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How Federal Statutes Are Named

Renata E.B. Strause,** Allyson R. Bennett,*** Caitlin B. Tully,†
M. Douglass Bellis,†† and Eugene R. Fidell†††

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Introduction

¶1 Given the number of public laws enacted since the First Congress began
work on March 4, 1789,† it is no surprise that some effort has been made to assign

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* © Renata E.B. Strause, Allyson R. Bennett, Caitlin B. Tully, M. Douglass Bellis, and Eugene
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1. The first bill signed into law by President George Washington was the Act of June 1, 1789,
ch. 1, 1 Stat. 23 (An Act to Regulate the Time and Manner of Administering Certain Oaths). The
Library of Congress estimated in 2005 that, through the 108th Congress, 44,291 laws had been
names to statutes, since mere sequential numbers, much less volume and page citations to the *Statutes at Large*, are hard to remember. This is not to say that some federal legislation is not identified by other means. For example, Public Law 83-280, which was a landmark of the “termination” era of federal Indian law in 1953, is commonly known simply as “Public Law 280.” As has been pointed out, this can cause confusion, since, given the productivity of many Congresses, there will be numerous Public Law 280s. At times, an enacted measure may retain its bill number in common parlance, as in the case of the Fishery Conservation and Management Act of 1976, which extended U.S. fisheries’ jurisdiction out to two hundred miles, and was occasionally referred to as “H.R. 200” even after enactment. These identifiers are both ambiguous and uninformative. The same is true

enacted (not counting private laws and simple resolutions). Chris Sagers, *A Statute by Any Other (Non-Acronomial) Name Might Smell Less Like S.P.A.M.*, or, *The Congress of the United States Grows Increasingly D.U.M.B.* 11 n.80 (2008), http://works.bepress.com/chris_sagers/1. The 109th to 111th Congresses added another 1325 public laws, for a total of 45,616. Our article does not address federal legislation enacted prior to the Constitution, but popular name issues arise there as well. *E.g.*, Northwest Ordinance of 1787, the formal title of which was “An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, and also known as the Freedom Ordinance.” The First Congress used the formal title when reaffirming it. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51. The Supreme Court has referred to the Ordinance variously as the Northwest Ordinance, the Ordinance of 1787, the Northwest Territory Ordinance, and even the Northwest Territories Ordinance (presumably reflecting the subliminal influence of the name of the Canadian federal territory). *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 100 (1985) (referring to the Northwest Ordinance); I.N.S. v. Chadha, 462 U.S. 919, 983 n.18 (1983) (the Northwest Territories Ordinance); Norton v. Whiteside, 239 U.S. 144, 151 (1915) (the Northwest Territory Ordinance); Strader v. Graham, 51 U.S. (10 How.) 82, 94 (1850) (the Ordinance of 1787). The First Congress also referred to the Articles of War enacted by the Continental Congress in the first Articles of War enacted under the Constitution. Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 119, 121 (“shall be governed by the rules and articles of war, which have been established by the United States in Congress assembled, as far as may be applicable to the constitution of the United States”).

2. Throughout this article, we have used a modified citation form when citing to session laws. Because the article focuses on statute names, rather than content, we have not included citations to where the act is codified, even if it is in the current version of the U.S. Code. In naming statutes, we have used the popular name if there is one, whether or not it is enacted. Some legislation has both an enacted short title and an unofficial popular name by which it is commonly known. For those laws, the enacted short title is either in the text or begins the citation, and the unenacted popular name is given in parentheses.


4. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.06 (2005 ed.).


7. One might assume that submission of the bill was timed to preserve its symbolically charged sequential number, but bills are not necessarily numbered in the precise order of arrival. In researching this article, we learned that it is possible to reserve a number for a bill. In each Congress since 1989, Rep. John Conyers has reserved H.R. 40 as the number for a bill to commission a study of the feasibility of paying slavery reparations to African Americans. The bill’s number refers to the forty acres that were promised to freed slaves. *Reparations, John Conyers, Jr.*, U.S. CONGRESSMAN, http://conyers.house.gov (under “Issues” menu, select “Reparations”) (last visited Oct. 18, 2012). Typically, low numbers are held for major bills that are central to the leadership’s legislative program.

The practice of referring to enacted laws by their bill numbers is not unique to the federal government. For example, Arizona’s Support Our Law Enforcement and Safe Neighborhoods Act,
of the practice of referring to part of a statute by the “title” number, of which the best-known example is Title VII of the Civil Rights Act of 1964, even though it and others do not appear in the United States Code Annotated Popular Name Table. Referring to legislation by public law number or title number injects further ambiguity because the reader may not know whether the intended reference is to the original statute or the statute as subsequently amended. On the other hand, that can be said even of narrative or descriptive titles. The authors of a leading guide to legal research call the variation in how statutes are referred to as “the beginning of a severe case of alphanumeric confusion.” And formal titles, such as the one in the very first federal statute, An Act to Regulate the Time and Manner of Administering Certain Oaths, are cumbersome and often hard to remember. The obvious answer: giving the statute a name that is easy to remember.

ch. 113, 2010 Ariz. Sess. Laws 450, as amended by Act of Apr. 30, 2010, ch. 211, 2010 Ariz. Sess. Laws 1070, is widely known as “S.B. 1070,” its bill number in the state senate, and was referred to as such by the U.S. Supreme Court throughout the recent decision invalidating large parts of the law. Arizona v. United States, 132 S. Ct. 2492 (2012). Voter initiatives often retain their “proposition” numbers in common parlance. E.g., Proposition 8 (codified at Cal. Const., art. I, § 7.5) (defining marriage as being only between a man and a woman); see also Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (invalidating Proposition 8).


9. Kent C. Olson, Principles of Legal Research 63 (2009). Olson adds that “[i]t may be simplest to do an online search for the phrase in order to identify the act. An Internet or newspaper search may turn up the full name of the act, and even better is a mention in a legal text or law review article that contains a footnote providing the statute’s code citation.” Id.


11. See Whisner, supra note 5, at 182, ¶ 30 (“Most of us just aren’t wired to remember strings of numbers and abbreviations.”). A related phenomenon may be seen in the work of the other branches. Thus, cases have long received docket numbers, although no one cites them that way (except perhaps for cases in the Supreme Court’s minuscule original jurisdiction, e.g., “Orig. No. 138” (South Carolina v. North Carolina, 352 U.S. 1254 (2008)), and even then only among those who follow the Court very closely). Instead, cases overwhelmingly tend to be known by the names of the parties. Some of course are sufficiently important and well-known that a single party’s name is all that is needed to signify the case, as in “Roe,” Roe v. Wade, 410 U.S. 113 (1973); “Miranda,” Miranda v. Arizona, 384 U.S. 436 (1966); “Brown,” Brown v. Bd. of Educ., 347 U.S. 483 (1954); “Erie,” Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); or “Marbury,” Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Cases may also acquire the judicial equivalent of a “popular name” through judicial and scholarly usage. Examples include “The Steel Seizure Case,” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); “The Nazi Saboteurs Case,” Ex parte Quirin, 317 U.S. 1 (1942); “The Sick Chicken Case,” A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); “The Slaughter–House Cases;” Butchers’ Benevolent Ass’n of New Orleans v. Crescent City Live-Stock Landing & Slaughter-House Co., 83 U.S. (16 Wall.) 36 (1873); and “The Dartmouth College Case,” Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). These are examples of what the Bluebook describes as “established” popular names. The Bluebook: A Uniform System of Citation 91 (19th ed. 2010) (R. 10.2.1(d)) (citing The Civil Rights Cases, 109 U.S. 3 (1883)) [hereinafter Bluebook]. The Insular Cases, which (depending on whose view you accept) were either all decided in 1901, e.g., De Lima v. Bidwell, 182 U.S. 1 (1901), or extend to cases decided as late as 1914, e.g., Ocampo v. United States, 234 U.S. 91 (1914), or even later, fall into a different but related category, as do in rem admiralty cases in which the name of a vessel may serve as the popular name for the case, even though the case may be little known outside the maritime bar, e.g., “The Hine,” The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867); “The Genesee Chief,” The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1852). Overall, many of the “popular names” of
¶2 But what name shall it be? At times, Congress has named its handiwork, either in the statute itself or in a later measure. These names may be descriptive, as in the Securities Act of 193312 or the Internal Revenue Code of 1939,13 1954,14 or 1986,15 or they may memorialize some individual.16 That individual may be a sponsor of the legislation,17 a beloved or respected congressional leader18 (living19 or cases "are quite obscure, 'popular' only in the broadest sense of the term. In recent years, the use of 'popular names' has declined precipitously, and very few new cases are being added to the list" found in Shepard's Acts and Cases by Popular Names: Federal and State. Berring & Edinger, supra note 10, at 108.

13. Ch. 2, 53 Stat. 510 (full text printed as an appendix to 53 Stat.).
14. Ch. 736, 68 Stat. 730 (full text printed in 68A Stat.).

17. Sagers claims that naming federal laws for sponsors “appears to be more and more a thing of the past,” adding that: “While of course there are still statutes named after their sponsors, it is telling that nowadays the choice seems most commonly made to indicate that a bill had bipartisan cosponsors. McCain-Feingold [ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81] and Sarbanes-Oxley [ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745] come to mind. It seems telling because it shows that the practice of statutory short names is now a rhetorical one.” Sagers, supra note 1, at 3 & n.9. Our research does not support Sagers’s impression that naming laws for sponsors is dying out.

19. No rule forbids naming federal legislation for living persons. Federal buildings and vessels are not infrequently named for the living. “The Postal Operations Manual specifies that the Postal Service may name a postal facility after an individual ‘only with the approval of the Postmaster General and only if the individual has been deceased for at least 10 years, with the exception of deceased U.S. Presidents, Postmasters General, or former members of the [Postal Service’s] Board of Governors.’ These restrictions do not apply to individuals honored by acts of Congress.” What’s in a (Post Office) Name?, U.S. Postal Service 4 (Aug. 2008) (footnote omitted), http://about.usps.com/who-we-are/postal
dead), or a private citizen to whom the legislation in some way relates (such as what Mary Whisner calls “Statutory Poster Children”).20 A statute may have a “popular name” either from birth or from some later date. Many popular or informal names are a matter of custom and usage only, and have no legislative status of their own, yet laws are often—indeed, typically—cited by these informal names.21

§3 While some attention has been paid to the recent spate of clever, loaded, or tendentious statutory names22 and acronyms,23 the naming of federal statutes for individuals has received surprisingly little systematic attention. The purposes of this article are to trace the history of federal statutory naming conventions and to identify as authoritatively and as completely as possible the persons and political issues Congress has decided to honor or highlight in this fashion, as well as the proliferation of abbreviations as a further shortening of the short title.24 Whether

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20. Whisner, supra note 5, at 178; see also Ben Jones, States Hurry Laws Named for Victims, USA Today, Sept. 23, 2011, at 4A. Legislation may also be known informally by the name of an individual whose conduct or circumstances prompted the measure. See, e.g., Hiss Act (Pensions), ch. 1214, 68 Stat. 1142 (1954); Eugene R. Fidell, The Next Judge, 5 J. Nat’l Sec. L. & Pol’y 303, 308 n.25 (2011) (discussing the Joe Baum Act (10 U.S.C. § 942(b)(4) (2006)), which bars retired military personnel who served on active duty for twenty or more years from being appointed to the U.S. Court of Appeals for the Armed Forces). Yet another category would include legislation that names post offices or other public buildings for individuals, where the tribute to an indirect. See generally Kevin R. Kosar & Pamela A. Hairston, Cong. Research Serv., RS 21562, Naming Post Offices Through Legislation 3 (2009), available at http://assets.opencrs.com/rpts/RS21562_20070319.pdf (suggesting that “[t]he practical effect of legislation renaming a post office is less than might appear”—a dedicated 11-by-14-inch plaque for the lobby).


22. E.g., Josh Lederman, A Bill’s Name Is Part of the Game, Medill Reports Chicago (June 8, 2010), http://news.medill.northwestern.edu/chicago/news.aspx?id=166509 (”[T]he purpose of strategic names is to put opponents on the defensive regardless of the merits. . . . It should be considered unethical . . . .” (quoting Joel Jacobsen, a N.M. Ass’t Att’y Gen.)). See also Eugene R. Fidell, Op-Ed., Legis-lation, N.Y. Times, June 1, 1995, at A25 (collecting statutes and bills).


24. In addition to our interest in the particular naming conventions noted above, one of us, Douglass Bellis, who works in the drafting office for the House of Representatives, has repeatedly received inquiries from reporters for the New York Times, the Wall Street Journal, and the Los Angeles Times about how names are developed for statutes.
the current conventions for naming federal legislation are in principle good or bad, wise or silly, the first step, which we take here, is to chronicle the practice in all its pied beauty.

A Collection of Popular Names

¶4 This article draws on data we gathered in a systematic examination of federal public laws, which we have made available in a searchable and sortable format through the web site of the Lillian Goldman Law Library at Yale Law School. In it, we have attempted to assemble every act of Congress whose name fails to reveal to the reader the matter addressed. This includes legislation popularly known by an individual’s name as well as the more recent phenomenon of acronymically identified statutes.

¶5 At times a researcher may have only the popular name of an act of Congress. This can make the text of the statute very difficult to find, since popular names vary in type, and until the second decade of the twentieth century, none were included in the acts themselves. Many, but not all, of the popular names are included in various popular name indexes. Besides being incomplete, those indexes may refer you only to much-amended compilations of the actual laws rather than to original versions, or perhaps only to the original version of a law when you are looking for the updated text. Our web site is an attempt to make it easier for researchers with popular names of federal statutes to find the text of the law they need.

¶6 The starting point for compilation of data presented on the web site and discussed in this article is the Table of Popular Names, a helpful guide maintained by the congressional Office of the Law Revision Counsel to accompany the official edition of the United States Code. The official table is an alphabetical list of both

25. Jess Bravin, Like Those Catchy Names for Statutes? Here’s a Man Who Doesn’t, WALL ST. J. LAW BLOG (Jan. 12, 2011, 1:38 P.M.), http://blogs.wsj.com/law/2011/01/12/like-those-catchy-names-for-statutes-heres-a-man-who-doesnt (noting recommendation of Brian Christopher Jones, doctoral candidate at the University of Stirling, that legislators “Keep It Impersonal: Don’t put the names of victims, members of Congress ‘or anybody who could be used to assist or hinder the legislation’”). Suggestions that members of Congress be barred from naming programs after themselves, Jennifer Steinhauer, Long Floor Fight Over Spending Cuts Gets Personal, N.Y. TIMES, Feb. 19, 2011, at A15, have not gained traction.

26. Database of Federal Statute Names, LILLIAN GOLDMAN LAW LIBRARY, http://documents.law.yale.edu/popular-names (last visited Nov. 1, 2012). The collection can be sorted by the popular name of the law, by the date of its enactment, or by descriptive category of naming convention. The categories are our attempt to bring some degree of order to the chaos. We note whether the popular name of a law has been enacted as an official short title (either through the original act or by amendments or related legislation) and whether that name comes from the name of the law’s sponsor or the name of a victim of a crime, or honors a particular individual or group. We also have separate categories for acronyms like the “USA PATRIOT Act,” where the short title is spelled by the first letter or letters of another, slightly longer, short title, and for abbreviations like “GPRA,” the Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285, which was not a word when the act was named, but which has become part of the “alphabet soup” of acronymic federal programs and agencies. Where available, each entry also contains a link to an outside source for our understanding of the name’s origin, as well as the law’s location in the U.S. Code.

enacted short titles and popular, but often unenacted, names of acts of Congress. The vast majority of the thousands of names included in that table are what we view as descriptive names—the Energy Policy Act of 1992 or the Anabolic Steroid Control Act of 2004—that is, the name of the legislation communicates key information about its content, but without any particular political spin. The rise of these short titles coincided with the increased tempo of federal legislation in the twentieth century and with the professionalization of legislative drafting. Most of these descriptive statutory names are not included in our database.

More relevant to our purposes are the names in the popular name table with less obvious links to the legislative content. From that table we culled any entry that appeared to be named for an individual or group, used an abbreviation, or that might have been a politically charged description. For each of these entries, we first determined whether the law had an enacted short title or other formal name included in the statute. Most of the popular names that were not enacted in the initial piece of legislation then received a second look—if the measure had been codified, we consulted amendments and other subsequent references to determine if the popular name was itself enacted at a later date, either by amending the original law to include a short title or by reference in later, related legislation. We looked for the origins of the statute names. This task was easiest for enacted short titles named for legislative sponsors, retiring members of Congress, and crime victims, and considerably more difficult for laws dating from before the mid-twentieth

the version of the popular name table made available on the web site “is based on the 2006 edition of the Code and a preliminary version of the Table Supplement V to that Edition”). About ten years ago, the Office of the Law Revision Counsel decided to review the popular name table, which had grown over the decades, and eliminate those entries that did not have statutory or at least some sort of congressional authorization, but they soon discovered that few laws would remain if that were the criterion for retention. They therefore left in those that had any sort of currency, even if only in the academic or popular press. Interview by Douglass Bellis with staff of the Office of the Law Revision Counsel (Feb. 17, 2012).

30. See infra ¶¶ 32–34.
century. Finally, in an attempt to catch any nondescriptive names that may have been enacted into early laws that were subsequently repealed (and therefore would not appear in the official popular name table), we reviewed the Statutes at Large from 1789 through, somewhat arbitrarily, the Bankhead-Jones Farm Tenant Act of 1937.

**Naming Conventions for Federal Statutes**

¶8 How federal statutory naming conventions developed helps put contemporary practice into perspective. At first, there were no short titles and no official names for acts of Congress other than “long” titles, such as “An act to provide for the safe-keeping of the Acts, Records, and Seal of the United States, and for other purposes.” In 1845, federal laws were arranged as “chapters” in the Statutes at Large, which is still the most authoritative source for acts of Congress in the form in which they were enacted. The arrangement in the Statutes at Large seems to imitate the then-contemporary practice in Great Britain, where a “statute” consisted of all the acts of one Parliament, and each act was a chapter in the statute. As in Britain, the earliest acts of Congress were cited by long title and date of enactment, and perhaps to the Statutes at Large. This is still an acceptable form of citation, although often a United States Code citation is added, which has the advantage of allowing the reader to see an updated version of the law.

¶9 Beginning in 1901, a new system for identifying acts of Congress was used in addition to the Statutes at Large chapter numbers, and each law passed during a particular Congress was numbered sequentially, with separate lists for “public” and

34. For popular names that were never enacted into law—the vast majority of entries that we studied in the popular name table prior to 1970—we searched the Biographical Directory of the U.S. Congress, which is compiled and edited by the Joint Committee on Printing. Where the name in the table was the same as the name of a member of the House or Senate contemporary to the legislation’s enactment, we listed that member as the origin of that popular name. Based on the convention of referring to legislation by its sponsors or primary supporters—a convention we have found in news sources as early as the late 1800s—it is likely that the popular names indicate sponsorship. See, e.g., Democratic Hostility to the Pendleton Act, N.Y. TIMES, July 12, 1885, at 6. Nonetheless, these entries represent only our best guess.

35. Ch. 517, 50 Stat. 522 (1937). Although our primary objective was to catalog and investigate those federal statutes with names that are more than mere descriptions of the legislative content, our curiosity about other naming conventions—such as the origins of the practice of enacting short titles within legislation, or attempts to amend earlier, important statutes to give them short titles—led us to attempt to cull additional information from the older volumes of the Statutes at Large. We chose the 1937 Bankhead-Jones Farm Tenant Act as our stopping point simply because most later statutes with popular names or short titles are included in the popular name table.


39. See BLUEBOOK, supra note 11, at 113 (R. 12.2.2(b)).
“private” laws. In 1957, the public and private law numbering system won out and the “chapter” approach was discontinued. This system provided an unambiguous and shorter means of referring to an act of Congress, but gave no information about the content of the legislation.

Some early acts of Congress had popular names, such as the Alien and Sedition Acts, which are remembered today for the serious political controversy they sparked. Popular names typically described the legislative content, but had no official status. They were not included in the act itself, which is why the long title continued to be used until well into the twentieth century, when the almost universal inclusion of formal short titles in acts of Congress all but rendered the older, but still technically correct, form of citation superfluous.

Early Congresses did not pass a great deal of legislation by current standards. The laws enacted by the first session of Congress occupy less than one-hundred printed pages in the first volume of the Statutes at Large. Most chapters in that volume were short and dealt with a single topic. Because Congress was slow to exercise its full power to confer jurisdiction over federal question cases, there seems to have been little need to cite to federal statutes in early federal court cases. In any event, there was little trouble in doing so unambiguously, as there were so few of them.

41. Perhaps, however, the use of public law numbers in legislation relating to the Patient Protection and Affordable Care Act of 2010 is a sign of a return to more apolitical monikers? See the discussion supra note 16. Will the use of public law numbers come to supplant short titles that have become too long or tendentious for convenient use, or will they simply be employed by a law’s detractors who do not want to cede any ground by referring to a law’s politically charged name?
44. The seventy-six pages of laws enacted during the first session of the First Congress are found at 1 Stat. 23–98. Now many individual acts of Congress are at least that long and, cumulatively, the number of pages devoted to new laws in a given session is often in the thousands. The Food, Conservation, and Energy Act of 2008, for example, takes up 629 pages. Pub. L. No. 110-234, 122 Stat. 923–1551.
45. The first volume contains 444 laws, enacted during the first five Congresses, averaging a little more than one-and-a-half pages per law. Only nine of the 444 statutes are ten pages or longer, and the only statutes longer than fifteen pages are the Tariff Act of 1789, the Judiciary Act of 1789, and the legislation establishing the Post Office.
47. An unscientific study of the oldest cases before the U.S. Supreme Court reveals that both attorneys (at least as reported) and Justices identified statutes both by their dates of enactment and by official long titles. See, e.g., Young v. Bank of Alexandria, 8 U.S. (4 Cranch) 384, 396 (1808) (referring to the “act of congress of February, 1801” and also to “the ’act concerning the district of Columbia’”). Both methods appeared to produce sufficient clarity, although the example of an 1813 case that quotes a statute which refers internally to a different statute by its long title shows that the conventions, at least to modern eyes, could get messy. See The Aurora, 11 U.S. (7 Cranch) 382, 383–84 (1813) (“The act of 1st of March, 1809, expired with the session of Congress, on the 1st of May, 1810, on which day, Congress passed an act, (vol. 10, p. 186,) the 4th section of which enacted, ‘that in case either Great
¶12 Eventually, though, there came to be more than one statute on a given topic. In practice, the year of enactment was added to the subject to distinguish one from another. An example of this can be seen with the Judiciary Act of 1789 (also known as the First Judiciary Act), 48 the Judiciary Act of 1801 (also known as the Midnight Judges Act), 49 and the Judiciary Act of 1802. 50 The national conflict over tariffs and foreign trade gave rise to some of the relatively few popular names that we have from the early to mid-1800s. The Embargo Act (1807), also “dyslexically” known as the “Oh! Grab Me Act,” 51 and the Force Bill (1833) 52 reflect this. The growing disputes over slavery also provide examples, such as the Fugitive Slave Law 53 and the Wilmot Proviso. 54 Despite evidence of use in newspapers and legislative debates, these popular names nonetheless remained unofficial and off the statute books. 55

¶13 The practice of using informal, unenacted names for acts based on topic worked out well enough into the nineteenth century (down through at least the Bankruptcy Act of 1898 56). Most statutes during this period continued to have no
name at all, even an unofficial one. For various reasons there seemed to be no need for them. Most federal law before the Civil War seemed of little interest to people in the United States, other than a few lawyers. Few citizens in a largely agrarian society were affected directly by it. Congressional action appears to have been mostly concerned with obtaining revenues through tariffs, organizing the burgeoning executive and judicial branches, and funding internal improvements. Matters affecting marriage, property, education, and regulation of local commerce, and virtually all criminal law—the sort of law that affects most people in their daily lives—were exclusively the province of state rather than federal law.

A Rival System of Popular Names

¶14 In the nineteenth century, a parallel practice developed of naming some legislation for individuals. The names that resulted from this practice, like the subject-related names, were again not set forth in the law itself, but grew out of common parlance. This method named the legislation after one or more members who sponsored it or were somehow related to it (normally as its proponents) in one or both chambers of Congress. The practice seems to have originated in Congress itself, where it likely was natural to identify a bill with its proponents. Perhaps it provided a convenient way to refer to bills as they were being considered. It may have evolved in imitation of the classical Roman system for naming laws after the consul or consuls who initiated them. The early American republic strongly identified with Rome, as the popularity of classical Greek and Roman architecture for public buildings and the statues of Washington wearing a toga attest. It may also have been influenced by a similar vogue for classical antiquity among the British, or at least the British Whigs, during the late eighteenth and early nineteenth centuries. Whatever the source, a similar custom of naming laws for their sponsors obtained in Britain. Since American lawyers were familiar with English cases and texts during the period, it might well be that this was the real source of the custom of referring to laws by the name of the sponsor.

57. Marriage, Divorce, and Children in Ancient Rome, at vi (Beryl Rawson ed., 1991) (citing as examples of this practice the les Papia Poppaea introduced by the consuls M. Papius Mutilus and C. Poppaeus Sabinus, and the legislation by Augustus bearing the name of his adoptive family, the leges Jueliae).


59. A memorandum of the Office of the Parliamentary Counsel prepared in relation to a Statute Law (Repeals) Bill indicates that before the introduction of official short titles in the 1840s: “Statutes of general importance had acquired short unofficial names, such as Jervis’ Act . . . .” Law Comm’n & Scottish Law Comm’n, Statute Law Revision: Fifteenth Report, Draft Statute Law (Repeals) Bill, 1995, Cm. 2784, ¶ 4.2, available at http://www.scotlawcom.gov.uk/download_file/view/321 [hereinafter Statute Law Revision]. Examples of the unofficial names of British acts contemporaneous with the first fifty years of the republic include Burke’s Act (22 Geo. 3, c. 75) (1782) (Colonial Leave of Absence); Sturges Bourne’s Act (58 Geo. 3, c. 69) (1818) (Vestries); Aberdeen’s (Lord) Act (5 Geo. 4, c. 87) (1824) (Entail); and Scrope’s (Poulett) Act (6 & 7 Will. 4, c. 96) (1836) (Parochial Assessments).

The More Popular “Popular Name” System, and the Merger of the Two Systems

¶15 Of the acts of Congress before 1900, many more seem to have the sort of popular name based on individuals’ names, usually sponsors’ names, than popular names based only on subject matter. Toward the end of the period 1790–1900, and following that until about 1950, we see a number of instances where the common name combines a subject matter allusion with one or more legislators’ names. More and more laws were passed, and therefore there was an increased need to distinguish one from another. Using legislators’ names is not a satisfactory solution, just as previously using a subject matter allusion without a year would create ambiguity. The sheer volume of federal legislation had increased by this time. More than one act of Congress might therefore be named after the same particularly prolific or influential member. As a result, sometimes the acts would be called such things as the First and Second Morrill Acts. Where ambiguity remains, there is often a reference to the topic covered as well, either as a noun modified by the adjectival sponsor’s name, such as the Steagall Commodity Credit Act, or in a parenthetical reference, such as the Carlisle Act (Internal Revenue). We thus see some blending of the two previously independent popular naming conventions.

¶16 By 1900, neither of the existing systems was sufficient to identify legislation unambiguously without a long formal citation. A new system was needed.

¶17 A similar problem had been faced in the United Kingdom. In 1847, long before any federal law had one, a drafter of the Markets and Fairs Clauses Act 1847 gave that act that official short title. Lord Brougham’s Act (also known as the Interpretation Act 1850), the long title of which was “An Act for shortening the Language used in Acts of Parliament,” may also have paved the way. Among other things, it eliminated the requirement that British acts be cited by their long titles; citation by session and chapter number sufficed. Both the first enacted short title


62. For example, Congress enacted eight different Judiciary Acts before 1900, each of which is referred to as the “Judiciary Act of” the year in which it was enacted. The addition of the year, however, did not solve the problem for the two Judiciary Acts of 1866, Act of July 23, 1866, ch. 210, 14 Stat. 209, and Act of July 27, 1866, ch. 288, 14 Stat. 306, the first of which is also referred to as the Judicial Circuits Act. See also Philip S. Bonforte, Pushing Boundaries: The Role of Politics in Districting the Federal Circuit System, 6 SETON HALL CIR. REV. 29, 38 (2009) (discussing the history of seven of the eight pre-1900 Judiciary Acts). See also supra ¶ 12.

63. Act of July 2, 1862 (First Morrill Act), ch. 130, 12 Stat. 503; Act of Aug. 30, 1890 (Second Morrill Act), ch. 841, 26 Stat. 417.

64. Act of July 1, 1941, ch. 270, 55 Stat. 498.


68. Id. § 3 (providing that “in any Act, when any former Act is referred to, it shall be sufficient, if such Act was made before the Seventh Year of Henry the Seventh, to cite the Year of the King’s Reign in which it was made, and where there are more Statutes than One in the same Year the Statute, and where there are more Chapters than One the Chapter; and if such Act referred to was made after the Fourth Year of Henry the Seventh, to cite the Year of the Reign, and where there are more Statutes or Sessions than One in the same Year the Statute or the Session (as the Case may require), and where
and Lord Brougham’s Act were passed before the Office of the Parliamentary Counsel was created in 1869. The first holder of that office, Lord Henry Thring, had been drafting legislation since at least 1860 and memorialized his advice for legislative drafters in a manual titled *Practical Legislation*.69 He recommended that every act include a short title, ending with the year of enactment.70

¶18 Parliament (or at least the Office of the Parliamentary Counsel) apparently found short titles useful, since in the Short Titles Acts 189271 and the Short Titles Act 1896,72 it retroactively provided official short titles for many earlier acts of Parliament.73 As short titles have come into common usage, the British custom is to name the statute for the topic governed by the act in question and the year of enactment.74 The United States was much slower to adopt enacted short titles, and to apply such titles to previously enacted measures. Not until the last quarter of the twentieth century did Congress generally provide short titles for most acts of Congress or stop referring to earlier legislation by official long title.

**Persistence of Informal Popular Names and Continued Transition to Sponsors’ Names**

¶19 By the time of the Civil War, Congress members’ names had become the most common source of popular names. Still, like the other popular names, these names were not found in the acts of Congress themselves. They continued to be unofficial, though their use seems so general as to eclipse the official long title for all practical purposes, except in formal references in other acts of Congress.

¶20 For the latter half of the nineteenth century and during the first quarter of the twentieth, this practice of naming laws (if they had names at all—most still did there are more Chapters or Sections than One the Chapter or Section or Chapter and Section (as the Case may require), without reciting the Title of such Act, or the Provision of such Section so referred to” (emphasis omitted)).

69. LORD [HENRY] THRING, PRACTICAL LEGISLATION (2d ed. 1902).

70. Id. at 93. Thring also noted the “logical and political antagonism of arrangement” of elements such as a short title and definitions within a piece of legislation. He thought that “[l]ogically, their proper place is at the beginning of the Act,” but recognized that “[p]olitically, their proper place is at the end of the Act, as a definition frequently narrows or widens the whole scope of an Act, and Parliament cannot possibly judge whether such narrowing or widening is or is not expedient till they are acquainted with the Act itself.” He thought that the draftsman should generally “adhere to the political and not to the logical rule, and to place the sections in question at the end of the Act.” *Id.* at 96–97.

71. 55 & 56 Vict., c. 10.

72. 59 & 60 Vict., c. 14. The Short Titles Act 1896 “authorised the citation of some 2,000 Acts by specified short titles.” STATUTE LAW REVISION, supra note 59, ¶ 4.2. It appears as though all of the short titles are topical and none refers to an individual. It seems that in fact there is a significant difference between the United States and the United Kingdom in that while the unofficial popular names followed similar courses in referring to sponsors, Parliament has stuck to descriptions of the legislative content when enacting official short titles, whereas the United States has not.

73. In addition to the two late nineteenth century Short Titles Acts, at least five other acts contained provisions authorizing the citation of an included schedule of acts by short titles. STATUTE LAW REVISION, supra note 59, ¶ 4.1.

not) for their proponents in Congress was the most common naming convention. As we might expect from the continuing salience of tariffs as a political issue, tariff acts were especially prone to having popular names. The 1846 Walker Tariff Act\textsuperscript{75} and the Wilson Tariff Act of 1894\textsuperscript{76} are examples. This continued well into the twentieth century, as evidenced by the famous Smoot Hawley (Tariff) Act of 1930, which was also known as the Tariff Act of 1930.\textsuperscript{77} The Fordney-McCumber Act of 1922\textsuperscript{78} seems to have even had an official short title naming it the Tariff Act of 1922.\textsuperscript{79} This was one of the earliest American officially enacted short titles. Nonetheless, it appears still to have been more familiar to lawyers and others through its popular name (based on the names of its sponsors) than it was under its official short title.

\[\|21\] Earlier, though, in 1918, there had been a spate of formal short titles (the earliest of which we are aware): the Soldiers and Sailors Civil Relief Act of 1918,\textsuperscript{80} the Third Liberty Bond Act of 1918,\textsuperscript{81} and the District of Columbia Minimum Wage Law.\textsuperscript{82} This may have been due to the growing influence on drafting of the Office of the Legislative Counsel, formally legislated into existence in 1919.\textsuperscript{83}

The Triumph of the Enacted Short Title

\[\|22\] By 1920 there were a number of laws with formal short titles: the National Prohibition Act,\textsuperscript{84} the Transportation Act, 1920;\textsuperscript{85} and the Merchant Marine Act, 1920.\textsuperscript{86} Some of these still had popular but unofficial names based on congressional sponsors or proponents.\textsuperscript{87} As seen in these examples, a number of acts enacted around 1920 include the year following a comma rather than an “of.” We still see this practice in some laws, notably appropriations laws,\textsuperscript{88} but it did not seem to stick for most short titles, which have gone back to the “of” format when referring to the year.\textsuperscript{89} One wonders if it was part of a more general argument within the

\textsuperscript{75} Ch. 74, 9 Stat. 42.
\textsuperscript{76} Ch. 349, §§ 73–77, 28 Stat. 509, 570.
\textsuperscript{77} Id. § 647, 42 Stat. at 990.
\textsuperscript{78} Ch. 356, 42 Stat. 858.
\textsuperscript{79} Id. § 647, 42 Stat. at 990.
\textsuperscript{80} Ch. 20, 40 Stat. 440 (short title at § 604, 40 Stat. at 449).
\textsuperscript{81} Ch. 44, 40 Stat. 502 (short title at § 8, 40 Stat. at 506). The act also amended two earlier pieces of legislation to give them the short titles the “First Liberty Bond Act” and the “Second Liberty Bond Act.” Id. § 7.
\textsuperscript{82} Ch. 174, 40 Stat. 960 (1918) (short title at § 23, 40 Stat. at 964).
\textsuperscript{83} Revenue Act of 1918, ch. 18, § 1303, 40 Stat. 1057, 1141 (1919). That original incarnation called the office the Legislative Drafting Service.
\textsuperscript{84} Ch. 85, 41 Stat. 305 (1919). The short title of the act was included at the beginning, rather than at the end.
\textsuperscript{85} Ch. 91, 41 Stat. 456.
\textsuperscript{86} Ch. 250, 41 Stat. 988.
\textsuperscript{87} For example, according to the popular name table, the National Prohibition Act was also known as the Volstead Act, and the Merchant Marine Act, 1920 was known as the Jones Act.
Office of the Legislative Counsel about the two alternative forms. For while the Office of the Legislative Counsel consensus seems to favor the “of” format for short titles, it favors the comma for a citation to a title of the United States Code. So we now more commonly see “title 5, United States Code” where we would once have seen “title 5 of the United States Code.” Perhaps this was a Solomonic judgment to satisfy irreconcilable stylistic claims. Or perhaps use of the comma originated outside the Office of the Legislative Counsel and was gradually replaced by the “of” style.

¶23 That the late teens and 1920s mark the somewhat tardy advent of the official short title in American usage may not be coincidental—the Office of the Legislative Counsel gained formal status in 1919. The Office’s founders seem to have been much influenced by their British counterparts. The Office would have had some additional inducements to encourage the use of enacted short titles. There was no Lord Brougham’s Act dispensing with the need to cite previous acts by their long titles. At the same time, there were more, and longer, acts of Congress that copiously amended earlier acts. Each amendment needed to be phrased with reference to the earlier act it was amending. Repeating the full long title citation for each amendment, especially as long titles were getting longer and longer, would surely be an unpleasant chore and not very conducive to the readability of the draft. Likewise, effective dates and other similar provisions keyed to the enactment of other statutes would be much less cumbersome if an official short title could be used. The formula for introducing a short title is “This Act may be cited as . . . ,” evincing a concern not only about what the act was called in common parlance, but also about how a drafter could refer to it later or in other laws.

¶24 But where in the bill the short title would appear was not immediately settled. At first, they were sometimes at the end of the bill and seem to have attracted little attention other than among lawyers (or perhaps drafters in the

90. See Harry W. Jones, Bill-Drafting Services in Congress and the State Legislatures, 65 Harv. L. Rev. 441, 443 (1952) (“The form of organization of the Office of the Legislative Counsel of the Congress of the United States was, in part, patterned on the Office of the Parliamentary Counsel to the Treasury. At the hearings which preceded the establishment in 1918 of the congressional drafting office, Lord Bryce, then British Ambassador to the United States, made an unusual appearance, at committee invitation, to explain at length the status and technical responsibilities of the Parliamentary Counsel.”).

91. Even before the practice of including short titles took hold, there is evidence that drafters of later amendatory provisions found citing to an act’s long title unduly cumbersome. For example, a 1917 law authorized the Secretary of Agriculture to permit mining on public lands obtained under the provisions of a law enacted six years earlier. The 1911 act’s official title was lengthy: “An Act To enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers.” Act of Mar. 1, 1911, ch. 186, 36 Stat. 961. Perhaps recognizing the difficulty of citing to the 1911 act by its official title, the 1917 act referred to it as “the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes, page nine hundred and sixty-one), known as the Weeks law.” Act of Mar. 4, 1917, ch. 179, 39 Stat. 1134, 1150. The citation to the 1911 law indicates that in common parlance—at least of the legislative drafters—it was known by the name of its House sponsor, John Weeks of Massachusetts. See Passing the Weeks Act, Forest History Soc’y, http://www.foresthistory.org/ASPNET/Policy/WeeksAct/PassingAct.aspx (last visited Oct. 16, 2012). See also infra ¶ 27.
Legislative Counsel’s Office who put them in for technical reasons). In one case, the short title appeared in the definitions section.\(^\text{92}\) Many bills, probably including most of those drawn up outside the Office, continued to have no short title at all. And even those from within the Office often did not have short titles. This may have been because it seemed unlikely to the drafters that these bills would ever be amended or otherwise need cross-referencing. Even today, inclusion of a short title is still considered optional, though it has become the prevailing practice.\(^\text{93}\)

**Formal Short Titles Waver in and out of Vogue from 1928 to the 1970s**

¶\(^\text{25}\) From about 1928 to 1931, enacted short titles were rarer again, even for acts that ultimately were often cited, such as the Davis-Bacon Act;\(^\text{94}\) after that, they reappear. During this time, many acts continued to have unenacted popular names derived from their sponsors’ names. Perhaps because this was a relatively quiet time for new major legislation, there were few acts sufficiently likely to be constantly cited and amended.

¶\(^\text{26}\) During the New Deal era, we again see more formal and descriptive short titles.\(^\text{95}\) Some well-known New Deal laws did not have enacted short titles and are known instead mostly by their sponsors’ names.\(^\text{96}\) The New Deal, however, opened the door to official titles recognizing sponsors of the legislation with the Bankhead-Jones Farm Tenant Act.\(^\text{97}\) Signed by President Roosevelt on July 22, 1937, the law provided loans to tenant farmers to purchase their land or new equipment. It was written and shepherded through the legislative process by Sen. John Bankhead of Alabama and Rep. John Jones of Texas, each the chair of his respective chamber’s committee with jurisdiction over the bill. The legislation carried a variety of descriptive names throughout the legislative process, but was titled the Bankhead-Jones Farm Tenant Act by an amendment offered by Sen. Barkley of Kentucky.\(^\text{98}\) The novelty of naming a law for its sponsors did not go unnoticed, and Oregon Senator McNary remarked “it is the first time in the history of legislation that an act has been designated officially in the act itself by the name of the author.”\(^\text{99}\)

¶\(^\text{27}\) Senator McNary was wise to choose his words carefully—although our research can back up his statement that the Bankhead-Jones Farm Tenant Act was

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\(^{92}\) Railroad Retirement Act (Hatfield-Keller Railroad Retirement Act), ch. 868, § 1(m), 48 Stat. 1283, 1284 (1934) (“The term ‘Railroad Retirement Act’ means and may be used in citing this Act and subsequent amendments thereto.”).

\(^{93}\) Despite its prevalence, there does seem to be little in the way of formal guidance on the use of short titles in federal legislation. See Jones supra note 23, at 462–65 (discussing the rules for short titles in the Drafting Manual for the House of Representatives).

\(^{94}\) Ch. 411, 46 Stat. 1494 (1931) (regulating wages for workers on government buildings).


\(^{97}\) Ch. 517, 50 Stat. 522 (1937).


\(^{99}\) 81 Cong. Rec. at 6760.
the first appearance of a sponsor’s name in the act itself, at least one earlier piece of legislation made official use of a popular reference to a bill’s sponsor. On March 1, 1911, President Taft signed legislation that allowed the federal government to purchase private lands to protect the headwaters of rivers and watersheds in the eastern part of the country.\textsuperscript{100} Although officially without a short title, the law was popularly known for its author, Republican Rep. John Wingate Weeks, of Massachusetts.\textsuperscript{101} Six years later, a provision in the 1917 Department of Agriculture appropriations bill granted the Secretary power to permit mining on “lands acquired under the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes, page nine hundred and sixty-one), known as the Weeks law.”\textsuperscript{102} We believe this is the first instance in which a sponsor’s name was incorporated into enacted legislation.

\textsuperscript{28} After the flurry of legislative activity accompanying the New Deal, there were relatively fewer enacted short titles until a burst after the Second World War.\textsuperscript{103} Formal short titles were probably of more interest to drafters than to the general public, and it could be that the use of short titles continued to be confined mainly to bills that the Office of the Legislative Counsel expected to amend later. Well into the twentieth century, there were few such bills, and correspondingly few short titles. Of course, during this same time the Office of the Legislative Counsel by no means had a monopoly on drafting legislation. Many committees had their own drafters or relied on executive branch officials for drafts.

\textsuperscript{29} By the late 1940s, short titles, where they existed, frequently appeared as an undesignated first section immediately after the enacting clause, moving toward the current norm of having them at the beginning of the statute or title they name.\textsuperscript{104} But some short titles, like that of the Atomic Energy Act of 1946, still appeared at the end of the act.\textsuperscript{105}

\textsuperscript{30} As late as the 1960s, there seem to be few, if any, acts of Congress that contained more than one short title, or short titles applicable only to some portion of

\textsuperscript{100} Act of Mar. 1, 1911, ch. 186, 36 Stat. 961.
\textsuperscript{101} Passing the Weeks Act, supra note 91.
\textsuperscript{102} Act of Mar. 4, 1917, ch. 179, 39 Stat. 1134, 1150.
\textsuperscript{103} E.g., National School Lunch Act, ch. 281, 60 Stat. 230 (1946); Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946); Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136. The Labor Management Relations Act, 1947, is more commonly known as the Taft-Hartley Act, and has been referred to as such in subsequent legislation, see Ocean Shipping Reform Act of 1998, § 106(b), Pub. L. No. 105-258, 112 Stat. 1902, 1907, perhaps showing the tension between the lingering custom of popularly naming bills for sponsors on the one hand and the new system of formal short titles based on the subject of the bill on the other.
\textsuperscript{105} Ch. 724, § 21, 60 Stat. 755, 775. See also, e.g., Army Aviation Cadet Act (Reynolds Aviation Training Act or Sheppard Aviation Training Act), ch. 165, § 8, 55 Stat. 239, 240 (1941); Portal-to-Portal Act of 1947 (Gwynne Act), ch. 52, § 15, 61 Stat. 84, 90.
the act. Both of these practices would later become much more common. This may reflect the fact that short titles were still somewhat in the legislative drafting shadows as compared with other means of naming statutes. The more recent practice may also be indicative of a larger change in the legislative process—the advent of omnibus legislation. In the 1970s, Congress first began to consider some legislation with an expanded scope, often incorporating the work of multiple committees in the process. The percentage of the congressional agenda taken up by omnibus measures has increased steadily in the decades since and can be attributed, at least in part, to politically strategic legislative choices. The rise of short titles for titles or sections of larger pieces of legislation may reflect the political deals struck in crafting the omnibus legislation.

¶31 As we have seen, and as the official popular name table often reflects, it seems common in the mid-twentieth century for even those laws that enacted their own short titles to also have popular titles that may have been more often used in common practice. These unenacted popular titles nearly always memorialize the name of the legislation’s sponsors. The Federal Boating Act of 1958, for example, was also commonly referred to as the Bonner Act, after the sponsor of the legislation, Herbert Bonner, who served as chairman of the Committee on Merchant Marine and Fisheries during the bill’s two-year consideration in the House.

¶32 In the 1960s, we see a rebirth of the vogue for official short titles after something of a dry spell, during which legislation continued to have unenacted


107. Id. at 154–55 (“During the 1980s the Democratic majority-party leadership sometimes decided to package legislation into omnibus measures as part of a strategy to counter ideologically hostile Republican presidents, especially Ronald Reagan . . . . By packaging disparate and individually modest provisions on salient issues such as trade, drugs, or crime into an omnibus bill, Democrats sought to compete with the White House for media attention and public credit.”).

108. It may also simply be an easier story to sell to the media and to voters that Rep. Smith won a legislative victory by passing his “Saving Babies” law if, rather than simply incorporating the substantive provisions into the omnibus bill, a section of the larger measure is titled the “Saving Babies Act.” The same may be true for naming sections of legislation for crime victims, as is the case with many of the individually named subdivisions of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587. See Jones, supra note 23, at 463 (discussing the “plethora of smaller acts, and thus short titles” within the Adam Walsh Act).


popular names, often very similar to what might have been a formal short title, had someone decided to enact one. The 1960s use of official short titles seems to be especially common in legislation that was thought of as either particularly important or likely to be amended later because of rapidly changing societal conditions, or both.\textsuperscript{112} We also see some short titles that omit the word \textit{act} altogether.\textsuperscript{113} It seems that, particularly in the case of the Civil Rights acts, the public debate and later references to the acts began to use the short titles as the key means of identification.

\textsuperscript{33} In the 1970s we see the final triumph of the short title, which has pretty much lasted ever since. Even rather obscure acts, such as the Little Cigar Act of 1973,\textsuperscript{114} began to have their own official names. Moreover, people seem increasingly to have used those names in common parlance to refer to the bills and the laws they became. The short title had freed itself from being solely a technical device for drafters and had become a real name for the act to which it was attached. So much of a reflex has it become to include a short title that it seems some bill boilerplates must now include one. For example, we have the oddly named “\underline{_______} Act of \underline{_______},” which is the official short title of Public Law 111-226, enacted August 10, 2010.\textsuperscript{115}

\textsuperscript{34} In part because of the drafters’ desire for convenience and brevity in amending older acts, Congress has retrospectively enacted popular names of some older acts into law as short titles. This occurred mainly after 1970, and may reflect the expanded role of the Office of the Legislative Counsel in the work of other committees, such as the House Judiciary Committee, after passage of the Legislative Branch Reorganization Act of 1970.\textsuperscript{116} The most concentrated effort to enact the popular but unofficial names for legislation appears in the final section of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which added enacted short titles to the Sherman Act, the Clayton Act, the Webb-Pomerene Act, and the Wilson Tariff Act.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{114} Pub. L. No. 93-109, 87 Stat. 352.
\item \textsuperscript{116} Pub. L. No. 91-510, 84 Stat. 1140.
\item \textsuperscript{117} Pub. L. No. 94-435, § 305, 90 Stat. 1383, 1397. The Hart-Scott-Rodino designation has its own interesting history as one of few pieces of legislation to break the two-name barrier. The law bears the names of Sen. Philip Hart (Mich.), Sen. Hugh Scott, Jr. (Penn.), and Rep. Peter Rodino (N.J.). Rodino was chair of the House Judiciary Committee, Hart was chairman of the Antitrust Subcommittee on Senate Judiciary, and Scott retired in 1976. In an interview for the Senate Historical Office Oral History Project, former Senate Judiciary Counsel Chuck Ludlam claimed that Rodino in fact “hated” the bill but allowed it to get through his committee, which was more liberal than he was, in exchange for having his name attached to the legislation. \textit{Chuck Ludlam, U.S. Senate: Oral History} (Dec. 10, 2003), http://www.senate.gov/artandhistory/history/oral_history/Ludlam_chuck.htm (click on “Hart-Scott-Rodino” link).
\end{itemize}
A Rococo Efflorescence of Short Titles

¶35 Once the practice of including official short titles took hold, it began to be a means for political and other ends as well as technical ones. The tension between the two types of titles has continued to increase since then. A good short title to a professional drafter is short and dispassionately descriptive. To a politician it may be a means of selling the bill, embarrassing opponents, or honoring persons the politician wants to recognize. Since Congress is a political body as well as a legislative one, perhaps we should not be disturbed by this. On the other hand, in its extreme forms, it can interfere with the readability or usability of an act of Congress. Our search for the origins of these less dispassionate, official statutory names produced at least six overlapping categories of naming conventions: (1) laws named for the legislation’s sponsor, (2) laws named for the victim of a crime, (3) laws named in honor of someone as a laudatory gesture, (4) laws named after an individual whose behavior exemplifies what the law is intended to remedy, (5) laws with short titles that produce an abbreviation that is itself a word, and (6) a “left-over” category of laws named with overtly political descriptions, but which do not fall easily into one of the other categories.

Sponsors

¶36 Although the use of sponsors’ names to identify legislation has been common practice for more than a hundred years, the practice of including the names of sponsors in an enacted short title took root in the 1970s. With few exceptions,\textsuperscript{118} statutes are known by a hyphenated moniker that nearly always includes the last names of the primary House and Senate sponsors. Examples of this convention include the Stevenson-Wydler Technology Innovation Act of 1980,\textsuperscript{119} the Garn-St Germain Depository Institutions Act of 1982,\textsuperscript{120} and the Sarbanes-Oxley Act of 2002.\textsuperscript{121} A less common convention is the use of two names to indicate bipartisan support. The Annunzio-Wylie Anti-Money Laundering Act, for example, was named for two House members: Democratic Rep. Frank Annunzio of Illinois and Republican Rep. Chalmers Wylie of Ohio.\textsuperscript{122} And even where the enacted short title remains descriptive, a piece of legislation may be referred to by its sponsors’ names as it moves through the legislative process, in order to emphasize its bipartisan nature to other members. Perhaps the clearest example of this practice is found in the history of the Bipartisan Campaign Reform Act of 2002. Commonly referred to as BCRA (pronounced “bick-rah”) by academics, the legislation was known as

\textsuperscript{119} Pub. L. No. 96-480, 94 Stat. 2311.
\textsuperscript{120} Pub. L. No. 97-320, 96 Stat. 1469.
“Shays-Meehan” in the House—for Republican Christopher Shays and Democrat Marty Meehan—and as “McCain-Feingold” when it was considered in the Senate—for Republican John McCain and Democrat Russ Feingold.  

Victims

§37 Another convention for federal statutes is to name the legislation after a victim of the particular ill the law addresses. Perhaps the most well-known example of this convention is Megan’s Law, which requires convicted sex offenders to register with local law enforcement upon release from incarceration. The federal law, along with its many state counterparts, is named for Megan Kanka, who was brutally raped and murdered in 1994 by a neighbor who had been convicted twice previously of being a sexual predator. Interestingly, most other laws named for female victims follow the convention of Megan’s Law and use the victim’s first name only, even though the identity of the victim is known. The more common convention for laws named for male victims, however, is to use both a first and a last name in the statute.

Laudatory (and Cautionary) Gestures

§38 An additional convention for short titles is to honor individuals. Frequently the honorees are advocates associated with the fight for the legislation, such as the Lilly Ledbetter Fair Pay Act of 2009, named for the plant manager at Goodyear who famously sued the company for sex discrimination in its pay practices. Even before the reign of the official short title, some laws had become known by the names of persons other than the sponsors, and not always to honor them. Now formal short titles often used these names, though typically in conjunction with a description of the subject matter of the bill. Other laudatory names honor recently

deceased members of Congress\textsuperscript{130} or retiring members who are also the bill’s sponsor.\textsuperscript{131}

\textit{Abbreviations}

\textsuperscript{¶}39 As they began to have political salience, short titles grew long.\textsuperscript{132} People began to refer to these acts not by their lengthening short titles, but by acronyms based on abbreviations that were sometimes rather loosely drawn from those short titles. In effect, they developed short titles for the short titles. In doing so, they were in effect acknowledging that the official short title could no longer serve its original purpose of providing a handy reference to the act in question.

\textsuperscript{¶}40 At first, abbreviations had no particular meaning in themselves and were entirely informal. For example, there was the abbreviation of the Intermodal Surface Transportation Efficiency Act of 1991, whose mostly fortuitous abbreviation created the amusing ISTEA (pronounced “ice tea”).\textsuperscript{133} Soon, however, the abbreviations came to be designed to have a relevant meaning, if only an evocative one, relating to the bill. Sometimes the abbreviation was spelled out in the short title itself. We find an early example in the Support for East European Democracy (SEED) Act of 1989.\textsuperscript{134} Consider, too, the Act for Reform In Emerging New Democracies and Support and Help for Improved Partnership with Russia, Ukraine, and Other New Independent States, or the FRIENDSHIP Act.\textsuperscript{135} The short title was so long that there had to be another, shorter one, added entirely separately. The longer title was probably constructed with the intent of providing a plausible abbreviation that would lead to the shorter short title, which was likely the one intended for actual use. Unlike ISTEA, the abbreviated title of the FRIENDSHIP Act hinted at its purpose. This also led to the use of short titles that would pack a political punch relating to the purpose of the bill, either by the use of an acronym or directly.


\textsuperscript{133} Pub. L. No. 102-240, 105 Stat. 194.

\textsuperscript{134} Pub. L. No. 101-179, 103 Stat. 1298.

HOW FEDERAL STATUTES ARE NAMED

%41 Acronyms of short titles associated positive things with the bill they labeled. Some amounted to slogans in favor of their own passage: Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (with a similarly editorial acronym, the SAFETY Act). So, too, with the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, also short-titled the PROTECT Act, and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, the CAN-SPAM Act of 2003.

%42 Eventually this approach would come to encourage long and twisting “short titles” that abbreviated to something politically evocative, such as the USA PATRIOT Act, the original “short title” of which is quite a mouthful. Rumor has it that staff spent a great deal of their time during the rather hurried consideration of the act devising this short title. This trend continues with acts such as the Securing the Protection of our Enduring and Established Constitutional Heritage Act, or the SPEECH Act. Perhaps the most creative use of an abbreviation in a short title was the 2005 transportation legislation steered by Rep. Don Young. He named the act the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, or SAFETEA-LU, supposedly as a nod to his beloved wife, Lu Young. By the 1990s, the triumph of the short title was so complete that many did not realize the official title of the bill was the “long title.”

Politically Charged Descriptions

%43 One final convention for naming statutes that we identified is the politically charged description. Names like the “Pro-Children Act of 2001” or the “Justice for All Act of 2004” put opponents of the legislation at a rhetorical disadvantage, implying they are anti-children or in favor of justice only for some. Brian Christopher Jones argues that some such names are also misleading, as they imply that the measure enacted will succeed. To some extent, of course, nearly all legislative names that are more than a dispassionate description are politically charged. Legislators are, after all, in the business of passing legislation and getting credit for

doing so with the voters. The opportunity to enhance the chances of success by making nonsubstantive changes to a bill’s name is an easy choice.

Conclusion

¶44 The use of official short titles in the United States remained rare until the 1970s but by the 1990s had become all but mandatory. However, their very popularity has led to their increasing use for political reasons rather than as a means of providing a needed short reference to a given law that otherwise has none. A tension between political ends and technical ones is not unnatural, or even necessarily bad. Both ends can be served, as they probably are fairly well in short titles such as the Plain Writing Act of 2010 and perhaps less so in the Sarbanes-Oxley Act of 2002, or the No Child Left Behind Act of 2001. Neither of these last two does much to tell us about the subject matter of the law, and so they lack the pithy elegance of such titles as the Social Security Act or the Securities Act of 1933. But they serve well enough as short monikers, even if they also make politically salient, even partisan, comments on the law they label. Perhaps little harm is done in practice by allowing two short titles, one long and tendentious and the other short and evocative (and perhaps tendentious as well) and allowing the long one to fade away from disuse.

¶45 Public participation in the legislative process is fostered by developments such as broad access to the Internet, which makes legislative documents freely available in real time. Memorable short titles can be a democratizing phenomenon but can also mislead. Unneeded complications and embellishments impede the open and honest assessment of the intended effect of a proposed or enacted law. They may also bring the law, and perhaps the lawmakers, into contempt by seeming too narrowly partisan.

¶46 Statutory names reflect competing considerations. Short titles are indeed useful, almost necessary, to provide a simple and uniform method of citing acts of Congress. Lengthy short titles do not serve the goal of simple and uniform nomenclature and should be avoided. Multiple titles for the same law are an open invitation to confusion. To be sure, there may be political advantage in unwieldy or strange short titles, and hence the temptation to employ them will be ever present. Still, it is not difficult to see the technical disadvantages. Unless legislators exercise self-control in the matter, we may discover that some other convention is needed to fill the role previously played by popular names and, more recently, by short titles.

The Public Mission of the Public Law School Library

Connie Lenz

As state funding diminishes, public law schools moving toward a model of financial self-sufficiency strive to articulate their continuing public mission. Public law school libraries also should take this opportunity to examine and refine their public mission by taking a broader view of their role in supporting their law schools’ public mission, and collaborating with one another and with other state-supported academic libraries to fulfill their public mission on a national basis.

Introduction
¶1 Eighty of the nation’s ABA-approved law schools are public law schools. Throughout most of the twentieth century, these public law schools received a significant percentage of their funding from state appropriations. In recent years, however, many states have reduced their support, in varying degrees, to both public universities and public law schools. As state funding diminishes, a growing

* © Connie Lenz, 2013. I am grateful for feedback and suggestions from all of my colleagues at the University of Minnesota Law Library, many of whom have devoted their careers to furthering the mission of our public law school library. In particular, I thank Joan Howland and Suzanne Thorpe for reviewing drafts and discussing the topic with me throughout the writing process. I am especially indebted to Mary Rumsey and Sarah Yates for both their editorial expertise and their insightful comments.

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number of law schools affiliated with public research universities are moving to a financial model of greater self-sufficiency, relying less on state appropriations and more on tuition, fund-raising, and other revenue-generating activities to support their programs and goals. As they do so, the law schools assert that the shift to a private funding model will not alter their public mission.

¶2 While the degree to which public law schools now rely on state funding varies, many have seen dramatic changes in the balance between their funding from state appropriations and from other sources of revenue. The University of Virginia Law School and the University of Michigan Law School were the first to transition toward self-sufficiency; the University of Virginia Law School receives no funding from the state and the University of Michigan Law School receives less than three percent of its funding from the state. Other public law schools are now following this path as they face significant reductions in state support. California has cut twenty-five percent of the funding of the University of California, Berkeley, School of Law (Boalt Hall) since 2000. The University of Minnesota Law School receives a “small fraction” of its funding from the state, and that funding is directed entirely to the law library. Arizona State University’s Sandra Day O’Connor College of Law is considering a plan to reduce its reliance on state funding over the next five years.

¶3 This new financial model is often referred to as “privatization” or “quasi-privatization,” terms that have been distinguished thus:

To privatize a university would be to totally split it off from state funding, state regulation, and state ownership. Quasi privatization essentially means a funding reliance on tuition and gifts, but legal authority remaining in the public governing board. Universities and law schools do not want to totally sever their ties to the state for a number of reasons, including capital appropriations, and access to tax exempt, low interest state bonds.

5. Binder, supra note 2, at 4.
6. Id. at 17–19 (noting that both Michigan and Virginia were uniquely situated to make this transition, as both schools engaged in long-range planning before embarking on the change; could charge tuition comparable to leading private law schools; had financial resources, including endowment funds, that are unavailable to most public or private law schools; had extensive fund-raising experience; had geographically diverse, successful, and generous graduates; draw from large population regions; and are situated in states with alternative public law schools available to state residents at lower tuition).
10. David Wippman, Self-Sufficiency by Any Other Name, PERSP. (Univ. of Minn. Law Sch.), Fall 2011, at 1; see also Karen Sloan, Another Public Law School Considers Dispensing with State Money, N.Y. LAW. (Online) (July 5, 2011) (available only on LexisNexis) (noting that state allocations funded twenty-two percent of the University of Minnesota Law School’s operating budget in 2008–2009 and approximately twelve percent of the budget in 2010–2011).
12. Binder, supra note 2, at 17 n.73.
Both terms have taken on negative connotations, with critics claiming that if public schools privatize, they unfairly benefit from a legacy of public support that built the strong university—benefits that include the schools’ buildings, land, library collections, and reputation. The schools prefer to characterize their transition as a shift to a model of financial “self-sufficiency,” asserting that although the institution may rely less on public funds, the school will continue to fulfill its public mission.

¶4 As public law schools moving to this new funding model strive to articulate their continuing public mission, their law libraries also must refine and articulate their evolving public mission. The public law school library should take this opportunity to delineate clearly its role in fulfilling the public mission of its parent institution. As part of its primary mission, the library supports the law school’s public mission by providing support for the curriculum and for the research and service activities of law school faculty. The library also directly fulfills the law school’s public mission by educating lawyers, sharing resources with other institutions, providing stewardship of collections built through a legacy of state support, and providing both the bench and bar and the general public with access to services and collections.

¶5 Following a brief overview of the history of the public university and its public mission, this article will examine the mission of state-supported law schools—particularly those affiliated with public research universities—and explore how that mission is affected as those law schools transition to a model of greater financial self-sufficiency. This consideration of the public mission of the public law school is crucial to understanding the public mission of the public law school library, as the library exists to support the law school’s mission. The article next examines the public law school library’s public mission—which is defined here as the activities in which the library engages to support the law school’s public mission—and how that mission is evolving. After outlining the unique challenges confronting the public academic law library’s public mission, the article concludes by encouraging public law school libraries to examine and, as necessary, redefine their public mission and to take a broader view of their role in supporting their law schools’ public missions. Public law school libraries also are encouraged to collaborate with one another and with state-supported university libraries to fulfill their public missions on a national basis.

13. See Kevin Carey, Why Flagship Public Universities Should Stay Public, CHRON. HIGHER EDUC. (Aug. 7, 2011), http://chronicle.com/article/Why-Flagship-Public/128542/ (“[F]lagship universities . . . [are] owned by the generations of citizens who built the universities with their tax dollars and hard work.”); Jack Stripling, Flagships Just Want to Be Alone, CHRON. HIGHER EDUC. (Mar. 13, 2011), http://chronicle.com/article/Flagships-Just-Want-to-Be/126696/ (quoting Charles B. Reed, president of California State University and a former chancellor of the State University System of Florida as stating, “The heads of major research institutions too quickly forget ‘who the hell built’ their facilities.”). See also David L. Kirp & Patrick S. Roberts, Mr. Jefferson’s University Breaks Up, 148 PUB. INT. 70, 76 (2002) (noting that the ten percent of revenue the University of Virginia’s Darden Graduate School of Business Administration contributes to the university has been characterized as a “franchise fee,” which pays for the cachet of the University of Virginia brand).

The Public University

§6 Traditionally, the core mission of the public university has been to provide citizens of the state with an affordable and accessible education, and to benefit the state by educating its citizenry and providing service to and research for the benefit of the state.15 The Kellogg Commission on the Future of State and Land-Grant Universities16 expanded on the purpose of the public university: “The irreducible idea is that we exist to advance the common good. . . . Historically, the covenant between public universities and the American people has been grounded in wide access, excellent curricula, research of value to people and communities, and public governance and financing.”17

§7 Public universities in the United States date to 1789, when the University of North Carolina was established as the nation’s first public university.18 The system of public higher education became dominant outside of the Northeast19 with the passage of the Morrill Act of 1862, which funded the creation of public universities throughout the country through the sale or lease of federal public lands.20 These universities originally focused on providing a “liberal, practical education” to citizens of the state by emphasizing areas such as “agriculture, military tactics, and the mechanic arts as well as classical studies.”21 In addition to the “land-grant” institutions, there are numerous other public research universities that share the same understanding of the public mission.22 “A social compact developed between the states and their citizens, whereby a quality education would be offered to all qualified state residents at nominal tuition.”23

§8 As they developed throughout the twentieth century, private universities and public universities influenced one another in different ways, leading to a con-

15. Peter McPherson et al., FORGING A FOUNDATION FOR THE FUTURE 27 (2010), available at http://www.aplu.org/document.doc?id=2263 (reporting that public research universities “educate 85 percent of the undergraduates and 70 percent of the graduate students educated in all high and very high research universities” and conduct 62% of U.S. federally funded research).


18. Binder, supra note 2, at 5.

19. Id. at 6 n.20 (“[T]he Big Ten Universities of Iowa, Michigan, Minnesota, and Wisconsin, the Pac Ten Universities in Arizona, Oregon, and Washington, and the Big 12 Universities in Colorado, Iowa, Kansas, and Nebraska do not face in-state competition from large, diversified private universities, such as Research I universities”).


23. Binder, supra note 2, at 6.
vergence of models. Public research universities raised their quality to compete with private universities; private universities adopted a more “egalitarian model” and made admissions decisions based upon academic qualifications rather than financial and social status.

§9 In recent years, reduced state funding, globalization, and technology have furthered the convergence between public and private research universities. These trends have affected the public university’s accessibility, affordability, and research and service missions. As states have experienced significant financial challenges, their reductions to university funding have placed the affordability and accessibility of the public university at risk. Greater reliance on tuition has increased the economic burden for both resident and nonresident students. Economic pressures, as well as competition for students, have resulted in universities’ changing the balance between residents and nonresidents by admitting more out-of-state students who pay higher tuition. Finally, reduced budget appropriations may require schools to alter financial aid models, limit enrollment, or place greater emphasis on applicants’ ability to pay tuition—thus making the schools less accessible.


27. Public acceptance of these changes is due, in part, to a shift from the perception of higher education as a public good to its perception as a private benefit. See Kellogg Comm’n, supra note 17, at 17–18 (noting “the urge to ‘privatize’ public institutions” and “an apparently growing public consensus that education is simply another commodity, another market for consumers, in which students are customers. Research . . . is prized far more for its commercial promise than its capacity to extend human capabilities or push back the boundaries of our knowledge and understanding.”); C.D. Mote, Jr., Lower Expectations for Higher Education?, Wash. Post, June 20, 2004, at B5; Jeffrey Selingo, What Americans Think About Higher Education, Chron. Higher Educ., May 2, 2003, at 10. See also Sandy Baum & Michael McPherson, Is Education a Public Good or a Private Good?, Innovations: Chron. Higher Educ. (Jan. 18, 2011, 10:02 a.m.), http://chronicle.com/blogs/innovations/is-education-a-public-good-or-a-private-good/28329 (explaining the basis of the public good vs. private good debate).


30. Scott Gelber, Going Back: The Social Contract of the Public University, 47 Hist. Educ. Q. 368, 375 (2007) (“Of particular concern to advocates of public higher education is evidence of an inverse relationship between privatization and access for low-income students caused by policies such as shifting financial aid from grants to loans, and from need-based to merit-based distribution.”).


32. Lewin, Universities Seeking Out Students of Means, supra note 29.
¶10 In addition to reduced affordability and accessibility, the nature of the public university’s research and service missions also has evolved from a focus on state and local issues to one addressing national and international concerns. The Kellogg Commission observed:

It was once possible to think of a public institution’s “territory” as encompassing everything within a state, or everything within the circumference of a circle drawn around the central campus. . . . [I]t is now technically just as easy to deliver instruction on crop-management techniques to developing nations in Africa or Asia as it is to provide extension advice to local farmers. Inherited concepts of appropriate service and engagement need to be rethought.33

¶11 Despite this convergence of models and reduction in state appropriations, public universities still strive to maintain their unique “public” missions and grapple with the question of what it is that defines a “public” institution.34 The Kellogg Commission identified the basic elements that define the obligation of public university education today. These include providing genuinely equal educational opportunity; offering excellent curricula; preparing students to lead and participate fully in society; supporting broad-based research and discovery agendas; using the university’s resources and expertise to address local, state, national, and international problems; and having public accountability.35 While acknowledging the “blurring of differences between private and public higher education,” the Commission distinguished between the two:

Many private institutions describe their mission as providing access, research, and service, using language almost indistinguishable from that of public universities. While it is true that all higher education has multiple goals, private institutions can choose or not choose to carry out various activities or serve particular constituents; however, it is the fundamental, inescapable obligation of public higher education to provide broad student access, to conduct research, and to engage directly with society and its problems—all in the service of advancing the common good.36

33. Kellogg Comm’n, supra note 17, at 17.
34. Scott Seaman, Another Great Dissolution? The Privatization of Public Universities and the Academic Library, 31 J. ACAD. LIBRARIANSHIP 305, 308 (2005) (“The University of Colorado at Boulder is not transforming into a private university but something different—a publicly directed fiscally autonomous institution.”); Tamar Lewin, Public Universities Seek More Autonomy as Financing from States Shrinks, N.Y. TIMES, Mar. 3, 2011, at A20 (“Faculty, staff, alumni and students here are 100 percent committed to the Wisconsin idea, the nearly 100-year-old idea that the boundaries of the university extend to the boundaries of the state. . . . Support for that idea is so strong that I don’t have to worry about our fulfilling the public mission—unless we’re in a position where we don’t have the resources or flexibility. The risk to the mission is greater if we don’t have flexibility we need than if we do.” (quoting Carolyn A. Martin, Chancellor, Univ. of Wis. at Madison)). But see Kellogg Comm’n, supra note 17, at 18 (cautioning that trends of tuition increases and aggressive fund-raising “threaten the ‘public’ character of our institutions because strategies focused on finances and market share, no matter how powerful, will never meet all public needs”); Stripling, supra note 13 (“While these presidents invariably stress that they want to retain the public mission and character of their universities, those institutions are increasingly likely to serve a broader public that crosses state, regional, and national boundaries.”).
36. Id. at 18.
The Public Law School

¶12 As universities developed in the nineteenth century, they added law schools—by either acquiring an existing school or creating a law department. By 1860, there were twenty-one college or university law schools in existence. These schools often were only loosely affiliated with their universities, and even those linked to a state university were usually financially self-sufficient. Some legislatures, reflecting the views of their constituencies, did not view legal education as a proper use of public appropriations. “Lawyer members were satisfied with the office training that they had themselves received; lay members were not interested in helping an unpopular profession.” Thus, before the Civil War, the instructors at most law schools collected all fees paid for their courses, rather than receiving a salary from the university.

¶13 By the early twentieth century, however, the prevailing trend was for universities with law schools to assume financial and administrative responsibility for them. By this time, “public opinion ha[d] come to recognize that the maintenance of a sound system of legal education is of vital importance to the community, and therefore constitutes a proper charge upon philanthropic or public funds.” And the public law schools shared the public universities’ goals of providing an affordable and accessible education for state residents.

¶14 As the mission of public law schools evolved, they defined their obligation to the state as requiring two components: training lawyers to serve the citizens of the state and providing research and service activities to improve the laws of the state. This ethos was clearly evident in the missions of the Midwestern flagship public law schools. William Reynolds Vance, dean of the University of Minnesota

37. Binder, supra note 2, at 7–8.
39. It was not uncommon for the establishment of a law department to lag behind the establishment of other university departments, even when the public university charter indicated that the university should include a “law department.” See, e.g., id. at 79 (noting that the state university of Wisconsin, founded in 1848 with four undergraduate divisions, including a law department, did not start a law school for twenty years); id. at 88 n.49 (noting that the 1868 charter of the University of California called for the creation of a college of law, but did not establish its own law school at Berkeley until 1908); Elizabeth Gaspar Brown, Legal Education at Michigan 1859–1959, at 3 (1959) (noting that the law school of the University of Michigan was established in 1859, although legislation indicating the university should include a law department was passed in 1837 and again in 1851).
40. Alfred Zantzinger Reed, Training for the Public Profession of the Law 153 (1921).
41. Id. at 183–84 (calling Harvard and Virginia exceptions which received “effective financial support”).
42. Id. at 183.
43. Id.
44. Id. at 186–87.
45. Alfred Zantzinger Reed, Present-Day Law Schools in the United States and Canada 102–03 (1928).
46. In 1928, the United States had thirty-eight law schools maintained by state universities or colleges. Id. at 83.
47. Binder, supra note 2, at 8.
Law School from 1911 to 1920, defined the school’s mission as serving the state rather than providing professional training for individual betterment:

[A] law school maintained by the state is to be conducted in the interest of the people of the state as a whole, and not merely for the benefit of the lawyers as a class, or for the benefit of those young men who seek admission to the bar as a means of gaining a livelihood. . . .

. . . . [T]he people have slowly come to understand that the welfare of society demands that their laws shall be wisely and justly made and fairly and honestly administered; hence they seek to provide for the proper training of the men who are to be the lawyers of the future.48

Furthermore, Vance recognized the value of research and policy development that the public law school contributes to the state: “There is still another duty which the State University Law School owes to the profession and to the people of the state who support it; that is, to make some real contribution to the knowledge which we have of law and its operation.”49

¶15 This view of the public law school’s obligation to the state was echoed in the introduction to the first issue of the Minnesota Law Review:

It should be the duty of a state university to assist in the solution of these questions [state and regional legal issues], in the legislature, in the courts, and in the forum of public opinion, quite as much as to render assistance to the municipalities of the state in their engineering plans, in promoting the public health, or to the farmers of the state in promoting agriculture. . . . To confine a university law school to the mere function of training lawyers to earn a living is to raise a doubt whether the public money is not being misspent.50

¶16 Henry Craig Jones, dean of the University of Iowa College of Law from 1921 to 1929, identified two unique functions of the state law school: “[F]irst, to train lawyers to serve efficiently the people of that particular state which supports it, and, second, to emphasize the public duties and obligations of the legal profession.”51 Jones stressed that state-supported institutions had the obligation to instill a public service orientation in their students:

By reason of their public origin and support, a special obligation rests upon the state-supported law schools to train their students as to the public obligations of the legal profession because the administration of justice is a primary and exclusive function of the state, and lawyers, as public servants, are those without whose aid private individuals cannot secure justice.52

He also believed the faculty of the state-supported law school had a unique obligation to help solve legal problems to benefit the local community and to strive to improve the administration of justice.53

¶17 Professor Eugene Gilmore served on the University of Wisconsin Law School’s faculty from 1902 to 1922 and led the school’s participation in the

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49. Id. at 414.
50. Foreword, 1 MINN. L. REV. 63, 65 (1917).
52. Id.
53. Id. at 8.
“Wisconsin Idea,” a concept he described as “an earnest attempt to realize democracy through an intelligent and independent electorate which is at the same time industrially and economically trained and efficient, such attempt being aided by the utilization of the expert knowledge and best skill of the community.” The law school contributed to this ideal by training most of the lawyers in the state and preparing students for public careers. The faculty also participated by lending their legal expertise to assist the state. As “the law professor’s peculiar expertise was that of drafting, evaluating, and improving law,” Gilmore and his colleagues became involved in various legislative drafting and legal reform initiatives.

¶18 Over time, models of public and private law schools—like the models of public and private research universities—converged. The academic models of all law schools became strikingly similar in the early twentieth century, as the case method and the Harvard curriculum were broadly adopted and became predominant. Through the 1930s, the American Bar Association (ABA) and the Association of American Law Schools (AALS) strengthened standards, establishing minimal education requirements for admission to and graduation from law schools. In response, states began regulating legal education and imposing requirements aligned with the higher standards, including graduation from ABA-approved law schools as a requirement for admission to the bar.

¶19 The G.I. Bill and standardized testing made private law schools more accessible. The G.I. Bill “allowed thousands of bright young veterans to go to any school that accepted them. The government would pay for it all—tuition, books, and living expenses. Elite schools were no longer only for elite people. . . . Veterans made up over 90 percent of the Harvard class of 1947.” The Law School Admission Test (LSAT) was introduced in 1948, making private schools more accessible to all who could meet the schools’ academic standards. Finally, private law schools adopted the public service missions of the public law schools.

¶20 While the academic models and service orientation of public and private law schools were substantially similar by the late twentieth century, the state-supported law schools remained more affordable and accessible for state residents.
by maintaining lower tuition and a preference for citizens of the state.66 These distinguishing characteristics, however, also began waning as state funding for public higher education diminished.

¶21 State funding for public universities began decreasing in the 1980s, and in many states the allotments for law and other professional schools have decreased more sharply than allocations for undergraduate education.67 The view has been that law and other professional schools are in a better position to become financially self-sufficient than are undergraduate departments. Law school and business school students are willing to pay higher tuition because they are more likely to command higher salaries upon graduation, and professional schools can rely on a wealthier alumni base for fund-raising.68

¶22 In response to decreased state funding, public law schools have been forced to move toward greater self-sufficiency—decreasing their reliance on state funding and increasing reliance on tuition69 and fund-raising.70 At these schools, tuition has increased for both residents and nonresidents, the gap between the two categories of tuition has narrowed,71 and the balance between resident and nonresident students has been altered to admit a greater number of out-of-state students who pay

66. Id. See also id. at 15 (stating that although the academic models of today’s law schools are similar, they “are characterized by differentiated programs, seminars, symposia, clinics, institutes, and centers”).

67. Id. at 3; Sebert, supra note 4. See also Courant et al., supra note 3 (observing that many of the benefits of professional and graduate education are “public goods” that are distributed beyond state boundaries and therefore are less of a priority than undergraduate education for the state).

68. Kirp & Roberts, supra note 13, at 74; Seaman, supra note 34, at 307. This line of reasoning may be losing its validity, as the market for law school graduates has declined and the debt load carried by law school graduates has become terribly burdensome. See, e.g., William D. Henderson & Rachel M. Zahorsky, The Law School Bubble: Federal Loans Inflate College Budgets, but How Long Will That Last If Law Grads Can’t Pay Their Bills?, 98 A.B.A. J. 30, 32 (2012) (reporting that in 2010, 85% of law graduates from ABA-accredited schools had an average debt load of $98,500; only 68% of those graduates reported being employed in a position requiring a J.D. nine months after graduation, and fewer than 51% found employment in private law firms).

69. Karen Sloan, At Public Law Schools, Tuition Jumps Sharply, NAT’L L.J., Aug. 3, 2009, at 1 (noting an increase of almost 25% for in-state tuition at Indiana University Maurer School of Law—Bloomington; an increase of almost 20% for in-state students and 13% for nonresident students at the University of Iowa College of Law; increases of 16%, 20%, and 12% for University of Colorado School of Law 1Ls, 2Ls, and 3Ls, respectively; an increase of 16% for in-state students and 11% for nonresident students at the University of Texas School of Law; and an increase of 15% for in-state 1L students and almost 8% for in-state 2Ls and 3Ls and nonresident and nonresident students at the University of Minnesota). See also Binder, supra note 2, at 10; Law School Tuition 1985–2011, Am. Bar Ass’n, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_ol_bar/statistics/ls_tuition.authcheckdam.pdf (last visited Oct. 28, 2012) (showing average and median law school tuition and fees for public and private law schools from 1985 to 2011).

70. Amanda Bronstad, Funding the Future: As State Funds Wilt, Public Law Schools Step Up Fundraising, NAT’L L.J., July 23, 2007, at 1; see also Berkeley Law’s Campaign for Boalt Hall, BERKELEY LAW SCH., http://www.law.berkeley.edu/giving.htm (last visited Oct. 28, 2012) (“With state support plummeting and tuition reaching its outer limit, philanthropy is the only remaining source of revenue to be tapped. So far, Boalt continues to thrive, thanks to a shrewd strategic plan, savvy leadership, and generous donors. But with the state slice of our budget shrinking fast, we don’t have the luxury of time to close the funding gap gradually. We have to do it now. Without philanthropy, we will risk compromising our recent—and future—gains.”).

71. Sloan, supra note 69; see also Law School Tuition 1985–2011, supra note 69.
higher tuition.\textsuperscript{72} Many public law schools affiliated with public research universities now charge tuition that parallels that of private law schools, diminishing the relative affordability and accessibility for state residents.

\textsection23 As private law schools have adopted public interest missions and as public law schools become less affordable and less accessible, the public institutions must define what is distinctive about their public mission. For example, California’s Ad Hoc Planning Study Committee for Professional Education in Law has identified the University of California law schools’ unique obligation thus: “As publicly financed law schools, U.C. law schools have an obligation to devote greater effort to centering their curricula more around the problems of the poor and less around the problems of the corporate elite.”\textsuperscript{73}

\textsection24 Dean Christopher Edley, Jr., leader of the transition of Boalt Hall toward self-sufficiency, has argued that the need to “privatize” funding models and the preservation of the school’s public mission are not mutually exclusive. According to Edley, “The university’s overall mission is to provide public access to world-class excellence at a bargain price.”\textsuperscript{74} He distinguished the law school’s mission from the overall mission of the undergraduate programs, as the law school has never offered “mass” education.\textsuperscript{75} He also acknowledged that the law school is increasingly less of a “bargain” as limited state funding requires the school to rely more heavily on tuition.\textsuperscript{76} Edley identified two elements that define Boalt’s “public” mission: “First, a great law school must be inclusive to produce leaders for all communities and sectors,” and “[s]econd, we have an obligation to harness our excellence in teaching and research so that we can help tackle the toughest, most critical problems facing California, the nation and the world.”\textsuperscript{77}

\textsection25 In 2012, Boalt Hall’s centennial, Edley further commented upon the unique mission of the public law school:

There is a distinctive responsibility in public law schools to engage a portfolio of the most difficult and important problems of the society with an intentionality and collective effort that I consider essential to its public character. This contrasts with the typically laissez-faire ethos of elite private institutions, even when lightly colored by the public-regarding nature of the legal profession, or the civic leadership expected of wealthy institutions. If this distinction is not apparent in a public law school, at least in its aspiration, then that school’s only raison d’etre is to be inexpensive—today an impossible burden if quality is also a priority. It would also be a strange allocation of scarce public education resources.\textsuperscript{78}

\textsuperscript{72} Binder, \textit{supra} note 2, at 10–13.

\textsuperscript{73} Rex R. Perschbacher, \textit{The Public Responsibilities of a Public Law School}, 31 U. TOL. L. REV. 693, 696 (2000) (quoting Univ. of CalIf., Ad Hoc Planning Study Comm. for Prof’l Educ. in Law, Analysis of Graduate Legal Education at the University of California 17 (1991)).


\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.; see also Fees & Cost of Attendance, Berkeley Law Sch., http://www.law.berkeley.edu/6943.htm} (last visited Nov. 2, 2012) (for 2012–2013, resident tuition and fees were $50,373; nonresident tuition and fees were $54,324).

\textsuperscript{77} Edley, \textit{supra} note 74.

¶26 The establishment of a new public law school—University of California, Irvine (UCI) School of Law—in 2009 provides strong evidence that there is still a unique mission and place for the public law school.\textsuperscript{79} UCI adopted a new financial model for developing a public law school:

Funding for the law school came in part from private gifts to support faculty chairs and tuition for the first class for three years and the second class at fifty percent for three years. However, [the University had] . . . set aside or banked FTE in anticipation of the needs of the School, and considerable contributions of staff time and UCI resources were essential for creating the new professional school. Overall funding was to come from state enrollment growth funding and private contributions and eventually from student fee revenues. The California Legislature “did not appropriate any state funds specifically for the planning and startup costs of the School.”\textsuperscript{80}

¶27 Advocates supporting the creation of the new law school stressed the need for high-quality, accessible public legal education: “It has been over thirty years since a new public law school was formed in California. Consequently, of the total number of law degrees awarded in California from ABA-approved schools, the percentage awarded by public schools declined precipitously from 58% in 1966 to 26% in 1996.”\textsuperscript{81} The Ad Hoc Committee to Evaluate UC Law School Proposals recommended approval of the proposed UCI law school, finding that:

[A] law school at UCI would address the inequity in access to public law schools that currently favors Northern California; it would produce a high caliber of lawyer; it would be positioned to prepare students to help underserved communities; and it would help meet one of UC’s fundamental responsibilities as a public research university: to provide legal education.\textsuperscript{82}

In outlining his vision for the school, Dean Erwin Chemerinsky noted two features that have been central to the mission of the public law school: “preparing students for the practice of law at the highest levels of the profession”\textsuperscript{83} and emphasizing public service.\textsuperscript{84}

¶28 The missions articulated by Edley (producing leaders and using Boalt’s resources to solve society’s most difficult and important problems on a local, national, and international level) and Chemerinsky (educating lawyers and providing public service) are clearly public missions, but they are not necessarily unique


\textsuperscript{81} Id. at 37 (quoting Proposal for a School of Law at the University of California, Irvine, at iii (Jan. 2001)).

\textsuperscript{82} Id. at 41.

\textsuperscript{83} Erwin Chemerinsky, The Ideal Law School for the 21st Century, 1 UC Irvine L. Rev. 1, 13 (2011).

\textsuperscript{84} Id. at 21.
to public law schools. Recognizing the difficulties inherent in defining the public law school’s public mission, Rex Perschbacher, former dean of the University of California, Davis School of Law, examined four elements stressed by the Kellogg Commission that he believes are particularly important for public law schools: “(1) genuinely equal access; (2) learning environments that prepare students to lead and participate in a democratic society; (3) engagement—a conscious effort to bring resources and expertise to bear on community, state, national and international problems; and (4) open and public accountability.” Perschbacher conceded that these responsibilities are often the same as those assumed by private law schools, but distinguished the mission of the public law school:

Mostly, I suggest that we take more care with these issues, that we examine what we do in light of the public interest—and ask how we are to locate that public interest—more often than a private law school needs to. But, to some extent, there is a unique role we play as public law schools; responsibilities we accept as we accept the benefits of public affiliation; and I would be very sad to see these burdens and benefits lost or so obscured that it no longer mattered that we were linked to the uniquely democratic and egalitarian tradition of public higher education.

The Public Law School Library

State-supported academic law libraries play a significant role in supporting and fulfilling their law schools’ public mission. As part of its primary mission, the library provides support for the curriculum and for the research and service activities of law school faculty who use their expertise to benefit the local, state, national, and international communities. The library also directly fulfills the law school’s public mission by educating lawyers, sharing resources with other institutions, providing stewardship of collections built through a legacy of state support, and providing access to services and collections to both the bench and bar and the general public. As state-supported law schools moving toward financial self-sufficiency strive to articulate their continuing public mission, their libraries must do the same.

86. Perschbacher, supra note 73, at 694.
87. Id. at 697.
88. An extensive body of literature has focused on issues arising from the provision of library services to members of the public. Articles have addressed risks involved in offering reference assistance to pro se patrons, particularly with regard to potential liability for malpractice and the unauthorized practice of law; access policies for external constituencies; and the need to facilitate citizens’ access to legal information. See Paul D. Healey, Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings, 94 Law Libr. J. 133, 2002 Law Libr. J. 8; Legal Information Services to the Public SIS [AALL Special Interest Section Recommended Reading Lists], 100 Law Libr. J. 728, 2008 Law Libr. J. 37 [hereinafter LISP Reading List].
Convergent Missions of Public and Private Law School Libraries

Although the missions of individual academic law libraries vary, the primary mission of all—both public and private—is to support the missions of their law schools, and no aspect of the library’s mission exists independently of the law school’s mission. In general, the primary mission of the public academic law library is to support the law school’s mission of (1) educating students to serve the state and broader community, (2) conducting research to benefit the state and broader community, and (3) using its expertise to provide service to the state and broader community. The missions of public academic and private academic law libraries will converge to the extent that the missions of their respective law schools converge. Both types of libraries tailor their services and collections to support the curricular needs of the law school, which develops its curriculum to educate students who will serve citizens of the state and beyond. Likewise, as faculty members at both public and private law schools engage in research and service activities that aim to effect law reform and solve legal problems, their law libraries provide support for these endeavors.

In addition to supporting the law school’s curricular, research, and service initiatives, both public and private law school librarians play a growing role in the direct education of students. The skills needed to locate, evaluate, and synthesize legal information have become increasingly sophisticated, and these skills are necessary for lawyers to participate actively in today’s legal environment. Although law librarians have long engaged in legal research instruction, the publication of the Carnegie Report in 2007 has increased focus on skills-based instruction in law schools. While the report did not specifically address the need for more legal research instruction, legal research experts have heeded its call for more practical skills education generally. Law librarians participate in first-year legal research instruction, offer courses in advanced legal research and specialized research areas

90. Recent examples of University of Minnesota Law Library librarians supporting the law school’s public mission include providing research assistance to faculty members engaged in the following endeavors: developing a freely available electronic bench book for Minnesota judges (http://ebenchbk.law.umn.edu/index.php/Main_Page), serving as reporter for the revision of the Model Penal Code, preparing to testify at congressional hearings on the foreclosure crisis and on the Video Privacy Protection Act, drafting a uniform law on manufactured housing for the Uniform Law Commission Joint Editorial Board for Uniform Real Property Acts, preparing to present programs for federal judges on the modern laws of war and on military commissions, drafting an amicus brief relating to the liability of corporations for human rights violations, and assisting in the representation of a petitioner to the United Nations Human Rights Committee.
91. Deborah K. Hackerson, Access to Justice Starts in the Library: The Importance of Competent Research Skills and Free/Low-Cost Research Resources, 62 ME. L. REV. 474, 474 (2010) (“The ability to perform competent and cost-effective legal research is one of the most important skills that law students should master to be prepared to practice law.”). See also Sarah Valentine, Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools, 39 U. BALT. L. REV. 173 (2010).
(e.g., foreign and international law, taxation, securities law), develop prepare-to-practice workshops for students approaching summer internships or graduation, and offer one-on-one instruction to students requiring research assistance. Thus, both public and private academic law libraries play a direct role in educating lawyers to serve the citizens of the state, region, nation, and international communities.

¶32 All academic law libraries, and particularly those with large research collections or specialized collections, contribute to the common good through resource-sharing programs. By participating in interlibrary lending, libraries provide access to their resources on a local, regional, national, and, in some cases, international level. This collaboration has been extremely successful and, as more libraries cancel print subscriptions and customize collections, the model must continue to be expanded.95

¶33 Large academic research law libraries holding collections of historical depth and breadth, as well as all law school libraries with specialized collections, also serve the public interest by providing stewardship of these collections.96 Although this role is shared by public and private law libraries, there is divergence with respect to the intended beneficiaries of this stewardship. The private law library acts as steward on behalf of its law school, larger institution, and scholars of the world; in addition to these constituencies, the public academic law library—whose collections have been built upon a legacy of state funding—serves as a steward on behalf of citizens of the state.

Divergent Missions of Public and Private Law School Libraries

¶34 Beyond their converging missions, there often is a significant difference in the missions of private and public academic law libraries. This divergence—noted above with respect to stewardship—is found in the way these libraries define their relationship to external constituencies, including the bench and bar as well as the public. As the Kellogg Commission observed, “private institutions can choose or not choose to carry out various activities or serve particular constituents.”97 While some private law school libraries allow all external constituencies to access their libraries, other private law school libraries do not.98 Although the extent to which public law school libraries serve patrons from outside the law school varies, all seem

94. See infra ¶¶ 44–47.
97. Kellogg Comm’n, supra note 17, at 18.
99. See, e.g., Harvard Law School Library Mission, HARVARD LAW SCH. LIBR., http://www.law.harvard.edu/library/about/mission/index.html (last visited Oct. 28, 2012) (restricting the support the library provides to the law school’s faculty and students and to a lesser extent the research needs of the Harvard University community and “scholars from outside the Harvard community requiring access to its unique collections”).
to recognize some obligation to do so.¶

Making collections and services available to external constituencies is often part of the public law school library’s secondary or tertiary mission.

¶35 Traditionally, the most visible way in which the state-supported academic law library has fulfilled its public mission is by allowing the bench and bar and the public to have access to services and collections. Both the nature and the extent of this obligation to external constituencies have been the subject of much debate, and the literature has connected state funding with the existence of such an obligation. Reporting on the results of a survey of state-supported law school libraries conducted in the early 1970s (when state funding was strong), Cameron Allen considered public academic law libraries’ obligation to serve “secondary” patrons. He observed:

The assumption has been rather widespread that a State school could not really decline to serve any citizen of the State. . . . The idea of the university at the service of the State, and the university campus as coterminous with the State itself, is in origin a midwestern concept, sometimes called the “Wisconsin Idea,” and has much to commend it. Echoes of this feeling showed up repeatedly in the survey replies, e.g., “_________ (State) University has a policy to permit taxpayers access to all libraries.” “We actually exclude no one. We believe that we cannot do so, since we are wholly supported by public funds.” “Our facilities are available to anyone having a legitimate use to make of them. Fortunately we have the facilities to provide this service. As a librarian, I believe we should not restrict service to the law school alone. We are supported by public money. We should serve the public, so long as they have a serious use to make of our services.”

100. A comprehensive review of law library mission statements is beyond the scope of this article, but compare the missions and access policies of three large public academic law libraries:

The Law Library’s purpose is to build collections and provide services to support the teaching and research needs of Law School faculty and students. Therefore, the Law Library’s collections, services, and policies are primarily designed to benefit the Law School’s faculty and students, and others officially connected with the Law School. The Law Library’s secondary users—whose needs are met only after those of the primary users—are other University of Michigan faculty and students who have legitimate need to use the collection, and attorneys. The Law Library accommodates others only so long as their use of the facilities does not interfere with use by primary and secondary users.


2. **Access & Borrowing, Berkeley Law Library**, http://www.law.berkeley.edu/library/access.html (last visited Oct. 28, 2012): “Outside of law school exam periods the Law Library is open to the entire University of California, Berkeley community, as well as attorneys and members of the general public who wish to conduct legal research or to use Federal Depository Library Program (FDLP) materials.”

The mission of the University of Minnesota Law Library is to support the research and curricular needs of the University of Minnesota Law School faculty and students. The Library is committed to providing faculty and students with the finest legal resources and service possible, as well as the highest level of support for scholarship and access to information. We are also committed to serving the legal information needs of the University community, the bench and bar, the citizens of Minnesota, and scholars throughout the world.


103. *Id*. at 167.
Allen questioned this “sweeping assertion that a State-funded law school library must serve all taxpayers,” noting that students pay tuition, which covers at least part of the law school’s expenses, including library services, and that libraries operate on restricted budgets that should be targeted to the needs of the library’s primary patrons—law school faculty and students. He questioned both the libraries’ sense of obligation and the taxpayers’ view that they have a right of access.

As state funding for public law schools and their libraries diminishes, others may question whether this obligation continues. But it is likely that the libraries responding to Allen’s survey were motivated by several factors. First, the respondents quoted do take their funding model into account in explaining their service to external constituencies, and they may perceive a legal or quasi-legal obligation. Second, they may feel there is a moral obligation of all libraries, and particularly those that are state funded, to provide access to information. Third, as Allen points out, the libraries may serve institutions influenced by the Wisconsin Idea, with a long-held tradition of the public university existing for the benefit of the citizens of the state.

A recent review of the case law regarding nonaffiliated patrons’ claims for access related to federal depository status or public funding determined that courts have not relied solely on either basis in determining whether there is some right to access. Instead, courts have explored the purpose for which the right is claimed. “When the reason for access is to consult library materials . . . factors such as participation in a depository program, funding models, traditional use, and library policies can all be relevant.”

Public law school deans have reinforced the state-supported academic law library’s traditional relationship with external constituencies. In remarks marking his formal installation as dean of the University of Minnesota Law School in 1980, Robert Stein noted the significance of the University of Minnesota Law

104. Id.
105. Id. at 167–68.
106. See, e.g., Kerry L. Fitz-Gerald, Serving Pro Se Patrons: An Obligation and an Opportunity, 22 LEGAL REFERENCE SERVICES Q., nos. 2/3, 2003, at 41, 46 (identifying the obligation to serve public patrons as a moral obligation); Laura N. Gasaway, Values Conflict in the Digital Environment: Librarians Versus Copyright Holders, 24 COLUM.-VLA J.L. & ARTS 115, 115–16 (2000) ("Librarians tend to view information as a necessary public good, such as food, shelter, and warmth . . . .").
107. Depository Library Program, 44 U.S.C. §§ 1901–1916 (2006). Under the federal depository library program, the federal government provides U.S. government documents to designated depository libraries at no charge. In return, the libraries are obligated to provide free public access to the documents. In 1978, accredited law school libraries became eligible to participate in the depository program.
109. Id. at 393, ¶ 48.
110. While one could argue that such statements were made at a time of greater state support or in an effort to bolster state support, or both, they nonetheless reinforce the tradition of providing access to external constituencies.
111. In 1980, the University of Minnesota Law School received approximately eighty percent of its funding from the state. See Tim Post, U of M Law School Prepares for Loss of All State Funding, MPR NEWS (May 17, 2011), http://minnesota.publicradio.org/display/web/2011/05/16/law-school-independent/.
Library: “It is truly one of the major resources of the State, not only in size, but also in the richness and variety of the collection.” He continued:

We encourage the lawyers and judges of this State to use the resources of our magnificent new building. We want you to consider it a law center for the State. You are welcome to use our Library. . . . [T]he Library contains numerous works not available elsewhere, which can be of value to you in your practice.

More recently, Richard Morgan, while serving as dean of the University of Nevada’s William S. Boyd School of Law, noted the law library’s role in the law school’s public mission (including the reasonable limits that must apply):

[T]he library serves as a training ground for our students, as a research center for our faculty, as a major resource for the legal profession, and as a source of information for members of the public who are interested in learning about their legal rights and obligations. In these ways, the Wiener-Rogers Law Library plays a major community service role, helping us to fulfill our law school’s mission of community service.

Because our library is—as a state law school library should be—open to the public as well as to the campus community and bench and bar, it receives heavy use from patrons with no legal training. While we are pleased to serve as a source of materials and information for public and other patrons, the library staff does not have the time to provide extended and continuing education to patrons on the use of the law library.

The public law school library’s relationship with external constituencies is one facet of a deep-seated institutional tradition that has evolved over time as part of the public law school’s public mission. As public law schools moving toward financial self-sufficiency strive to articulate their continuing public mission, the public law school library’s relationship with external constituencies is one of the most visible and easily comprehensible examples of fulfilling that mission. By providing access to the legal profession, the library plays an important role in serving the legal and policy-making needs of citizens of the state; by providing access to the general public, the library allows citizens of the state to utilize an array of legal information resources.

113. Id. at 397.
115. Law school clinical programs are another highly visible way in which both private and public law schools support their law school’s service missions. In contrast to library services provided to the legal profession and general public, clinical programs also serve a strong pedagogical purpose within the curriculum.
116. Barbara Bintliff, What Can the Faculty Expect from the Library of the Twenty-First Century?, 96 LAW LIBR. J. 507, 512, 2004 LAW LIBR. J. 30, ¶ 22 (noting that law firms cancel print in reliance on academic law library collections and that the support provided to the public and the correctional system is increasingly important as court, county, public, and prison libraries face budget reductions).
Challenges to the Public Law School Library’s Public Mission

¶42 Budgetary constraints and new demands are requiring all academic law libraries to evaluate service priorities and redefine collecting policies, but there are unique challenges for the public law school library, which also must grapple with its evolving relationship with external constituencies. State-supported academic law libraries have long addressed the challenge of balancing their primary mission of serving the needs of their faculty and students with their secondary or tertiary missions of serving the needs of external constituencies, and they have developed clear policies regarding the extent of services available to these constituencies. In recent years, however, primary patrons have developed new expectations. Faculty members are requesting research in greater depth and requiring significant analysis. Librarians must support a broader range of faculty and student research interests including international, interdisciplinary, and empirical work. Reference librarians also are being called upon to provide more research instruction. Finally, libraries are directing resources toward new initiatives—such as creating repositories, offering increased publication support for faculty- and student-published journals, and developing web sites and portals for research and curricular needs—to support the work of faculty and students.

¶43 Given the increased demands from their faculty and students, public academic law libraries must curtail some of the services historically available to external constituencies. For example, libraries might change traditional reference service, which could include reducing hours the reference desk is staffed so that librarians can focus on significant research questions and teaching. Though this change may be necessary to enable the library to meet the needs of primary patrons, it restricts both the visibility and the availability of reference assistance for secondary patrons. Similarly, libraries may stop devoting time to creating research guides targeted to members of the public and restrict their attention solely to guides closely tailored to the curriculum.

117. See Palfrey, supra note 95, at 172–75, ¶¶ 5–12 (outlining the “perfect storm” confronting academic law libraries).

118. Public university libraries face the same challenge. See, e.g., Seaman, supra note 34, at 307 (“In the context of rapidly diminishing resources the [University of Colorado] Libraries has struggled to balance obligations to primary constituencies with its role in the larger community.”).

119. See, e.g., the mission statements quoted supra note 100.

120. Richard A. Danner, Supporting Scholarship: Thoughts on the Role of the Academic Law Librarian, 39 J.L. & Educ. 365, 378 (2010) (citing comments by John Palfrey regarding the increasingly interdisciplinary and international focus of legal scholarship, as well as the use of research methodologies outside the traditional legal research approach).

121. See supra ¶ 31.

122. For examples of new roles law librarians are assuming, see Danner, supra note 120, at 384–85 (development of repositories, assistance with copyright agreements); Taylor Fitchett, James Hambleton, Penny Hazleton, Anne Klinefelter & Judith Wright, Law Library Budgets in Hard Times, 103 LAW LIBR. J. 91, 99, 2011 LAW LIBR. J. 5, ¶ 24 [hereinafter Fitchett et al.] (development of interdisciplinary wikis, cite-checking, management of working paper series).

123. Margaret McDermott, Staffing the Reference Desk: Improving Service Through Cross-Training and Other Programs, 19 Legal Reference Services Q., nos. 1/2, 2001, at 207, 208 (“As technology and user needs change, alternatives are needed to the traditional model of the reference desk being all things to all people.”).
¶44 The public law school library’s traditional relationship with external constituencies also faces challenges as collecting policies are necessarily redefined in ways that will limit the library’s ability to serve practitioners and members of the public.124 Several factors—including reduced budgets, emerging technologies, and user preferences—are driving an ongoing shift from reliance on print to electronic resources.125 Often, however, license agreements governing use of these online resources include terms that conflict with the state-supported academic law library’s public mission.126 Among other restrictions, licenses may confine access to the law school community.127 Because public academic law libraries have traditionally taken the needs of external constituencies into account, they are reluctant to replace print resources, which all patrons may access, with licensed resources, which may be unavailable to external constituencies.128 Financial pressures, however, will not allow the public law school library to maintain dual formats of information resources indefinitely.129

¶45 License restrictions regarding access also have implications for resource sharing. In limiting access to a prescribed patron group, licenses often limit interlibrary lending.130 Thus, as libraries shift from print to online resources, they will be unable to lend some resources they once were able to share.131 To the extent public law school libraries consider resource sharing to be a part of their public mission, that mission is compromised by licenses that limit their ability to engage in this practice.132

124. Lee, supra note 96, at 17, ¶ 32 (stating that libraries’ core missions of stewardship, education, and service are “threatened by the rapid, unplanned conversion from print to electronic resources”).


126. For a thoughtful discussion of the values conflict between public libraries and copyright holders, see Gasaway, supra note 106. See also William M. Cross, Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship, 104 LAW LIBR. J. 195, 197, 2012 LAW LIBR. J. 18, ¶ 8 (“The adoption of a licensing model does significant harm to libraries and their patrons, reducing or even obliterating libraries’ ability to serve their traditional mission.”).

127. While libraries may negotiate for broader access, e.g., access for “walk-in” patrons, not all license agreements will permit this.

128. Rita Reusch, Commentary, By the Book: Thoughts on the Future of Our Print Collections, 100 LAW LIBR. J. 555, 559, 2008 LAW LIBR. J. 25, ¶ 19 (noting that the University of Utah’s Quinney College of Law Library had always regarded its secondary mission of serving the “legal information needs of the university, the legal community, and the public. . . . [as] part of [its] rationale for not cancelling print titles that are readily available to law students and faculty under LexisNexis and Westlaw licenses”).

129. Escalating print subscription costs compound the problem. See, e.g., Kendall F. Sviengalis, Legal Information Buyer’s Guide & Reference Manual 2011, at 5 (2011) (“The decline in the number of subscribers to print reporters . . . has forced up reporter costs at faster rates than in previous years.”).


131. Michael Chiorazzi, Books, Bytes, Bricks and Bodies: Thinking About Collection Use in Academic Law Libraries, 21 LEGAL REFERENCE SERVICES Q., nos. 2/3, 2002, at 1, 25 (“We run the risk of relying on others until there are no others to rely upon. If every library were to rely on interlibrary loan to supplement its own collection, the system collapses.”).

132. The relative lending activity of public versus private academic law libraries and the extent to which public law school libraries consider resource sharing to be part of their public mission are topics for future research.
§46 Finally, the shift from print to electronic resources alters the stewardship role of public academic law libraries. If the library licenses rather than owns resources to which it subscribes, it cannot guarantee preservation of and continued access to the resources. Even when digital content is purchased, questions arise regarding its long-term viability and the library’s ability to provide continued access.

§47 In addition to changes in format, large academic law libraries, which once developed broad and deep research collections to support both the current and future needs of legal scholars, are now customizing their collections based on the current research and curricular needs of their faculty and students. This trend toward customized collections will increase the need for interlibrary borrowing and lending for all academic law libraries, as they will have to rely on one another to fill gaps in their respective collections. Cooperative arrangements will most likely provide for expedited lending between participating libraries, and law school faculty and students will continue to be provided the resources they require. Academic law libraries, however, generally will not borrow from other libraries to fulfill the needs of members of the bench and bar and the public. Therefore, if the public law school library customizes its collection narrowly, these external constituencies will lose access to many information resources.

Redefining the Public Law School Library’s Public Mission

§48 Public academic law libraries will continue to contribute to their law schools’ public missions—by supporting the curricular, research, and service activities of their faculty members and students, and by educating lawyers to serve the state, national, and global communities—and they should articulate this role

133. Lee, supra note 96, at 17, ¶ 32.
134. Cichocki, supra note 130, at 39. There also are serious preservation concerns regarding purchased electronic content.
135. Sallie Smith, Susanna Leers & Patricia Roncevich, Database Ownership: Myth or Reality?, 103 LAW LIBR. J. 233, 236, 246, 2011 LAW LIBR. J. 15, ¶¶ 9, 34. See also Michael Kelley, Potential Crisis May Be Brewing in Preservation of E-Journals, Lib. J., Mar. 15, 2012, at 19, 19 (reporting on a study finding that “only about 15 percent of e-journals are being preserved and that the responsibility for preservation is diffuse at best”).
136. Bintliff, supra note 116, at 509, ¶ 9 (“The time is long past when most law libraries can aspire to comprehensiveness either in print or electronically.”); Fitchett et al., supra note 122, at 104, ¶ 37 (describing the University of Virginia Law Library’s new collecting policies, which are carefully aligned with current research interests rather than the potential value of resources to future researchers); Lee, supra note 96, at 29, ¶ 76 (“[A]cademic law librarians have built and shared their collections trusting that other libraries, particularly large research libraries, have been collecting the rest, preserving it, and making it available to other librarians and patrons. . . . It is now becoming too expensive for even top academic research libraries to collect this thoroughly.”).
137. Fitchett et al., supra note 122, at 97, ¶ 17 (advocating for interlibrary lending agreements based on subject specialties of each library).
138. But see Lynn Foster, Access to Academic Law Library Services: A Survey, 84 LAW LIBR. J. 741, 744 (1992). Foster reported on a 1991 survey finding “[a]proximately half of the state-supported law school libraries offer interlibrary loan services to attorneys and judges on either a free or fee basis, but only a quarter of the private law libraries do so.” It is not clear how interlibrary loan services were defined in the survey, and the survey results on the topic may not be reliable. Foster explained that many respondents misinterpreted the question, and that she eliminated “unwanted responses.” A survey of current practices is a topic for future research.
clearly. While the ABA’s Standards for Library and Information Resources consistently refer to the library’s ability to support “the school’s teaching, scholarship, research and service programs,” many state-supported academic law library mission statements do not explicitly include support of law school service activities in their primary mission. Instead, the mission statements delineate their primary mission exclusively as supporting the law school’s research and curricular programs. Because these libraries provide strong support for the law schools’ service missions, the libraries should incorporate this role as an explicit part of their own primary missions.

¶49 To the extent that the public law school embraces a uniquely public mission, its law library also will have a public mission distinguishable from those of private academic libraries. What has been clearly distinctive about the public academic law library’s mission is its relationship to external constituencies, including the bench and bar and the public. Now, as demands upon the library’s limited staff and budget dictate changes in the way the library can serve these constituencies, the public academic law library must make deliberate choices regarding its public mission.

¶50 Each public law school library will need to examine its own public mission within the context of its law school’s mission, and there will be variations in how each defines its public mission. Many questions must be addressed, including: To what extent can the library continue to provide direct, one-on-one assistance to members of external constituencies? To what extent can the library continue to take the needs of external constituencies into account in selecting material and formats for its collection? Does the library’s public mission apply equally to supporting the legal information needs of the legal community and the needs of members of the general public? Is providing a higher level of service to the law school’s alumni than to other members of the state bar consistent with the library’s public mission? Does the existence of a public law library within the same geographic area affect the public law school library’s public mission? Is active participation in resource-sharing activities part of the library’s public mission, and should the


141. Public university libraries face the same challenge. See, e.g., Brenda Bailey-Hainer & Rick B. Forsman, Redefining the Future of Academic Libraries: When the Definition of “Public Good” Changes, 31 J. Acad. Librarianship 503, 504 (2005) (“We must face the painful end of an era, necessitating a move towards fee-for-service and business models.”); Seaman, supra note 34, at 307 (noting that in response to budget cuts the University of Colorado had to eliminate free interlibrary loan to in-state libraries).
library’s resource-sharing policies extend to external constituencies? How does the library define its stewardship role on behalf of external constituencies, and for what specific areas will the library assume responsibility for stewardship?

§51 In redefining their public missions, public law school libraries also should take a regional and national view of that mission, and develop partnerships to advance the common good. John Palfrey has called for “radical collaboration” between libraries, librarians, private sector institutions, and governmental entities, and this approach is without doubt necessary as libraries move forward in creating what he defines as a new “legal information ecosystem.” Judith Wright has advocated for regional and national “cooperation in print and digital preservation projects, with libraries assuming special responsibility for their own jurisdictions” and for cooperative foreign collecting and sharing of foreign law librarians’ expertise.

§52 While such collaborative efforts among differing types of institutions are indeed necessary and important, public academic law libraries also must not overlook the common bond created by their shared public mission. Based on this commonality, public law school libraries should collaborate with one another to ensure that this public mission is fulfilled in a coordinated manner on a national basis.

§53 As a first step, leaders of public law school libraries, particularly those affiliated with large research universities, should meet to explore their common goals and challenges. This group should examine together the public mission of the public academic law library in the twenty-first century and develop a plan to collaborate in ways that will allow them to fulfill their shared public mission.

§54 Examples of areas in which these libraries can cooperate include forging cooperative collecting agreements that take into account the near- and long-term legal information needs of external constituencies, developing broader resource-sharing policies, and devising preservation plans that provide for shared stewardship of collections in all formats. Additionally, this group should participate in and make a concentrated advocacy effort on behalf of digitization, preservation, and “access to legal information” initiatives, many of which are already under way.

142. Palfrey, supra note 95, at 188, ¶ 64.
143. Id. at 178, ¶ 26. Palfrey identified three key aspects of this ecosystem: “First, we need to ensure the creation of materials that contain or describe legal information. Second, we should focus on the provision of access to these materials to our patrons. And third, we need to consider the need for reliable preservation over time of these materials.” Id.
144. Fitchett et al., supra note 122, at 97–98, ¶ 17.
¶55 Wright has suggested ways in which academic law libraries might cooperate not only with one another, but also with their university libraries.146 While this strategy clearly applies to both private and public academic law libraries, the state-supported university library’s initiatives will be crafted within the context of the university’s public mission and will, therefore, provide opportunities for the affiliated law library to contribute to that mission. The university libraries at many public research universities are already far along in regional collaboration and their law libraries should seize the opportunity to become involved in existing projects.147

Conclusion

¶56 As state funding for public higher education diminishes, public law schools are moving toward a model of financial self-sufficiency. As they do so, they strive to articulate their continuing public missions. While the missions of public law schools and private law schools may share common goals—educating lawyers who will serve the citizens of the state and broader community; educating students who will serve as local, state, national, and world leaders; engaging in research and service activities to effect legal reform and solve policy problems—public law schools identify a higher level of responsibility for serving the citizens of the state and broader community, and a higher level of accountability in fulfilling that responsibility.

¶57 Public academic law libraries must examine and redefine their public missions within the context of the law school’s mission. The libraries contribute to fulfilling the law school’s public mission by supporting the law school’s curricular, research, and service missions. The library directly educates students by engaging in legal research instruction. The public law school library also serves the common good by participating in resource-sharing programs and by providing stewardship for resources. Additionally, providing the legal community and members of the public access to the library’s services and collections is one of the most visible and easily understandable ways in which the law school provides service to the broader community.

¶58 The public law school library’s relationship with external constituencies is becoming increasingly complex as financial and staff resources are becoming strained and collections are changing in both format and scope. The library must consider the extent to which it can serve these constituencies, and articulate its mission clearly with respect to this group. The public academic law library also

must determine the extent to which other activities, particularly resource sharing and stewardship, are part of its public mission. Finally, public law school libraries, recognizing their common public mission, should collaborate to fulfill that mission.
Forensic Bibliography: Reconstructing the Library of George Wythe

Linda K. Tesar**

The Wolf Law Library at the College of William and Mary initiated a project to recreate the library of George Wythe, the founding father of American legal education. A relatively small number of Wythe’s books are still extant today; for some volumes, there is strong documentary evidence to prove conclusively he owned specific editions of particular titles. Additionally, four bibliographies with varying levels of substantiating information provide insight into the contents of Wythe’s library. Examination of these sources launched an excursion into bibliographic history and rare book collecting that illuminates the difficulties in attempting to establish the exact editions contained in a historical personal collection. The project expanded the known contents of George Wythe’s library and altered the law library’s existing collection development policy to accommodate the new discoveries.

¶ 1 At the College of William and Mary, much institutional pride derives from the fact that the law school’s history traces back to George Wythe, the first law professor in the country and one of the nation’s preeminent founding fathers. History, though, has unkindly forgotten many of Chancellor Wythe’s most important contributions—both to our fledgling nation and to the beginnings of university-based legal education. Wythe taught a who’s who gallery of statesmen from Thomas Jefferson to John Marshall to Henry Clay, and some writers have suggested that no

* © Linda K. Tesar, 2013. This is a revised version of the winning entry in the open division of the 2012 AALL/LexisNexis Call for Papers Competition. An earlier draft of this paper was submitted in a seminar class at William and Mary Law School taught by Professor Warren Billings. Portions of the paper, particularly the biographical section, are similar to those in a paper entitled “George Wythe's Library: The Man and Books That Shaped Virginia Law,” delivered at the 2011 Virginia Forum. My thanks go to Warren Billings for his wise counsel and suggestions; to Jim Heller, Fred Dingley, and Stephen Blaklock for their comments on various drafts of this paper; and to Andy Howard and Sean Renaghan for their help in taming the Wythe Collection spreadsheets.

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1. Among those who shared the magic of Wythe’s teaching were Thomas Jefferson, third president, secretary of state, minister to France and governor of Virginia; John Marshall, chief justice of the United States; Henry Clay, secretary of state, speaker of the House of Representatives and United States senator from Kentucky; Littleton W. Tazewell, United States senator and governor of Virginia; John Brown, one of the first two United States senators from Kentucky; and St. George Tucker, John Coalter and Spencer Roane, justices of the Virginia Supreme Court.

other law professor can claim a similar level of success if that success is measured by the careers of his students. In his own time, Wythe enjoyed a reputation as a man of impeccable character and judgment who amassed a law library noted for its size and depth. The natural response of a librarian to having such an educational luminary in the organization’s past is to discover as much as possible about that person’s library and, if the means present themselves, to re-create it. What follows, then, is an account of the effort to re-create George Wythe’s library at the College of William and Mary’s Wolf Law Library: the sources, the questions, the decisions, and the books themselves. The discussion will elaborate on Wythe’s history, illuminate other attempts to identify his library, and discuss the collection policy derived from the process.

2 In 2005, Kevin Butterfield, head of technical services at William and Mary’s law library, devised a plan to re-create the legal portion of George Wythe’s library and, in so doing, to honor Wythe’s groundbreaking role as a legal educator. Butterfield and the library’s director, Jim Heller, derived their purchase list for the new George Wythe Collection from an internal Colonial Williamsburg bibliographic memo written by Barbara C. Dean in 1975. While Dean’s memo provided a starting point for the development of the collection, Heller and Butterfield winnowed out many religious, literary, and scientific titles that were less likely to have been used by Wythe in his capacity as law professor or judge. The remaining seventy-two titles constituting the library’s purchasing list covered various aspects of law, ethics, history, and political science.

3 The development policy associated with the new collection enumerated three categories for purchase: books Wythe assigned to his students, books known to have been owned by Wythe, and books Wythe was known to have read or thought to have owned. Heller and Butterfield chose to focus initially on the first two categories, and within those two, gave collecting preference to treatises over case reports. Their progress in the first few years yielded a collection of thirty titles—nineteen new purchases and eleven transfers from the Wolf Law Library’s existing rare book collection. Early purchases included William Blackstone’s Commentaries on the Laws of England, Matthew Hale’s History of the Pleas of the Crown, and Daniel Call’s copy of Wythe’s own case reports, Decisions of Cases in


5. Memorandum from Barbara C. Dean, Colonial Williamsburg Found., to Mrs. Stiverson, Colonial Williamsburg Found. (June 16, 1975) (on file at Wolf Law Library, College of William and Mary) [hereinafter Dean Memorandum].

Virginia by the High Court of Chancery. In 2009, Butterfield left William and Mary, and I inherited the task of developing the Wythe Collection. With the number of purchased items on the original list steadily increasing, in early 2010 I began a project to update Barbara Dean’s list of Wythe books with new discoveries and further research.

George Wythe and His Books

¶4 The project of identifying Wythe’s library required gathering information on the man himself. George Wythe was probably born in 1726 in Elizabeth City County, Virginia. After a legal apprenticeship with an uncle, he moved to Williamsburg in 1748 to accept appointments to the clerkships of “two of the most important committees of the House of Burgesses.” During Wythe’s tenure in these positions, he also served a brief stint as Virginia’s youngest- ever attorney general and developed a legal practice, with clients who included George Washington and Richard Henry Lee. Historians believe Wythe most likely accepted apprentices before he began teaching his most famous pupil, Thomas Jefferson, in 1762, but no records verify or identify earlier students. Other clerks followed Jefferson, although their precise number is unknown.

¶5 As a well-respected leader in Virginia, Wythe represented the Commonwealth during the Revolution by participating as a delegate to the Continental Congress, signing the Declaration of Independence, and briefly attending the Constitutional Convention. Wythe also participated in the effort to rewrite Virginia’s code of laws, and presided over Virginia’s convention to ratify the Constitution. In 1778, the leaders of Virginia further recognized his legal knowledge and skills by appointing him to the newly created High Court of Chancery.

¶6 A year after Wythe’s appointment to the court, Thomas Jefferson, then governor of Virginia, convinced the board of visitors of the College of William and Mary to reorganize the curriculum and to create the chair of Professor of Law and Police (roughly the equivalent to contemporary policy or political science). With Jefferson’s influence, the board named Wythe to fill the new chair, the first of its

7. The exact date of Wythe’s birth remains unknown. Most biographies list either late 1726 or early 1727. See DILL, supra note 1, at 3.
8. Hunter, supra note 1, at 140.
10. DILL, supra note 1, at 18.
11. Hunter, supra note 1, at 142.
12. Wythe’s law clerks included James Madison, bishop of Virginia and president of William and Mary College; and St. George Tucker, Wythe’s successor as professor of law and police at William and Mary and author of a Virginia edition of Blackstone’s Commentaries. Id. at 143.
13. As Dill explains:
   The jurisdiction of a chancery court was restricted to giving relief where the common law offered none, where its remedy was imperfect, or where the common law would do an injustice to being applied in causes not intended to be comprehended by the common law. . . . [A] High Court of Chancery required men of high probity and superlative legal ability.
   DILL, supra note 1, at 41.
kind in this country and only the second created in Anglo-American law (the first was William Blackstone’s Vinerian chair at Oxford).  

¶7 In his popular classes, Wythe introduced both mock trials and mock legislatures to American legal education. His students read Blackstone, studied the English case reports, and attended biweekly lectures. Wythe is believed to have taught around two hundred students at William and Mary, the most notable of whom were future U.S. Supreme Court Justices John Marshall and Bushrod Washington. After teaching for nearly ten years, Wythe, unhappy with the direction of academic life at the College, left William and Mary in 1789 and moved to Richmond where the High Court of Chancery had relocated the same year. He lived there until his death in 1806.

¶8 The process of re-creating Wythe’s library begins with a few indisputable facts. If Wythe made an inventory of his library, it does not exist today. No body of Wythe’s papers has been found, nor has anyone identified pertinent family documents. According to his biographers, some of Wythe’s books were sold by his grandnephew before Wythe died in 1806. Wythe died childless, but he bequeathed the entirety of his library to Thomas Jefferson in an 1806 codicil to his will. The executor of that will, William DuVal, estimated the value of the collection to be “about £500.” At Jefferson’s request, Jefferson’s cousin and agent, George Jefferson, received the books from DuVal and created an inventory of the volumes before

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15. Id. See Davison M. Douglas, The Jeffersonian Vision of Legal Education, 51 J. LEGAL EDUC. 185, 186 n.3 (2001) for a brief discussion of early university legal educators. Further controversy on the primacy of Wythe’s role involves the teaching career of Tapping Reeve and the founding date of the Litchfield Law School. Many articles have been written on the topic, see, e.g., Charles R. McManis, The History of First Century American Legal Education: A Revisionist Perspective, 59 WASH. U. L.Q. 597 (1981); Steve Sheppard, An Introductory History of Law in the Lecture Hall, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, supra note 1, at 13–14; Andrew M. Siegel, “To Learn and Make Respectable Hereafter”: The Litchfield Law School in Cultural Context, 73 N.Y.U. L. REV. 1978 (1998); and the National Park Service has weighed in as well (erecting a sign at the site of Litchfield stating it was the nation’s first law school), see The Best that Is in the Old, 55 A.B.A. J. 843 (1969). Regardless of which can claim to be the first law school, Litchfield or William and Mary, Wythe was the first professor on this continent to teach law classes at a college or university.


17. Id. at 164 n.95.


19. See Hunter, supra note 1, at 145. As late as 1810, Wythe’s lecture notes were still in existence. Hunter quotes an 1810 letter from Governor John Tyler to Thomas Jefferson in which Tyler asked Jefferson to edit Wythe’s lecture notes: “[T]hey will be very valuable, there being so much of [Wythe’s] own sound reasoning upon great principles and not a mere servile copy of Blackstone, and other British commentators.” Sadly, Jefferson declined the request, citing his long absence from the legal profession, and no other trace of Wythe’s lecture notes has been found. Id.


21. B.B. Minor, Memoir of the Author, in WYTHE, supra note 3, at xi, xxxvii (“I give my books and small philosophical apparatus to Thomas Jefferson, president of the United States of America: a legacie, considered abstractlie, perhaps not deserving a place in his museum, but, estimated by my good will to him, the most valuable to him of any thing which i have power to bestow.”).

sending the collection to Monticello later in 1806. Unfortunately, the catalog created by George Jefferson did not survive.  

¶9 It is impossible to trace the location of all the books Wythe owned, but in her seminal work, *Catalogue of the Library of Thomas Jefferson*, Millicent Sowerby identified several volumes with a Wythe provenance. Existing volumes from Wythe’s bequest have been discovered within the collection Jefferson sold to the Library of Congress in 1815. These titles bear Wythe’s signature, his armorial bookplate, or manuscript notes identifying Wythe as the owner. The Library of Congress today owns several legal, political, and historical volumes as well as a few religious texts with an unquestionable Wythe provenance. Libraries across the Commonwealth of Virginia hold other fugitive items. For example, the John D. Rockefeller, Jr., Library in Colonial Williamsburg owns John Adams’s *Thoughts on Government Applicable to the Present State of the American Colonies*, which is inscribed “John Adams to George Wythe.” The Library of Virginia holds at least four different Virginia session law titles with Wythe’s signature on the title page, and the University of Virginia, the College of William and Mary, and the Virginia Historical Society each own volumes with Wythe’s distinctive bookplate or his manuscript signature. In total, more than fifty of Wythe’s actual books have been located in existing collections.

¶10 Identifying the titles Wythe authored or coauthored provided another ready source of volumes for the Wythe Collection. In 1795, Wythe published a collection of case reports, *Decisions of Cases in Virginia by the High Court of Chancery*, to document his decision making and, in part, to rebut those decisions that the Virginia Court of Appeals had overturned. B.B. Minor republished these reports in 1852 and expanded them to include all known case reports by Wythe. This included several cases published individually in pamphlet form from 1797 to 1798. Wythe also participated on the committee to revise the Virginia code of laws in 1776, and presumably owned a copy of the resultant report, *Report of the Committee of Revisors Appointed by the General Assembly of Virginia in 1776*. Similarly, Wythe collaborated on two compilations of Virginia statutes published in 1769 and 1785.

¶11 To move beyond Wythe’s extant books and his publications required a wider focus, and it was at this point that the hunt began and the study turned to the bibliographic record. Somewhat surprisingly, given the acknowledged scholarly neglect surrounding Wythe, at least four bibliographies devoted to the contents of Wythe’s library have been created. Examining them propelled the project into the realm of bibliographic detection. Each bibliography provided an illuminating glimpse into the depth of research required to reconstitute a library such as Wythe’s, and demonstrated that each successive researcher endeavored to build upon the previous efforts and to expand the known scope of Wythe’s library. Each of these bibliographies is discussed in detail below.

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Goodwin’s Bibliography

¶12 The oldest bibliography dates from 1958, when Mary R.M. Goodwin, a senior researcher at the Rockefeller Library, compiled it as part of her study for Colonial Williamsburg, *The George Wythe House: Its Furniture and Furnishings.*

Goodwin identified fifty-four titles in three categories: law books, journals, and miscellaneous. She relied primarily on Sowerby’s *Catalogue*, which described conclusive marks of Wythe’s ownership on ten volumes: nine contain the bookplate of George Wythe and one features his signature. Sowerby attributed a further eight to Wythe’s probable ownership by comparing Wythe’s manuscript notes in volumes with his bookplate to other volumes from Jefferson’s collection. Some of Sowerby’s determinations were less than definitive; for example, she described a Library of Congress copy of *Cases Argued and Decreed in the High Court of Chancery* as containing manuscript notes which “could be in the handwriting of George Wythe.”

Although no other distinguishing marks point to Wythe’s ownership, Sowerby’s attributions are logical and fit within the known habits and tastes of Wythe. Goodwin gleaned two other titles from Sowerby: parallel Greek and Latin editions of *The Iliad* and *The Odyssey*. Sowerby, however, makes no mention of Wythe in her descriptions of Homer’s works.

¶13 Goodwin next turned to records of eighteenth-century merchants to determine what book purchases Wythe may have made from any of them. She identified titles Wythe bought from the Williamsburg Printing Office or ordered from John Norton and Sons of London. Her sources included the *Virginia Gazette Daybooks, 1764–1766* and Frances Mason’s compilation of company correspondence, *John Norton & Sons, Merchants of London and Virginia*. Yielding twenty-four entries on Goodwin’s list, these two sources prove the usefulness of consulting merchant records to discover book ownership information. A typical letter quoted from the John Norton correspondence follows:

To
John Norton Esq.
Merchant in London

Dear Sir:

I beg the favour of you to get the under-mentioned books, and send them by an early opportunity to

Your humble servant

G. Wythe
Williamsburg
7th May 1770

Books to be sent to G. W.
Andrews’ reports
Atkyns’ reports

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27. See Goodwin, *supra* note 22, at xlv. Goodwin wrote concerning *The Iliad*: “Jefferson had six editions of Homer—none identified as Wythe’s—but we know that an edition was in Wythe’s library.” Regarding the inclusion of *The Odyssey*, Goodwin noted: “Not identified as Wythe’s— but a copy of the work was undoubtedlly in Wythe’s library.”
Bunbury’s reports
Burrow’s reports
Fortescue’s reports
Foster’s reports
Melmoth’s reports
Shower’s cases in parliament
[Enclosure]

Be pleased to add to the catalogue in the letter the journals of the house of commons since 1766.

G. W.
8:May 1770

Aside from substantiating the inclusion of these titles in Goodwin’s bibliography, the letter proves invaluable in reconstituting Wythe’s library for a number of other reasons. First, it illustrates the depth of Wythe’s collection. The letter also demonstrates that the records of Wythe’s time frequently contain only general bibliographic information, and highlights the need for the researcher to rely on other clues in the source material. To identify specific editions of the works in question, Goodwin resorted to library union lists and bibliographies of law to identify any reports published or in print in 1770 under the appropriate author’s name. For example, a search of WorldCat for “Andrews’ reports” reveals that only the 1754 compilation of cases reports, *Reports of Cases Argued and Adjudged in the Court of King’s Bench, in the Eleventh and Twelfth Years of the Reign of His Present Majesty King George the Second*, was published before 1770 with “Andrews” as an author. Without the date of the letter itself, two later editions might have contended with the 1754 edition for inclusion in a Wythe library.29

¶14 For the ten remaining titles in her list, Goodwin explored the special collections of the Library of Virgina30 and consulted the 1937 dissertation by W. Edwin Hemphill, “George Wythe, the Colonial Briton.”31 The Hemphill titles relied upon notes written by Thomas Jefferson in his commonplace book while studying law under Wythe.32 Hemphill notes that the pertinent portion in Jefferson’s book, written between 1774 and 1777, was based, in keeping with Jefferson’s growing interest in politics, upon more philosophical legal materials, including Lord Kames’ fourteen Historical Legal Tracts (first published in 1758), Sir John Dalrymple’s Essay towards a General History of Feudal Property in Great Britain (London, 1757), and Hale’s History of the Common Law (London, 1716).33

29. Editions were published in Dublin in 1791 and London in 1792. While less likely to have been purchased by Wythe so late in his career, without the date of the letter their existence before his death in 1806 would have reduced the certainty that he owned the 1754 edition.
32. A commonplace book is comparable to a modern student’s notebook.
Goodwin cross-checked these volumes against Sowerby’s catalog and reasoned that Wythe must have owned copies, perhaps in some cases earlier editions than Jefferson’s.

§15 The use of Jefferson’s commonplace book as a resource for Wythe’s library raises a few questions. The first is what impact should the dates of Jefferson’s notes have upon the inclusion of these titles in the Wolf Law Library’s George Wythe Collection? According to Gilbert Chinard, in his introduction to *The Commonplace Book of Thomas Jefferson*:

[1] It seems that we may assume with reasonable certainty: that the bulk of the Commonplace Book represents notes taken by Jefferson on law, political science, and religion during his formative years; that there is little doubt that the first hundred pages or so, containing some 550 entries, were compiled at a time when Jefferson, either a student of law or a young lawyer, was primarily interested in questions of legal procedure; that the articles on feudal laws, the survey of the federative system of government [sic], the extracts from Montesquieu and Beccaria, the history of the Common law (articles 550 to 882) were written after 1774 and not later than 1776 . . . .

§16 The second question is at what point, if any, did Jefferson’s entries no longer reflect the suggestions and tutelage of Wythe? Jefferson studied law under Wythe from 1762 to 1767, yet Goodwin’s work on the Wythe house included titles generally thought to have been noted in Jefferson’s commonplace book a decade later. Based on this evidence, would it be reasonable to assume that Wythe also owned these titles? The third question has to do with collection development—should the Wolf Law Library include these titles if no other corroboration of Wythe’s ownership could be uncovered?

**Dean’s Bibliography**

§17 Nearly two decades after she compiled it, Goodwin’s short bibliography became the genesis of the original source for the Wolf Law Library’s collection development plan, Barbara C. Dean’s 1975 bibliographic memo. To Goodwin’s analysis, Dean added titles revealed by scouring newer research than that available in 1958, and her additions further illustrated the need to pursue a variety of sources in the written record. Dean’s search comprehended the entire range of Wythe’s known tastes in reading. She divided 189 titles into six categories of association: (1) titles known to have been owned by Wythe; (2) titles Wythe purchased from the *Virginia Gazette* office or ordered from John Norton and Sons; (3) titles noted in the commonplace books of Wythe’s students (both his William and Mary students and his law clerks) and presumably assigned by Wythe; (4) titles known to have been read by Wythe; (5) titles written or collaborated on by Wythe; and (6) other titles illustrative of Wythe’s time.

§18 In her first section, Dean enlarged upon Goodwin’s entries by adding some of Wythe’s published cases and combing through Wythe’s correspondence as reported in the early volumes of *The Papers of Thomas Jefferson*. Of the forty-six titles described in this section, twenty-two derived from Goodwin’s research as dis-

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35. Dean Memorandum, *supra* note 5.
cussed above. Dean identified two titles that Sowerby connected to Wythe and one that Hemphill linked to him but which Goodwin overlooked. Dean also included seven titles representing individual case reports from Wythe’s decisions as chancellor on Virginia’s High Court of Chancery. Wythe’s letters to and from Jefferson indicate that Wythe received eight other publications in a shipment from Jefferson while the latter was minister to France.36 Dean verified another title by searching contemporaneous newspapers and discovering that Wythe advertised in 1771 in the Virginia Gazette seeking the return of a missing volume from a set of books:

> I miss a third volume of Burrow’s Reports. Whether it was lent out I forget. Perhaps some Gentleman’s servant carried it from the Capitol by mistake last October court. Whoever will let me know where it is, I shall be obliged to him for the information.

George Wythe37

¶19 Dean also found it helpful to delve into the special collections of the University of Virginia, where she uncovered three volumes containing the bookplate of George Wythe.38 The collections of Colonial Williamsburg yielded a copy with Wythe’s signature, and from the Botetourt Inventory,39 Dean included the entry “three journals from Lord Botetourt’s estate.”40 Unfortunately, Dean provided no other information to pinpoint the latter title.

¶20 Dean’s next section, titles Wythe purchased, followed the same research as Goodwin and added four new titles—three from the Virginia Gazette Daybooks which for unknown reasons Goodwin did not include, and one from the correspondence between Jefferson and Wythe. More interestingly, Dean differed from Goodwin on the identity of three items for which they listed the same sources. The disagreement highlights one of the fundamental problems in any effort to reconstitute a library where the endeavor rests upon incomplete bibliographic information.

¶21 Records from the Williamsburg Printing Office indicate that Wythe purchased “Franklin’s Pamphlet” in February of 1764.41 Goodwin concluded that this notation possibly represented Benjamin Franklin’s Cool Thoughts on the Present Situation of our Public Affairs, published “ca. 1763.”42 Dean identified the “Franklin Pamphlet” as The Interest of Great Britain Considered, With Regard to Her Colonies, and the Acquisition of Canada and Guadaloupe. Searching Charles Evans’s

37. Notice, Virginia Gazette (Ind), Feb. 7, 1771, at 4. Interestingly, Dean did not note, as Goodwin did, that Wythe ordered this title from John Norton. See Goodwin, supra note 22, at xlv; John Norton & Sons, supra note 28, at 133–34.
38. Dean Memorandum, supra note 5, at 4. One of these verifies Goodwin’s assumption that Wythe must have owned a copy of Homer’s Iliad.
39. The Botetourt Inventory refers to the inventory of items owned by Norborne Berkeley, Baron de Botetourt (1718–1770). The published version of this, COLONIAL WILLIAMSBURG FOUND., AN INVENTORY OF THE CONTENTS OF THE GOVERNOR’S PALACE TAKEN AFTER THE DEATH OF LORD BOTETOURT (1981), appeared six years after Dean’s memo. Presumably, Dean worked with the unpublished manuscript.
40. Dean Memorandum, supra note 5, at 6.
41. Goodwin, supra note 22, at xlv.
42. Id.
monumental Bibliography of Early American Imprints justifies Dean’s conclusion. While Evans did attribute Cool Thoughts to Franklin, he indicated the first date of publication as being April 26, 1764, a few months too late to support Goodwin’s supposition. What cannot be determined is the precise edition of the Franklin work. Dean listed the original publication information as London, 1760. The Interest of Great Britain Considered was indeed published in London in 1760, but reprints followed in Dublin and Philadelphia the same year, and a second edition appeared in London in 1761. Unfortunately, it is impossible to definitively answer whether Wythe owned one of the London editions, the one from Dublin, or the one from Philadelphia.

¶22 The second disputed title derived from Wythe’s July 1751 purchase of “Puffendorf’s Introduction.” Goodwin described that purchase as the 1732 French edition, Introduction a l’Histoire Generale et Politique de l’Univers: où l’on Voit l’Origine, les Révolutions, l’Etat Present, & les Interêts des Souverains, whereas Dean entered the volume as the 1748 English title, An Introduction to the History of the Principal Kingdoms and States of Europe. Goodwin based her opinion on the existence of the French title in Sowerby’s catalog of Jefferson’s library. Presumably Dean chose the publication nearest in time to the date of Wythe’s purchase. She may also have determined that it was more likely that Wythe owned the English edition.

¶23 The third disputed entry centered on an order Wythe placed with John Norton and Sons in the letter dated May 8, 1770. Wythe asked Norton to send him “Fortescue’s reports.” Goodwin interpreted this to refer to the second edition of Sir John Fortescue’s De Laudibus Legum Angliae, published in 1741. Again her choice seems to rest upon the existence of this title in Jefferson’s library. Dean, perhaps understanding that Goodwin’s choice would more accurately be described as a treatise rather than case reports, chose to list Fortescue’s Reports of Select Cases in All the Courts of Westminster Hall from 1748. For this listing, Wythe’s own designation of “reports” strongly suggests the case reports volume rather than the treatise.

¶24 Dean next turned to a variety of sources to create the section on books Wythe assigned to his students, and it comprises the largest single portion of her bibliography. It also underscores the rewards of consulting the papers and manuscripts of persons contemporary with the library’s owner. Of the eighty-seven

43. The WorldCat record for Franklin’s Cool Thoughts contains the bibliographic note: “Attributed to Benjamin Franklin by Evans. First published as a supplement to the Pennsylvania journal, Apr. 26, 1764.” In this note, “Evans” refers to the fourteen-volume opus, Charles Evans, American Bibliography (1941–1959).

titles, five duplicated entries elsewhere in Dean’s memo, and fourteen derived from Goodwin’s list. From the remaining total, Dean discovered forty-one in John Marshall’s Law Notes, published in the first volume of The Papers of John Marshall.\footnote{1} In preparing the chief justice’s papers for publication, the editors of the Marshall papers transcribed Marshall’s notations and listed the specific titles and precise editions that Marshall used. These notes date to John Marshall’s brief adventure as one of Wythe’s law students at William and Mary in 1780, and probably represent books Wythe owned and recommended.\footnote{Id. at 40.}


In his actual readings under Wythe, we cannot place exactly the books that Jefferson read. But we do know that he studied the statutes of English law, the precedents of the common law, the famous Coke on Littleton, and the laws which had been enacted by the Burgesses of Virginia since 1619. . . . . . . . We do know that Jefferson studied the following works . . . . Harrington’s Oceana, Sidney’s Discourses on Government, Filmer’s Patriarcha, Beccaria’s Crime and Punishment.\footnote{William Clarkin, Serene Patriot: A Life of George Wythe 42 (1970).} Unfortunately, Clarkin failed to supply supporting bibliographic citations for his authoritative prose, making it impossible to fully identify his sources. Deductive reasoning suggests that Clarkin used Jefferson’s commonplace book for all of the titles. However, as noted above, the dates of Jefferson’s entries spanned a wide range, only part of which would have coincided with his legal studies under Wythe. In particular, the editor of the commonplace book, Chinard, dated the Montesquieu and Beccaria entries to after 1774.\footnote{Commonplace Book of Thomas Jefferson, supra note 34, at 14.} With such evidence, their place in Wythe’s library remains somewhat suspect.

\%26 Dean’s fourth and fifth categories contained books Wythe read and works he wrote or collaborated on, respectively. All of the titles in the latter category have already been mentioned. Of the books Wythe read, Dean derived seven from a biography of Henry Clay in which the author described Wythe’s chancery decisions: “Wythe fortified legal points with Juvenal’s Satires, Quintilian’s Rhetoric and Oratory, and the Whig Essays of the great John Locke; with Rutherford on Grotius, Archimedes on mathematics, Tooke and Purley on grammar.”\footnote{Bernard Mayo, Henry Clay: Spokesman of the West 26 (1937).} Additionally, Dean

\begin{thebibliography}{9}
\item 1 The Papers of John Marshall 37–45 (Herbert A. Johnson et al. eds., 1974).
\item Id. at 40.
\item Marie Kimball, Jefferson: The Road to Glory, 1743–1776 (1943); Nathan Schachner, Thomas Jefferson: A Biography (1957).
\item Commonplace Book of Thomas Jefferson, supra note 34, at 14.
\item Bernard Mayo, Henry Clay: Spokesman of the West 26 (1937).
\end{thebibliography}
added works by Homer and Euripides based on a similar discussion of Wythe’s decisions in Clarkin’s biography.\footnote{Clarkin, supra note 49, at 207; Dean Memorandum, supra note 5, at 15.}

\footnote{Clarkin, supra note 49, at 207; Dean Memorandum, supra note 5, at 15.} ¶27 Wythe’s correspondence with Jefferson provided the final three titles in the section comprising books Wythe read. In a letter to Jefferson dated April 6, 1775, Wythe wrote, “I have looked cursorily over all the charters in my office. Of those sent by Mr. Montagu the three which seem to concern the matter you are considering are the same that are in the appendix to Mr. Stith’s history . . . .”\footnote{Letter from George Wythe to Thomas Jefferson (Apr. 6, 1775), reprinted in 1 The Papers of Thomas Jefferson, supra note 36, at 163, 163.} The editors of Jefferson’s papers identified “Mr. Stith’s history” as William Stith’s The History of the First Discovery and Settlement of Virginia, Being an Essay Toward a General History of This Colony.\footnote{Id. at 164.} In another letter to Jefferson, dated July 10, 1788, Wythe referred to the deliberations of Virginia’s constitutional convention.\footnote{Letter from George Wythe to Thomas Jefferson (July 10, 1788), reprinted in 13 The Papers of Thomas Jefferson, supra note 36, at 329.} From this reference, Dean added to her bibliography the Journal of the Convention of Virginia. While this work itself was not mentioned in Wythe’s letter, Wythe did participate in the convention as Chairman of the Committee of the Whole, and it seems reasonable to include a copy of the Journal in his library. Dean found the final title in her list of books Wythe read in a letter Wythe sent on April 22, 1790: “I have not been able . . . to obtain the writings of Phlegon mentioned by Ferguson in his tables and tracts.”\footnote{Letter from George Wythe to Thomas Jefferson (Apr. 22, 1790), reprinted in 16 The Papers of Thomas Jefferson, supra note 36, at 368.}

¶28 The last section of Dean’s bibliography enumerated standard law books of the period and derived in whole from Alan Smith’s dissertation, “Virginia Lawyers 1680–1776: The Birth of an American Profession.”\footnote{Smith, supra note 48.} Dean, however, lacked proof that Wythe owned any of these works. A few of the titles have been corroborated by more recent research, but for the majority of them there is no evidence that they were owned by Wythe. Some represent additional works by authors already included in Wythe’s library such as Sir Geoffrey Gilbert, Sir Matthew Hale, and Henry Homes, Lord Kames. Before we could decide to add these to the Wythe Collection several questions needed to be resolved: Did any circumstances exist in which the fame of the author, the widespread ownership of a title, or Wythe’s known collection preferences would override the need for authoritative proof? Or would the absence of strong evidence automatically disqualify these titles from inclusion in Wythe’s library?

The Jefferson Inventory

¶29 Help was forthcoming in a recently published bibliography that changed the landscape of the research. Endrina Tay, a librarian at Monticello’s Jefferson Library, and Jeremy Dibbell, of the Massachusetts Historical Society, published an article in January 2010 detailing their 2008 discovery of a manuscript list in the
hand of Thomas Jefferson. They determined that Jefferson compiled the list to record decisions he made regarding the distribution of Wythe’s library. Jefferson’s inventory consists of twelve pages—four blank and eight containing brief manuscript notations for 338 titles representing 649 volumes. No precise bibliographic information—date, publisher, or place of publication—accompanies any of Jefferson’s entries. But while the lack of detail caused problems in the effort to reconstitute Wythe’s library, the inclusion of the new works more than doubled the possibilities for a Wythe Collection purchase list. The discovery of the new titles also underscored the need for our collection development plan to distinguish between varying levels of bibliographic credibility.

¶30 The contents of Jefferson’s inventory provide the best evidence yet of George Wythe’s wide-ranging interests. Law reports, legislative journals, and legal treatises constitute approximately one-third of the entries. Another large portion is devoted to Greek and Roman classics of history, literature, and philosophy, with Plato, Aristotle, Homer, Herodotus, and Julius Caesar all represented. Wythe owned scientific works such as “Goldsmith’s Animated Nature. 4 v. 8°.” and “Dobson’s Commentary on fixed air. 8°.” He collected volumes on military engineering (“Plans of forts in America 8vo.”) and mathematics (“Emerson’s Algebra. 8vo.”). Wythe’s interests also encompassed English literature and religion—he held works by Shakespeare, John Milton, and Jonathan Swift, and collected multiple versions of the Bible in Greek, Latin, and English.

¶31 Unfortunately, Jefferson’s lack of detail in listing the contents of Wythe’s library means that many entries require substantiating evidence for the identification of precise titles or editions. For example, a typical entry, “Brydall’s conveyancer. 8vo.” requires the researcher to examine all possible legal titles published in England or the United States before 1806 by an author named Brydall with conveyancer in the title and produced in an octavo (8vo.) edition. If more than one was published in the appropriate time span, the collector would be forced to try

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59. Tay and Dibble describe this as “a manuscript book catalog that Jefferson maintained from the late 1770s through 1812, now preserved in MHS’s Coolidge Collection of Thomas Jefferson Manuscripts.” Id.
60. Id. Jefferson gave items from Wythe’s library to his nephew, Dabney Carr, Jr.; his grandson, Thomas Jefferson Randolph; his granddaughters, Anne and Ellen Randolph; his daughter, Martha Jefferson Randolph; her husband, Thomas Mann Randolph; his daughter Maria’s husband, John Wayles Eppes; James Ogilvie, his grandson’s tutor; and James Dinsmore, a joiner at Monticello. Jefferson also kept 155 titles for himself. The majority of the legal titles were either sent to Carr or kept by Jefferson.
61. Id.
62. *Jefferson’s Inventory, supra* note 44.
63. Id., at 6, 7.
64. Id. at 6.
narrowing the field through further research. In this particular case, two octavo editions of a plausible book by Brydall came to light: John Brydall’s *Ars transferendi dominium: or, A Sure Law-Guide to the Conveyancer*, published in London in 1697 and 1702. The existence of Wythe’s bookplate in a 1697 copy owned by the University of Virginia answered the question of which edition Jefferson received from Wythe.

¶32 Deciphering other titles from the Jefferson inventory is more complicated. In fact, many of Jefferson’s descriptions are cryptic in their brevity and defy recognition. A particularly intriguing but vague example is “Grotius.”66 Multiple contenders could be described by this modest entry and little recommends one over another.67 Some help came from Jeremy Dibbell, who made an attempt to identify every title in Jefferson’s inventory in an extensively annotated version on *LibraryThing*.68 Where possible, Dibbell indicated all publication and edition information. When guesswork entered the equation, Dibbell clearly noted which items could not be specifically identified. For example, Dibbell recorded the entry “juris civilis. fol.” and noted, “Precise work/edition unknown. Possibly an edition of Denis Godefroy’s *Corpus Juris Civilis*.”69

¶33 To translate Jefferson’s notations into titles and editions, Dibbell presumably relied upon Sowerby, WorldCat, and the *English Short-Title Catalog*.70 It also appears that he consulted Jefferson’s correspondence, various auction records, and Thomas Mann Randolph’s probate inventory.71 Unfortunately, perhaps due to the nature of *LibraryThing*, the only information regarding the resources for the list appears on the profile page: “This LT catalog has been created using Jefferson’s list of Wythe books, with additional books drawn from other Wythe correspondence, invoices and orders.”72 The lack of more specific documentation obviously raised a crucial question for the Wythe Collection: would the library need to re-create Dibbell’s research or otherwise validate his determinations in order to include the titles from the *LibraryThing* bibliography?

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67. I performed an advanced WorldCat search for works by Grotius on April 2, 2010, using the following parameters: author = Grotius, publication date = -1806, format = book, material = not microform. The search resulted in 4417 records. A similar search in the *English Short-Title Catalog* on Feb. 26, 2012—word(s) from author = Grotius—revealed 152 titles.


70. ESTC: ENGLISH SHORT-TITLE CATALOG, http://estc.ucr.edu (last updated Sept. 16, 2010). According to the ESTC web site:

- The English Short-Title Catalog (ESTC) is a vast database designed to include a bibliographic record, with holdings, of every surviving copy of letterpress produced in Great Britain or any of its dependencies, in any language, worldwide, from 1473–1800. In order to increase access to these items, we include references to microfilm, digital, and other facsimile versions.

71. See Tay & Dibbell, supra note 58.

72. Member: GeorgeWythe, supra note 68.
Brown’s Bibliography

¶34 The last bibliography the Wythe Collection research project uncovered was the unpublished 2009 manuscript by Bennie Brown of the Bookpress, Ltd., an antiquarian bookshop in Williamsburg, Virginia.73 Brown’s bibliography combined the earlier research of Goodwin, Dean, and Tay and Dibbell with extensive annotations. Unlike Dean and Goodwin, Brown created no subcategories for the four hundred and sixty-six entries on his list. Titles are arranged alphabetically by author. Rather than relying upon only one source for each title, Brown’s information incorporated all known sources for a particular title. For example, his entry for the Reports of Cases Adjudged in the Court of King’s Bench by James Burrow enumerated six different sources, including Wythe’s letter cited above, his advertisement in the Virginia Gazette, the entry from the Jefferson inventory, and a reference in John Marshall’s Law Notes. Brown identified at least fifty titles not included in earlier bibliographies or in the Jefferson inventory, resulting from his search through the original documents cited in the other bibliographies as well as his analysis of Wythe’s case reports. Brown’s knowledge of antiquarian books and the availability of computerized resources also played a part in the creation of his expanded list.

¶35 Brown found many new titles by revisiting the papers of Wythe’s students. By examining the manuscript copy of John Marshall’s law notes74 instead of relying upon the published extract included in The Papers of John Marshall,75 Brown discovered eighteen additional titles Marshall used during his studies at William and Mary. These new titles included twelve collections of case reports and six treatises such as George Booth’s The Nature and Practice of Real Actions and Sir Geoffrey Gilbert’s The Law of Evidence. Similarly, Brown found eight extra titles by returning to Jefferson’s correspondence, his commonplace book, and his more recently published literary commonplace book.76

¶36 Perhaps most interestingly for the purposes of understanding Wythe’s usage of his library, Brown scoured Wythe’s writings to unveil the sources Wythe referenced in his case reports. The majority of Brown’s notes from Wythe’s cases corroborate previously known titles, but Brown did uncover seven new titles, including Jean Domat’s The Civil Law in its Natural Order, Henry Blackstone’s Reports of Cases Argued and Determined in the Courts of Common Pleas and Exchequer Chamber, and Miguel de Cervantes’s Don Quixote.

¶37 Brown further expanded his bibliography by visiting various libraries in the Commonwealth of Virginia and locating a few more of Wythe’s extant books in

75. 1 PAPERS OF JOHN MARSHALL, supra note 45, at 40 (“The extract printed here covers approximately one-fourth of the text of the law notes, from the beginning of the manuscript to the end of the topic ‘Condition.’”).
their special collections. He also found a title, John Locke’s An Essay Concerning Human Understanding, in the personal collection of bookseller William Reese, and discovered Wythe’s name in the subscriber lists for a couple of titles, including William Waller Hening’s The New Virginia Justice. Other titles new to the list include eighteenth-century newspapers from Richmond and Williamsburg.

Revising the Collection Development Policy

¶38 Armed with the information gathered from the four bibliographies and their sources, I undertook a revision of the development policy for the Wolf Law Library’s George Wythe Collection. Combining the sources yielded a total of nearly 500 titles covering a wide array of subjects. After thoughtful deliberation, I settled on three subject categories: (1) law (treatises, reporters, and legislative journals); (2) political science, history, and philosophy; and (3) religion, literature, and science. For purchasing purposes, the library gives priority to the legal titles and those in the political science, history, and philosophy section as those most closely supporting a curriculum of “law and police.” However, as Brown’s research demonstrates, Wythe frequently laced his legal opinions with quotes from works of literature, science, and religion, which allows for the occasional purchase of items from that category.

¶39 Within each of the categories, titles are divided by a system analogous to the burden of proof required in civil and criminal trials. The “beyond a reasonable doubt” titles—where Wythe’s actual books still exist—form the section with the greatest desirability. A second tier of books—the ones for which the documentary evidence of Wythe’s ownership is conclusive or “clear and convincing”—includes those volumes to which Wythe subscribed and the few titles precisely identified in newspapers or auction records. Items meeting a “preponderance of the evidence” standard that indicate Wythe ownership follow next in a third tier. These derive from the notes and records of Wythe’s students and have some measure of specificity as to edition and title. A fourth tier consists of those titles with “some credible evidence”; these include entries from Jefferson’s inventory for which precise edition and title information is lacking. Finally, the last tier contains titles that do not meet the burden of proof—Dean’s section of legal works, “Books Representative of Wythe’s Time”; and later titles from Jefferson’s commonplace book that could not be verified by present research.

¶40 The new development plan was written in June 2010.78 Recent additions address policies for titles quoted by Wythe in his case reports and books representative of eighteenth-century law libraries. The plan attempts to address questions raised by the examination of the four bibliographies and, in combination with an extensive spreadsheet of the titles and categories, provides the library with the tools necessary to re-create George Wythe’s library.

77. Reese’s copy has Wythe’s signature on the title page.
78. This development plan, which is included infra as the appendix, originated as an assignment for the Rare Book School course, Law Books: History and Connoisseurship, in June 2010. My thanks go to Michael Widener for his excellent suggestions and guidance.
After ninety-seven purchases (since 2009) and the transfer of forty-six titles from the existing rare book collection after the discovery of Jefferson’s inventory, the Wythe Collection at the Wolf Law Library now contains 174 titles. The library counts among its Wythe treasures Sir Robert Brooke’s *La Graunde Abridgment; The Works of John Locke*; and a first edition, first impression of John Marshall’s *Life of George Washington*. Additionally, a recent agreement with the Earl Gregg Swem Library—the main library at the College of William and Mary—transferred on permanent loan three of Wythe’s actual books: volume 6 of *The Reports of Sir Edward Coke* (with Wythe’s bookplate); Hugh Blair’s *Lectures on Rhetoric and Belles Lettres* (inscribed to Wythe from Thomas Lee Shippen); and *The Proceedings of the Convention of Delegates and Corporations in the Colony of Virginia, July, 1775* (with Wythe’s signature on the title page). Development of the collection proceeds as funds allow, and a newly cleaned, early twentieth century painting of George Wythe now presides over an expanded display of his re-created library in the law library’s Nicholas St. George Rare Book Room. A new project inspired by the *Thomas Jefferson’s Library* exhibit at the Library of Congress is in the initial stages of exploration. If successful, the project will create a separate display room and permanent exhibit devoted to George Wythe, his teaching career, and the books within his library.

Appendix
Development Plan for The George Wythe Collection
The Wolf Law Library
College of William and Mary

The Wolf Law Library’s main collecting goal in regard to rare materials focuses on replicating the library of William and Mary professor George Wythe (1726–1806), the first law professor in the nation. Wythe assembled one of the most important libraries in eighteenth-century Virginia. Its impressive array of Western classics, history, philosophy, and law had a direct impact on the development of Virginia law and the law of the new nation.

The George Wythe Collection focuses on items of a legal nature; however, the library also actively collects Wythe's holdings in history, philosophy, and political science. The chancellor’s entire library consisted of approximately 470 titles. Roughly half of those titles fall outside the primary goals of our collection, but they may be considered in special circumstances.

Collection Priorities

1. **Titles showing a definite connection to George Wythe:** The library makes every attempt to duplicate the exact edition and impression of all items with a proven connection to Wythe. This group includes titles written by Wythe; those he collaborated upon; volumes known to possess Wythe's signature, his armorial bookplate, or inscribed notes attributed to him; and those works that include Wythe's name among the published list of subscribers. References for the identification of these titles include


2. **Titles identified in Jefferson’s manuscript list:** The library collects all titles identified by Thomas Jefferson’s manuscript list detailing his dispersal of George Wythe’s library. Where the specific edition Wythe owned is unknown, the library limits consideration to those works published before Wythe’s death in 1806 and prefers those titles/editions known to have been owned by Jefferson (see Sowerby) or the recipient he listed. If no specific edition/title information exists for these copies, the library prefers those editions/titles identified in contemporary Virginia libraries. When none of these options identifies an edition or title, the library will collect the most valuable edition of a given work that might have been part of the chancellor’s collection. References for the identification of titles in this category include those listed above as well as


3. *Titles noted in the commonplace books or other writings of Wythe’s students:* The library collects those titles specifically noted by Wythe’s students in existing papers and commonplace books that do not fall into categories 1 or 2. If the student note postdates that student’s educational association with Wythe, every attempt will be made to verify the title through other resources. Reference works for these titles (in addition to those above) include


4. *Titles quoted or mentioned in Wythe’s case reports:* The library collects those titles to which the chancellor refers or alludes in his published case reports if the titles do not fall into categories 1, 2, or 3. Reference works for these titles include


b. George Wythe, *Between William Yates and Sarah his wife, Plaintiffs, and Abraham Salle, Bernard Markham, Edward Moseley, Benjamin Harris, and William Wager Harris, Defendants [sic]* (Richmond, Va.: Printed by Thomas Nicolson, 1796)

c. George Wythe, *Case upon the Statute for Distribution* (Richmond, Va.: Printed by Thomas Nicolson, 1796)

d. George Wythe, *Love Against Donelson and Hodgson* (Richmond, Va.: Printed by Thomas Nicolson, 1796)

e. George Wythe, *A Report of the Case Between Field and Harrison, Determined by the High Court of Chancery, in Which the Decree was Reversed by the Court of Appeals* (Richmond, Va.: Printed by Thomas Nicolson, 1796)

f. George Wythe, *Between, William Fowler and Susanna his Wife, Plaintiffs, and, Lucy Saunders, an Infant, by James A. Patterson, Her Guardian, Defendant [sic]. Between Parke Goodall and John Clough, Plaintiffs, and, John Bullock, the Younger, Defendant [sic]* (Richmond, Va.: Printed by Thomas Nicolson, 1798)
g. George Wythe, *Decisions of Cases in Virginia, by the High Court of Chancery* (Richmond, Va.: Printed by Thomas Nicolson, 1795)

5. Titles representative of Wythe’s time: The library collects titles represented in law libraries of the eighteenth century if those titles do not fall in the above categories. Reference works for these titles include


**Supporting Materials**

The library collects all available scholarly materials relating to George Wythe including books, manuscripts, dissertations, theses, and articles. The library supplements this by also collecting items of Colonial or Revolutionary Virginia history, biographies of Wythe’s major students (Thomas Jefferson, John Marshall, James Monroe, and Henry Clay), and supporting reference works in the history of American law.

**Availability of Materials**

The library has distributed a list of titles to a small number of rare book dealers specializing in either law books or Virginia materials. Many items are available on the market, while others are considered extremely difficult to locate.

**Level of Funding**

Currently, the library has no specific funds to devote to purchasing the items on the Wythe Collection list. Suitable donors need to be identified in consultation with the dean of the Law School and our development office.

**Use of the Collection**

The intention of the Wolf Law Library in creating the George Wythe Collection is to highlight the early development of legal education at the College of William and Mary and provide an exhaustive collection for research in this field. Collection materials will be made available to all scholars and visitors under appropriate supervision. New items will be regularly displayed in the Rare Book Room and featured in the rare book section of the law library’s web site. A soon-to-be-created display for the staircase lounge will also draw patrons to visit the collection, and a
program of tours for alumni, students, and friends will focus on the growth of the collection. The library plans to create a brochure featuring the collection, its goals, and a short biography of George Wythe.
“Information Is Cheap, but Meaning Is Expensive”: Building Analytical Skill into Legal Research Instruction

Yasmin Sokkar Harker

Law students and new attorneys must have well-developed analytical skills in order to find information that is pertinent to their legal problems and to become competent legal researchers in today’s information-rich environment. Law librarians and legal research instructors can help develop students’ analytical skills by asking them to participate in activities that encourage metacognition about processes that are critical to information seeking.

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Introduction

¶1 In an interview about computing and human progress, science historian George Dyson explained, “Information is cheap, but meaning is expensive. Where is the meaning? Only human beings can tell you where it is.”¹ Today’s lawyer works in a world flooded with so much information that it is easy to get lost. It is the lawyer’s job to find information that is pertinent to the legal problems presented and ultimately to create something meaningful from that information.

¶2 In this information-rich environment, though, new attorneys often do not have the skills necessary to be competent legal researchers. Judges, attorneys, and law firm librarians all report dissatisfaction with the quality and efficiency of law student and new associate research.² An important skill often lacking is the ability to find information that is relevant to the legal problem, particularly if the information is abstract or conceptual in nature. Students and new attorneys also have difficulty when they are required to use analogies to link the information to the legal issue.

¶3 This problem is exacerbated by the ascendance of computer-assisted legal research (CALR) systems, such as WestlawNext and Lexis Advance, which are based predominantly on “Google-like” keyword searching. Without the underlying organizational structure that is intrinsic to print-based legal publishing, new researchers are easily distracted by the superficialities of legal information, such as fact similarities and literal definitions, and thus fail to discover legal rules and concepts.³ CALR, Google, and the explosion of online information have also created an environment in which information literacy is critical. The speed and ease with which Internet content is created makes the ability to evaluate the information’s credibility and reliability even more crucial,⁴ and this ability can only be developed if one has strong analytical skills.

¶4 This article suggests approaches to supporting analytical skill development in legal research instruction. It urges instructors to use class activities that require students to reflect on their decision-making processes and to use metacognition to facilitate the recognition of concepts, analogies, and the process of legal research, an approach informed by the fields of cognitive and educational psychology. It discusses research on learning and metacognition, as well as Bloom’s taxonomy of learning domains and Paul Callister’s modification of that taxonomy for legal research. The first section looks at the literature on law student and new attorney

Legal Research Is a Critical Skill Law Students and New Attorneys Lack

Legal Research as a Critical Skill

Legal research is the foundation for almost everything done by attorneys. No matter the field of specialization, and whether in the role of adviser or advocate, lawyers must learn the appropriate law and apply it to specific circumstances. Indeed, a report by the American Bar Association (ABA) Task Force on Law Schools and the Profession (the MacCrate Report) identified legal research as one of the “fundamental lawyering skills” that are “essential for competent representation.”\[^5\] Although the more recent Carnegie Report did not identify specific skills critical to lawyering, it did list “practical skill” as one of the three pillars that provide structure to legal education.\[^6\] Given the central role legal research plays in a lawyer’s work, it is no surprise that legal research constitutes a major portion of an average new attorney’s workday. According to a 2007 Thomson/West–sponsored study, a new associate at a law firm will spend forty-five percent of the workday conducting legal research.\[^7\] Moreover, because the doctrine of *stare decisis* is such a central feature of the American legal system, everything a lawyer does, from writing a motion to conducting discovery, must be firmly rooted in sound legal research. Not only do lawyers spend a significant amount of time researching, professional responsibility also demands that they do so competently. Lawyers failing to perform adequate legal research are subject to discipline,\[^8\] sanctions,\[^9\] and lawsuits.\[^10\]

[^7]: THOMSON/WEST, supra note 2, at 2.
[^10]: Ellie Margolis, Surf’in’ Safari—Why Competent Lawyers Should Research on the Web, 10 YALE J.L. & TECH. 82, 102–06 (2007–2008) (examining cases in which lawyers have been sued for malpractice due to inadequate research).
Law Students and New Attorneys Often Lack Legal Research Skills

¶7 For decades, law librarians and legal research educators have grappled with the question of how to improve the research skills of law students and send new attorneys into the field ready to practice. Much thought and dozens of approaches to teaching legal research have been tried, but the feedback law schools are receiving from the field is grim: new lawyers lack legal research skills.

¶8 A brief review of the literature from the past few decades supports the conclusion that legal employers are dissatisfied with the legal research skills of law students and incoming associates. They are perceived as unable to identify the applicable sources of law and unable to create efficient or cost-effective legal research strategies.11 Librarians complain that law students are ignorant of legal research tools12 and print-based resources.13 Moreover, they have trouble applying “concepts and analogies” to their legal research and are unable to understand the context of their search results.14 In a 2005 survey asking externship field supervisors to choose five skills that students were most lacking, “quality of research” and “efficiency of research” were among the top choices, with “quality of research” chosen by thirty-five percent of respondents and “efficiency of research” chosen by thirty-two percent.15

¶9 This lack of legal research skills is costly, both in terms of attorney time and in terms of commercial database charges. An unskilled researcher can spend hours searching online in expensive databases—there are anecdotes in the law librarian community about new associates who have “accidentally” spent thousands of dollars in one Westlaw or LexisNexis session, and a 2007 study found that law firms write off a significant portion of new associate research billings.16 Given the current economic climate, clients are increasingly wary of the costs associated with legal research. A recent survey of cost recovery in law firms reveals that legal research is one of the top two expenses for which clients are “pushing back” or refusing to pay.17 And in the public interest and social justice contexts, minimizing the costs of legal research is essential.18

13. See Greenberg, supra note 2, at 242.
15. Young & Blanco, supra note 2, at 117. According to the Young and Blanco survey, the eight skills most lacking in student externs were attention to detail (chosen by 56%); quality of argument and analysis (53%); poise and confidence (41%); initiative and self-reliance (38%); quality of research (35%); efficiency of research (32%); following basic rules of grammar, construction, and format (26%); and knowledge of available research resources (21%). Id. at 116–17.
16. THOMSON/WEST, supra note 2, at 2.
18. Hackerson, supra note 8, at 474–75.
CALR Exacerbates Legal Research Inadequacies

§10 Searching LexisNexis, Westlaw, and, increasingly, Google, has become the dominant method for conducting legal research. The 2012 Legal Technology Survey Report from the ABA reported that 58.9% of lawyers regularly used free online services for research, and 58.4% regularly used fee-based online services for research. When asked whether or not they conducted legal research online, 95.9% of lawyers said that they did, and 82.2% said they conducted legal research using fee-based services.

§11 Along with the improved access and speed promised by online legal research, both fee-based and free, there are also major drawbacks. Chief Justice John Roberts articulated one problem in a speech at Drake University Law School:

[B]lind reliance on research that focuses merely on words, and not on concepts, poses the same hazards that lawyers encountered in the late nineteenth century. Lawyers run the risk that word searches will uncover reams of marginally relevant precedent superficially on point, thereby distracting them from engaging in critical analysis or structuring of the underlying legal principles.

In that speech, Chief Justice Roberts noted a problematic consequence of the paradigm shift from print-based to online legal research. In print-based research, there are formatting and organizational cues that indicate the structure of the content. For example, a treatise section is located within the organizational structure set forth by the treatise table of contents. Just by flipping through the pages to find the section, the researcher receives information about where that topic fits in a conceptual hierarchy. In online research, especially when using keyword searching, those cues are removed, leaving the researcher to sort out the structure by herself.

§12 Since the early 1980s, when commercial legal databases began to be used in law offices and law schools, several articles have been published evaluating the impact of this paradigm shift on legal research. In 1986, Daniel Dabney evaluated full-text CALR systems and found that “[t]hey do not provide comprehensive (or even adequate) retrieval of documents by subject.” In the same year, Bob Berring expanded on that idea, positing that full-text searching created a new paradigm in the legal literature by removing an underlying legal structure that had been inherent in print research. He found that in the “old paradigm,” the “location of issues and cases . . . was part of their meaning,” but in the new paradigm, “[f]ree-text searching . . . deprives the researcher of context.”

20. Id. at V-34.
21. Id. at V-40.
23. See id. at 9.
§13 Despite improvements to commercial database search algorithms, scholars have continued to note the limitations of CALR. In 1996, Barbara Bintliff found that in CALR, “[t]here is no overriding organization of concepts and rules.”26 And in 1998, Molly Warner Lien observed that full-text searching results in research that lacks analysis of “the wisdom, correctness and applicability of legal arguments.”27 In her 2007 article Context and Legal Research, Bintliff described how electronic searching has created “shifting context” for legal problems that is removed from an overarching framework.28 Attempts to electronically reproduce the underlying structure of print-based research, such as KeySearch in Westlaw, have been only marginally successful.29 Despite the limitations of CALR, students tend to be overly confident in their electronic searches. A study conducted by Lee Peoples revealed that law students have more confidence in the results of an electronic search than in the results of a digest search, even though they answered more questions correctly when using the digest.30

§14 More recently, Sarah Valentine has written at length about the impact CALR has on legal research. Specifically, she described how the link between legal analysis and legal research, which had been inherent in print-based research, has been severed by CALR. The absence of this link impedes students’ ability to see the broad legal principles that apply to their legal issues, thus threatening their ability to become good researchers. Valentine called for legal educators to address this problem, stating: “The disjunction caused by the shift in legal paradigms must be addressed in the first year of law school and it must be addressed in legal research.”31

§15 While the majority of articles have criticized the effects of CALR on research skills, there are some who argue that the problem is not as dire as it is widely pronounced to be. For example, in a 2009 article, Judith Lihosit found that despite the absence of an underlying legal structure in full-text search results, attorneys are receiving that structure through on-the-job training and guidance from more experienced attorneys.32

§16 The impact of the next, more “Google-like,” generation of legal research systems (such as WestlawNext and Lexis Advance) on legal research has not yet been fully explored. However, because the lack of discrete databases in those systems dispenses with even more of the underlying legal structure, they may move researchers even further away from context. Ronald Wheeler has noted that because WestlawNext does not require the researcher to choose a database before searching, much of the analysis that used to be done before executing a search will

30. Id. at 676, ¶ 38.
31. Valentine, supra note 3, at 197.
no longer be necessary to retrieve results. Thus, it is up to the researcher to apply analysis to the search results:

With WestlawNext, researchers do not have to think about their legal questions and ponder whether they are likely to be controlled by statute, common law, or regulation. Without having to ponder those questions, researchers don’t develop a sense of which types of documents are best to consider, given their unique facts and circumstances.\(^\text{33}\)

\(\S 17\) CALR is now the dominant legal research method, and this is unlikely to change. The underlying legal structure and formatting once so influential in print-based legal research are gone, so legal research educators must teach the lawyers of the future to use their own analysis in its place. Many scholars have offered excellent suggestions to effect the changes and improvements within the legal research classroom and curriculum that will be necessary to accomplish this goal. These include creating new textbooks for the new legal research paradigm,\(^\text{34}\) incorporating legal research throughout the curriculum,\(^\text{35}\) using collaborative learning tools,\(^\text{36}\) using problem-based or resource-based approaches,\(^\text{37}\) and teaching students to begin with secondary sources.\(^\text{38}\)

\(\S 18\) One crucial area for improvement is analytical skill development. Because researchers are no longer guided by structure or context, they must rely on their own analytical skills to connect legal problems to the information they find. This will be even more imperative in the future, and “[t]eachers of legal research will need to focus much more on examining and evaluating sources when using WestlawNext.”\(^\text{39}\) Legal research educators must help students develop strong analytical skills to cope in a digital environment.

**Information Literacy**

\(\S 19\) The huge amount and variety of information on the Internet has made information literacy critical to legal research. Lawyers must be able to assess the credibility and reliability of information in order to use it wisely and ethically. Despite the fact that most incoming law students have spent years using the Internet, the research shows that they are not information literate.\(^\text{40}\) They tend to overestimate their research skills\(^\text{41}\) and equate being able to access information with

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36. See, e.g., *id.* at 180–81.
41. *Id.* at 189–92.
being able to master it. Legal research instructors must address information literacy, and this means the development of analytical skills must be prioritized.

**The Context for Teaching Legal Research Skills**

**Thinking like a Lawyer**

¶20 The predominance of Westlaw, LexisNexis, and Google and the sheer amount of information available to modern researchers underscore the need for lawyers to find meaning in a world of information. But the ability to find meaning can only exist where there are strong analytical skills. What does analytical skill mean for legal research?

¶21 In her article, *From Creativity to Computerese: Thinking Like a Lawyer in the Computer Age*, Bintliff urged researchers to think like lawyers and defined “thinking like a lawyer” in the legal research context in part as “finding, analyzing and applying ‘the law.’” In discussing the shortcomings of new lawyers, Scott Stolley identified a major problem as their inability to work with “concepts and analogies,” stating:

> In their computer dependence, our new law graduates have difficulty with concepts and analogies. Unfortunately, they are often tied to the literalness of computer-produced research. . . . I have had other computer-dependent associates tell me that they can’t find a case that says something I know is out there.

And in a discussion of legal research and user interface design, Julie Jones noted that in an information-rich environment, the “efficient allocation of attention to the right information” is key. Researchers must be able to sort through an abundance of information and make decisions about which pieces of information merit attention.

¶22 Valentine urged legal research educators to teach legal research “as an iterative process of problem solving.” In order to do so, legal research teachers must make sure students are able to move through “a process of creating a research plan, researching, reflecting on what has been found, applying it to both the issue at hand and to the original research plan, and repeating the process as needed until applicable legal context and specific rules and procedures are distilled” and must require of the students “analysis, synthesis, and application of information to the facts and issues at hand.”

¶23 A review of cases in which lawyers failed to conduct competent legal research gives insight into what “analytical skill” means for legal research. Marguerite Butler examined Rule 11 cases in which lawyers were sanctioned for

42. Lien, supra note 27, at 118.
43. Bintliff, supra note 26, at 339.
44. Stolley, supra note 14, at 40.
46. Valentine, supra note 3, at 218.
47. Id. at 219.
48. Id. at 220.
failure to conduct adequate legal research.\textsuperscript{49} She found that lawyers fail to conduct competent legal research in two significant ways: by failing to find the law that applies to the facts of the case, or by failing in their “evaluation and selection” of the law.\textsuperscript{50} These errors result in misapplications and misstatements of the law. For example, in one case a lawyer was sanctioned for arguing that “rhetorical hyperbole” in a defamation case was not protected by the First Amendment. However, the court found several Supreme Court decisions affirming First Amendment protections for rhetorical hyperbole.\textsuperscript{51}

\textsuperscript{\textsection 24} Failure to conduct competent legal research also leads to an ignorance of procedural rules, such as exhaustion of administrative remedies or statutes of limitation. In a case Butler cites, a federal court found that if the lawyer had conducted competent research, he would have found a line of cases that showed his due process claim to be “fundamentally flawed” and would not have filed the claim in federal court.\textsuperscript{52} From this examination of cases we can infer that some lawyers are missing critical legal research skills including the ability to find authority by concept, the ability to critically evaluate authorities, and the ability to use analogies to link research results with case facts.

Lawyers and Librarians

\textsuperscript{\textsection 25} Law librarians are called upon to engage with and evaluate legal information in a number of different ways, but these are not always the same ways in which lawyers are expected to engage with legal information.\textsuperscript{53} At the reference desk, librarians are asked to recommend sources, but they are not necessarily expected to use or apply the results of those recommendations. For collection development, librarians are required to examine and evaluate research sources but are not required to use the information found within those research sources. A workweek for a reference librarian might include suggesting a database, compiling a list of cases on a certain topic, teaching a student how to Shepardize a case, explaining the difference between the Federal Register and the Code of Federal Regulations, helping a patron find a sample complaint, and deciding to purchase one treatise over another. Librarians are rarely asked to write a brief or argue before a judge. Thus, librarians place great value on the ability to evaluate “sources of legal information,” perhaps even more than on the ability to evaluate the legal information itself.

\textsuperscript{\textsection 26} The great majority of the law students we teach, though, will become practicing attorneys. They will use the information they find to provide support for briefs, advise clients, and formulate litigation strategies. For them, the goal of legal research will be to educate [themselves] about the potential legal theories and solutions applicable to a client’s factual situation, determine likely legal and nonlegal outcomes, and use the accumulated information to strategize how best to influence courts, mediators, opposing counsel, and other players in the legal system.\textsuperscript{54}

\begin{itemize}
  \item 49. Butler, \textit{supra} note 9.
  \item 50. \textit{Id.} at 714–15.
  \item 51. \textit{Id.} at 696.
  \item 52. \textit{Id.} at 712.
  \item 54. Valentine, \textit{supra} note 3, at 218–19.
\end{itemize}
Practicing attorneys will not be as involved in deciding which databases or treatises will be purchased; they will not need to evaluate sources of legal information in the same way and to the same extent as librarians. Instead, they will need to engage directly with the information they find. This requires them to look at the information on the screen or the page, pay attention to some of the information, ignore some of the information, and ultimately select key pieces of information for later use. The best selections will be informed by the purpose of the research, the facts of the case, the jurisdiction of the case, and the venue in which the research will be presented.

As legal research teachers, librarians must consciously and explicitly address the difference between teaching students to evaluate sources of legal information and teaching them to analyze legal information itself. With that distinction in mind, law librarians must make an informed decision about how much emphasis should be placed on each skill and how each should be taught.

Why These Skills Must Be Taught in a Legal Research Class

The ability to analyze and synthesize; to think in concepts and analogies; to reflect on the information found; and to move through an iterative, analytical process of problem solving—these are critical analytical skills needed for legal research. But these skills are necessary in many areas of legal education—how are they different in the legal research context? What sets legal research apart?

In most law school classes, students function in a “closed universe,” not an information-rich environment. They are expected to read closely a group of cases or a list of statutes and regulations that they have been given, and to analyze, dissect, critique, and apply only those materials. Even in classes that have an “open universe” component, such as legal research and writing, the focus is often on the writing, not the research. The research component is just a precursor to the writing, and students do not have the time to reflect on the choices they make during the research process. In contrast, in a legal research class, students must navigate an almost infinite amount of information and make decisions about which pieces are useful, which warrant further examination, and which should be ignored. A legal research class provides an environment in which the decisions made during the research process are the focus of the class, rather than a skill that is secondary or subordinate to a substantive topic or another lawyering skill.

Theories of Learning

Analytical skill is a concept that is difficult to describe and even more difficult to teach. Educators who want to help students build analytical skill should look to the research from education and cognitive psychology for guidance.
Metacognition

¶32 Metacognition is a powerful tool for developing complex analytical thinking:

[Metacognition] has usually been broadly and rather loosely defined as any knowledge or cognitive activity that takes as its object, or regulates, any aspect of any cognitive enterprise. . . . It is called metacognition because its core meaning is “cognition about cognition.” . . . Metacognitive territory includes both what you know about cognition and how you manage your own cognition. . . .

Metacognitive skills are believed to play an important role in many types of cognitive activity that are related to problem solving. Examples are oral communication of information, oral persuasion, oral comprehension, reading comprehension, writing, language acquisition, perception, attention, memory, logical reasoning, social cognition, and various forms of self-instruction and self-control.55

¶33 Educational psychologists have inquired into the question of what constitutes “good thinking” and found that it requires the possession of problem-solving strategies, as well as metacognitive knowledge about those strategies.56 Metacognitive knowledge is critical to a person’s understanding of when and where to apply particular problem-solving strategies.57 Metacognition requires that the learner understand what “skills, strategies, and resources” are entailed in a task; it also requires that the learner know how and when to deploy these skills, strategies, and resources and be aware when they are working or not working and make adjustments in their deployment.58

¶34 In an experiment to examine the benefits of metacognition, researchers studied high school students learning geometry with the aid of a computer program called the Geometry Cognitive Tutor. The Geometry Cognitive Tutor required students not only to solve geometry problems, but also to explain all of the problem-solving steps correctly.59 The program then provided feedback on both the solutions and the explanations. For one of the experiments, the researchers divided the students into two groups—one group used a version of Geometry Cognitive Tutor that required students to explain the problem-solving process, while the other used a version that did not. The students were then tested again for comprehension of geometry concepts. The researchers found “that self-explanation does not increase the rate at which knowledge is acquired as much as it changes the nature of the knowledge acquired.”60 Students who were required to explain the problem-solving process noticed gaps in their knowledge and repaired them, leading to a deeper understanding of the material. When faced with new geometry problems, they were

57. Id. at 3.
60. Id. at 166.
better at transferring the knowledge they had learned to new problems, and were less likely to jump to conclusions.\footnote{Id. at 173.}

\footnote{Id. at 173.}

\section{Metacognition}

Metacognition is a powerful tool for improving information-seeking skills as well. Research has shown that information-seeking behavior is more successful when the researcher has strong metacognitive knowledge.\footnote{Janette R. Hill & Michael J. Hannafin, 	extit{Cognitive Strategies and Learning from the World Wide Web}, 45 EDUC. TECH. RES. & DEV., no. 4, 1997, at 37, 38.} In an information-seeking context, metacognitive knowledge can mean knowledge of one’s cognitive processes, which include “scanning, searching, questioning, chunking [organizing units of information into larger groups of information], generating hypotheses, and making decisions.”\footnote{Id. at 173.} To determine the impact of cognitive factors on online research, researchers examined adult learners as they searched for information on specific topics. Searchers were instructed to think aloud as they moved through the search process, while investigators made audio recordings. Along with administering pre- and post-search surveys, the investigators examined these recordings and looked at the impact various factors had on the success of the search.\footnote{Factors examined included “perceived orientation, . . . perceived self-efficacy, . . . system knowledge, and . . . prior subject knowledge.” \textit{Id.} at 56–57.} They found that searchers who had a high level of metacognitive knowledge were much more successful searchers: they were able to reflect on and refine their search processes, were active in processing and comprehending the information found, and were able to notice and remedy the gaps in their knowledge.\footnote{See \textit{id.} at 56–57.} Further, searchers with strong metacognitive skills were also better oriented to the online system.\footnote{Id. at 56.}

\section{Legal Research}

Legal research combines information-seeking skill with legal reading skill. Since metacognitive skill enhances both of these activities, legal research educators should make it a priority. Kristina Niedringhaus has written about the benefits of metacognitive knowledge to legal research education. She found that students who learn “by reflecting on what they have learned and filling in the gaps, will not only be better students, but will be able to contribute more fully to the classroom

experiences." Legal research educators should not only teach research strategies, they should help students acquire metacognitive knowledge about when and where to use those research strategies.

**Bloom’s and Callister’s Taxonomies**

To assist them in best helping students, legal research educators should identify and organize learning goals. This can be done by considering and implementing Bloom’s taxonomy of learning, and Paul Callister’s recently proposed adaptation of that taxonomy. In essence, Bloom’s taxonomy provides a strategy for ordering learning concepts in a hierarchical fashion. Published in 1956, it identifies six successive stages of learning, arranged from least to most complex. These stages are knowledge, comprehension, application, analysis, synthesis, and evaluation. Since then, the taxonomy has been used widely and has been revised a number of times.

In a recent article on law school learning and neuroscience, Hillary Burgess discussed the taxonomy’s application to legal education as a whole. She organized common law school objectives and activities such as “identify relevant case facts” and “synthesize rules” into the various levels of cognition. Burgess noted that while law school activities teach the four lowest levels of cognition, law school exams test the three highest levels of cognition.

In his article *Time to Blossom: An Inquiry into Bloom’s Taxonomy as a Hierarchy and Means for Teaching Ordered Legal Research Skills*, Paul Callister adapted Bloom’s taxonomy specifically for legal research instruction, and provided examples of legal research objectives (“learning competencies”) for each of the levels and activities that may be used to support those learning competencies. The levels of cognition in Callister’s adapted taxonomy are slightly different than Bloom’s and are more suited to the legal research process. For example, Callister collapses analysis and synthesis into a single level because of their interaction as an iterative process. His levels, ordered from the most basic to the most advanced, are:

- Remembering
- Understanding
- Application
- Analysis/Synthesis
- Concluding
- Metacognition

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73. *Id.* at 22.
75. *Id.* at 205, ¶ 27.
76. *Id.* at 199–212, ¶¶ 19–41.
¶41 Callister suggests the following research competencies for the highest three levels: “[s]imulate analysis and synthesis on both simple and complex problems in a simulated practice environment”, 77 “[r]esolve a problem and report a conclusion that takes a position as informed by research”, 78 and “[r]eflect[] on and assess[] . . . research experiences and . . . critique, modify, and invent research schema.” 79 Creating and implementing learning goals based on these research competencies will support the development of analytical skill.

**Ideas for Practical Implementation**

**Helping Students Develop Analytical Skill in Legal Research**

¶42 Legal research instruction often covers where and how to find legal information, as well as the processes and strategies for conducting legal research. However, legal research educators should specifically address analytical skill development as it pertains to selecting information in an information-rich environment, making sense of the information found, and choosing the “right” or “task-specific” information from the abundance of choices. This means building analytical skills such as conceptual thinking, reasoning by analogy, and thinking through an iterative process.

¶43 Armed with information about cognition and metacognition, as well as taxonomies, legal research educators can develop approaches to meet those goals. This can mean using questions, exercises, problems, or simulations that take students through a metacognitive process and foster metacognitive knowledge.

¶44 One method might be to use in-class questioning techniques to foster metacognition. In her article *Resource-Based Learning and Course Design*, 80 Meg Butler discusses different ways to use questioning effectively in the classroom. In particular, she recommends Socratic questions that elicit thinking and reflection about the decisions in the research process. 81 For example, a series of questions that ask a student to defend relying on a case that has a yellow citator flag may encourage metacognition so that a student’s understanding “reflect[s] the difference between simply knowing there is a service to help legal researchers identify whether a legal opinion remains ‘good law,’ and understanding the significance of a yellow flag in KeyCite or Shepard’s.” 82

¶45 Class questions, activities, and exercises can also be designed to encourage metacognition about a specific cognitive process used in information seeking, such as searching, scanning, chunking, generating hypotheses, or making decisions. For example, to foster metacognition on scanning, a student might be asked to scan the table of contents for a particular title or chapter in the *C.F.R.*, describe how the sections relate to one another conceptually, and explain how this might affect the

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77. *Id.* at 216.
78. *Id.* at 217.
79. *Id.*
81. *Id.* at 226–27, ¶ 16.
82. *Id.* at 228, ¶ 20.
way he searches the *C.F.R.* in the future. Another example might be to ask students to read a fact pattern, find the encyclopedia article that best answers the question posed in the fact pattern, explain why that encyclopedia article was the most useful, and identify two or three research paths they could take based on the information found in the article. This would foster metacognition on decision making, both about what information to use and about the research process itself.

§46 These kinds of questions, activities, and exercises will take students through metacognitive processes and allow them to identify and repair gaps in their knowledge. This in turn will strengthen their ability to think conceptually, analogously, and iteratively. A significant number of similar activities can be created by examining different stages of the legal research process and identifying a piece of metacognitive knowledge that is useful for that stage. Searching, scanning, chunking, generating hypotheses, and making decisions may be used as pieces of metacognitive knowledge to work with.

**Examples from a Legal Research Class**

§47 The legal research teachers at CUNY Law School have for several years used a number of simulations and exercises throughout our legal research courses, based on our teaching experiences and continuing discussions about the course. The two-credit legal research course at CUNY is taught over the entire first year to incoming students and is graded. Evaluative devices include assignments, drills, and a multiple-choice exam. Generally speaking, the course requires increasingly complex analytical skill as the year progresses.

§48 The spring 2011 final assignment given by the CUNY legal research faculty provides an example of a simulation that required the students to function at the higher levels of cognition from Bloom’s and Callister’s taxonomies. It was a take-home assignment based on a single fact pattern (built either on statute or common law, and federal or state law, depending on the instructor). The students had three weeks to complete it. Our intention was to elicit the application of analytical skills and strengthen them through metacognition.

§49 The assignment consisted of four parts: for part 1, students were required to complete a memo drawing conclusions as to how the law would affect their client and noting if more facts were needed before they would be able to reach further conclusions; for part 2 they were required to provide a list of the authorities they used, and for each authority, indicate how they found the authority and why they chose it; for part 3 they were required to describe and reflect on their research process; and for part 4 they were required to reflect on costs and suggest more cost-effective strategies.

§50 Part 1 was designed to develop the skills of analysis, synthesis, and drawing conclusions. In addition, by asking the students if more facts were needed to draw further conclusions, we tried to elicit analysis and synthesis in the context of an iterative feature of legal research—that is, the idea that research often leads to more questions. For example, in a New York adoption statute, an unmarried father’s consent to an adoption is required only if he has paid support to the child and has had

83. The assignment is included *infra* as the appendix.
contact with the child. Because the fact pattern was silent on whether the father has paid child support, the student should indicate in the memo that knowledge of whether the father has paid child support is critical to application of the rule. Another example dealt with New York statutory and case law stating that discrimination against someone based on body weight can be unlawful if the weight is the result of a medical condition or is disabling. If the fact pattern is silent on whether the weight is the result of a medical condition or is disabling, the student should indicate that additional information is necessary.

¶51 We have found that a good way to create this type of fact pattern is to base it on a rule of law that has several factors and then omit one of the factors. Another method is to create a fact pattern based on a law that has exemptions, and make the fact pattern ambiguous as to whether the exemption is fulfilled. For example, under the Fair Labor Standards Act, a nonsupervisory employee is entitled to overtime pay, unless the employee can be considered an outside salesperson. If the fact pattern is ambiguous as to whether the employee is an outside salesperson, the student should note that additional information is required.

¶52 We hoped that anchoring the assignment to an analysis of the information the students found would help them assess their choices in parts 2 and 3 more thoroughly. Students’ analyses in part 1 could also help us see how they articulated the conclusions they drew from the information they presented in parts 2 and 3.

¶53 Part 2’s list of authorities was designed to encourage a metacognitive process about students’ decision-making process as it related to authorities. That is, asking students to reflect on why they chose particular authorities would strengthen their ability to think conceptually and analogously. Part 3’s reflection on the research process was designed to encourage a metacognitive process as to the legal research process as a whole. We hoped that by considering why they chose certain research tools and why they took certain research paths, students would be better able to plan and strategize. Part 4 asked students to reflect on the costs of legal research and suggest cost-effective alternatives, and in this way we hoped that their ability to plan and strategize in a cost-effective manner would improve.

¶54 All four parts were intended to reinforce knowledge of bibliographic tools learned over the entire academic year. Students needed to consult case law, statutes, and regulations. They had to review legal encyclopedias, treatises, law reviews, and other types of secondary sources and explain why they chose to rely upon them for information. They needed to update their information, and then explain their legal analysis. Finally, in examining the cost of their legal research project, they had to evaluate their research process and techniques and how they would affect a client.

¶55 Results from the assignment varied by student, but they were interesting and encouraging. When asked to explain their decisions as to the authorities they chose, most students considered why some authorities were more useful to their fact patterns than others, and a few explicitly identified when they chose cases because they were analogous to the fact pattern, even if the fact patterns were very different. A few explained that the concepts in a particular case were important to an element of the fact pattern, even though the fact pattern as a whole did not resemble the one they had been given. When asked to reflect on the overall legal research process, most students explained why some sources were useful to them
and which strategies worked best, but a few explicitly described how information from early in the research process changed their conceptualization of the legal question and encouraged them to change their strategy. Even for the students who did not engage with the information in a way that demonstrated analogical and conceptual thinking, the assignments gave the instructors the opportunity to comment on the questions and suggest ways students could develop their skills in this area.

Conclusion

§56 Law students and new attorneys must have well-developed analytical skills in order to find information that is relevant to their legal problems and to become competent legal researchers. They must see past the superficialities of legal information, such as the literal meaning of words and the fact similarities between cases, and learn to engage more deeply with the information.

§57 In order to ensure that our students become competent, efficient researchers, legal research instructors must make analytical skill development a priority in the classroom. Looking to the research on cognition and metacognition will help instructors create activities that engage and develop analytical skills. Particularly recommended are activities that elicit metacognition on specific cognitive processes and activities derived from the higher levels of Bloom’s and Callister’s taxonomies. The literature from cognitive and educational psychology offers an enormous amount of information instructors can use and apply, especially in the area of analytical skill development and learning. Legal research instructors can then create and share their activities with each other.
Appendix

Sample Research Assignment

Assignment Details

Your supervisor calls you into her office and says she needs a report on a specific issue which includes the following components:

1. A summary memo of your analysis.
2. A list of the sources you used in your analysis memo, including explanations of why you used them. In addition, list resources you think might be helpful as background information, or would help your supervisor understand what additional information might be needed.
3. An explanation of your legal research process or strategy so that a subsequent intern can replicate your results if necessary and understand the methodology used in your project.
4. A cost assessment that includes the time spent on the project, the time spent researching, and an estimate of online research costs. You should also include suggestions of cost-effective measures for the intern to follow when updating your research in a few months.

Each section is explained in further detail below. The facts will be provided to you in a separate handout.

1. Analysis Memo

Provide an analysis of your issue, explaining whether or not there is enough authority to support the argument your supervisor wants to make in the brief. If you believe that additional information is needed to help support the conclusion, be sure to discuss that as well. You should provide citations to relevant authority when necessary.

2. List of Primary and Secondary Sources

Your list should include all authority that you are citing in your analysis memo. For each source you should provide a citation and explain why the source was used for support in your analysis memo.

If your resources list includes materials that are not cited in the analysis memo, but were instrumental to your understanding of the concepts needed to make the analysis, be sure to list and explain those as well. Remember that your supervisor will be reviewing this section of your assignment to understand how you formulated the analysis you presented in your memo.

Provide the citations to no more than eight sources of primary authority that address your issue. Be sure to indicate whether the source is mandatory or persuasive precedent and the current status of each source. You should also describe and explain how you found each source and indicate the relevance of each authority to your analysis and why you chose it.

Provide three secondary sources that you found most useful in completing this assignment (providing multiple sections of the same source will count as only one
source). You must use at least two different types of secondary sources. Provide the citation information for each source, note how current each source is, and describe and explain how you found each source. You should also indicate the relevance of each secondary source to the formulation of your analysis memo.

3. Legal Research Process

Describe the legal research process or strategy you followed in completing the project. Remember that this section of the assignment will be primarily used in two ways:

• By your supervisor to assess the credibility of your results and support the summary of legal information you found; and

• To help a subsequent intern unfamiliar with this area of law understand how you arrived at your results, know what sources you consulted that were the most helpful, and re-create your research.

Your plan should include the reasons why you selected certain sources for research and how you determined the current status of any authority.

Your plan should not contain general directions about the utilization of a source (e.g., how you used an index and why it’s important) but instead articulate the reasons why it was chosen at a certain point and why it was important to the overall process (e.g., you might note that for background information at the start of the process you used an index to gain certain information).

Finally, if there are any specific hints or tips you could offer an intern who will need to do further research on this issue, please include them in your plan.

4. Cost Assessment of Legal Research Process

During your research process, you should keep track of your time, and provide a final estimate of the time and costs for this project calculated as indicated on the attached Billing Invoice. A copy of a completed Billing Invoice must be handed in with your final assignment.

Review and reflect upon the information you have found and the legal research process you explained in part 3 of the assignment as well as the final costs as indicated on your Billing Invoice. Were you able to use any free online resources or cost-effective measures to assist you in the legal research process? In reexamining the process, do you think there is any area where you could have implemented alternative measures to save costs? Why or why not?
### Billing Invoice

<table>
<thead>
<tr>
<th>Service</th>
<th>Rate</th>
<th>Total Number</th>
<th>Total (Rate Multiplied by Number)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>EXAMPLE</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney time per billable hour</td>
<td>$100.00</td>
<td>18</td>
<td>$1800.00</td>
</tr>
<tr>
<td>Attorney time(^a) per billable hour</td>
<td>$100.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Each terms and connectors case law database search(^b) (Include each initial search, and all subsequent searches that are edited)</td>
<td>$65.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Each natural language case law database search (Include each initial search, and all subsequent searches that are edited)</td>
<td>$100.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Each terms and connectors annotated code search</td>
<td>$75.00</td>
<td></td>
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</tr>
<tr>
<td>Each natural language annotated code search</td>
<td>$100.00</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Each online secondary source accessed for information</td>
<td>$100.00</td>
<td></td>
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</tr>
<tr>
<td>Each use of KeyCite or Shepard's services</td>
<td>$10.00</td>
<td></td>
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</tr>
<tr>
<td><strong>Total Bill:</strong></td>
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</tbody>
</table>

\(^a\) Your billable hours should include all time spent researching the assignment and the time spent composing and writing the entire assignment. For the purposes of this assignment, you should account for your time only in one-hour increments.

\(^b\) Remember that using “Focus” or “Locate” does not trigger an additional search charge in LexisNexis or Westlaw. You may choose to use the “History” or “Research Trail” at the end of your research to help you review the information for this section.
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. If you would like to review books for “Keeping Up with New Legal Titles,” please send an e-mail to bkeele@indiana.edu and nsexton@email.unc.edu.

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Reviewed by Elaine M. Knecht*

¶1 Paul Rylance, the author of *Writing and Drafting in Legal Practice*, practiced as both a solicitor and a barrister for many years before developing in-house skills-training programs for several United Kingdom–based international law firms. Making the transition to the academy, he became the associate dean of the Faculty of Law at the University of the West of England. Later he was the founding director of the Bristol Institute of Legal Practice. He followed an entrepreneurial path and now provides training and consulting services to law firms. While this edition of *Writing and Drafting in Legal Practice* is based on Rylance’s 1994 book of the same title, he calls it a substantial revision of the basic text and draws attention to the inclusion of four chapters covering the use of e-mail in legal practice.

¶2 The book is laid out in three parts. The first two parts cover the writing process from prewriting organization to proofreading. Part 3 addresses the drafting process in greater detail. The volume’s first pages include a number of gems: “Bad habits need to be eliminated rather than perpetuated” (p.xvii); “[J]ust as the aspiring musician must first learn the scales before beginning to improvise, so the beginner needs ground rules for legal writing and drafting” (p.xix); and “Good writing is clear thinking on paper” (p.3).

¶3 Rylance warns that if one reads the book straight through there will be a good deal of repetition. Instead, this is the kind of reference that you will want to keep at your elbow and turn to for information regarding, for example, the Oxford comma. An appendix features an “Undesirables Checklist” and suggested remedies. For instance, avoid “bottleneck” because it is overused, and instead of “confessed and acknowledged,” choose one of those words and use it consistently.

¶4 I took the author’s advice and did not read the book straight through; rather, I made extensive use of both the table of contents and the index. While both are helpful, I found the table of contents more useful, as each of the three parts is broken down by chapter and each chapter by topic. This allows readers to find a general topic in the table of contents, and then see how it is subdivided even further in the body of the text.

¶5 Several books on legal writing, including this one, have appeared in the last five years. Bryan Garner seems to be the preeminent author on the topic, working twice with U.S. Supreme Court Justice Antonin Scalia.¹ Rylance and Garner cover many of the same topics, but Garner includes many more real-world examples of how to accomplish what the rule or concept in question dictates.

¶6 My initial reaction to *Writing and Drafting in Legal Practice* was that it devoted far too much space to advice that we all should have learned while prepar-

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ing our first high school term paper, such as “Keep sentences short” (p.16) and “[M]ake only one main point in each sentence” (p.17). However, writers sometimes need to be reminded of the basics of good writing, and this book serves that purpose. With the proliferation of legal writing and research courses at almost all American law schools, this book will likely find a home on the ready reference shelves of academic law libraries everywhere, but because of the competition it faces, it may gather some dust.


Reviewed by Genevieve B. Tung*

¶7 Ten years ago, William Landes and Richard Posner wrote: “Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.” This law and economics approach contends that copyright, patent, and trademark protections exist to incentivize artistic, scientific, and commercial creativity that would otherwise be deterred by free-riding and piracy. Exceptions to intellectual property’s discrete monopolies, such as fair use in copyright, may be justified only by market failure. The markets will efficiently determine what types of useful arts are worth pursuing, even if this leads to a disproportionate abundance of goods for the wealthiest consumers.

¶8 In *From Goods to a Good Life: Intellectual Property and Global Justice*, University of California, Davis professor Madhavi Sunder, who has written on issues of law and culture, the First Amendment, and human rights, demonstrates how this narrow economic framework fails to address the ways that intellectual property contributes to (or denigrates) the social and economic well-being of individuals and communities. Sunder calls for a more pluralistic approach to understanding intellectual property “as social and cultural policy” in addition to economic policy (p.32). In doing so, Sunder advocates for a fair assessment of the artistic and scientific innovations of poor and marginalized communities, and for the recognition that “participation in the production of the world’s knowledge is an end in itself” (p.178). Unlike the purely utilitarian approach of law and economics, a cultural and social theory of intellectual property also considers: “Who makes the goods? Who profits, and at whose expense?” (p.29).

¶9 Relatively short for its ambitious scope, the book is divided into seven chapters, each describing situations in which traditional intellectual property theories have shortchanged less powerful creators and ignored (or misinterpreted) noneconomic metrics of well-being. These include selective crackdowns on authors of slash and fan fiction, the asymmetrical treatment of creative appropriation by filmmakers in the developing world when compared with their counterparts in the

* © Genevieve B. Tung, 2013. Reference Librarian and Assistant Professor, Rutgers University School of Law–Camden Law Library, Camden, New Jersey.

United States, and the destructive impact of the one-size-fits-all approach to patent law mandated by the World Trade Organization. The careful attention paid to the details of these examples, however, comes at some expense to the analytical narrative, particularly regarding problems that arise uniquely under copyright, patent, or trademark regimes. Ultimately, it is Sunder’s demand for a critical approach to the law’s disparate impact on the rich and the poor that unifies her approach to all forms of intellectual property.

¶10 Sunder begins by exploring how culture links creativity to individual fulfillment and communal prosperity, but goes on to demonstrate that unrealistic conceptions of culture can reify unjust treatment of “traditional” knowledge and discount the innovations of poor or minority communities. Older theories, which see culture as a set of passively received traditions or commodities, do not reflect today’s “emergent participatory culture,” which gives rise to so many conflicts with and challenges to existing intellectual property legal structures (p.56).

¶11 Sunder offers many examples of how emerging technologies have spurred the growth of participatory culture-making and how unequal access to technology stifles the innovative capacity of poor communities and their ability to benefit from existing legal structures. She offers a thought-provoking critique of how reformers who strive to protect the public domain from moneyed intellectual property maximalists may inadvertently allow the exploitation of authors and inventors from communities whose contributions are more likely to be treated as “traditional” or uninventive, and thus ineligible for protection from appropriation.

¶12 From Goods to a Good Life professes a debt to the work of Amartya Sen and Martha Nussbaum, whose work on human development theory and quality of life is a constant touchstone. Sunder’s interdisciplinary approach may make her book of interest to readers in public policy and the humanities, although some familiarity with intellectual property law is assumed. The book includes forty pages of endnotes and a compact but thorough index. Although many of Sunder’s examples reference popular culture, the tone is scholarly and theoretical. This book is nothing less than a call to reevaluate all of our assumptions about who should benefit from cultural production, and it is appropriate for both law school and general academic libraries.


Reviewed by Taryn L. Rucinski*

¶13 In 1972, Christopher Stone argued the unthinkable: that a right of legal standing be conferred “to forests, oceans, rivers and other so-called ‘natural objects’ in the environment—indeed to the natural environment as a whole.”3 In 2012, Jan Laitos has followed Stone’s theory to its natural conclusion, arguing not only that

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* © Taryn L. Rucinski, 2013. Environmental Law Librarian and Adjunct Professor of Law, Gerber Glass Law Library, Pace University School of Law, White Plains, New York.

trees should have standing, but that the next phase in our environmental legal consciousness should be the “creation of a legally recognized right of nonuse, held not by humans, but by the natural resources themselves” (p.6). In this regard, *The Right of Nonuse* is likely to become a standard in the canon of environmental law.

¶14 Arguing for the adoption of a biocentric (as opposed to the current anthropocentric) legal standard, Laitos’s book is divided into five parts. Part 1, “The Nature of Nature,” sets forth the author’s thesis: the only way to restore the Earth and halt its rampant depletion is to alter our current legal system to “reflect the worth of nature and natural systems irrespective of humans” (p.5). In part 2, the social and economic history of resource use and nonuse are examined through the lens of game theory with the conceptualization of five distinct historic periods. These include the Pleistocene Epoch (the Age of Human Survival); the eighteenth century, with the development of the Age of Market; the 1950s, with the Age of Property; the present (the Anthrocene Age); and, finally, a predicted time in which the right of nonuse is recognized in the new Age of Ecocentrism.

¶15 Of the most relevance to lawyers, part 3 reviews the three relevant generations of natural resource laws: first-generation use interests, second-generation human nonuse interests, and anticipated third-generation nonanthropocentric resource nonuse laws. In contrast, part 4 investigates the underlying biological, scientific, and economic components of resource use and nonuse. In part 5, Laitos concludes with a practical discussion of how a right of nonuse might be created, while simultaneously broaching the corollary issue of resource empowerment.

¶16 Laitos, a professor of law at the University of Denver, is one of the foremost scholars on the intersection of constitutional and natural resource law in the United States. As such, he is uniquely qualified to give voice to this perspective. Moreover, the text, while dry, is surprisingly approachable and well supported by a plethora of cross-disciplinary resources from history, economics, anthropology, and law. My major criticism of the work is its overreliance on game theory, particularly in part 2, which has the effect of oversimplifying otherwise complex relationships. Furthermore, Laitos’s prose style can at times seem a bit repetitive as the same or similar phrases are often reused. Despite these minor shortcomings, *The Right of Nonuse* provides us with a new, valuable, and previously unexplored basis for future environmental regulation.

¶17 Of note to researchers, *The Right of Nonuse* includes a table of cases and an index. Although a bibliography is not included, the footnotes make this omission less problematic. *The Right of Nonuse* is highly recommended for academic law and nonlaw libraries with programs that offer environmental coursework, and for law firm and government libraries that have an environmental specialty.

Reviewed by Casey Duncan*

¶18 In 1999, Lawrence Lessig wrote that it was at most only a slight exaggeration to proclaim that “encryption technologies are the most important technological breakthrough in the last one thousand years. . . . Cryptography will change everything.”4 Seven years later, in a revised edition of the same book, he no longer included this statement in his discussion of cryptography and encryption.5 Jean-François Blanchette’s *Burdens of Proof: Cryptographic Culture and Evidence Law in the Age of Electronic Documents* “develops a series of arguments to account for cryptography’s failure to perform, focusing on the case of digital signatures” (p.5). *Burdens of Proof* therefore occupies and analyzes the conceptual space between the heady expectations and current reality of cryptographic encryption and its relation to the authentication and evidentiary weight of digital documents.

¶19 Part survey and part critique, *Burdens of Proof* is an accessible work that, in a concise eight chapters, provides a rich history of cryptography. The book examines the relationship between digital signatures enabled by public-key cryptography and the efforts of legal systems across the globe to adapt complex evidentiary regimes to a new era of digital documentation. Blanchette, a UCLA information studies professor, is an authority in this area, having served on a special task force charged with providing expert guidance during extensive revision of the rules governing the admissibility of written evidence in French courts. Throughout his discussion, Blanchette offers keen insight into the interplay between cultural presumptions and biases inherent in both cryptographic and legal cultures.

¶20 Blanchette discusses how cryptography developed from a narrow discipline that was chiefly the concern of ambassadors, spies, and military personnel into a modern field combining scientific and cultural aspects of both mathematics and computer science. A series of events in the 1970s, including the development of public-key cryptography and the publication of a seminal research paper, *New Directions in Cryptography*,6 which helped usher the field from relative obscurity, also coincided with revolutionary developments in information and computer-networking technologies. One result was that fundamental cryptographic principles, including authenticity, confidentiality, and accountability, became entwined with the Internet’s very architecture.

¶21 At the same time, cryptography’s professional culture largely internalized the popularized conception of digital information as immaterial and therefore was only capable of being secured through the likewise immaterial principles of purely mathematic cryptography. This conception, in turn, has led affected disciplines to

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* © Casey Duncan, 2013. Assistant Director for Technical Services, Tarlton Law Library, Jamail Center for Legal Research, University of Texas School of Law, Austin, Texas.
both misunderstand and discount the significant ways in which paper documentation shaped such diverse areas as daily work activities, legal evidentiary standards, and even the deep moral and cultural authority afforded to written documents and signatures. Similarly, Blanchette relates how legal evidentiary regimes themselves developed concurrently with technologies that enabled and fostered deep cultural reliance on the authenticity, verifiability, and enforceability of written documents and signatures. Attempts by legal systems to bring evidentiary rules and presumptions in harmony with cryptographically protected signatures have met with limited success, precisely because respect for the evidentiary authority of paper “extend[s] far and deep into law’s most quotidian activities” (p.11).

§22 Blanchette discusses how current cryptographic modeling practices affect the practical application of any resulting technological advances and how they make fundamental assumptions about the nature of proof and authority of digital signatures as evidence. He also describes how legal adjudicators view the evidentiary weight and value of cryptographically protected signatures.

§23 It is in critiquing the cultural blind spots of both legal and cryptographic disciplines that Blanchette’s intellectual contribution is most significant. Other works almost certainly provide a more detailed discussion of the practice and theory of cryptography and encryption. Likewise, works such as Stephen Mason’s *Electronic Signatures in Law* provide a more detailed and descriptive account of specific evidentiary regimes as they relate to digital signatures. Blanchette’s contribution is his critical analysis of the ways in which the culturally shaped views and presumptions exhibited by both cryptographers and legal professionals vary or even at times work at cross-purposes.

§24 The goal of *Burdens of Proof* is to articulate the divergent concepts shared by cryptographic and legal disciplines related to the evidentiary value of digital signatures. Both seek veracity, accountability, and enforceability, but often conceptualize the achievement of these goals in very different ways. *Burdens of Proof* is both theoretical and technical without being inaccessible. It is highly recommended for academic law libraries, but it would be useful reading for anyone concerned or curious about the interplay between evidentiary rules and encryption and digital signatures.


Reviewed by Karen Skinner*


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Their Inalienable Right to Self-Governance, has written a succinct, well-organized review of current theories of constitutional jurisprudence. The book is part of the Inalienable Rights Series published by Oxford University Press, which includes works by authors such as Richard Posner, Richard Epstein, Alan Dershowitz, and Laurence Tribe.

¶26 Wilkinson discusses four theories of constitutional interpretation that he calls “cosmic constitutional theories.” He provides a primer on each theory, touching on the virtues and vices of each. However, significantly more space is devoted to the drawbacks and day-to-day workability of each theory. Additionally, he identifies what you might call a representative, or champion, for each theory. From the first chapter, it is clear that Wilkinson believes that judicial restraint is the best course and that none of the theories he is about to discuss lives up to that ideal.

¶27 Living constitutionalism, as touted by Justice William J. Brennan, purports to attach current meaning to the words of the Constitution. Wilkinson credits living constitutionalists with “curbing racial and gender discrimination and expanding the rights of free speech and to the assistance of counsel” (p.11), but he believes that the courts overreached on “abortion, capital punishment, and habeas corpus” (id.), among other areas. Living constitutionalism promotes stability and assists the other branches of government to promote equality, but “charges judges with the task of creating a better world” (p.20). Wilkinson, providing his harshest criticism for this first theory, alleges that living constitutionalism ignores democratic will, institutional limitations, and textual constraints.

¶28 Juxtaposed against living constitutionalism is originalism. Relying primarily on Robert Bork’s The Tempting of America, Wilkinson states that originalism “accepts the original public understanding of the Constitution as the only legitimate source of constitutional interpretation” (pp.37–38). Originalism’s greatest virtue, according to Wilkinson, is its focus on judicial restraint. The problem with originalism is that it requires judges to be historians. Two judges can reach conflicting conclusions from the same historical documentation, which Wilkinson argues actually leads to judicial activism.

¶29 Wilkinson uses John Hart Ely’s Democracy and Distrust to convey political process theory. This theory proposes that “courts should focus their attention on process rather than outcomes, ensuring both that our democratic government functions openly and transparently and that majorities adequately consider the interests of minorities” (p.63). The reliance on process is grounded in faith in representative government. Wilkinson argues that political process theory allows courts to define our democracy, while using process judgments as a substitute for substantive judgments.

¶30 The discussion of cosmic constitutional theories wraps up with Judge Richard Posner representing pragmatism. Pragmatic judges base their decisions on effects when the specific language of primary authorities does not resolve an issue. The truly pragmatic judge bases decisions on “overall consequences” (p.82) and not just those likely to affect the individual litigants. According to Posner and

Wilkinson, pragmatism provides flexibility, cautions judges with limitations, and encourages honesty. However, the trouble with pragmatism arises when judges decide whether to balance costs and benefits when legal texts do not provide a solution, and then again when deciding how to balance interests.

¶31 Wilkinson maintains throughout the book that there is no one perfect theory, and that all of these constitutional theories have major shortcomings that cause judges to be interventionists. Wilkinson does such a good job laying out these shortcomings that by the end of the book you want his own take on which theory is best, or for him to provide a theory of his own, despite the fact that he states in the introduction that he does not do so. Alas, the reader is left desiring a solution to a problem that appears to have none. In spite of that, *Cosmic Constitutional Theory* offers a useful assessment of constitutional theories, and it is recommended for all academic law libraries and other academic libraries where patrons seek scholarly commentary on constitutional theory.


Reviewed by Alicia Y. Dyer*  

¶32 The idea of a book that covers Shari’a law is intriguing in and of itself, since it involves a topic that is as foreign to the Western mind as it is mystical. In the 620s, when the Qur’an was first articulated by the Prophet Muhammad, the term *Shari’a* referred to the idea of a “direct path to water” (p.12), a concept very important to desert peoples. In overly simplistic terms, *Shari’a* refers to Islamic law, which represents a Muslim’s quest to do “right by God” (p.278). In reality, it is a complex concept that denies simple definition, which is why a text such as *Heaven on Earth: A Journey through Shari’a Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World* is so useful. Although most Westerners have heard of the Shari’a, they know of it only in a very limited (and often hostile) context and have little understanding of its meaning. Sadakat Kadri, an English barrister of Indian heritage, strives to explain to a Western audience the elusive concept of the Shari’a in a digestible way.

¶33 Because of its complexity, one cannot expect to know and understand the Shari’a after reading one text, especially given the diversity of interpretation of the Shari’a that persists among Muslims. But Kadri outlines the chronology of events from the time of the Prophet Muhammad to the present, providing context for these differing opinions regarding the interpretation and application of the Shari’a.

¶34 In the first half of *Heaven on Earth*, Kadri leads readers through the history of Islam, beginning with the birth of the religion as conveyed to the Prophet Muhammad. Islam persisted through many tumultuous years, weathering conflicts not only with other major religions, but also from within the religion itself, which

eventually led to separate factions of believers and schools of jurisprudential thought. In this context, it is easy to identify the challenges Islam faced in codifying and interpreting the laws of God, particularly due to the reluctance to transcribe the texts from which those laws derived.

¶35 It would be disingenuous to write a book on Islamic law that is geared toward Western readers without mentioning the events of September 11, 2001. In the second half of the book, Kadri moves on to discuss Islam in the present-day world. Within the context of the historical underpinnings of Islamic law, Kadri provides a cogent description of violent Muslim extremism and the principles relied on in support of those ideals, while also demonstrating the isolation of such beliefs. Suicide bombings did not exist in the Muslim world until 1983, but these incidents are the ones most familiar to Westerners. Kadri helps dispel some of the myths about Islamic religion and culture that have proliferated in the Western world, by focusing on the isolation of radical incidents. Kadri also addresses other issues frequently condemned in Western countries, particularly related to the inequality and treatment of women. Here again, it is apparent that one should view these matters within the context of the laws themselves, and the nation and system of government where they occur, instead of blaming the religion as a whole. Without knowing this context, Westerners cannot appreciate the nuances and differences found among believers, let alone understand the principles that guide the religious laws.

¶36 Increasingly, legal professionals may find themselves addressing Shari’a issues, particularly in the context of inheritance, business, and matrimonial disputes. The Federal Arbitration Act,10 coupled with its interpretation in U.S. courts, has permitted religious tribunals to arbitrate such disputes. These judgments are then given the force of law by state and federal courts. Thus, a proper understanding of the Shari’a would greatly benefit practitioners and scholars. *Heaven on Earth* would make a worthwhile addition to academic collections, both general and legal, as well as to collections at law firm libraries where attorneys work with Muslim clients.


Reviewed by Jacquelyn McCloud*

¶37 “Times have changed, but the issues themselves are not new” (p.2), states Peter Decherney in the introduction to *Hollywood’s Copyright Wars: From Edison to the Internet.* Decherney, a film scholar and associate professor of cinema studies, English, and communication at the University of Pennsylvania, lends his authoritative voice to an account of the history of the Hollywood film industry and its relation to copyright law in the United States.

¶38 Beginning with Thomas Edison’s attempt to control the film industry during the early 1900s, Decherney discusses transformative innovations in film tech-

* © Jacquelyn McCloud, 2013. Electronic Services Librarian, University of Iowa Law Library, Iowa City, Iowa.
nology and the resulting influence technology has had on the film industry during the last century, concluding with present-day issues regarding digital media and the Digital Millennium Copyright Act. While film technology has changed, Decherney successfully shows that the issues surrounding innovation remain the same. Piracy, authorship, and industry self-regulation emerge as dominant themes.

¶39 Each of the book’s five chapters examines a period of transformation for the Hollywood film industry. Decherney begins by examining the creation of movies and piracy (chapter 1) and the emergence of the studio system and plagiarism (chapter 2). Next, he explains the impact of television (chapter 3), home video, and fair use on the film industry (chapter 4). The last chapter focuses on the creation of the Internet, digital media, and digital copy protection.

¶40 Early in the book, Decherney states that: “Copyright law is the battlefield on which media piracy battles are fought” (p.11). Decherney delves into the respective roles of the stakeholders in the piracy battle and the tension between old and new media. On one side there are “incumbent businesses trying to protect their investment in older media by resisting the new. On the other side, today’s pirates are often tomorrow’s moguls, who are simply pushing the limits of new technology in directions that have yet to be assimilated” (id.). The incumbent-pirate paradigm is repeated throughout the book. For example, early in film history, directors defended the right to borrow ideas from literature and theater, thus rebuffing claims of plagiarism. A few decades later, directors were on the other side of the argument. During the 1960s, directors championed “moral rights” (p.127) in an effort to prevent the studios from licensing new versions of their works for television.

¶41 Examining piracy raises the question of authorship. To this end, Decherney discusses selected legal cases that sought to answer the authorship question in the context of U.S. copyright law. He focuses more on the context and backstory surrounding these cases than the actual text of the decisions. His approach breathes life into the opinions and makes the discussion of authorship under copyright law accessible for all readers. For those who are interested, there are extensive footnotes as well as case citations.

¶42 Decherney also discusses the policy and extralegal resolutions to copyright conflicts in Hollywood. He uses the talent guilds as an example of the self-regulation Hollywood has preferred over judicial resolution. For instance, during the 1920s the Screen Writers Guild (later known as the Writers Guild of America) established terms for film rights and screen credits and negotiated disputes between writers and producers in an effort to handle such matters in-house rather than through the court system. In-house regulation was also used by the film industry during the 1980s to resolve its video rental problem, which emerged as a result of the VCR.

¶43 Hollywood’s Copyright Wars is an enjoyable and engrossing work about the history of the American film industry. It provides an insightful discussion of U.S. copyright law in the context of film and media. It is well organized and extensively footnoted and has an adequate index. This book is recommended for academic law libraries, undergraduate libraries, and public libraries.


*Reviewed by Wendy Law*

¶44 The legal job recession and revelations about law schools’ misleading reports of employment numbers and LSAT scores have tarnished the prosperous image of legal education. In *Failing Law Schools*, Brian Tamanaha, a law professor at the Washington University School of Law, examines the current state of law schools and reveals ways they are failing today. In particular, he shows how the economic model is broken, with the cost of law school far outstripping most graduates’ economic opportunities and leaving many with financial hardship. Tamanaha’s goals are to expose “the disconnect between the cost of a legal education and the economic return it brings and finding ways to fix it” (p.xi).

¶45 Tamanaha sets out the framework for these goals in the first half of the book. He illustrates the complex dynamics of law faculties through his own experiences as an interim dean. He then relates how law schools and law professors furthered their own interests using regulatory mechanisms such as the Association of American Law Schools (AALS) standards and American Bar Association (ABA) accreditation standards. Law faculty reduced their teaching loads, increased their salaries, and prevented cost-saving changes to the ABA standards that would have offered schools more flexibility to hire non-tenure-track professors. Moreover, the elite law schools utilized AALS and ABA standards to evolve from a two-year law practice training model taught by practitioners to a three-year unified model taught by full-time scholars. Both factors influence today’s legal education costs.

¶46 Tamanaha then explores the practicing bar’s concerns that future lawyers are being inadequately trained by professors with little practice experience and who produce increasingly irrelevant scholarship. These concerns prompted schools to add clinics and expand their faculties and administrations, which in turn required larger student bodies and tuition increases to cover expenses.

¶47 Tamanaha demonstrates how schools’ desires to increase their *U.S. News & World Report* rankings to gain prestige and compete for students has a detrimental effect on legal education. Schools have reported misleading postgraduate employment numbers, and many use scholarships to increase their median LSAT scores and grade point averages, instead of funding students with financial need.

¶48 In the second half of the book, Tamanaha challenges how law schools currently operate and explains how the economic model for legal education is broken. Tuition increases have caused graduate debt to balloon, and graduates’ ability to meet their debts is dependent upon employment. With the decrease in employment opportunities, many graduates will enter the Income-Based Repayment program, which has negative implications for both graduates and the federal government that will forgive their loans.

¶49 Tamanaha offers prospective students insight into whether law school is worth the cost, examining the degree’s economic return and whether it will pay off.

* © Wendy Law, 2013. Head of Collection Development, Dee J. Kelly Law Library, Texas Wesleyan University School of Law, Fort Worth, Texas.
given graduate debt levels. He looks at factors impeding prospective students from making informed choices about law school and discusses warning signs, such as schools with high average graduate debt and low salary and employment numbers. *Failing Law Schools* thus offers prospective students a method for calculating their financial risk and advises them on several issues to consider before applying.

¶50 In Tamanaha’s view, law schools risk decreasing demand for legal education by increasing tuition, and reduced applications may cause class quality and revenue to fall. Other risks include structural changes in the legal market, an oversupply of graduates, and alumni with unmanageable debt. Tamanaha proposes standards that will permit affordably priced, two-year law schools focused on training practitioners. Ultimately, though, he believes that market forces will impose changes on today’s unsustainable law school economic model even if his solutions are rejected. Tamanaha concludes that law faculty must help contain the rising costs of legal education and fix the skewed law school economic model to enable people from disadvantaged economic backgrounds to afford law school.

¶51 Readers will find *Failing Law Schools* to be relevant, well written, organized, scholarly, and a thoroughly engaging read. Tamanaha makes compelling arguments for why law schools are failing economically and offers solutions. Though he admits many colleagues will not agree with his views, he brings to light troublesome trends and problems and makes projections about the future of the legal market and law schools, drawing upon reports, articles, statistics, and personal experience. His assertions are well researched, supported by detailed notes, and the book has a good index to aid the reader. *Failing Law Schools* will interest legal academics, students, and regulators. The book is recommended for academic and public library collections.
Is reading books about law helpful to law librarians? Ms. Whisner discusses why and what she likes to read, and makes recommendations about books others might find interesting.

§1 Stronger even than the stereotypes about sensible shoes and glasses on a cord is the one about librarians loving to read. Of course, when I meet strangers, they can tell at a glance that I have glasses (no cord, because I need them all the time) and sensible shoes, so little is left to say but “You must love to read!”¹ I’ve heard that admissions committees for graduate programs in library and information science weary of applications that open with “I’ve always loved to read.” So when I talk to potential students, I encourage them to write about their fascination with technology, their experience in customer service jobs, and their eagerness to help people navigate the flood of information, in addition to—or instead of—their love of reading.

§2 The reality of librarianship is that we’re all too busy to sit down and read while we’re at work. And yet many of us do love to read and might have been attracted to the profession because of the image of spending our days surrounded by books, promoting books, organizing books, preserving books, and getting books to people who need them. While many of us do read a lot in our leisure hours, loving to read isn’t essential to being a good librarian. One could hold all the profession’s values and do a terrific job at work, but prefer to spend time away from work rock-climbing, quilting, canoeing, dancing, watching movies, or performing in a Scottish pipe band.

The Reading Bug

§3 I happen to be one of the librarians who do love to read and, among other things, I read books about law. I’ll talk later about whether it’s useful in my work,

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* © Mary Whisner, 2013. I am grateful to my colleagues Tricia Hart and Ann Nez for reading a draft and helping me with the section on cataloging practice.
1. There’s also: “Computers must have really changed the way you work!”—but I’ve already written about that. Mary Whisner, Change and Continuity (Rip Van Winkle’s Reference Office), 102 Law Libr. J. 141, 2010 Law Libr. J. 7.
but I want to be clear that the reason I read is not in order to be a better reference librarian. I just have the bug.

¶4 As the due date for this column approached, I was busy at work. Going about my various duties, I tried to think of a good topic that would not require weeks of research. (Some of my favorite columns have been packed with footnotes, but the digging required for those takes more time than I had.) While doing research for a professor, I came across a book that appealed to me, and then I realized I had my column topic: I could write about this book and perhaps some others. The excitement I felt at getting to read the book cemented my choice—I would not only have something to write about, but I’d also get an emotional boost during a stressful period at work.²

¶5 The book was Lawtalk: The Unknown Stories Behind Familiar Legal Expressions.³ Why did Lawtalk call to me? First, it concerns two of my longtime interests: language and law. Second, I already knew the work of two of the authors. I met Fred Shapiro twenty-five years ago when I was a library school student interviewing for my first job, and we have stayed in touch. I like and use his Dictionary of American Legal Quotations and The Yale Book of Quotations. I’ve read with interest his scholarship trying to assess the impact of various books and articles by measuring their citation rates.⁴ I don’t know Marc Galanter personally, but I know him as a scholar. His book on lawyer jokes was thought-provoking (as well as funny at times),⁵ and his article on repeat actors in litigation is a classic of law and society.⁶ Finally, Lawtalk had a very positive blurb from Bryan Garner,⁷ the prolific author on writing and legal writing. So, even though I hadn’t heard of the first two authors, I wanted to take a look at the book.

¶6 The acknowledgments elaborate on what it means for Lawtalk to have four authors. Marc Galanter had the idea and was primarily responsible for the jokes and sidebars. Fred Shapiro provided research and handled most of the permissions and illustrations. All four authors contributed to all of the entries, but each entry has one primary author, indicated by initials at the end of the entry. James Clapp or Elizabeth Thornburg gets primary credit for all but two, which are attributed to Marc Galanter.⁸

². The first weeks of fall quarter are always busy. Last year at this time, the busyness inspired a column about ways to cope with too much work. Mary Whisner, Work Crunch, 103 Law Libr. J. 147, 2011 Law Libr. J. 8.
³. James E. Clapp, Elizabeth G. Thornburg, Marc Galanter & Fred R. Shapiro, Lawtalk: The Unknown Stories Behind Familiar Legal Expressions (2011) [hereinafter Clapp et al.].
⁵. Marc Galanter, Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc’y Rev. 95 (1974). See also In Litigation: Do the “Haves” Still Come Out Ahead? (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (reprinting the original article and presenting new articles on its themes). The original law review article is one of the most cited of all time, ranking thirty-seventh as of November 2011. Shapiro & Pearse, supra note 4, at 1490.
⁷. Galanter’s two entries are rainmaker and thinking like a lawyer. Clapp et al., supra note 3, at 205, 258.
Aside on Cataloging

Reading a book with four authors, who played different roles in its creation, led me to think about the cataloging of books with multiple authors. The cataloging in publication for Lawtalk is as follows:

Lawtalk: the unknown stories behind familiar legal expressions / James E. Clapp . . . [et al.]
   p. cm. — (Yale law library series in legal history and reference)
   Includes bibliographical references and index.
   ISBN 978-0-300-17246-1 (hardback)
   1. Law—United States—Dictionaries. I. Clapp, James E. (James Edward), 1943—.
   KF156.L39 2011
   340' .14—dc23 9

James E. Clapp is the only author listed. So what happened to the other three? They’re not there because when a work has more than three authors standard cataloging practice has been to include only the first. And so, in most catalogs, a researcher who was a fan of Elizabeth Thornburg, Marc Galanter, or Fred Shapiro would not be able to find this book they coauthored. This also happens in footnotes and bibliographies.10 The Bluebook (not generally renowned for its flexibility) allows listing more than the first author “when listing all of the authors’ names is particularly relevant,”11 and so I listed them when I first cited the book, above.

Libraries do not have to follow cataloging conventions slavishly, so I wondered whether the authors’ home libraries included more than the cataloging in publication does, and in fact they do. The law library at Southern Methodist University, where Elizabeth Thornburg teaches, lists all four authors. The University of Wisconsin Law Library cataloged Lawtalk as being by “James E. Clapp, Marc Galanter . . . [et al.],” enabling researchers there to find this book by a Wisconsin professor (but leaving out Thornburg and Shapiro). Yale Law Library, where Fred Shapiro works, lists “James E. Clapp . . . [et al.]” in the main entry, but has added author entries for the other three authors.12 (Yale also includes a detailed table of contents. That way, someone who happened to search their library catalog for ham sandwich would find this book.13 More likely, of course, is a search for affirmative action or hearsay—where the book would turn up among a long list of works, possibly leading a researcher to something relevant and interesting.)

Many cataloging rules originated in the days when catalog cards were hand-written or individually typed. Even after cards could be purchased or were machine

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9. Cataloging in publication is not meant to be the last word. It’s a starting point for catalogers, not the final record.

10. See, e.g., MLA Style Manual 190 (3d ed. 2008) (§ 6.6.4) (for more than three authors, option to list all or list the first followed by et al.); Chicago Style Citation Quick Guide, CHICAGO MANUAL OF STYLE ONLINE, http://www.chicagomanualofstyle.org/tools_citationguide.html (last visited Nov. 11, 2012) (for four or more authors, in bibliography list all authors, but in notes list the first followed by et al.).


12. James E. Clapp, the first author listed, is a practicing attorney and so has no “home” library to check.

generated, they still had to be filed by hand. This labor—and the limits of space in card catalog cabinets—must have contributed to the rule against listing more than three authors.\textsuperscript{14} Who would want to create and file those extra cards for “added author” entries? Now that our catalogs are online, though, the economics of labor and space have changed. Of course, it still requires labor to create entries for multiple authors, but not as much labor as creating and filing individual cards. And with copy cataloging and bibliographic utilities, the extra work need be done only once, not in each library. The added access would benefit users and meet their expectations. If I can go to Amazon.com or Google Books and find *Lawtalk* when I search for “Marc Galanter,” why shouldn’t I be able to do that in a library catalog?

\textsuperscript{11} Happily, it turns out that the cataloging world addressed this problem while I wasn’t looking. Resource Description and Access (RDA) is a new cataloging standard, already adopted by some libraries and soon to be adopted by others (like mine). RDA undoes the Rule of Three that limited the number of authors in a catalog record (although RDA 2.4.1.5 allows for an “optional omission”).\textsuperscript{15}

\textbf{Diverse Topics, Suitable for Browsing}

\textsuperscript{12} Returning to the book itself, *Lawtalk* presents essays on legal terms in alphabetical order (from “abuse excuse” to “the whole truth”), but it offers much more than definitions and etymology. The authors use the terms as thematic starting points for discursions on history, policy, pop culture, and—of course—law. The style reminded me of writers from outside law whose collected short works I have enjoyed, including Stephen Jay Gould, Anne Fadiman, and Geoffrey Nunberg. Gould and Fadiman wrote their essays for magazines (*Natural History*, *Civilization*, *The American Scholar*); many of Nunberg’s pieces were written for the radio program *Fresh Air* (an audio periodical, so to speak). I haven’t seen any indication that *Lawtalk*’s essays originally appeared in another format, but they have that same feeling.

\textsuperscript{13} Entries average a little under four pages: short enough to read during a coffee break, but long enough to say something. They are independent from one another, so one could use the book for isolated questions (“Where did Brown’s phrase ‘all deliberate speed’ come from?”\textsuperscript{16}) or just flip through it, picking out whatever caught one’s attention. Of course, one could also read it straight through, as I did. Throughout, I found myself reacting to choice tidbits with internal com-

\textsuperscript{14} My colleague Ann Nez observed that limiting the number of authors listed is in tune with (and could have stemmed from) a view of authorship that values the lone creator and devalues collaboration.

\textsuperscript{15} If you are a cataloger, you probably use the RDA Toolkit, an online collection of cataloging resources, including RDA. If you just want a look at RDA, see the RDA Constituency Review Draft, RDA Toolkit (Oct. 31, 2008), http://www.rdatoolkit.org/constituencydraft. Rule 2.4.1.5 is on page 62 of chapter 2. See also Adam L. Schiff, Changes from AACR2 to RDA: A Comparison of Examples 18, available at http://www.rda-jsc.org/docs/BCLAPresentationWithNotes.pdf (last visited Nov. 28, 2012).

\textsuperscript{16} Clapp et al., supra note 3, at 93. See also Brown v. Bd. of Educ. 349 U.S. 294, 301 (1955).
ments like, “Gee, I never knew that! How interesting!” But the book is more than a parade of trivia. The authors’ discussions of etymology and usage often include commentary on important policy issues.

§14 I enjoyed the varied topics and wide-ranging commentary. Come to think of it, the experience of reading about one interesting topic for a while and then moving to another interesting topic reminds me of one thing I like so much about being a reference librarian: getting to work on and talk with people about many different projects. And just as some types of questions recur in the reference office, I noticed that many entries addressed one or more common themes: criminal law, constitutional law, race, and law practice.

Criminal Law

§15 Like myriad other Americans, I have watched thousands of hours of crime dramas and read stacks of murder mysteries. Crime is dramatic, and how our society addresses it is important. In recent years I’ve read more nonfiction about criminal justice than crime novels: I get some drama and also some food for thought.

§16 “As good be hang’d for an old sheep as a young lamb” is a very old proverb (the book cites a source from 1678) that today “is often used lightheartedly.” But for many centuries stealing sheep was indeed a capital offense. And it wasn’t alone: “by the early nineteenth century, over two hundred capital crimes had been defined” in England. That fact startled me. I could easily assume crimes like murder, treason, rape, and piracy might be punishable by death, but those and stealing sheep added up to only five offenses—nowhere near two hundred. The other offenses included being in the company of gypsies, minor burglary, and pulling up a shrub in a park. This willingness to hang offenders for what we see as minor offenses today made the early nineteenth century the era of the “Bloody Code.” Not at all the impression left by happy hours spent reading Jane Austen’s witty novels about marriage and manners.

§17 After the discussion of Britain’s heavy use of the death penalty, the entry traces the country’s retreat from it. Now, pursuant to the European Convention on Human Rights, the death penalty is only available in times of war or imminent threat of war. Quickly jumping across the Atlantic, the entry (this one is by Clapp)

17. There are entries for blackmail; blue wall of silence; corpus delicti; CSI effect; eye for an eye; fishing expedition; hanged for a sheep; indict a ham sandwich; rap; rap sheet; RICO; thin blue line; third degree.
18. There are entries for color-blind; deliberate speed; electoral college; one person, one vote; penumbra; separate but equal; three-fifths rule; wall of separation.
19. There are entries for affirmative action; badge of slavery; color-blind; deliberate speed; Jim Crow; play the race card; separate but equal; three-fifths rule.
20. There are entries for attorney general; attorney vs. lawyer; billable hour; black letter law; boilerplate; Chinese Wall; fishing expedition; hornbook law; kill all the lawyers; lawyers, guns, and money; Philadelphia lawyer; rainmaker; shyster; white shoe.
21. CLAPP ET AL., supra note 3, at 118.
22. Id.
23. Id. (quoting Roberta M. Harding, Capital Punishment as Human Sacrifice: A Societal Ritual as Depicted in George Eliot’s Adam Bede, 48 BUFF. L. REV. 175, 257 (2000)).
24. Id. at 118.
contrasts America’s experience: “The United States, where technology is king, took a different path to the end of hangings—replacing hanging in almost every state by electrocution, and that in turn by lethal injection.”

The entry is not a long history of the death penalty, and this sentence is not a diatribe against our national commitment to it, but the comment is pointed.

¶ 18 The entry for blood money (also by Clapp) explains that the term relates to the practice in many cultures of payment to the family of someone killed by violence or accident to prevent an escalating retaliation leading to a feud. Leaping from ancient and distant cultures to the present day, the entry connects the practice with payments the United States has made to Iraqi civilians killed by the military and with the wrongful death award against O.J. Simpson. And then there is the sense of “blood money” that means payment to someone who helps bring about another’s death, as in the payment to Judas Iscariot for betraying Jesus. Clapp discusses the historic practice of paying witnesses for their testimony (and some witnesses’ laxness about the truth of their testimony). The issue’s currency becomes apparent when Clapp notes the common use by prosecutors of jailhouse snitches and cites a study finding that sixteen percent of 130 people exonerated by DNA evidence had been convicted based on testimony for which the informants were rewarded in some way.

Constitutional Law and Race

¶ 19 Many of the terms from constitutional law reflect America’s history of oppressing people of African ancestry. The entry for three-fifths rule, for example, explains the clause in the Constitution that allowed the slaveholding states more members in Congress than they would have had if apportionment were based on voting population alone rather than voting population plus three-fifths of the slaves:

The great irony of the three-fifths rule is that rather than hurting the slaves’ cause by failing to count them as full persons, it hurt them by counting them at all. For example, it was only by reason of the three-fifths rule that the Virginia slave owner Thomas Jefferson, a consistent supporter of slavery policies, defeated the non-slave-owning New Englander John Adams in the presidential election of 1800.

The consequence of the three-fifths rule was that for seven decades—the formative years for the country under its new constitution—American government was dominated by slaveholder interests.

¶ 20 This concise analysis illuminates not just the term but also a critical period in American history. Read the entries on badge of slavery, Jim Crow, separate but equal, and deliberate speed to follow at least some of the subsequent history of race and the Constitution.

25. Id. at 119.
26. Id. at 39–40.
27. Id. at 42. For a troubling look at the use of paid informants and its effect on communities, see Alexandra Natapoff, Snitching: Criminal Informants and the Erosion of American Justice (2009). 
Law Practice

¶21 I’ve heard people refer to “white-shoe firms” for years, but I didn’t quite get it. After all, the lawyers at those firms seemed to wear dark suits and black shoes all the time. At last, I have an answer: it comes from the white bucks the lawyers wore at their country clubs and their younger counterparts wore at Ivy League colleges. A white-shoe firm was one made up of well-connected white male Protestants—the Ivy League and country club set. Even the snootiest law firms have diversified their hiring since the 1950s, but the term survives. Now white shoe indicates a firm’s “historical origins or its current status as powerful, well established, and well connected.”

¶22 White-shoe firms and most lawyers throughout the country bill their time by the hour—or tenth of an hour—and associates are under great pressure to make sure their annual totals of billable hours are high. But it was not ever thus. In 1958, the American Bar Association urged lawyers to bill for their time, and the practice became the dominant mode of billing for services by the late 1970s. Elizabeth Thornburg’s entry for billable hour traces this history and the recent criticisms of the system. Along the way, readers are also treated to a couple of lawyer jokes.

Other Terms

¶23 Lawtalk has not said all there is to say about terms used in law. Perhaps the authors are already drafting entries for a sequel (Lawtalkback? Lawdoubletalk?). There are certainly enough colorful terms left to write about. For instance, I’d like to read what they would say about the following: circuit split, golden parachute, marriage equality, on all fours, parade of horribles, poison pill, race to the bottom, reasonable doubt, slippery slope, and white-collar crime.

Other Books

¶24 Part of the charm of Lawtalk is the brevity and tightness of the essays. But sometimes you want more than that. The authors provide helpful endnotes for those who want to read more (without breaking up the flow of the text for the skimmers). I’m also going to offer some more recommendations because it’s fun to share books I’ve enjoyed. The topics I’ve highlighted—criminal law, constitutional law, race, and law practice—often overlap, as a book about criminal law might also explore the practice of a defense attorney or the ways the criminal justice system is stacked against people of color.

¶25 A work that has justifiably received a lot of attention in the past couple of years is Michelle Alexander’s The New Jim Crow, which argues that the “war on crime” is a subtle, or not-so-subtle, war on communities of color. Snitching is a good companion book while the use of criminal informants is discussed in The

29. Id. at 287.
30. Id. at 27–31.
32. Natapoff, supra note 27.
New Jim Crow (police use informants who mostly know—people of their own race), that book is much broader; *Snitching* looks at the topic in more depth. If you’re curious about criminal justice during the time of the “old” Jim Crow, I recommend *Slavery by Another Name*, which recounts in painstaking detail the use of charges like vagrancy to arrest and imprison black men and women and put them out to work in chain gangs and other settings.\textsuperscript{33}

\¶ 26 While those three books examine the national situation, there are also fascinating books with a tighter focus. Set in Honolulu in the 1920s and early 1930s, *Honor Killing* tells the story of two trials and the national uproar around them.\textsuperscript{34} One was a trial of five men of color (Hawai‘ian, Chinese American, and Japanese American) who were prosecuted for the rape of the young white wife of a naval officer. After the jury in that case deadlocked, the officer and three others were tried for murdering one of the accused men. Adding to the drama is the larger-than-life figure of Clarence Darrow, hired to defend the whites accused of murder.

\¶ 27 I am happy with my job as a reference librarian, but I am curious about the practices of lawyers who take on hard criminal cases. *Angel of Death Row*\textsuperscript{35} and *Autobiography of an Execution*\textsuperscript{36} are memoirs by death penalty lawyers discussing their difficult practice lives and cases. *Unbillable Hours*\textsuperscript{37} is the memoir of a brand new associate at a big law firm who started working on a postconviction relief case as a pro bono project and became completely invested in the work.

\¶ 28 You probably haven’t heard of the defendants in the memoirs above, but likely have heard of the Green River Killer. For years, law enforcement hunted for the killer of dozens of women south of Seattle in the early 1980s. Finally, in 2001, DNA evidence enabled police to identify the killer as Gary Ridgway, a seemingly ordinary guy who worked painting trucks. The defense team negotiated a plea deal: no death penalty in exchange for Ridgway’s cooperation in solving the cases for which the prosecution didn’t have evidence, for instance, young women who had been reported missing but whose bodies had never been found. *Defending Gary* is an account by Ridgway’s attorney of his experience, which included being present for the months of interviews during which the prosecutors tried to learn all they could about Ridgway’s crimes.\textsuperscript{38} Unlike many of the serial killers in the movies, Ridgway was no evil genius; in fact, he wasn’t very bright at all, but for many years he was good at getting away with murder.

\¶ 29 For more stories about death penalty cases, you could read the aptly named *Death Penalty Stories*.\textsuperscript{39} And for stories about lawyers struggling (or not) with the ethical complexities of practice, you might want to read *Legal Ethics Stories*.\textsuperscript{40} The first story in that collection combines the themes of race, constitutional law, and

\textsuperscript{33} Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (2008).


\textsuperscript{37} Ian Graham, *Unbillable Hours* (2010).

\textsuperscript{38} Mark Prothero, *Defending Gary* (2006).

\textsuperscript{39} Death Penalty Stories (John H. Blume & Jordan M. Streiker eds., 2009).

\textsuperscript{40} Legal Ethics Stories (Deborah L. Rhode & David Luban eds., 2006).
law practice: a lawyer took on a pro bono case for the ACLU, representing the Ku Klux Klan, and as a result lost his position as general counsel for the NAACP.\textsuperscript{41} Another story that is particularly memorable combines the themes of criminal law and law practice: the very high profile case of Theodore Kaczynski, whose court-appointed lawyers planned to present mental health evidence, contrary to his clear wishes, thus forcing him to choose between a guilty plea and a defense that was anathema to him.\textsuperscript{42}

\textsuperscript{¶}30 Another recent memoir offers a view of a special type of law practice—that of the “jailhouse lawyer,” a prisoner who helps other inmates with their legal claims.\textsuperscript{43} Shon Hopwood was a directionless college dropout who thought that robbing banks would solve his problems. It not only didn’t make him rich, it landed him in prison for ten years. But early in his sentence he was assigned to work in the law library. And, as a \textit{New York Times} reporter put it, “The law library changed Mr. Hopwood’s life.”\textsuperscript{44} He threw himself into law study, and when working on a case devoted endless hours to analyzing every angle. Remarkably, two out of his three petitions for certiorari were successful. Today he is out of prison, studying law not in a prison library but at the University of Washington School of Law.\textsuperscript{45}

\textbf{Benefits of Reading}

\textsuperscript{¶}31 As you can tell, I read a lot, including books that are in my library’s collection. So what? Is it useful? Does it help me be a good reference librarian? Would I recommend that other librarians read books about law in their spare time?

\textsuperscript{¶}32 Reading books helps me promote them. Sometimes I write a blog post or recommend a book to a professor or a student I think would be interested. But, really, I could generally write a blog post or make a recommendation based only on the publisher’s description of the book or someone’s review of it.

\textsuperscript{¶}33 While reading books isn’t necessary in order to promote them, it does inform me and makes me more familiar with legal issues that might arise in my reference work. I don’t want to claim too much, though: perhaps there are some reference interactions that I handle slightly better than I otherwise would, but the benefit is marginal. And I might get the same or greater benefit from other types of reading—bar journals, legal newspapers, blogs, or law reviews.\textsuperscript{46} And reading about law does improve my ability to fit in with the law school community. When I chat with faculty members, attend a lecture or colloquium, or talk to students about

\textsuperscript{41} David B. Wilkins, \textit{Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?}, in \textit{id.} at 17.

\textsuperscript{42} Michael Mello, \textit{United States v. Kaczynski: Representing the Unabomber, in Legal Ethics Stories, supra} note 40, at 139.

\textsuperscript{43} Shon Hopwood, \textit{Law Man} (2012).

\textsuperscript{44} Adam Liptak, \textit{As a Criminal, Mediocre; As a Jailhouse Lawyer, An Advocate Unmatched}, \textit{N.Y. Times}, Feb. 9, 2010, at A12.


\textsuperscript{46} For a discussion of this sort of professional reading, see Mary Whisner, \textit{Keeping Up Is Hard to Do}, 92 \textit{Law Libr. J.} 225, 2000 \textit{Law Libr. J.} 20.
their projects, I can make more mental connections because of the pages I’ve filtered through my head.

¶34 In the end, I suspect that the greatest benefits of reading books about the law are personal. I get the intellectual stimulation and pleasure of reading interesting books when I read on any topic. Having some law books in the mix has the bonus of heightening my interest in the questions I answer, the classes I speak to, and what’s going on at the law school. Book-length works enable me to engage with a topic more deeply (and for a longer time) than any number of blog posts or tweets; I like that and find it meaningful.47 Reading books about law is good for my engagement and good for my morale.48

¶35 Librarians who do not enjoy reading nonfiction in general or law in particular—or who would like to but don’t have the time to read books—might find that reading occasional books from the law library is a burden. But new librarians or those without legal training might find such reading helpful in expanding their knowledge of law and the legal system. For many librarians, the benefits may be similar to what I’ve experienced: familiarity with topics, connection with the people around them, intellectual stimulation, and a morale boost. Being bitten by the reading bug can be a blessing.

47. A team of authors who wrote a detailed account of one case explained why they chose to write at such length:

Unlike even a three-part newspaper series or a documentary in which the DeLuna story plays a part, a book-length treatment allows a deeper exploration of milieu, context, and motivation.

. . . .

More generally, a book-length presentation permits an anatomy, not only of a single obscure murder, but also of the ensuing criminal investigation, trial preparation, two-part capital trial, multi-layered appeals, and botched execution in a case whose very obscurity makes it a far better representation of what usually goes on in criminal cases than do the facts and proceedings in more notorious and idiosyncratic cases such as Sacco and Vanzetti, the Rosenbergs, and O.J. Simpson.

James S. Liebman et al., Los Tocayos Carlos, 43 COLUM. HUM. RTS. L. REV. 711, 1115–16 (2012). The authors are right: reading hundreds of pages made a deeper impact than reading something shorter that suggested that an innocent man had been convicted and executed. I saw each step of the slapdash investigation, single-minded prosecution, and incomplete defense. The 413-page PDF of this book-length article is available for download at http://www3.law.columbia.edu/hrlr/ltc/print-version.html. A web site complements the text with original documents and audio and visual sources: http://www3.law.columbia.edu/hrlr/ltc/ (last visited Nov. 11, 2012).
