2009, at 18; Alyssa Thurston, *Addressing the “Emerging Majority”: Racial and Ethnic Diversity in Law Librarianship in the Twenty-First Century*, 104 LAW LIBR. J. 359, 2012 LAW LIBR. J. 27.

Ballard-Thrower, Rhea, Dwight King, and Grace M. Mills. "Profiling Minority Law Librarians: An Update." *Law Library Journal* 101 (2009): 267–95.

In an update to a 1995 article,<sup>7</sup> the authors compare the profile of minority law librarians in 1992–93 with data from a 2007 survey as well as relevant information from the AALL 2005 and 2007 salary surveys, parsing the differences and explaining how the status of minority librarians has changed. Some of the more interesting findings include that while many minority librarians have achieved management and supervisory positions, many more are over the age of forty, which may have implications for the future. Another finding—that more than half of minority librarians responding to the 2007 survey had worked in a library prior to becoming law librarians—suggests to the authors that more recruitment effort could be directed toward colleges and high schools. The article is recommended reading as it is the most recent, comprehensive effort to canvass information specifically about minorities within law librarianship.

Garces, Vincente E. "The Recruitment of Minority Librarians: A Bibliography of the Literature, 1990–1998." *Law Library Journal* 90 (1998): 603–14.

This bibliography collects citations relating to minority librarians from 1990 to 1998 and should be considered a starting point for anyone seeking additional information on diversity within the larger library profession. While the literature has grown steadily since 1998, Garces's article still remains a firm foundation from which to start analyzing the material.

Howland, Joan S. "Diversity Deferred." *Law Library Journal* 90 (1998): 561–74.

In this article, Howland reflects that "[l]aw librarianship only mirrors the society in which it must exist" (p.563). She talks of the effect the story of Virginia Proctor Powell Florence, the first African American woman to be admitted to Carnegie Library School in Pittsburgh, had on her own research agenda. Howland observes that Florence's story, which included facing systemic racism in pursuit of her profession, leads one to "reflect upon the fact that, at a time when African-Americans—albeit in limited numbers—could gain access to professional training in fields such as law, medicine and education, the doors to library school were generally still firmly shut" (p.565–66). Howland also mentions Magdalene O'Rourke's 1970 essay *Hiring Practices in Law Libraries*, which discussed racism in the profession. Like O'Rourke, Howland finds that her "impression[s] of a lack of wholehearted acceptance of and commitment to cultural and ethnic differences is not 'derived from an expensive, elaborate and time-consuming study. They derive from a commonsense look at the realities of a field with which I am familiar'" (p.573 (quoting O'Rourke)). Almost a hundred years removed from Florence, decades after O'Rourke's essay, and fifteen years after Howland's observation, I still share both women's sentiment.

## Conclusion

¶6 I hope that my Diversity Dialogues columns have made it clear that I strongly believe law librarianship as a whole needs to reaffirm and strengthen a commitment to diversity within the profession. Not only is it important for us to

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7. Dwight King, Rhea A-L Ballard, Helena Lai & Grace M. Mills, *Profiling Minority Law Librarians: A Report on the 1992–93 Survey*, 87 LAW LIBR. J. 247 (1995).

reflect the country's demographic changes, but familiarity with the different facets of diversity helps us create better and more efficient work environments. Understanding why conflict arises allows us to influence organizational culture so that it includes more points of view. This will ultimately help librarians and their communities better navigate an increasingly global environment and a rapidly changing profession of law.

¶7 Embracing diversity in all its forms, whether it be the people we work with, the organizations we work within, or the ways in which we have traditionally approached the profession and work we do, can only help us navigate the path ahead. The issues confronting law librarians regarding diversity, proving the value of the profession to the community, and new ways we can reach out and maximize our impact on users are already being discussed within the larger field of librarianship, and we can look there for guidance on how to approach the problem within our specialized field. At the very least, there should be a concerted effort by AALL to determine the number of minority librarians within law librarianship and the management or leadership roles in which they serve. AALL must make a greater formal effort in both time and money to address the issues of recruitment and retention in underrepresented populations.

¶8 For example, what holds back formal or ongoing dialogue between different types of libraries where we can openly discuss the challenges or problems we face? Can AALL provide open spots at the Annual Meeting where librarians from different backgrounds have the time and space to discuss what they share in common or try to let one another know how we are being innovative within our own organizations? And could AALL make it a priority to let these conversations be led by trained facilitators who can report back to the larger membership?

¶9 The barriers that have traditionally existed to separate academic; law firm; and state, court, and county law librarians should be understood to be largely of our own making. In the end, we all work with attorneys and people who interact with the legal system, and we should be more actively and aggressively working together to understand what we have in common. By doing so, we will help the profession as a whole instead of wasting time and effort determining what makes us so different from one another.

¶10 In 1998, many of the articles that discussed diversity in *Law Library Journal* advocated for more diversity, in part due to the growing multicultural population. In 2013, while progress has been made, AALL and the law librarianship profession are far behind in clearly establishing a consistent commitment to diversity. Half-hearted attempts or diffuse efforts over decades will not bring about permanent change, nor can it be expected or assumed that the limited number of minority and diverse librarians already within the profession should bear the heaviest responsibility when it comes to recruitment or retention. There needs to be a systemic effort that, I would argue, can only be initiated, promoted, and sustained by AALL to reach out to LIS educators, to relevant populations, and to *all* librarians to promote the value of diversity within the profession and demonstrate how it can assist the entire field.

¶11 While I have enjoyed writing this column, I am concerned that in another fifteen years another librarian will still be echoing the sentiments I have expressed,

which already repeat some of the concerns voiced in 1998. Perhaps law librarianship will become more diverse simply due to demographics, which will force the profession to include more librarians from minority backgrounds. Yet that is an enormous assumption to make, and it is countered by the risk that the numbers of minority librarians will remain the same or decrease because of factors such as changes in legal education and the profession, which may shrink the field of law librarianship.

¶12 I never expected that the career I chose would be able to utilize both my library and law degrees in a way I find so professionally and personally rewarding. And I adamantly believe that my experience as a person of color helps me work with the community I serve within my institution. But I recognize and understand that while part of that is due to my own initiative, it was, frankly, due equally to my great luck in having connected with minority librarians who have mentored me, as well as my experience in libraries before I went to law school. I believe many law librarians from minority backgrounds end up within law librarianship because we “fell into it.” We found a mentor or worked in a library. We practiced law and perhaps burned out a bit doing it. We were looking for second or third careers, wanting to harness our thirst for information or our desire to help others.

¶13 My most fervent wish is that every law librarian will understand the need for more librarians from diverse backgrounds within the field and commit to helping increase the opportunities for those who wish to join us, that you comprehend the value of diversity within your law library, that you agree change is needed, and that you believe your library needs assistance in breaking down barriers that limit the richness diversity can bring to the workplace.

¶14 If each librarian, no matter his or her background, decides to take the personal initiative to be more open to diversity—to question whether their workplace or attitudes are inclusive of the experiences of their colleagues, their students, faculty, attorneys, or whomever they serve—I am convinced that a movement may come to fruition. I firmly believe that embracing diversity increases the chance of innovation, which is sorely needed now, as the legal profession shifts in ways few of us anticipated.

¶15 The only constant is change. If, after repeated warnings and reflections, the field of law librarianship chooses to ignore the realities of demographics and a fundamental shift in the practice of law, we will cease to be relevant to those we have traditionally served. I, for one, believe that with the collective will to embrace diversity, there are enough of us to make sure that does not happen.

## Memorial: Grace “Betty” Woodall Taylor (1926–2013)

### Face of University of Florida Law, Futurist, and Mentor\*

¶1 I didn’t know Betty Taylor in 1962 when, as a junior at the University of Florida (UF), I contemplated three-and-a-half years of teaching to pay back a state scholarship before I could fulfill my dream of attending law school (without an identifiable source of funding to do so!); nor would any undergraduate woman have dared to enter the bastion of male chauvinism that constituted the law school of that period. An interview Betty gave to the *Florida Alligator* after a fire in the law library reading room changed the course of my life. She described her long course of J.D. study, first full time, then, after marriage to a young lawyer and motherhood, as a full-time reference librarian in the main library and part-time student who began studying every morning by 4 a.m. to be prepared for class, because she knew she was being watched critically. For approximately twenty-five years, Betty provided the model, which many of us followed, of studying law part time while working full time in law libraries (generally first as catalogers), which allowed women to gain a foothold in the profession.

¶2 Upon graduating from the new Master’s in Librarianship program at the Florida State College for Women (now Florida State University [FSU]) in 1950, Betty applied for a job in the Harvard Law Library and sought admission to its law school, only to learn that the law school did not accept women. Faced with the choice of paying back a State of Florida scholarship or working for the state, she accepted a position at the mainly male UF. Part-time law study was possible there, but the law school was famous for faculty who harassed the few women students for taking places that should have gone to male breadwinners. The male students mocked women for speaking in class and shuffled their feet on the bare wooden floors in the library until any woman left. Betty Taylor endured such treatment during the twelve years it took her to earn her law degree part time. Betty transferred to the law library in 1956, after earning half of her law credits, and became director three weeks after graduation in 1962, albeit at a salary twenty percent less than was offered to a male candidate. The promotion included a position on the faculty; after her immediate appointment as faculty secretary, she advised other women never to attend a faculty meeting with a yellow legal pad!

¶3 The UF law library had 62,000 volumes when Betty took over. In those days, directors generally also served as the sole reference librarian and taught a show-and-tell legal bibliography course. Catalog card entries were searched in the Library of Congress National Union Catalog and individually typed. The creation of union

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lists of regional holdings was a major improvement, and Betty compiled twelve volumes of southeastern law libraries' union lists. This was only a small part of the over one hundred speeches, articles, and presentations; eight books; and numerous audiocassettes and indexes for which she is responsible. As her library grew to 600,000 volumes, this pioneer in forecasting and using technology to improve legal research correctly predicted that hard-copy collections would shrink over time. Laborious manual processes, lovingly cherished by legal traditionalists, would give way to Westlaw, LexisNexis, and the other tools that she was the first to bring to law libraries whose directors at the time considered them outlandish.

¶4 Betty often recounted her introduction to technology: When she was appointed to a law school committee to predict the increases in enrollment to be expected from Baby Boomers, she visited the university's underutilized computer center to enlist the assistance of a statistician and correctly predicted that the number of law students would increase dramatically. When she was later offered the opportunity to conduct research with an assigned graduate student assistant, the resulting *Florida Bar Association Journal Index* produced from punch cards was one of the first uses of computers to organize legal documents. It garnered her an invitation to speak to the 1967 inaugural International Computers-in-Law Conference in Geneva, Switzerland. Betty had foreseen the conversion of library catalogs to databases but had been told that they could not handle languages other than English. The foreign-language databases she saw in Geneva were the inspiration for her ensuing proselytizing for the use of computers in research. The culmination of Betty's acceptance as a predictor of the influence of technology in law libraries was her appointment as the chair of the program committee for the 1981 AALL Annual Meeting in Washington, D.C., for which the program focused on technology. A highlight was a roving robot!

¶5 Betty advocated for the use of both LexisNexis and Westlaw. A member of the first Westlaw Academic Advisory Committee, she also served for twelve years as a trustee for the National Center for Automated Information Research (NCAIR), funded by LexisNexis's purchase of New York State's legal database. That organization is best known for its grants to Peter Martin's computerized casebook and distance education projects as well as its early support for CALI. She later led the effort to bring that organization to UF with a grant of \$2.5 million plus a state matching grant of the same size.<sup>1</sup>

¶6 Betty's continuing national prominence was recognized by FSU's library school with its first Outstanding Alumnus Award and by AALL with the Marion Gould Gallagher Award in 1997 and membership in the 2010 inaugural class of the AALL Hall of Fame. She served on the AALL Executive Board from 1981 to 1984, ran for Vice President/President-Elect in 1990–91, and either chaired or served on committees as diverse as Placement, Nominations, LOWNET, National Legal Resources, and Local Arrangements. She served as president of SEAALL (Southeastern Chapter of AALL) and codirected its institute in 1974. Her law school classmate Sandy D'Alemberte, then President of the American Bar Association (ABA) and Florida State University, appointed Betty to the Facilities

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1. See *infra* note 9 for more on NCAIR.



Committee of the Law Library of Congress while I was the Law Librarian, which was probably the only time when our supporters really understood our program! She served as a member of numerous ABA accreditation inspection teams, as well as sitting on committees on science and technology, international information networking, and law libraries. Her AALS service included membership on its accreditation committee. Betty's law library interests were not limited to technology; for example, she cochaired the program committee for a Rothman-sponsored workshop on acquisitions in 1980.

¶7 Betty was even more active at her home university. She was among the first tenured law faculty members; the first woman to hold an endowed professorship at UF (that professorship honored beloved professor Clarence J. TeSelle, and Betty also became curator of his bust!); president of the Phi Beta Kappa chapter; and a member of Beta Phi Mu, Phi Delta Delta, and Florida Blue Key. Her great love was teaching her seminar on computers and the law, which she did from 1983 to 2003. She also taught legal writing to undergraduate freshmen in the Frontiers of the Mind program and served on the doctoral committee for one of her students.

¶8 Unlike members of my generation, I never knew Betty to have an older, authoritative mentor. She was an original—an energetic, hard-charging lady with partners, collaborators, and cheerleaders such as Dean Frank Maloney; West Publishing Vice President Roger Noreen; and coauthors Dan Henke, Director of Hastings College of the Law Library, and Bob Munro, research librarian at the Levin College of Law.

¶9 She backed Dean Maloney's controversial decision to leave the center of the UF campus for a new entity called a "law center," with space for academic programs, clinics, and a law reform enterprise that partnered with law firms, government agencies, and international organizations. When I visited UF to recruit students for Duke Law School in the 1970s, Betty proudly showed me around the building she had a major part in designing. It included then-unheard-of separate rooms for Westlaw and LexisNexis, a computer lab, and an open-plan area with six classrooms that could be cordoned off to form an auditorium so that 1000 students could be accommodated at one sitting, an idea with more promise than practicality. I never asked Betty if the gain of adequate parking was worth the loss of proximity to the business and accounting schools that expanded into the vacated law school space, but the explosive growth of the law student body left them little choice but to move.

¶10 Betty was always conscious that she was a role model for women in law. She authored *A History of Race and Gender at the University of Florida Levin College of Law 1909–2001*<sup>2</sup> and coauthored *Women at the University of Florida*<sup>3</sup> as well as a major bibliography on feminist jurisprudence.<sup>4</sup> Betty was famous on campus for the orange and blue suits she wore on game days and for always taking time to counsel women students as their numbers rose. Dean Bob Jerry, in appreciation of

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2. Betty W. Taylor, Essay, *A History of Race and Gender at the University of Florida Levin College of Law 1909–2001*, 54 FLA. L. REV. 495 (2002).

3. MARY ANN BURG ET AL., *WOMEN AT THE UNIVERSITY OF FLORIDA* (2003).

4. BETTY W. TAYLOR, SHARON RUSH & ROBERT J. MUNRO, *FEMINIST JURISPRUDENCE, WOMEN AND THE LAW* (1999).

Betty's iconic status, noted that in addition to her role in technology, she had served as the law school's acting dean in 1981, the only woman to do so. He appointed her as the law school archivist upon her retirement from the law library, a post she held for another seven years. Dean Jerry encouraged Betty and CIO Andy Adkins to capitalize on the law school's contacts with government agencies in the state through its Center for Government Responsibility to create a digital archive of water law documents. This was their second successful collaboration.<sup>5</sup>

¶11 Betty was a pioneer in legal education. She loved her job and never wanted to retire. I believe that Betty was the only law library director whose faculty threw her an anniversary party at AALL, but then how many law librarians served one university for more than fifty years? I'm forever grateful to have followed in Betty's footsteps as director of the Levin College of Law Legal Information Center, so named by her to recognize the fusion of law and technology, but I'm more honored to have had her as a friend and inspiration. I've never had another colleague with the energy, foresight, and sheer force of will to take on so much and perform so brilliantly. Her like will not come our way again.—*Kathleen Price*<sup>6</sup>

### She Will Always Be “Mrs. Taylor” to Her Staff\*

¶12 Mrs. Taylor once told me the story of her undergraduate days at FSU and how a groundskeeper near her dorm would cut blossoms from gardenia plants on campus and lay them out on a canvas sheet in the early morning for the women to take and wear to class. She said that gardenias always made happy memories for her. I thought it was appropriate that I had been working with some gardenias in my yard when I heard the news of Mrs. Taylor's death. It is fitting that such sad news should be tempered with such a beautiful and favorite aroma, a memory of better days.

¶13 You can read about Mrs. Taylor's many professional achievements in *Who's Who* and in tributes to her, both here and elsewhere, but I want to tell you what I know about her from working with her for more than twenty-five years as her associate director.

¶14 Mrs. Taylor was born on June 14, Flag Day, in Butler, New Jersey. She might have been born in New Jersey, but she was a Florida native. She loved being a Floridian who had “sand in her shoes.” She was the wife of Gainesville attorney Ed Taylor and a mother and grandmother who adored her daughters, Carol and Nancy, and their children. She thought they hung the moon, and she celebrated all of their accomplishments. I never saw her more excited than when she had her family in town for the holidays or a football game, except maybe the day before they all invaded Crescent Beach for the annual Taylor beach weeks. They swam, fished, surfed, played tennis, and generally got more than their money's worth out of those days at Crescent.

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5. More information about this is in Andy Adkins's reminiscences, *infra* ¶¶ 30–31.

6. Associate Dean for Library & Academic Technology (retired), and Clarence J. TeSelle Professor of Law Emerita, Levin College of Law, University of Florida, Gainesville, Florida.

\* © Rick Donnelly, 2013.

¶15 She was the daughter of Mr. and Mrs. Frank Woodall and grew up in Kissimmee, Florida; she used to talk about the ranches in the area before Disney World moved in. When her widowed mother was in her nineties and might have gone to an assisted living or nursing home, Mrs. Taylor bought the house next door to hers in Gainesville, moved her mother in, and provided the care she needed until the end of her life.

¶16 She was a loyal sister to Rosie, and Rosie's husband, Kip. She and Rosie both went to FSU, and Mrs. Taylor rewarded her parents' faith in education by earning her baccalaureate degree and Master's degree in Tallahassee and becoming the first Distinguished Alumna of the FSU School of Library Science. She earned her law degree from UF, loved the university, and was extremely proud to be a law school alumna. She was a true orange-and-blue Gator. She never missed a Florida football game, watching either in person or on her TV. As a Georgia alumnus, I can also tell you that she was magnanimous in victory. She enjoyed UF Homecoming and Gator Growl and always got tickets for the family and planned a big weekend around it.

¶17 There is one four-letter word Mrs. Taylor hated: R-E-S-T! Her DNA was designed to work. I never entered her office and discovered her not working—ever. Her door was always open, and she would always make time for a visitor. On days of celebration at the College of Law, when we were visited by alumni who had become judges, justices, governors, senators, and representatives, I grew accustomed to hearing, "Where is Betty Taylor?" "Is Betty Taylor still here?" She had many, many friends across the country.

¶18 The work of libraries is part public and part business, and Mrs. Taylor relished her business responsibilities. She liked the budgets, the buying and brokering for information in books and in databases. She was a master negotiator who could crunch the numbers and get the most for our money. Her proposals for each year's budget were a challenge she enjoyed immensely. She was an observant steward of state funds, and she was hands-on, as all who worked in the technical services or business services side of the library can attest. She was loyal to her staff and the library faculty and promoted more education and continuing education for all. She had worked as a full-time administrator while going to law school and raising her children, so she believed that others could, too.

¶19 She was intellectually curious and delighted in technology and computing. Space exploration fascinated her—she said she would love to travel in space, and she was thrilled by the space shots we could see from the law school roof.

¶20 She loved sporty cars and drove too fast. She thought that flying on a plane through turbulence was a thrill. She told me that she was bored with calm flight; she enjoyed a good bounce and the dips and rolls of a plane—that's when she felt like she was *really* flying! She was a great one for travel and traveled the world with family and friends; she had an orange dress and a blue dress custom-tailored in Hong Kong that she wore to UF events.

¶21 She was a math whiz who never used a calculator and could calculate a table of figures faster than most people could work a calculator. She was a gardener and said that she spent some of her best time at home working in her yard. She was a genealogist who relished the search for her ancestors in England, miners from Cornwall who emigrated to Canada before coming to the United States.

¶22 A couple of years ago, I was browsing a state garden club magazine and noticed that the section devoted to obituaries of former members was not titled “Deaths” or “Obituaries”; those who had died were listed under the heading “Completed the Cycle.” I like that image. It is the image of the cultivation of a life, its flowering and maturity, its full growth, and finally, its return to nature after a full measure of beauty and contribution to the world’s garden. Mrs. Taylor has completed that cycle, and we are all enriched by having known her. When she entered heaven and saw so many loving friends and family, I hope that some gardener there remembered to lay out a canvas full of gardenia blossoms for her as they did when she was in college—nothing would have been more fitting or pleased her more.—*Rick Donnelly*<sup>7</sup>

### **A Determined Visionary and a Role Model\***

¶23 It is tempting to speak at length about Betty Taylor’s incredible vision of the role of computers, the Internet, LexisNexis and Westlaw, and a dozen other inventions new to most of us in the late 1960s. No one could overstate her futuristic and, to many of us, science-fiction-esque ideas: catalogs without cards, national legal libraries without walls or books, legal research with machines, and interactive teaching. Few of us believed any of that would ever be practical for our law schools or our libraries. Betty, though, embraced the future and spoke at many conventions, seminars, and group sessions. It sounded interesting to us, but in the early days it was just academic chatter. Her accomplishments in educating and convincing us are well recorded and remembered by many law librarians.

¶24 There was another side to Betty, which law librarians of my generation knew very well. Betty was a determined person. She entered our field without a law degree and while working full time and raising two children. She spent twelve years, one course at a time, obtaining her law degree from the University of Florida Law School.

¶25 Betty was dedicated and loyal. Except for a brief stint at the UF university library, she spent more than fifty years as a librarian at the UF law school, as a director, a professor, and even as interim dean. She had the respect of generations of students, faculty, deans, and university presidents.

¶26 Betty was kind and giving. She shared her wisdom and experience with many younger and newer librarians. Unsolicited, she wrote a glowing letter of recommendation for me when I applied to the University of the District of Columbia Law School. She mentored several young law librarians and gave her time freely to speaking and teaching.

¶27 Betty was professional and dignified. I never heard her gossip or utter an unkind word about anyone. She gave me lots of wonderful and useful advice and help. When my law school (Mercer) was about to purchase and totally renovate a very large building, the architect told me that he had hired a consultant to plan the

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7. Associate Director Emeritus, Legal Information Center, Levin College of Law, University of Florida, Gainesville, Florida.

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law library—done deal! I could not accept that, as the person he hired had never worked on a law library. I knew Betty was the only one for us. Using her résumé and all her recommendations, I was able to persuade my dean and the president to hire her. She came to Macon for three days and worked with us. It was a harmonious and productive time. Everyone was impressed with her competence and her flexibility as well as her personal demeanor.

¶28 It's wonderful to be intelligent, to be a visionary, to accomplish great things in one's life, but to do all of these things and retain the respect and admiration of your peers and remain a kind and humble person—that's an accomplishment.

¶29 To paraphrase Shakespeare, “Good night, sweet Betty, and flights of angels sing thee to thy rest.”—*Leah Chanin*<sup>8</sup>

### Fund-Raiser Extraordinaire\*

¶30 In 1997, the University of Florida College of Law received a Request for Proposal to assume NCAIR (National Center for Automated Information Research).<sup>9</sup> Working in collaboration with the UF College of Business and the Legal Technology Institute, Betty Taylor spearheaded the project team to prepare a detailed proposal, which led to the establishment of the International Center for Automated Information Research (ICAIR) at the UF Levin College of Law in 1998. This project provided funding for innovative projects to further research in the legal, accounting, and financial industries.

¶31 Another example of Betty's business acumen was the Florida Water Law project, which began as a discussion about preserving and archiving rare and important documents that were used to create the five Water Management Districts of the State of Florida. With Betty Taylor's knowledge of the law and her contacts throughout the state, we were able to identify, locate, and procure several private collections from all over Florida. This two-year project led us to digitize and create a massive online searchable archive of the history of water management in Florida. This project would not have been possible without Betty Taylor's keen sense of history and preservation.—*Andy Adkins*<sup>10</sup>

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8. Former Director of the Law Library, Mercer University, Macon, Georgia, and University of the District of Columbia, Washington, D.C.

\* © Andy Adkins, 2013.

9. NCAIR was founded in 1966 with the proceeds from the sale of the New York Bar Association's law and accounting databases, which joined Ohio's OBAR as the basis of LexisNexis. Its national board of trustees, including law librarians Betty Taylor and Dan Henke, made grants and engaged in the study and application of technology to the two professions. In order to increase the impact of its remaining \$2.75 million endowment, NCAIR invited sixteen schools to compete for the funds with the proviso that they commit to raising an additional \$20 million for innovative collaborations between academe and business. UF impressed the search committee with an immediate \$2.5 million match from the state.

10. Chief Information Officer, Steptoe and Johnson PLLC, Bridgeport, West Virginia.

### Grace Is Her Name and the Key to Her Accomplishments\*

¶32 I first met Betty while interviewing for the deanship at the UF College of Law. She stood out as one of the most knowledgeable and keenly aware members of the law school community. First, she had a very deep understanding of the law school based on forty years of experience with multiple deans and presidents, hundreds of faculty members, and thousands of students. She consistently was able to call on these connections to support the College of Law and law library initiatives. Second, she presided over the creation of one of the nation's finest law libraries, always being one of the first women in her position: as a leader of the library; as a professor of law and the holder of an endowed professorship; as the chair of many national organizations; and as a teacher of the use of legal technology in the library, the classroom, and the legal profession.

¶33 In my four years at UF, I came to know and respect Betty Taylor even more deeply. She was instrumental in bringing a gift of \$5 million to the law school to create ICAIR, the law school's technology teaching center. She helped to build the law school's external consulting service, the Legal Technology Institute. She provided calm and consistent service to students, faculty, and members of the public in need of the library's services; she also ensured that every staff member treated every patron with respect and dignity. She served as a brilliant mentor to junior staff members and graciously welcomed every new faculty member to the law school community. I could not have asked more from her than she already did in her efforts to make the law school a great place.

¶34 Libraries can sometimes be problem spots in universities. Under Betty Taylor's leadership, the UF Law Library never was. Instead it was always budget conscious, exceedingly focused on serving its patrons, always looking outside itself to increase its value to others, and proud to be the glue holding together the law school academic community. As dean, I could always count on Betty Taylor's library to be problem free and value oriented. Betty built the model; her legacy lives on in the library's continued excellence.—*Rick Matasar*<sup>11</sup>

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\* © Rick Matasar, 2013.

11. Vice President for University Enterprise Initiatives, New York University, New York, New York. This is a revised version of remarks made when nominating Betty Taylor for the Florida Women's Hall of Fame.



### Selected Publications of Betty W. Taylor\*

- "American Law Library Book Catalogs." *Law Library Journal* 69 (1976): 347–56.
- American Law Publishing, 1860–1900*. (With Robert J. Munro.) 4 vols. Dobbs Ferry, N.Y.: Glanville, 1986.
- Automation in the Law School: Including Law Libraries*. (With Dan F. Henke.) New York: Glanville, 1986.
- Basic American Law*. Dobbs Ferry, N.Y.: Condylne/Trans Media, 1978.
- A Bibliography and Subject Index of Publications Issued by Official Florida Agencies, January 1942–December 1951*. (With A. Elizabeth Alexander.) Gainesville, Fla.: University of Florida Libraries, 1953.
- "Book Selection and Acquisitions: Comments and Annotated Bibliography." (With William W. Gaunt.) *Law Library Journal* 63 (1970): 107–20.
- "Books vs. Non-Book Information." *St. John's Law Review* 70 (1996): 129–43.
- Budgeting for the Law School Library*. (With Dan F. Henke.) New York: Glanville, 1981.
- Budgeting for the Law School Library in the 1990s*. 2nd ed. (With Dan F. Henke.) New York: Glanville, 1993.
- A Collection of Bibliographic and Research Resources: International Legal Bibliography*. (With Robert J. Munro.) New York: Oceana, 1984–87.
- "The Economics and Management of Legal Information." *AALL Spectrum*, March 1999, 28.
- Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda, and Bibliography*. (With Sharon Rush and Robert J. Munro.) Littleton, Colo.: Rothman, 1999.
- "From Punch Cards to Smart Cards: A History of Technology at the Levin College of Law." *Journal of Technology Law and Practice* 7 (2002): 255–62.
- "A History of Race and Gender at the University of Florida Levin College of Law 1909–2001." *Florida Law Review* 54 (2002): 495–520.
- Index to Florida Legal Periodicals*. Gainesville, Fla.: University of Florida College of Law Library, 1996.
- Law in the Digital Age: The Challenge of Research in Legal Information Centers; An Analytical Justification for Law Libraries*. (With Dan F. Henke.) Dobbs Ferry, N.Y.: Glanville, 1996.
- "Law Library Consortium Data Base Components and Standards Study Group Report." (With Dan F. Henke and George S. Grossman.) *Law Library Journal* 70 (1977): 74–84.
- Legal Aspects of U.S.-China Economic, Business, and Trade Relations: A Bibliography*. (With Dan F. Henke.) New York: Oceana, 1985.

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\* © Robert Munro, 2013. Research Librarian (Retired), Levin College of Law, Gainesville, Florida.

*Legal Information in the 1980s: Meeting the Needs of the Legal Profession.* Littleton, Colo.: Rothman, 1982.

“Library Service to the Law School.” In *The Spirit of Law Librarianship: A Reader*, 2nd ed., edited by Roy M. Mersky and Richard A. Leiter, 45–60. Chicago: Alert Pubs., 2005.

*Model Self-Study: Preparing the Law Library for Accreditation.* (With Dan F. Henke.) New York: Glanville, 1987.

“Shared Resources—The Academic Library.” In *Law Librarianship: A Handbook for the Electronic Age*, edited by Patrick Kehoe et al., 597–605. Littleton, Colo.: Rothman, 1995.

*Transfer of Technology: A Bibliography of Materials in the English Language.* New York: Oceana, 1985.

*The Twenty-First Century: Technology’s Impact on Academic Research and Law Libraries.* (With Elizabeth B. Mann and Robert J. Munro.) Boston: G. K. Hall, 1988.

*Women at the University of Florida.* (With Mary Ann Burg and others.) Gainesville, Fla.: University of Florida, 2003.

## Memorial: Colleen Kristl Pauwels (1947–2013)\*

¶1 Colleen Kristl Pauwels, Associate Professor of Law and Director of the Law Library Emerita at the Indiana University Maurer School of Law, passed away on April 24, 2013, at the age of sixty-seven, in Bloomington, Indiana. Colleen served as director for more than thirty years, and under her leadership the law library became one of the finest legal research facilities in the country. Her energy, creativity, and high standards left a lasting impact on the law library and all those who were fortunate enough to work with her.

¶2 Colleen was born Chicago and spent her early years in Washington, Indiana, until her family moved to South Bend, where she attended grade school and high school. In high school, Colleen was a state champion swimmer in breaststroke, demonstrating a competitive spirit and desire to excel that remained with her throughout her life. Colleen received her A.B. from Barat College in 1968. In 1971, she moved to Bloomington with her husband, where he attended graduate school at Indiana University. During this time, Colleen began working in the government documents department at the university library. This experience convinced her to pursue a career in librarianship, so she began taking classes at the School of Library and Information Science while continuing to work full time. In 1975, shortly after completing her M.L.S., Colleen accepted an appointment as Public Services Librarian at the Indiana University Law Library.

¶3 I first met Colleen in 1976 when I accepted a staff position at the law library. At the time, I had no intention of working in a library for my entire career. However, getting to know Colleen and watching her work inspired me to become a law librarian. Through her encouragement, I completed my M.L.S. and J.D. while continuing to work at the law library. We worked together side by side for more than thirty years, not only colleagues but close friends.

¶4 While Colleen had no thoughts of spending her entire career at Indiana, fate had a different idea. In 1978, after being at the law library for only three years, she was named acting director when the director left suddenly. Although she was only supposed to be in the position for a short time, it became obvious to everyone that this position was a natural fit for her talents and vision, and she was named director in 1983. Concluding that a law degree was essential to her success, she began taking courses in law school, completing her J.D. in 1986, just three years after starting classes while continuing to work full time.

¶5 Colleen inherited a library that urgently needed more funding, more staff, and more space. She always explained her enormous success by claiming that it was easy to look good in the early days because doing anything made one appear to be a genius. As usual, she was being too modest. Under Colleen's leadership, the law

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\* © Linda K. Fariss, 2013.

library was transformed from a facility that struggled to meet the basic needs of its faculty and students to a nationally recognized legal research facility. The collection grew in size and strength and she brought together, and retained, a highly qualified staff. Colleen believed that the most important goal for a library was to provide top-notch service, and she often stated that she was most proud of the service offered by the library's outstanding staff.

¶6 The library's space problems were addressed when funding was received to build an addition to the law school, which was completed in 1986. Colleen was an integral part of the planning for the addition and renovation project. It was during this time that her talent for space planning first became evident. From that time until her retirement in 2011, every building or renovation project in the law school benefited from Colleen's good sense, careful eye, and excellent taste.

¶7 Colleen's research focused primarily on the history of the Maurer School of Law. She was keenly committed to preserving its history, conducting numerous oral history sessions with faculty, staff, and graduates, and building an archive for the law school within the library. She became the go-to person for any question dealing with the school's past. Shortly before her death, Colleen was inducted into the Academy of Law Alumni Fellows, which is the highest honor the Maurer School of Law bestows on its graduates. This award recognized her many years of dedicated service to the school.

¶8 Colleen is survived by her husband, Gerry, and her children, Erin and Matt. She also leaves behind her "second family" at the law library, who mourn her loss. Under Colleen's leadership the Indiana University Law Library flourished, but what her staff remember most is her smile, her laugh, and her unfailing optimism. She was my mentor and dearest friend for more than thirty years and there is not a day that goes by that I do not miss her friendship.—*Linda K. Fariss*<sup>1</sup>

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1. Director of the Law Library, Indiana University Maurer School of Law, Bloomington, Indiana.

**Proceedings of the 106th Annual Meeting of the  
American Association of Law Libraries  
Held in Seattle, Washington  
July 13–16, 2013**

**General Business Meeting, Monday, July 15, 2013**

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**General Business Meeting**  
**July 15, 2013**  
**Ballroom 6B**  
**Washington Convention Center**  
**Seattle, Washington**

[The General Business Meeting of the American Association of Law Libraries was called to order at 4:01 P.M. at the Washington Convention Center, Ballroom 6B, with Jean M. Wenger, President, presiding.]

**Call to Order and Introductions**

¶1 **President Jean M. Wenger** (Cook County Law Library, Chicago, Illinois): The Chair is pleased to call to order the 2013 Business Meeting of the American Association of Law Libraries. As of today, July 15, 2013, we have 1476 AALL members registered for the 2013 Annual Meeting. The AALL Bylaws, Article V, Section 3, stipulate that a quorum for a business meeting of the Association shall consist of fifty members registered at that meeting. The Chair observes there is a quorum.

¶2 The Chair would now like to introduce those present at the head table, beginning on my left: Parliamentarian Kevin Connelly; Vice President/President-Elect Steve Anderson; Treasurer Susan Lewis; Secretary Deborah Rusin; and Executive Director Kate Hagan.

**Adoption of the Standing Rules**

¶3 The Rules of Conduct for the AALL General Business Meeting are available on the table at the back of the room. In the interest of managing today's agenda, no member may speak for more than three minutes, and the Chair will limit discussion to no more than ten minutes on any one agenda item. The Chair will announce when the time is completed. If members wish to extend discussion beyond the allowed time, a motion to extend discussion will require passage by a two-thirds majority. If the Chair hears no objections, these rules will be adopted for this meeting. (No response.) Hearing no objection, these rules are adopted for this 2013 Business Meeting.

**Adoption of the Agenda**

¶4 Copies of today's agenda and accompanying handouts are available in the back of the meeting room. The meeting will be recessed no later than 5:15 P.M., unless extended by vote of those members present. Are there any changes or additions to the agenda? (No response.) Hearing none, I declare the agenda adopted.

¶5 The Chair is pleased to call Secretary Deborah Rusin to the podium to report on the 2013 election results.



## Report on Elections

¶6 **Ms. Deborah Rusin** (Katten Muchin Rosenman LLP, Chicago, Illinois): Thank you, Madam President. The ballots for AALL's election of the officers and Executive Board members were distributed to all voting members on November 1, 2012, returned December 1, 2012, and tabulated electronically the following day. This schedule is consistent with the AALL Bylaws. The successful candidates were Holly Riccio, Vice President/President-Elect; Gail Warren, Treasurer; Femi Cadmus and Kenneth Hirsh, members of the Executive Board. Continuing on the Board will be Steve Anderson, President; Jean M. Wenger, Past President; Deborah Rusin, Secretary; Katie Brown, Amy Eaton, Greg Lambert, and Suzanne Thorpe, members of the Executive Board. 1517 ballots were returned, and none were invalidated

## Introduction of New Board Members

¶7 **President Wenger:** The Chair declares the following persons duly elected by the membership and asks them to stand and be recognized: Holly Riccio, Vice President/President-Elect; Gail Warren, Treasurer; Femi Cadmus and Kenneth Hirsh, members of the Executive Board. If there are no objections, the Chair will authorize the Secretary to destroy the ballots of the 2012 election. (No response.)

## Memorials

¶8 We have been informed of the deaths of several members and friends of our Association during the past year. They are Patricia Brown, Rick Brown, Judith Esrig, Sue Johnson, Jenny Kanji, Brenda A. Kelly, Dwight D. Opperman, Colleen Pauwels, Alice Reaves, Erwin Surrency, Grace W. "Betty" Taylor. Are there any other members or friends we should remember at this time? (No response.)

¶9 Please stand and join me in a moment of silence as we remember the contributions of these individuals to our personal and professional lives. (A moment of silence was observed by the members.) Thank you; you may be seated.

## President's Report

¶10 I am pleased to report to you, the membership, on my year as AALL President. Before I begin, I would like to thank the Executive Board for their support and leadership this year, especially Darcy Kirk, for her guidance and advice, and Steve Anderson, for his support and strategic foresight. Supporting our work and ensuring the smooth functioning of all operations is Kate Hagan, Executive Director, and her staff. We are indeed fortunate for their dedication and professionalism. Most importantly, my special thanks to all of you. Without dedicated and enthusiastic members, AALL would not be the vibrant and valuable association we know. Your service on committees and task forces and in AALL entities, your advocacy for library and information issues, your participation in the Annual Meeting, just to name a few activities, are crucial to your colleagues and to the profession as a whole.

¶11 I built my theme for the 2013 Annual Meeting and Conference around the word *value*. “Rethink Your Value” is an appropriate theme for us as we begin rethinking and rebranding how we operate and define our roles in our work environments. I was very pleased to oversee a major initiative this year to enhance program content and the schedule of the Annual Meeting. This year’s educational programs were designed around members’ needs and featured innovative learning styles and an outstanding lineup of speakers from inside and outside of AALL. The timely and thought-provoking programs you have attended are due to the hard work and innovation of the Annual Meeting Program Committee, chaired by Julie Pabarja. A major part of the Annual Meeting experience is the interaction attendees have with the host city and its environs. Seattle has been wonderfully showcased for us by the Local Arrangements Committee, co-chaired by Rita Dermody and Tina Ching. Please give them a round of applause. (Applause.)

¶12 Tomorrow afternoon, at the conclusion of the Annual Meeting, AALL will launch the 2013–2016 Strategic Directions of authority, advocacy, and education. At that time, we will close the book on the 2010–2013 Strategic Directions. I remember introducing those strategic directions to you at the 2010 business meeting in Denver. How quickly time goes by. It is particularly gratifying to see how the 2010–2013 Strategic Directions have transformed our Association, our operations, and our future. The strategic directions guide and inform the work of AALL. I asked the Executive Board’s Strategic Directions Committee, chaired by Steve Anderson, to report on the accomplishments of the AALL under the 2010–2013 plan. Their report is in the summer 2013 Executive Board book and will be posted on AALLNET.

¶13 There is great news to report on the Uniform Electronic Legal Material Act (UELMA). UELMA has been adopted in eight states and is pending in six more. In the two years since its adoption by the Uniform Law Commission, UELMA has gained momentum and is on track to be adopted in a few more states by the end of the year. This advancement is only possible through the tireless and dedicated work of AALL and chapter members with the assistance of our Government Relations Office.

¶14 Immediately after the 2012 Annual Meeting, I appointed a special committee of the Executive Board to draft FAQs to inform the membership about the proposed amendments to the AALL Bylaws. The proposed amendments revised the categories of membership, rights of members, chapters, and rules of order and were approved by the membership in October. One of the important tasks of the President is not only to address her initiatives but to continue and advance the ongoing projects of her predecessors. Our work is truly a continuum. An initiative of Past President Kirk was the very successful Futures Summit. The recommendations of the Futures Summit Implementation Committee have been largely completed. Toward that end, I appointed the Task Force for Practice-Oriented Education and Publication, which will identify opportunities for members to develop and participate in practice-oriented education and CLE, and to recommend ways to share experiences and best practices.

¶15 This year, the Association completed two very important initiatives coming out of the 2011 Vendor Colloquium. At its fall 2012 meeting, the Executive Board

approved the third edition of the *AALL Guide to Fair Business Practices for Legal Publishers*. The new edition of the *Guide* was the work of the *AALL Guide to Fair Business Practices for Legal Publishers* Revisions Task Force, chaired by Kay Todd. At its spring 2013 meeting, the Executive Board approved the *Procurement Toolkit and Code of Best Practices for Licensing Electronic Resources*, which was the work of the Library Procurement Process Improvements Task Force, chaired by Tracy Thompson-Przylucki.

¶16 In the fall, I appointed a task force to promote and establish our legal research competencies as the “gold standard” within AALL and for the legal community. Work included, in part, developing an effective implementation plan and revising the language of the competencies to reflect the many audiences within the legal community. On Friday, the Executive Board approved the *AALL Principles and Standards for Legal Research Competency* and extended the term of the task force to continue their implementation work.

¶17 In January, I appointed the Future of Legal Education Response Task Force. The task force drafted a response to the American Bar Association (ABA)’s Task Force on the Future of Legal Education’s call for comments on the economics of legal education and the delivery of legal education and its regulation. It is critical that law librarians be a recognized constituency in any discussion of legal education.

¶18 Law librarians are the authoritative voice in legal information. AALL continues to develop relationships and create venues for outreach and dialogue with affiliated legal and information associations. In August, I attended the International Legal Technology Association (ILTA) Annual Conference and met with the leaders of ILTA, the Legal Marketing Association, the National Association for Law Placement (NALP), and the Association of Legal Administrators. In May, I met with presidents and executive directors of legal organizations. This was an opportunity to discuss our response to the ABA Task Force on the Future of Legal Education and the development of our *Principles and Standards for Legal Research Competency*.

¶19 In January 2013, I represented AALL at the Association of American Law Schools meeting in New Orleans and the American Library Association Midwinter Meeting in Seattle. In April, I met with Acting Public Printer Davita Vance-Cooks, Superintendent of Documents Mary Alice Baish, and their staff. We had a very good discussion on the role of law libraries in the Federal Depository Library Program (FDLP) and the importance of no-fee, permanently preserved, and publicly available official government information in digital formats. The Federal Depository Library Program Task Force completed its report and identified ways to promote, engage, and improve the synergy of law libraries and the FDLP.

¶20 An important responsibility of an AALL officer and board member is to visit chapters at their request. This year I had the opportunity to make four chapter visits. In August, I visited the Dallas Association of Law Libraries (DALL). In October, I attended the fall conference of the Law Library Association of Maryland (LLAM). In May, I attended the Michigan Association of Law Libraries (MichALL) Annual Meeting and was the chapter visitor to the Law Librarians of Puget Sound (LLOPS) in Seattle. During these chapter visits, I was invited to attend board meetings, tour law libraries, share news of events at the national level, and respond to

questions. I wish to express my appreciation for the warm hospitality extended to me on my visits.

¶21 As President, I had the great pleasure of representing AALL at several conferences of sister associations throughout the world. In October, I attended the thirty-first Annual Course on International Law and Legal Information of the International Association of Law Libraries (IALL) in Toronto, Canada. In February, I attended the eighth Joint Study Institute (JSI), which was hosted by the University of Melbourne in Australia. The JSI is cosponsored by AALL, the Australian Law Librarians' Association (ALLA), the British and Irish Association of Law Librarians (BIALL), the New Zealand Law Librarians' Association (NZLLA), and the Canadian Association of Law Libraries (CALL/ACBD). In May, I attended the CALL/ACBD Annual General Meeting in Montreal. In June, I had the wonderful opportunity to represent AALL at the third international conference sponsored by the Chinese and American Forum on Legal Information and Law Libraries (CAFLI) in Shanghai. AALL was an institutional sponsor for the conference. Our representation in the international arena is an opportunity to share ideas and discuss universal issues surrounding legal information with colleagues worldwide.

¶22 It has been a tremendous honor and privilege to serve as your President this year. I would like to thank all of you for your dedication, your willingness to volunteer, and your strong commitment to the values that make law librarianship an exceptional profession. Thank you.

### Remarks of the Vice President/President-Elect

¶23 The Chair is now pleased to introduce Vice President/President-Elect Steve Anderson to the podium for his report.

¶24 **Mr. Steven P. Anderson** (Maryland State Law Library, Annapolis, Maryland): Thank you, Jean. I want to take this opportunity to thank Jean for her mentoring and wise counsel during this last year. She has set a fine example, and I am most grateful for both her patience and her diligence. Thank you, and congratulations on a successful and informative Annual Meeting. I am pleased to report on my past year as your Vice President, and I am privileged to preview my initiatives for 2013–2014.

¶25 Through chapter visits, e-mail exchanges, and conference calls, I have had the good fortune to meet many of you, either live or virtually, and I am always heartened by your enthusiasm for the profession and your support of AALL. I am especially appreciative of all of you who answered my call to volunteer for committee work. Like last year, this year's announcement was made in February—a time frame more suitable for beginning work at the Annual Meeting. In making selections, the Appointments Committee and I paid special attention to the applications of those members who had applied before but were never selected. As is often the case, there were far more applications than available positions—a testament to the vibrancy of the Association, although admittedly something of a conundrum for those not appointed. Some volunteers may yet be appointed as vacancies occur, and please do not be dissuaded from volunteering again. Application pools vary, as do the demographics of committees that ensure the proper balance of member

representation. I would like to take this time to acknowledge all of you who volunteered to serve and especially thank the Appointments Committee, without whose insight and coordination the selection process would not be as straightforward.

¶26 This year, I had the good fortune to attend two chapter meetings. In October, I was pleased to join members of the Ohio Regional Association of Law Libraries (ORALL) for their annual meeting. Then, in May, I attended the year's final chapter meeting of the Atlanta Law Libraries Association (ALLA). I am grateful for the hospitality of the boards and meeting planners of both chapters. Such visits afford Executive Board members a unique opportunity for understanding the needs, challenges, and aspirations of our colleagues as they work in their day-to-day environments.

¶27 One of my tasks this year was to chair the Executive Board's Strategic Directions Committee. In addition to drafting an annual action plan for the current year, the committee reported on the implementation of the 2010–2013 Strategic Directions, as they culminated this year. The report, which was just accepted by the Executive Board, notes many accomplishments aligned with the goals of leadership, education, and advocacy, and describes initiatives ranging from the Futures Summit and the Vendor Colloquium to the recent launch of the Mentor Match application on AALLNET. The report will be made available to members shortly.

¶28 In order to further the goals of the Association's new strategic plan, I am in the process of forming three special committees. The Economic Value of Law Libraries Special Committee will define methodologies for determining the economic value of and return on investment in law libraries; assist in the development of a comprehensive, quantitative study and report of law libraries' value; and suggest ways for AALL to promote the completed report. The Digital Library Initiatives Special Committee will identify existing and planned digital library initiatives and recommend ways in which AALL and law libraries can more effectively and sustainably participate in them. The Access to Justice Special Committee will identify and evaluate existing law library programs and strategies for enhancing citizens' access to the justice system; suggest new practices or projects for law libraries to adopt that will facilitate access to justice; and draft a white paper for circulation to the legal community that describes the existing and prospective roles all types of law libraries play in fostering access to justice.

¶29 I recently announced that the theme of the 2014 Annual Meeting is "Beyond Boundaries," a phrase I selected for its professional meaning, its geographic symbolism, and, quite frankly, for its personal resonance. The 2014 Annual Meeting Program Committee Chair, Amy Hale-Janeke, and her committee are already working hard to ensure that next year's meeting in San Antonio will offer highly relevant programs that will challenge us to reach beyond our own reference desks and communities to strive for the goals of our new strategic plan: authority, advocacy, and education. Local Arrangements Committee Chair Mike Martinez promises a welcoming city, famous for its hospitality, tempting cuisine, and vibrant riverwalk.

¶30 "Beyond Boundaries" serves as a tribute to San Antonio's unique Mexican and American bicultural heritage. Finally, the theme "Beyond Boundaries" is a personal reminder for me to overcome the physical limitations stemming from having

young-onset Parkinson's disease. I believe it is critical for those of us with disabilities to continue to thrive in our chosen professions.

¶31 I want to close by again thanking Jean, as well as the whole Executive Board, Executive Director Kate Hagan, the talented and dedicated headquarters staff, and, most especially, my colleagues at the Maryland State Law Library for their encouragement and support this last year. I look forward to seeing all of you again in San Antonio.

### Treasurer's Report

¶32 **President Wenger:** The Chair is pleased to call Treasurer Susan Lewis to the podium for the Treasurer's Report.

¶33 **Ms. Susan J. Lewis** (Pence Law Library, American University Washington College of Law, Washington, D.C.): Thank you, Jean. How many of you attended the presentation this morning on giving presentations? One of the takeaways that I took from that was that you should always include pictures or charts in your presentation. I hope you all have a copy of the Treasurer's Report for fiscal year 2012 that you could pick up outside on the table. It's a snapshot of the Association's finances as of the end of the fiscal year on September 30, 2012. I will present the highlights from that picture, that snapshot.<sup>1</sup>

¶34 Fiscal year 2012 turned out to be a very good year for the Association. If you look at Schedule A of that handout, it will give you an overview of the total financial picture. You'll see the assets listed, which include the day-to-day checking accounts of the general fund, including the operating checkbook and savings accounts. The assets also include the investment portfolio, which consists of three invested funds. And these comprise, as of September, seventy-two percent of the Association's assets. They include the current reserve fund, which is a reserve account maintained for special projects and contingencies. There's a permanent investment fund, which is the long-term investment account for the Association. And then there are restricted funds, which include the endowments and other funds that are Board-restricted for particular purposes.

¶35 The total assets of this last year were up over ten percent from fiscal year 2011. It was a very good year. And then the current liabilities, also on Schedule A, were down about fifteen percent. So the total net assets were up more than sixteen percent for the year for the Association. Schedule B, also on that handout, is the larger view, laying out a picture of all of the funds of the Association over the twelve-month period of the fiscal year. And then Schedule C gives you a layout of the activities for the general fund. The general fund is, as I mentioned earlier, the operating checkbook for the Association.

¶36 The revenues included in the general fund were up more than ten percent this year. The three largest sources of revenue for the Association—these made up eighty-six percent of general fund revenues last year—are your membership dues, the money that you pay to belong to the Association; subscriptions and royalties

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1. See Susan J. Lewis, *A Look at AALL's 2012 Fiscal Year*, AALL SPECTRUM, May 2013, at 6 (containing schedules A–D).



for the *Index to Foreign Legal Periodicals (IFLP)*, which I'm sure many of you subscribe to at your institutions; and, finally, the revenue from the Annual Meeting, including registration fees and the fees that vendors pay to maintain booths in the exhibit hall. These three sources—membership dues, *IFLP* subscriptions and royalties, and Annual Meeting receipts—account for the bulk of the revenue that the Association takes in.

¶37 On the flip side, the total expenses for the general fund this year were up about five percent. The expenses, for instance, for the Annual Meeting, which is always an expensive proposition to put on, were up about sixteen percent. That varies from place to place with the cost of each locale.

¶38 So the increase in net assets for the general fund this past year was \$426,327. This was a very good amount, much of it due to the success of the *Index to Foreign Legal Periodicals*. And I would like to mention Marci Hoffman, the editor. This increase in net assets was transferred to the current reserve fund, where we put additional funds that we are able to raise above our budget projections and which is maintained for special projects.

¶39 Finally, Schedule D on your handout lays out the various restricted funds that are managed. These include endowment contributions and other special funds. These are restricted to particular purposes, and this schedule shows how they are accounted for. These funds, in various ways, were there to support the Association's commitment to its Strategic Directions in fiscal year 2012. These were leadership, education, and advocacy. And these strategic directions and the funds that support them, are there to support you, our members.

¶40 In conclusion, I would just like to stress, again, that the Association's financial condition has continued to improve year over year since the financial downturn that we had a few years ago. We seem to have pulled ourselves out of that pretty well.

¶41 I would like to give a special thanks to Finance Director Paula Davidson and Executive Director Kate Hagan for the work that they do to support our financial mission and the Association overall. Thank you.

¶42 **President Wenger:** Copies of the reports of the Executive Director and the Director of Government Relations are available on the tables as you entered the room. Because of our time constraints, these reports will not be delivered from the podium. If there are any questions regarding these reports, or any reports given today, please step up now to one of the microphones. (No response.)

### 2013 Hall of Fame Inductees

¶43 I would now like to honor some of our colleagues and recognize them for their accomplishments. First, it is time to honor some very important members, those who have been inducted into this year's Hall of Fame. The Hall of Fame was established in 2009 to recognize those members whose contributions to the profession and service to the Association have been significant, substantial, and long-standing. Today, it is my honor to induct into the 2013 Hall of Fame four individuals deserving of this recognition.

¶44 Dick Spinelli. Dick, will you please come forward? Is there anyone in this room who does not know Dick Spinelli? I don't think so. Dick has been involved in our profession since joining Rothman and Company in 1968. Since that time he has made a point of knowing us and our collections. In 1993, Dick joined William S. Hein & Company and has been involved in the development of many important legal information products, including, most recently, Spinelli's Law Library Reference Shelf. While he does not have a long list of AALL leadership positions on his résumé, he does have a first-name relationship with virtually every member of our profession. Please join me in welcoming Dick as a member of the AALL Hall of Fame. (Applause.)

¶45 Kay Todd. Kay, will you please come forward? Kay is a past president of AALL, serving from 1993 to 1994. It is interesting to note that at that time she was just the fourth private law librarian in AALL history to serve as President. During her term, she convened a meeting of law librarians, legal publishers, and legal information scholars, which has served as the model for subsequent vendor colloquiums. Kay also provided leadership by chairing the 1990 Long-Range Planning Committee, which produced AALL's first strategic plan. Most recently, Kay agreed to chair the *AALL Guide to Fair Business Practices for Legal Publishers* Revisions Task Force, which produced much-needed revisions to the *Guide*. Kay's service of leadership to AALL has spanned her entire career, and from that AALL has greatly benefited. Please join me in welcoming Kay as a member of the AALL Hall of Fame. (Applause.)

¶46 Judith Wright was unable to join us today, as she is attending her son's wedding. But I would like to take this time to speak to her accomplishments. Judith recently retired as the Associate Dean of Library and Information Services at the University of Chicago, a position she had held since 1980. Judith has been a valued leader in our profession, serving as Chair of AALL's Special Committee on Educational Policy and its National Legal Resource Committee. She also chaired the ABA Section of Legal Education and Admission to the Bar's Law Libraries Committee. Throughout her career she has been an innovator, and she has served as a mentor to a generation of law library professionals. Please join me in welcoming Judith as a member of the AALL Hall of Fame. (Applause.)

¶47 Albert Brecht. This award is being awarded posthumously and will be accepted on behalf of his family by Pauline Aranas, a longtime colleague and friend. Pauline, will you please come forward? Albert, for nearly forty years, was the lifeblood of the University of Southern California's (USC) law library. He had a remarkable tenure at USC and was known for being ahead of the curve. Albert's role as an AALL leader was no less impressive. While his service as President stands out, he also chaired numerous committees and task forces on behalf of the Association. But perhaps his biggest contribution to the profession was as a talent scout. Those he hired and mentored went on to prominent roles in law librarianship. Albert left us much to emulate. Please join me in welcoming Albert as a member of the AALL Hall of Fame. (Applause.)

### President's Certificates of Appreciation

¶48 Each year the President has the opportunity to present special certificates of appreciation to people or organizations who have contributed to the Association or the profession in exceptional ways. It is my pleasure this year to present several such certificates. I ask that each recipient come forward when his or her name is called.

¶49 Mark Estes, for his six years of dedicated and exemplary service as Editor of *AALL Spectrum*. (Applause.)

¶50 Darcy Kirk, for her vision and exemplary leadership in convening the 2011 Futures Summit and for her many contributions to AALL and the profession. (Applause.)

¶51 Julie Pabarja, for her exemplary leadership as Chair of the 2013 Annual Meeting Program Committee, ensuring the success of educational programming at the 106th AALL Annual Meeting, and for her many contributions to AALL and the profession. (Applause.)

¶52 Janet Sinder, for her six years of dedicated and exemplary service as Editor of *Law Library Journal*. (Applause.)

¶53 Tracy L. Thompson-Przylucki, for her exemplary leadership as Chair of the Library Procurement Process Improvements Task Force and for her many contributions to AALL and the profession. (Applause.)

¶54 Kay Moller Todd, for her exemplary leadership as Chair of the *AALL Guide to Fair Business Practices for Legal Publishers* Revisions Task Force and for her many contributions to AALL and the profession. (Applause.)

¶55 Sally Wise, for her exemplary leadership as Chair of the Promoting the AALL Principles and Standards for Legal Research Competency Task Force and for her many contributions to AALL and the profession. (Applause.)

¶56 And now I would like to recognize one of our staff members who has reached a service milestone. Kim Rundle, will you please come forward? For her fifteen years of dedicated service to AALL and its members. (Applause.)

¶57 I also want to thank all of the exceptional staff members for all their behind-the-scenes efforts that have helped to make this meeting a success. While doing so may be their job, they are truly dedicated and regularly go above and beyond the call to be sure everything runs smoothly. Will our staff members please stand? (Applause.)

### Introduction and Remarks of Special Guests

¶58 We are delighted this afternoon to have four special guests from our counterpart law library associations in other countries. At this time, I would like to introduce each of them and invite them to give us a brief greeting from the floor microphones. Jas Breslin, President, British and Irish Association of Law Librarians, BIALL.

¶59 **Ms. Jas Breslin** (Morrison & Foerster, LLP, London, England): I'm glad to represent my association, the British and Irish Association of Law Librarians. And I'm really looking forward to continued interaction between the members of AALL and BIALL. I'd also like to take the opportunity to invite everybody here to our conference next year, our annual conference in Harrogate, England—it's taking

place on the 12th to 14th of June. I hope we will see some of you there. And I hope to get the opportunity to make you feel as welcome as I did in Seattle. Thank you.

¶60 **President Wenger:** Lisa Sylvester, National President, Australian Law Librarians' Association, ALLA.

¶61 **Ms. Lisa Sylvester** (Legal Services Corporation, Brisbane, Australia): Hi, everyone. Thank you very much for inviting me. It's my first international trip since I was seventeen, so it was a bit scary on the flight over. But I made it. No checked bag, so I'm enjoying my time here. In terms of what's happening back home, we've gone through quite a bit of amalgamation of the division and come up with a national membership model which has gone forward now, full steam ahead.

¶62 We've got a great conference going in September if anyone would like to come to our conference in Sydney. The following year, it's going to be in Adelaide, right near a wonderful wine region. And in the following year, probably back in Melbourne. We were delighted to host the Joint Study Institute, which only happens every two years. It was a fabulous networking opportunity—I think Jean would agree with that. There were a lot of tours and lots of networking opportunities.

¶63 In terms of what's happening advocacy-wise in Australia, we've had a huge reform proposed for copyright. I know copyright is something that's mentioned a lot here within your program. It is quite a difficult area in Australia, particularly with fair use. One interesting thing you might like to read is what the publishers have to say about it. If you look at the Australian Law Reform Commission, you'll see what they think about it all. Also we are doing a project which is about to come out—and I'll make sure I get a copy to Steve—about return on investment within law librarianship, which is an Australian project that was done with the Australian Library Information Association. So I'll be delighted to leave a copy of the report so you can see what we think, in Australia, about it all.

¶64 Thank you very much, and enjoy the rest of the conference.

¶65 **President Wenger:** Petal Kinder, President, International Association of Law Libraries, IALL.

¶66 **Ms. Petal Kinder** (High Court of Australia, Canberra, Australia): Thank you, Jean. Warm greetings, as always, from the International Association of Law Libraries. And I congratulate you and your members on a really successful and rewarding conference. I'd like to announce that our next conference will be held in Barcelona this September on the 15th through the 19th of September. I hope to see all of you there. And thank you for inviting me.

¶67 **President Wenger:** Shaunna Mireau, Secretary, Canadian Association of Law Libraries, CALL/ACBD.

¶68 **Ms. Shaunna Mireau** (Field Law, Edmonton, Alberta): I'm so pleased to bring warm greetings from the Canadian Association of Law Libraries. As this is my very first AALL conference, I wanted to share five things I've learned at AALL. First, every person at this conference has at least one, and usually several, great ideas. Second, every person at this conference is willing to share their great ideas either by presenting or sharing as panel members, or by participating in discussions by asking questions or offering comments—in the exhibit hall, on escalator rides, and over coffee, lunches, and karaoke. Every person at this conference is an

innovator. And I'm not going to define that because I think everyone can define that for themselves. The fourth thing I've learned is that every person at this conference is a legal industry survivor. I'm not going to define that either. And finally, every person at this conference has been incredibly welcoming.

¶69 I invite you to let members of the Canadian Association of Law Libraries repay the wonderful hospitality that you've shown me by attending our annual meeting in Winnipeg, Manitoba. While Canadians joke and call it Winter-peg, we promise that you'll have plenty of warm sunshine, just as we all had in Seattle. It's an amazing city. As you prepare to travel beyond the boundaries of your 2014 conference, we invite you to attend our conference as well, May 25 to 28, 2014, in Winnipeg. Thank you.

### Resolution of Appreciation

¶70 **President Wenger:** I will ask AALL member Catherine Lemann to come forward to a floor microphone for a Resolution of Appreciation.

¶71 **Ms. Catherine Lemann** (New Orleans, Louisiana): Whereas the 106th Annual Meeting and Conference of the American Association of Law Libraries held in Seattle, Washington, on July 13–16, 2013, was an exceptional educational and networking success;

¶72 And whereas the success of AALL's 106th Annual Meeting and Conference can be attributed in large part to the contributions of many individuals and entities that gave willingly of their time, energy, resources, and support;

¶73 Therefore, be it resolved that on behalf of AALL and its members, thanks be given to the following who worked throughout the year on Annual Meeting arrangements:

- President Jean M. Wenger and the AALL Executive Board;
- Tina S. Ching and Rita R. Dermody, Co-chairs of the Local Arrangements Committee, and its members;
- Julie Pabarja, Chair of the Annual Meeting Program Committee, and its members;
- All members of the AALL staff; all the speakers, moderators, and program coordinators; all those who volunteered their time and assistance; and
- All AALL members, without whom the Annual Meeting would not have been such a success.

¶74 And be it further resolved that, on behalf of AALL and its members, thanks be given to our gold-level sponsors: Bloomberg Law/Bloomberg BNA, LexisNexis, Thomson Reuters, and Wolters Kluwer Law & Business; and all our other corporate contributors who have cosponsored or sponsored an event, service, or publication or otherwise given their support to the Annual Meeting.

¶75 **President Wenger:** Do we have a second to the resolution?

¶76 **Voice:** So moved, second.

¶77 **President Wenger:** All in favor, say aye.

¶78 **Voices:** Aye.

¶79 **President Wenger:** Motion carries.

### Other Resolutions

¶80 We have received no other resolutions. Therefore, we will move on to new business.

### New Business

¶81 Are there any items of new business? (No response.) Receiving no requests for new business, we will move to the next item on the agenda.

### Announcements and Adjournment

¶82 Are there any announcements to be made? (No response.) We have completed all items of the agenda. The Chair now requests a motion to adjourn.

¶83 **Voice:** So moved.

¶84 **President Wenger:** There is a motion to adjourn, is there a second?

¶85 **Voice:** Second.

¶86 **President Wenger:** It has been moved and seconded that we adjourn. All in favor signify by saying aye.

¶87 **Voices:** Aye.

¶88 **President Wenger:** All opposed please say nay. (No response.) The 2013 Business Meeting of the American Association of Law Libraries is now adjourned. We hope you will stay for the Members' Open Forum, which will begin immediately. Donna Williams will serve as the moderator. The forum will last no later than 5:15 P.M.

(WHEREUPON the meeting was adjourned at 4:46 P.M.)



## Appendix A

### Report of the Director of the Government Relations Office

**Ms. Emily Feltren** (American Association of Law Libraries, Washington, D.C.): AALL's advocacy program continues to grow, with many opportunities for the Government Relations Office (GRO) and AALL members to influence our public policy priorities at the federal and state levels. Here are some of the highlights from 2012–2013.

#### Federal Policy Priorities

In January 2013, the GRO worked with the chairs and vice chairs of the Copyright, Digital Access to Legal Information, and Government Relations Committees to develop AALL's public policy priorities for the 113th Congress. This document articulates AALL's support for public access to government information, a balance in copyright law between rights holders and users, protection of privacy, and access to justice.

The GRO advocated in support of funding for the Government Printing Office (GPO), the Institute of Museum and Library Services, the Legal Services Corporation, the Library of Congress (LC), and the National Archives and Records Administration. AALL President Jean M. Wenger submitted testimony in support of full funding for GPO and LC, highlighting the importance of the Federal Depository Library Program (FDLP), FDsys, and the Law Library of Congress.

The GRO worked closely with members and other open government groups to promote access to information that is produced by the federal government. In particular, we advocated for passage of the Access to Congressionally Mandated Reports Act, H.R. 1380, which directs GPO to provide online public access to thousands of reports that are mandated by Congress. The bill was reported out of the House Committee on Oversight and Government Reform in May 2013.

AALL submitted comments, drafted by the Copyright Committee, in response to the Copyright Office's notice of inquiry on orphan works and mass digitization. AALL also joined the Owners' Rights Initiative (ORI), which supports the principle that "if you bought it, you own it." AALL signed on to an amicus brief in support of petitioner Supap Kirtsaeng in *Kirtsaeng v. John Wiley & Sons, Inc.*, and we were pleased with the Supreme Court's decision in favor of first sale. We continue to work with ORI on a proactive first sale agenda.

The GRO worked with AALL's FDLP Task Force to participate in the National Academy of Public Administration's congressionally mandated study of GPO. In February 2013, President Wenger and Task Force Chair Sarah G. Holterhoff wrote to Acting Public Printer Davita Vance-Cooks in support of GPO's leadership in providing no-fee permanent public access to government information. This letter led to a productive meeting in April 2013 between President Wenger, Acting Public Printer Davita Vance-Cooks, Superintendent of Documents Mary Alice Baish, Assistant Public Printer Jim Bradley, General Counsel Drew Spalding, and myself on GPO's priorities and the needs of law librarians. In June 2013, AALL, joined by

the American Library Association, the Association of Research Libraries, the Medical Library Association, and the Special Libraries Association, submitted a statement for the record in support of President Obama's nomination of Davita Vance-Cooks to be Public Printer of the United States.

### State Policy Priorities

We continued to work with members and chapters to promote the Uniform Electronic Legal Material Act (UELMA), support public law libraries, and respond to the threat of elimination of print. UELMA became law in six more states in 2013, bringing the total number of enactments to eight: California, Colorado, Connecticut, Hawaii, Minnesota, Nevada, North Dakota, and Oregon. AALL members and chapters worked with their Uniform Law Commissioners, coordinated coalitions, and testified in support of the act. President Wenger and AALL Past President Darcy Kirk testified in support of UELMA in Illinois and Connecticut, respectively.

AALL worked with the Northern California Association of Law Libraries, the San Diego Association of Law Libraries, and the Southern California Association of Law Libraries to respond to threats to the San Francisco Law Library; coordinated with the Atlanta Law Library Association to oppose the closure of the Georgia State Archives; and worked closely with the Social Responsibilities Special Interest Section and the Law Library Association of Greater New York to oppose a proposal to eliminate the requirement that law libraries be maintained within New York's local correctional facilities.

### AALL's Advocacy Team

The GRO expanded our resources for advocates, including redesigning our web site ([www.aallnet.org/gro](http://www.aallnet.org/gro)) so that it is organized by issue area (access to government information, intellectual property, open government, privacy, and state issues) to make it easier for AALL members, congressional staff, and other interested parties to find information. We launched a new Twitter feed (@AALL\_GRO), changed the Washington E-Bulletin into an HTML publication that focuses on upcoming policy events and opportunities, and posted frequently to the *Washington Blawg*. The GRO also published a Member Advocacy FAQ to answer common questions about effective advocacy. Public Policy Associate Elizabeth Holland led monthly online advocacy training on topics including the federal budget process, communicating with Congress, and media advocacy. In April 2013, thanks to the support of the Executive Board, we hosted our first Local Advocate Lobby Day, which brought AALL advocates and chapter members to Capitol Hill for lobbying training and a successful day of action on issues such as access to government information and privacy.

### A Note of Thanks

Finally, thank you to the Executive Board, our staff colleagues, members of the Copyright, Digital Access to Legal Information, and Government Relations Committees, members of the FDLP Task Force, and members of the Government Policy Advisory Group for their leadership and guidance throughout the year.

## Report of the Executive Director

### Highlights

**Ms. Kate Hagan** (American Association of Law Libraries, Chicago, Illinois): AALL is fortunate to have members who continue to volunteer their time, talent, and treasure to their professional organization. As a result of our members' dedication, we are on solid financial footing and ended the year with an increase in net assets of just over \$400,000. This allowed us to contribute money to our current reserve fund while also providing start-up funding for some new initiatives.

Our financial stability is the result of two successful Annual Meetings in 2011 and 2012. We also have continued to attract new members and retain our current members. In addition, the *AALL Index to Foreign Legal Periodicals* has been very successful under the leadership of Marci Hoffman. Our investments were also well managed and helped us to realize investment growth.

This year the Executive Board finalized the Association's 2013–2016 Strategic Directions with input from members, AALL entities, and other stakeholders. The plan provides a road map for the future growth of AALL. With the goals of authority, advocacy, and education, the plan details organizational objectives for each goal area. For the next three years, our activities and initiatives will be driven by those goal areas. The rapidly changing environment in which all members work informed much of the plan's development, and we will continue to focus on communicating the value of the law librarian profession.

### Advocacy on Behalf of the Profession

We had great success in our advocacy efforts this year. We were able to advance the adoption of the Uniform Electronic Legal Material Act (UELMA), which provides for the authentication and preservation of, and permanent access to, online government legal information. The act has now been adopted in eight states, which speaks highly of the work of our members and the Government Relations Office staff who have been so diligent in this effort.

Several important task forces completed their work this year on initiatives of importance to the law library community. The *AALL Guide to Fair Business Practices for Legal Publishers* Revisions Task Force updated and published the third edition of the *AALL Guide to Fair Business Practices for Legal Publishers*. The new edition is available on AALLNET to all members. In addition, the Library Procurement Process Improvements Task Force published *Procurement Toolkit and Code of Best Practices for Licensing Electronic Resources*, which is also available on AALLNET. This toolkit has already proven very popular at chapter meetings and meetings of other law-related associations that we attended this year.

Another task force, the Promoting the AALL Legal Research Principles, Competencies, and Standards for Law Student Information Literacy Task Force, worked to establish these competencies as the "gold standard" for research competency within and for the legal community. This task force will continue its work in the coming Association year, but it has been very successful in its outreach to other law-

related entities and will provide programming at some of their upcoming conferences.

### Education and the Annual Meeting

Last year, in an effort to ensure that our premier event, the Annual Meeting and Conference, continued to support the professional life and growth of our members, AALL hired Velvet Chainsaw Consulting to review our Annual Meeting and draft a report. The resulting report, *Observations and Recommendations of the American Association of Law Libraries* (October 2011), was then reviewed by the Executive Board, which adopted many of the report's recommendations.

Many of those recommendations have been implemented for the 2013 Annual Meeting. Among the most important changes is the addition of Deep Dive programs, longer sessions that run across two consecutive program time slots. In addition, more Hot Topic programs have been added, and the Monday Morning Recharge sessions focus on practical business skills. We also are providing more time between education programs to allow for more discussion and networking among attendees.

We have also devoted time and resources to our education programs that take place outside of the Annual Meeting. This year, we hosted our second online library management course for members. This six-week course allowed members to participate virtually, learning the latest information and best practices in library management. This spring, we also hosted a law library management course in Chicago. Both courses were facilitated by Maureen Sullivan, a well-known consultant in library management, and immediate past president of the American Library Association.

We have continued to offer monthly webinars to members on a variety of topics from e-books to library staff development. In addition, we offered some virtual training on advocacy and other topics to add to members' leadership development skills.

### AALL Strengthens Relationships with Chapters and Other Associations

AALL representatives and staff continue traveling to meetings across the country to meet with chapter members and other members of related organizations to discuss the value of law librarianship and the Association.

This year, AALL exhibited at the ORALL, WestPac, MAALL, SCALL, NOCALL, and SEAALL meetings. This provided a wonderful opportunity for us to learn more about those chapters and for the chapter members to learn more about AALL. In addition, we attended and exhibited at the meetings of the International Legal Technology Association (ILTA), the Legal Marketing Association (LMA), the Association of Legal Administrators (ALA), and the National Association of Law Placement (NALP). We also exhibited at the Canadian Association of Law Libraries meeting.

AALL representatives also attended the ALA Annual and Midwinter Meetings, the ABA Section of Legal Education and Admission to the Bar's quarterly meetings, and the Special Libraries Association meeting.

In April we, along with the Association of Legal Administrators, ILTA, LMA, and NALP, hosted a C-Level Summit in Washington, D.C. We are hopeful the summit will result in similar meetings between our associations in the future. Catherine Monte, chief knowledge officer at Fox and Rothschild, was our representative on the Summit Planning Committee.

Recognizing the critical role technology plays in shaping the legal information profession, AALL continued its collaboration with ILTA on a special series of legal technology programs at this year's Annual Meeting. This year, the programs cover big data, emerging technologies, enterprise search, and competitive intelligence. In addition, this past fall we collaborated with ILTA to develop a white paper on the changing role of law librarians in the legal profession.

### Technology

We strive to continually make improvements to AALLNET—from updating current features and functionality to incorporating new elements as identified through member feedback and association trends. After last year's Annual Meeting, the focus was on building the AALL brand, and we started working with our special interest sections (SISs) to migrate their web sites into our content management system. This helps maintain the AALL look and feel while still allowing SISs the freedom to present their content in any manner. Also, the content management system helps accommodate the different levels of experience our volunteers have in managing web sites. Some SISs have already migrated, and those remaining will be completed in the upcoming weeks.

To help address a variety of questions and concerns with My Communities, we recently launched a new help center. This area contains tips and tutorials, including a user's guide, FAQs, and short videos, to assist our members in becoming more familiar with My Communities.

As part of our ongoing commitment to the professional development needs of our members, last month we launched the online Mentor Match program. This member-driven mentor-matching resource is a unique networking and career development tool designed to help our members find and connect with one another to establish mutually beneficial mentoring relationships.

New this year is the conference mobile app. Available on multiple platforms, the conference app puts the best of the Annual Meeting and Conference at your fingertips. Browsing the entire schedule and bookmarking favorite sessions, locating sessions and exhibitor booths, and participating in this year's scavenger hunt are just some of the things attendees can do with the app.

### Membership Report

Despite difficult economic times, AALL's membership remains healthy and well above average. We finished the 2012–2013 membership year with a ninety-one percent retention rate, while the average renewal rate for membership organizations is eighty-one percent. Our recruitment rate also increased this year, with 358 new members in 2012–2013 compared with 330 the year before. Membership numbers across all categories have declined slightly during the past few years, and with

this in mind, AALL continues its commitment to offering support and resources to members who are seeking new positions in the profession and looking to learn new skills to advance their careers.

### AALL Staff

AALL has a very dedicated staff with a solid knowledge of the Association and our members. The average tenure for an AALL staff member is seven years, which provides us with a wonderful work environment. All of our staff work together to deliver value and to move the AALL strategic plan forward. This year, staff worked with members, committees, SISs, chapters, and other stakeholders to support member initiatives and activities. They were able to implement important changes to the Annual Meeting, update and improve member communications and AALL-NET, and expand our advocacy efforts in Washington, D.C., and at the state level. It is my honor to work with the AALL staff; they bring enthusiasm, knowledge, and integrity to their jobs every day, and AALL is indeed fortunate to have them as part of the AALL team.

### Executive Board

Until you work closely with the AALL Executive Board, it is hard to understand the depth of their commitment to AALL and the profession. While board meetings do require an investment of time in studying the issues and being prepared, the bulk of board members' work is in serving as liaisons to more than thirty committees, attending and presenting at chapter meetings, working on their assigned board committees, and moving the Association's strategic plan forward. They put in countless hours and work with your best interests in mind. I interact with your board members every day, and they are truly dedicated to this profession.

Speaking on behalf of the entire staff, we enjoy working with all of you, the AALL members. AALL is fortunate to have such active and interested members who work to advance the profession.



## **Appendix B**

### **Statements of Candidates for 2013–2014 AALL Election**

#### **Candidates for Vice President/President-Elect in 2013–2014**

**Julie Pabarja\***

For me, AALL has always played an important role in helping me find solutions to challenges and developing the skills that I need to be successful in my role. Changes are affecting our libraries and our work. We are looking for answers on how to handle the challenges, finding ways to express our value to our institutions, and trying to develop a different set of skills as our roles evolve. We can no longer be passive in our roles, and we must not be afraid to try new things.

I have not followed a typical path to put me on this ballot. However, my leadership experiences within my local chapter and AALL have prepared me to handle the responsibilities of leading AALL. I have been part of endeavors that were challenging and made an impact when decisions were made. As a board member of my chapter, I participated in the amending of the bylaws. As chair of the AALL Continuing Professional Education Committee, I began the process to update the AALL Competencies of Law Librarianship and led guided discussions to seek input from members. Today, I am chair of the Annual Meeting Program Committee and in the process of implementing changes to the program selection process for the Annual Meeting. These experiences have proven to me that it is OK to try new things even when hard decisions have to be made. Respecting traditions and the input of the members need to be considered, especially when changes are happening. These are the values that I will take with me going forward.

As we look to the future of the profession and the Association, it will be AALL members who will help define our future. We all play a part in the successes of the Association. Through education, involvement within the Association, and leadership development of the new generation, we can continue to build a stronger Association that helps prepare us for the challenges of the future.

Education is vital to our careers in order to stay current in our profession and to gain the necessary skills. I have always played a role in the education of our members as well as in my workplace, and, as President, I will continue to stress the importance of it and help shape the future of AALL education. I would like to see AALL continue to offer education programs that are relevant to the issues we face today and that give us the tools to help prepare us for tomorrow's challenges.

By getting involved within the Association, I have seen the strengths of our members and what we can accomplish when we work together. We must build bridges among the different entities and learn from each other. There is a place in the Association for everyone to get involved, whether it is through involvement with committees, caucuses, special interest sections, or chapters or by participating in educating our members, advocating, or writing articles to share our knowledge or promote our profession.

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\* Research Services Manager, DLA Piper, Chicago, Illinois.

As many of our colleagues think about retirement, it is important that we turn to the younger and newer members of the Association who are the future of law librarianship and AALL. I look forward to helping implement many of the ideas that came out of the Futures Summit and continuing the conversations that started at this Summit. We should offer more mentoring opportunities as well as opportunities for members to develop the skills to shape them into leaders, not only within their institutions but also within AALL. This generation will not only be the students but also our teachers as they bring fresh ideas, different perspectives, and innovative technologies to our Association.

I would like to thank the AALL Nominations Committee for recognizing me as a candidate for Vice President/President-Elect. I am honored to be a part of this impressive slate of candidates and of AALL history. I am seeking the opportunity to lead this Association and a chance to shape the direction of AALL.

Holly M. Riccio\*

In *The Tipping Point*, pop culture savant Malcolm Gladwell famously describes three categories of people responsible for social change: Connectors, Mavens, and Salesmen. Conventional wisdom would suggest that most librarians are Mavens—brokers of knowledge, sharing and trading the information they accumulate. But I have come to recognize myself as an unapologetic Connector, someone who inhabits multiple personal, professional, and cultural networks—who likes to think she has, as Gladwell would say, “a special gift for bringing the world together.”

I’ve probably been connecting since I was kid, introducing one friend to another because I knew they both liked the same band. I’ve connected former coworkers with other former coworkers seeking job opportunities. I’ve connected librarians with other librarians whom I knew could help them find an elusive document or fulfill a difficult research request. I’ve connected myself with others at O’Melveny & Myers, expanding my skills and forging new ties with colleagues outside the library, in the firm’s knowledge management and talent development departments. Somewhere along the way, I might even have brought a couple of people together and made (for those of you who remember your 1980s dating shows) a Chuck Woolery-style “Love Connection.”

Not long ago, I mentioned to an O’Melveny manager how much I related to Gladwell’s theory. “I’m sure it isn’t hard to see in me,” I said. “Most people can probably peg me as a Connector after, oh, fifteen minutes.” “Try fifteen seconds,” my colleague said.

The American Association of Law Libraries needs a leader with the ability to connect, now more than ever. The opportunities for growth and forward-thinking change lie in reaching out—to individuals, internal groups, and outside organizations—and making connections that will ultimately lead to ideas, innovation, and action. I know from my own AALL experiences that just connecting two members over a seed of an idea can make us all ask ourselves, “Now, why didn’t we do this sooner?”

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\* Library/Calendar Manager for Northern California, O’Melveny & Myers LLP, San Francisco, California.

I joined AALL as a student member, knowing that I would be entering the field of law librarianship upon graduation from library school. I knew that the Association would be essential to my professional success, but I underestimated the ways in which it would surpass my initial expectations and bring so much to my life. Many of my professional colleagues have become not only mentors and sounding boards to me, but also lifelong friends. As your friend and colleague, I would be honored to take on the challenges facing our profession—and seize the opportunities they provide—as AALL Vice President/President-Elect.

If chosen to lead AALL, I will focus on the following initiatives:

- Preparing members to be leaders, both in their own organizations and within the Association, by providing more opportunities for training and development
- Connecting all our members, regardless of library type or job function, through new and existing technology
- Encouraging transparency and communication so members can openly and constructively discuss the issues confronting the Association
- Identifying what newer law librarians and potential members want from a professional association and looking for ways to provide it

Whether the issue is finding new ways to facilitate collaboration across library types or job functions, recruiting and engaging new members, or establishing partnerships with other legal professional associations, it all comes back to connections.

### **Candidates for Treasurer in 2013–2014**

**Joan M. Bellistri\***

With my term as the AALL representative to the National Center for State Courts coming to an end, I felt that I should find another way to be involved with AALL and to venture beyond involvement in my SISs and local chapter. No sooner had I had that thought than James Duggan called and asked me to be a candidate for AALL Treasurer. I said “yes” because I think it is important to support the work of our Association. It is only through active member participation that AALL can be the voice of its members.

I would take seriously my responsibility of overseeing the Association’s finances and reporting to the membership. As a member of the board, I would hope to serve AALL members through the support of educational opportunities and advocating for the information issues facing our profession. I am committed to the idea that the value of a law librarian must be made known within our organizations and to the other organizations and professions with which we work. If I were to become Treasurer, I would bring my experience in handling the finances and budget in my library. I am honored to be a candidate for AALL Treasurer.

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\* Director, Anne Arundel County Public Law Library, Annapolis, Maryland.

### Gail Warren\*

September 2012 marks a couple of milestones in my professional career—I will have served for thirty years as the state law librarian in Virginia, and I will celebrate my thirtieth year of membership in AALL. Much has changed during the past thirty years—when I arrived at the Virginia State Law Library in 1982 as a recent law school graduate, there wasn't a single computer in sight, and books were the primary format consulted for our information and research services. I had a lot to learn. As I began attending AALL Annual Meetings and more actively participating in committees, chapters, and other roles within the Association, the friendships I forged and the mentoring I received inspired me to be a better law librarian, a better leader, and a better person. I still have a lot to learn. Today, membership and active participation in AALL continues to be crucial to my career development and personal growth. And I am no less enthusiastic about the future of my chosen profession today than I was in 1982.

Despite the passing of thirty years and the changes wrought by a global economy and ubiquitous technology, the essential components of both my library's role in the judicial branch and broader legal community in Virginia and the role of our Association remain the same: educating our users through a variety of means and providing excellent, efficient service by making the most of the available resources.

The challenges presented by an ongoing economic crisis and the relevance of law librarianship in a time when technology offers immediate access to an infinite range of resources do not diminish the importance of our Association's values and goals. Indeed, our ability to continue to provide leadership opportunities, to communicate the value of law librarians, to advocate for "equitable and permanent access to legal information," and to foster a learning community that addresses the needs of longtime and newer members, many of whom are unable to attend our Annual Meeting, will only be realized through the efforts of a dedicated cadre of member volunteers and thoughtful stewardship of our financial resources. The success of our efforts also depends on encouraging member participation at all levels, working collaboratively with other organizations, and actively envisioning our future.

As I begin my thirty-first year of membership in the American Association of Law Libraries, I am confident about the future of our profession and would be honored to serve as AALL Treasurer.

### Candidates for Executive Board Member in 2013–2014

#### Femi Cadmus\*\*

Like perhaps many other law librarians, I stumbled on law librarianship by accident. Knowing full well that I did not want to practice law, I could not quite think of what else to do. My foray into a position as a part-time research assistant

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\* State Law Librarian, Virginia State Law Library, Richmond, Virginia.

\*\* Edward Cornell Law Librarian, Associate Dean for Library Services, and Senior Lecturer in Law, Cornell Law School, Ithaca, New York.

in the law library at the University of Oklahoma was an eye opener and a life-changing experience, so much so that I decided to become a law librarian. More than twenty years later, and right into the twenty-first century, we are in troubling times as libraries have come under assault from debilitating price increases, “land grabs,” and perceived displacement by technology. Provocative statements about the relevance of libraries and librarians adds to the tone of the debate and has served to further diminish the appeal of librarianship as a career. More than ever, it is important to have an association of informed, engaged, and involved librarians to forge a vision for the twenty-first century that ensures the relevance, sustainability, and viability of law libraries. This can only be accomplished by open, transparent, and shared governance, which encourages and listens to differing opinions and suggestions.

**Kenneth J. Hirsh\***

Immediately before entering the M.L.I.S. program at Florida State University, I had been running a solo law practice in Melbourne, Florida. One day at home, my elder daughter, then about four years old, asked me why I needed to go into the office every day. Chief among the reasons I gave her was that I needed to make money for us to live. Not long afterward, she presented to her mother and me a picture she had drawn that appeared to show me holding a dollar bill on the top of a copy machine. When we asked her what she had drawn, she said, “It’s Daddy making money.” After a good laugh, I explained that I was *not* literally making currency!

Thinking about that incident raises the question, Why did I become a librarian? I suspect many of you occasionally ask yourselves the same question. Although nearly all of us need an occupation in order to survive, why did we choose this occupation, the profession of librarianship? In my own case, I realized that I was unhappy representing legal clients who dismissed my advice, and it grew increasingly clear that I would not be able to earn a good living in an environment that required me to bring in new customers, i.e., paying clients. I yearned to take my legal skills and turn them to another profession where my personality and interests would match the demands on me, much more so than practicing law. At that time, I believed that obtaining a library degree and working in a law school environment would be that match. Now, twenty-four years later and having worked at two academic institutions since making that decision, I still believe it was the right one for me.

I suspect most of you have similar reasons for becoming a law librarian or related professional: you felt your interests and talents, together with a good professional education and training, would be a match. Whether it was a devotion to tackling puzzles and delivering useful research, classifying materials in just the right way, teaching law students or firm lawyers the most efficient way to find the information they need, or any of the myriad other jobs law librarians perform, you

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\* Director of the Law Library and Information Technology, University of Cincinnati College of Law, Robert S. Marx Law Library, Cincinnati, Ohio.

realized that it was the work you wanted to do—maybe even had to do—to be happy. And you then decided that you wanted to join together with others who felt the same way, so you joined AALL and other library associations.

The Association and we, its members, are facing what many consider unprecedented challenges. The legal profession itself, and consequently legal education, are undergoing structural changes on top of the cyclical contraction brought on by the 2008–2010 recession. Law firms are shrinking or closing as new competitors appear in the marketplace. Law schools, faced with declining prospects for their graduates, flat or declining endowment income, and, in the case of public law schools, ever-diminishing levels of state funding, are under even greater pressure than other units on university campuses. State and county governments, faced with shrinking tax revenue, have sacrificed the services of their law libraries and made it more difficult for their citizens and courts to meet the legal knowledge needs of a civil society. Legal information vendors continue to seek profits while their customer base is shrinking and has less money to spend; they face increasing competition from free services and, in what I would argue is a very positive development, increasing assertiveness of their customers in demanding real value for every dollar spent.

Against these challenges, AALL can offer no panacea—no guarantees. But it can offer these things: the talents of more than 4000 members of all backgrounds and many common interests, each one of whom chose law librarianship as a career or profession; the dedication of its committee members, officers, and staff toward accomplishing our collective aims as law librarians; forums for promoting discussion of the challenges we must address together; a credible voice to other professional associations, attorneys, universities, and government agencies; and a means of funding the efforts to provide all of these.

As I look at the list of Executive Board candidates, I know that any would serve the Association well. I ask that you cast your votes as you see fit and that you remain involved in our Association beyond the election and throughout the years. We are all in this together.

#### Allen R. Moyer\*

I just returned from AALL's 105th Annual Meeting in Boston. As usual, I am swamped with work that seems to have proliferated on my desk during the few days that I was away. However, just as in years past, I have returned with a renewed sense of purpose, ready to face whatever challenges lie ahead. This is due in large part to the adrenaline rush I get from attending AALL's Annual Meeting. Getting together each year with others who believe in and are committed to the practice of law librarianship gives us an opportunity to connect, communicate, and, yes, sometimes commiserate. We get a chance to teach one another, learn from one another, and to share strategies on how to be better at what we do.

When asked to consider running for the Executive Board, I reflected on what I have gained through my experience with AALL over the past eighteen years. As

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\* Associate Professor and Director of the Law Library, DePaul University, Chicago, Illinois.



librarians, we live in multiple parallel universes. Some of us occupy worlds focused on legal practice, academia, and business; others may be focused on management, government, and information technology. The common thread connecting us all is our work in the acquisition and dissemination of information. Through AALL, I have formed alliances with many people across this spectrum. We have worked on projects and initiatives, all to achieve a common good. In the process, I have benefited from establishing and maintaining solid professional and personal relationships.

A cornerstone of the success of AALL's Annual Meeting is the range of educational programming offered. We strive to develop and offer interesting, timely, and informative educational sessions and training workshops with high-quality speakers and presenters. Through these efforts, AALL has helped me to expand my knowledge base and improve my skills.

AALL membership offers ample leadership opportunities. From my involvement with local chapters to special interest sections to caucuses and nationally focused committees, I have had opportunities to develop leadership skills and to take on leadership roles. This has provided me with valuable experience in meeting my professional requirements as a faculty member at my university.

I decided to seek a seat on the Executive Board as a way of giving back to an organization that has given me so much. I believe AALL is uniquely positioned to address some of the most important issues of our time. We are no longer entering the "information age"; we very quickly are advancing through it. Librarians, and those involved in the practice of librarianship, have always played a key role when it comes to acquiring and disseminating information. Changes are taking place in legal practice and education, not to mention information technology. These changes will, undoubtedly, have a significant impact on our profession. It is up to us to recognize our value and promote our contributions as we define and redefine what we do and how we do it.

### Roger V. Skalbeck\*

My name is Roger Skalbeck. I'm running for the position of Executive Board Member of AALL.

I like to talk. And I like to listen. I like conversations, dialogue, debates, and decisions. That last part is important: decisions. An obvious core part of our lives as librarians demands decisions. Presented with a need to change, stay the course, or look for inspiration elsewhere, we have to figure out what to do next. The good way to do this is to listen, discuss, debate, and try to make decisions that make a positive impact. It also doesn't hurt to change your mind now and again.

I began library school discussing the role of advertising on the Internet. We debated banners on Yahoo! We cut our teeth doing research on Dialog before the advent of browser-based commercial services. Back then, Westlaw still had Shepard's. LexisNexis had CounselConnect to get attorneys on the Internet, and

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\* Associate Law Librarian for Electronic Resources & Services, Georgetown Law Library, Washington, D.C.

Martindale-Hubbell issued e-mail addresses to all attorneys in their directories. As librarians, we had to decide how to respond to these issues of the day. We had conversations about how to leverage new technologies, and we had to decide what roles we would play in our firms, schools, courts, and agencies.

Today, the issues have evolved. We now debate flat-rate contracts, bring-your-own-device dilemmas, vendor relations, and annual meetings. About two dozen times recently, I've tried to engage people in discussing issues of importance to law librarians. Together with Rich Leiter, I've cohosted and comanaged the Law Librarian Conversations podcast series to do just that: have conversations. This is a great opportunity to explore what matters to us as librarians. It's good for discussions but not appropriate for decisions.

My interest in running for the Executive Board is to turn a "small a" association with fellow librarians into a "big A" Association with fellow librarians. AALL does good work. In the near and mid-term future, there are plenty of new initiatives, changes, and debates critical to our professional Association. I hope to participate in these discussions, helping make decisions that have a positive impact.

With the current Executive Board election, we've got four strong candidates. I know Allen, Femi, and Ken well. Any of them will do a great job on the board. If elected, I promise to try to do my best. I'll listen, talk, discuss, debate, and help make decisions. I can't promise that every decision will please every librarian, but I do promise to try to do well. If I don't win, I'll call up the others with heartfelt congratulations.

**Proceedings of the Members' Open Forum  
Conducted at the 106th Annual Meeting of  
the American Association of Law Libraries  
Held in Seattle, Washington  
Monday Afternoon, July 15, 2013**

¶1 **Ms. Donna S. Williams** (Dorraine Zief Law Library, University of San Francisco School of Law, San Francisco, California): Good afternoon, ladies and gentlemen. Thank you for attending the Members' Open Forum. I am Donna Williams, your moderator. During the Open Forum, members can voice suggestions and comments, or raise issues to the Executive Board or the Executive Director without the restrictions of following parliamentary procedure. It is at their discretion whether to respond or not. Each speaker has up to two minutes to comment followed by a one-minute follow-up comment. The Members' Open Forum is being recorded, so I ask that you please use the microphones located in the two aisles. Please state your name and institution at the beginning of your comments. I will now open the floor. Anybody? (No response.)

¶2 Okay. We did have one question that was submitted at the exhibit hall: What is AALL doing to use glossy advertisements or other public campaigns to portray the profession and their services to corporate counsel in the United States and internationally?

¶3 **President Jean M. Wenger** (Cook County Law Library, Chicago, Illinois): This is an interesting observation and suggestion to make regarding other audiences, which we all agree can and should promote their value. The new strategic plan for 2013–2016 has a new goal area of authority, which provides that law librarians should be recognized as essential to the legal profession. We will consider outreach to corporate counsel as we begin the implementation of the new strategic plan.

¶4 **Ms. Williams**: Thank you, Jean. Mark?

¶5 **Mr. Mark Estes** (Bernard E. Witkin Alameda County Law Library, Oakland, California): Incoming President, I heard with glee about your new Digital Library Initiatives Special Committee. But I wasn't quite certain whether the charge for that committee would include defining what we as purchasers, and also our customers, would like to see as the interface for digital libraries, e-books, or whatever else we call them.

¶6 **Mr. Steven P. Anderson** (Maryland State Law Library, Annapolis, Maryland): Thank you, Mark. I think, initially, the Digital Libraries Initiative brings something more on the order of digital preservation of repositories that already exist. If a law library or other institution has a repository of already-digitized materials, how is that being preserved for posterity? And then, how is that digitally transmitted to other organizations like the Digital Public Library of America and National Digital Stewardship Alliance and the Library of Congress. Those kind of plans are what I have in mind.

¶7 **Mr. Estes:** Thank you. Wonderful goal. Then I ask you to create yet another committee or a task force to address the question of what it is that the interface should look like. Because we, as the librarians, should be in a better place to understand and articulate and draw out the appropriate customer-user interface, rather than waiting for publishers to show it to us and let us respond. We need to get ahead of this one.

¶8 **Mr. Anderson:** I agree. It sounds like a very interesting proposal. After this session, we'll put our heads together and try figure something out.

¶9 **Mr. Estes:** Thank you, Steve.

¶10 **Mr. Anderson:** Thanks.

¶11 **Ms. Williams:** Thank you. Are there any other suggestions, comments? (No response.) Thank you.

(WHEREUPON the meeting was adjourned at 4:56 P.M.)

## 2013–2014 Officers, Committees, Chapter Presidents, Special Interest Section Chairs, Representatives, and Executive Staff

### Executive Board

#### President

Steven P. Anderson  
Director  
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