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Internet Citations in Oklahoma Attorney General Opinions

Lee F. Peoples

This article reports the results of a study finding a forty-nine percent failure rate of links to Internet resources in Oklahoma attorney general opinions. This phenomenon, known as link rot and reference rot, can frustrate the efforts of future researchers, weaken public confidence in the law, undermine stare decisis, and hinder the law's natural growth and expansion. Specific solutions for addressing the problem are proposed.

Introduction

The citation of authority is a fundamental component of the common law legal tradition. Citations communicate that a line of argument is supported by an authoritative source that can be retrieved and reviewed to better understand the argument’s underpinnings. For centuries, lawyers and judges cited stable print sources that were relatively easy to locate. Once a source was in hand, a researcher had no reason to doubt that she was viewing anything other than the exact content as cited.
¶2 The citation of Internet resources in legal materials has turned this stable system on its head. As one commentator recently noted, “the footnote, a landmark in the history of civilization, took centuries to invent and to spread. It has taken mere years to nearly destroy.”1 Citations to Internet resources began appearing in law reviews, judicial opinions, and other legal materials in the late 1990s. Some citations are for trivial matters or dicta, while others are used to support logic or legal reasoning.

¶3 An alarming number of links to Internet resources cited in legal materials no longer work. No one can “predict what links will rot, even within individual Supreme Court cases. The Internet’s ephemeral nature means websites can be available today—and gone tomorrow.”2 The constantly changing nature of the Internet has the potential to dramatically impact the law. One study posited that the citation of Internet resources that no longer function “is contributing to the slow erosion of one of common law’s most fundamental principles—\textit{stare decisis}.”3

¶4 Internet resources become unavailable over time due to “link rot” and “reference rot.” Link rot refers to a link that no longer displays any content. Researchers who click on a link that has succumbed to link rot typically see a “404 not found” error page.4 Reference rot describes a link that “still works but the information referenced by the citation is no longer present, or has changed.”5

¶5 Link and reference rot occur for a variety of reasons. Links are references to content maintained by third parties, many with no interest in ensuring that links continue to function in perpetuity.6 Links often fail when websites are reorganized and link addresses, technically referred to as URLs, change. Link rot can occur when a website owner loses interest in maintaining a website, removes content from a website, or fails to renew a domain registration. Reference rot can occur when a website owner updates content to provide more current information or alters a website in any way.

¶6 Previous studies have demonstrated that link failure is widespread. One study examining links in law journals published between 1999 and 2011 found a seventy percent failure rate. Other studies found link failure rates ranging from twenty-seven to fifty percent in opinions of the Supreme Court of the United States7 and in state court appellate opinions from Washington,8 New York,9 Kentucky,10 and Texas.11 No study has examined link rot in attorney general opinions.

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2. Raizel Liebler & June Liebert, \textit{Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996–2010)}, 15 \textit{Yale J. L. & Tech.} 273, 277 (2013).
5. \textit{Id.} at 166.
6. \textit{Id.} at 165.
7. Liebler & Liebert, supra note 2, at 278.
9. \textit{Id.}
11. Arturo Torres, \textit{Is Link Rot Destroying Stare Decisis As We Know It? The Internet-Citation Practice of the Texas Appellate Courts}, 13 \textit{J. App. Prac. \\& Process} 269, 277 (2012).
¶7 This article begins by introducing the Oklahoma Office of the Attorney General and explaining the role of attorney general opinions in Oklahoma law. The second section presents the study methodology and summarizes study findings. The next three sections describe specific instances of link rot and reference rot in attorney general opinions and explore the consequences of these failures. The citation of Internet sources that are not stable, reliable, or authoritative is then examined. The article concludes with specific recommendations for improvement.

**The Role of Attorney General Opinions in Oklahoma Law**

¶8 The Oklahoma attorney general is an elected official who serves as the “chief law officer of the state.” Among the duties of the attorney general is giving a written opinion on questions of law when requested to do so by “the Legislature or either branch thereof, or by any state officer, board, commission or department, or by district attorneys.” Attorney general opinions are primary legal authority and are “binding on state officials until a court of competent jurisdiction renders an inconsistent decision.” Opinions “stating an act of the legislature is unconstitutional should be considered advisory only, and thus not binding until finally so determined by an action in the District Court of this state.” The attorney general has issued a small number of unpublished opinions. Unpublished opinions are “not an official Opinion of the Attorney General, but rather legal advice from an Assistant Attorney General in the form of a letter.”

¶9 The preface to the annually published compilation of opinions explains:

> Opinions are the product of a time-honored and well-established procedure used by Attorneys General. With each Opinion request eligible for review, an Assistant Attorney General is assigned to thoroughly research the legal context and precedent of all issues involved in order to draft a proposed opinion. The draft is presented in opinion conference by the Assistant Attorney General for debate and analysis among the Attorney General, the First Assistant Attorney General, the Solicitor General and a group of senior Assistant Attorneys General. Often, an Opinion is the subject of rigorous debate and multiple drafts before it is approved and signed by [the] Attorney General. . . .

> As has been stated by previous Attorneys General, Attorney General Opinion conferences are among the most intellectually stimulating exercises in the practice of law. The discussions range from legal history to language syntax to punctuation. While enunciating the views of the Attorney General, an opinion reflects the minds and effort of the many participants in the process.

¶10 Oklahoma attorney general opinions are an important part of Oklahoma law. The purpose of this study is not to criticize the substance of opinions, their authors, or the Office of the Attorney General. The findings and suggestions of this study are offered to make sources cited in opinions more accessible, to aid the development of Oklahoma law, and to help ensure its long-term stability.

13. *Id.* § 18b(A)(5).
Study Methodology and Results

¶11 The data forming the basis of this study was compiled by searching the WestlawNext database of Oklahoma attorney general opinions to locate opinions citing Internet resources. The initial search query used to locate opinions citing Internet resources was adv: www https http website internet “web page.” An additional query was used to locate Internet resources cited in opinions but only referred to by a top-level domain, adv: com org mil gov.

¶12 These searches returned a total of eighty-five attorney general opinions. Opinions that merely contained a search term but did not cite an Internet resource for factual information or to support the logic or reasoning of the opinion were removed from the dataset. This left a total of sixty-eight opinions citing an Internet resource for factual information or to support the logic or reasoning of the opinion. An Internet citation in an opinion referenced multiple times was counted only once.

¶13 The first citation to an Internet resource in an attorney general’s opinion appeared in 2002. The rate of citations has been growing steadily since 2002, as depicted in figure 1. The sixty-eight opinions citing Internet resources since 2002 comprise approximately fifteen percent of all opinions published during that time period. Interestingly, the percentage of attorney general opinions citing Internet resources is nearly identical to that of the U.S. Supreme Court. Fourteen percent of U.S. Supreme Court opinions published since 2000 include a citation to an Internet resource.

¶14 The total number of links found in all opinions was ninety-five. Forty-seven Internet resources were cited for factual information. Forty-eight Internet resources were cited to support the logic or legal reasoning of the opinion. Each link was checked to verify that it still worked. The content displayed on web pages was checked to determine whether it suffered from reference rot (not containing the information it was cited for). Advanced Internet search techniques were used to try and locate cited web pages that were inaccessible due to link rot (not displaying any content). Finally, each Internet resource cited in opinions was subjectively evaluated to determine its accuracy, reliability, and suitability for inclusion in an opinion.

¶15 Initial results revealed that seventy-three out of the ninety-five links cited in opinions did not work. This high failure rate can be explained because of the way WestlawNext formats links. WestlawNext occasionally inserts extra spaces into links, causing them to fail when cut and pasted into an Internet browser. For example, Opinion 2014-17 cites the Oklahoma secretary of state’s website for the text of a state question. The link is displayed as follows in WestlawNext (note the additional space after the “://” symbols): https://www.sos.ok.gov/gov/questions.aspx.

20. Liebler & Liebert, supra note 2, at 297.
21. Several of the sixty-eight opinions citing Internet resources contained more than one link.
WestlawNext typically inserts an extra space after the “://” symbol in a URL, but sometimes extra spaces are added elsewhere in links. Opinion 2008-2 cites an article appearing at the website religionandsocialpolicy.org. The link displayed in WestlawNext contains an extra space following the “://” symbol and following the “?” symbol: http://www.religionandsocialpolicy.org/interviews/interview_upd_cfin?id=87&pageMode=general.

Of the seventy-three links that initially appeared to fail, twenty-five were made to work by removing extra spaces inserted by WestlawNext. WestlawNext’s practice of inserting extra spaces into links may be obvious to an Internet savvy researcher. But an average or unsophisticated researcher may give up after retrieving an error message.

After correcting for link failures caused by WestlawNext’s insertion of spaces, the actual failure rate of links in attorney general’s opinions was determined to be forty-nine percent (forty-seven out of ninety-five links did not work). This failure rate is roughly comparable with the failure rate found in other studies of judicial opinions: Kentucky appellate courts (forty-seven percent failure rate); 25

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24. See the studies discussed infra about the lack of basic Internet research skills among members of the general public, law students, and lawyers.
Texas appellate courts (thirty-nine percent failure rate);\textsuperscript{26} published judicial opinions in Washington State (forty percent failure rate);\textsuperscript{27} published judicial opinions in New York State (twenty-seven percent failure rate);\textsuperscript{28} and the U.S. Supreme Court (twenty-nine percent failure rate).\textsuperscript{29}

¶19 The past twelve years of data demonstrate that the older a link in an Oklahoma attorney general opinion is, the more likely it is to fail. Grouping opinions by year reveals that links in opinions from 2002 to 2006 have a failure rate of sixty-eight percent, links in opinions from 2007 to 2010 have a failure rate of forty-six percent, and links in opinions from 2011 to 2014 have a failure rate of twenty-six percent (see figure 2). These results are consistent with studies finding that links in judicial opinions and law review articles are more likely to fail as they age.\textsuperscript{30}

\textbf{Finding Information Hidden by Link Rot}

¶20 Of the forty-seven links that did not work, twenty-six could be located by conducting additional Internet searches or modifying the link provided in the opinion. Some of this additional research was relatively straightforward and required a simple Google search or use of state government legal research websites. Some rotten links required more advanced research techniques to locate, including use of the Internet Archive’s Wayback Machine\textsuperscript{31} and other archives of web content.

¶21 Opinion 06-4 cited a rotten link to an unpublished Oklahoma Court of Civil Appeals opinion in answering the question of whether Indian tribes are required to purchase workers’ compensation insurance for their employees.\textsuperscript{32} The unpublished Court of Civil Appeals opinion is important to the legal reasoning of the attorney general’s opinion. The opinion notes it is “the only case to discuss the application of the Oklahoma Workers’ Compensation Act to a federally recognized Indian tribe.”\textsuperscript{33} The link to the case at the Oklahoma Public Legal Research System does not work because the address of the site recently changed. Some researchers not aware of the change may be alarmed to find a rotten link to primary legal authority in an attorney general’s opinion.

\begin{itemize}
\item \textsuperscript{26} Torres, supra note 11, at 281.
\item \textsuperscript{27} Aldrich, supra note 8, at 227.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Liebler & Liebert, supra note 2, at 282. But see Zittrain et al., supra note 4, at 175 (noting a forty-nine percent reference rot rate in links found in U.S. Supreme Court opinions).
\item \textsuperscript{30} See Torres, supra note 11, at 282 (“As a whole, the data show an upward trajectory of link rot with the passage of time.”); Zittrain et al., supra note 4, at 167 (citing an early study by Mary Rumsey finding a “steady decrease in working links” in law review articles). But see Liebler & Liebert, supra note 2, at 298–99 (“Based on statistical tests, we found no clear relationship between the time elapsed since a link was cited and whether the link still works.”).
\item \textsuperscript{31} \textit{INTERNET ARCHIVE WAYBACK MACHINE}, http://archive.org/web/web.php (last visited Aug. 24, 2015) [http://perma.cc/YLW4-26EU].
\item \textsuperscript{32} The link was to http://www.oklegal.onenet.net/oklegal-cgi/isearch. The address of the Oklahoma Public Legal Research System is now http://www.oklegal.onenet.net/ (last visited Aug. 24, 2015) [http://perma.cc/S2HK-SFA6].
\item \textsuperscript{33} Okla. Att’y Gen. Op. No. 06-4 (June 23, 2006).
\end{itemize}
Rotten links to the Oklahoma secretary of state’s website were found in several opinions. Citations to this website were problematic because links have changed as the website has been reorganized in recent years. For example, a link to the text of a state question available from the secretary of state’s website is cited to explain a change to the Oklahoma Constitution. The link brings up a “404” error page. However, a researcher with some legal research ability could locate the state question at the secretary of state’s website. In this instance, the rotten link could have been avoided if the opinion included a parallel citation to the text of the state question as published in a newspaper of general statewide circulation. In Opinion 09-10, a link the Oklahoma Funeral Board’s website to the text of proposed administrative rules is rotten. Researchers with an understanding of Oklahoma

administrative law can locate the proposed rule by searching the Oklahoma secretary of state’s website.

¶23 More skill is required to retrieve other rotten links. Opinion 08-2 addresses the question of whether the Office of Faith-Based and Community Initiatives is a state agency and who has the authority to determine its budget.38 The opinion reaches the conclusion that the office is not a state agency but functions within the Department of Human Services (DHS). In supporting these conclusions, the opinion cites traditional legal sources including state statutes and executive orders. The opinion also cites less traditional sources including an interview with the office’s former director.39 The interview is cited to explain that the office previously functioned under the State Department of Health (OSDH), but was brought under the umbrella of the DHS in July 2002 and renamed the Office of Faith-Based and Community Initiatives following the expiration of a contract between OSDH and DHS.40 The interview is the only source cited in the opinion to explain the office’s shift from OSDH to DHS.

¶24 The link for the interview provided in the opinion indicates that the interview appeared at the website religionandsocialpolicy.org. Entering the complete link into a web browser returns a “404 file not found” error. Religionandsocialpolicy.org is no longer a functioning website. The link redirects researchers to the website of the Nelson A. Rockefeller Institute of Government.41 A search of the Nelson A. Rockefeller Institute of Government website or a general web search will not locate the interview. The only way to locate the interview is through a careful search of the Internet Archive’s Wayback Machine. The Wayback Machine is a digital archive of 425 billion webpages.42 To locate the interview, a researcher must know that the Wayback Machine exists, enter the link for religionandsocialpolicy.org, browse to the archived version of the site available after the date of the interview, and search for the name of the office’s former director. Many researchers may be unfamiliar with the Wayback Machine and assume that the interview is unavailable.

¶25 Opinion 08-1 addressed the question of whether an “Emergency Detention Order” is required to involuntarily admit a person believed to be in need of mental health treatment to a hospital or other facility. The opinion cites the Oklahoma Department of Mental Health and Substance Abuse Services’ Emergency Detention and Civil Commitment Manual (2007) numerous times and includes a link to the manual. The manual is cited as legal authority to support the opinion’s main conclusion that an emergency detention order is not required to involuntary admit a person believed to be in need of treatment.43 The opinion also refers readers to the

40. Id.
42. INTERNET ARCHIVE WAYBACK MACHINE, supra note 31.
manual “for a much more extensive discussion of the emergency custody and detention process.”\(^44\) The opinion does not paraphrase or quote relevant language directly from the manual. Unfortunately, the link provided to the manual returns a “404” error page. A researcher savvy enough to look can obtain the manual from the Oklahoma Digital Prairie, a digital archive of state government publications.\(^45\)

¶26 Opinion 02-38 considers whether text message solicitations from telemarketers are covered under Oklahoma’s Telemarketer Restriction Act (TRA).\(^46\) In answering the question, the opinion notes that the TRA does not contain legislative findings. The opinion goes on to presume that the legislature “knew about telemarketing fraud through the use of text messaging.”\(^47\) The sole citation to support this assertion is a link to a Federal Trade Commission (FTC) Consumer Alert titled *Phone, E-Mail, and Pager Messages May Signal Costly Scams.*\(^48\) The cited Consumer Alert is not quoted or paraphrased in the opinion. The link to this document created by a federal government agency no longer works, but the document can be retrieved by searching the National Archives.\(^49\) The National Archives created several digital snapshots of agency public websites over the past fifteen years.\(^50\) Researchers who were unfamiliar with these digital snapshots or how to locate them would be unable to uncover this important FTC Consumer Alert cited as the only source of support for the opinion’s presumption of legislative knowledge.

¶27 Opinion 12-21 attempts to determine whether in the Oklahoma Nursing Practice Act the legislature intended a “supervising practitioner be onsite for consultation throughout all the stages of administration of anesthesia.”\(^51\) In support of its conclusion that the legislature intended supervising practitioners to be onsite, the opinion cites several Internet sources, including guidance from the now defunct Oklahoma Workers Compensation Court in the form of the Court’s Schedule of Medical and Hospital Fees. The link provided retrieves a “404” error page.\(^52\) An Internet search for the Schedule of Medical and Hospital Fees returns a “download page” from the Workers Compensation Court providing links to several schedules from the years 2005 through 2012. The January 19, 2012, date included in the opinion’s citation to the bad link should clue a researcher to review the 2012 schedule available from the court’s website. However, many researchers may not take the extra step to conduct an Internet search to locate the schedule or know which schedule to download if they locate the court’s “download page.”

\(^44\) *Id.*


\(^47\) *Id.*

\(^48\) The citation is to http://www.ftc.gov/bcp/online/pubs/alerts/phonscam.html.


\(^52\) The citation is to http://www.owcc.state.ok.us/PDF/2012F eeS schedule-1 -19-12ëditions_FINAL .pdf.
Skills Needed to Find Information Hidden by Link Rot

¶28 Researchers who discover a broken link in an attorney general opinion may not take the time to try and locate the missing information. Many researchers are not aware of specialized digital archives like the Wayback Machine or the Oklahoma Digital Prairie. Some may not have the skill to use digital archives or perform other advanced searching techniques to find information made inaccessible by link rot.

¶29 Studies conducted over the past several decades have documented the inability of large segments of the population to use the Internet. One study found that members of the general user population lack the basics of surfing the Web. A few people barely know what a Back button is, and thus have an incredibly hard time moving from screen to screen. Many people rarely use search engines, and solely rely on functions of their browsers or Internet service providers. Some respondents also have a hard time entering valid search terms including the common occurrence of spelling mistakes.53

A more recent study debunked the general perception that “young users are generally savvy with digital media.”54 The study found “considerable variation . . . even among fully wired college students when it comes to understanding various aspects of Internet use. Moreover, these differences are not randomly distributed. Students of lower socioeconomic status, women, students of Hispanic origin, and African Americans exhibit lower levels of Web know-how than others.”55

¶30 A 2011 study found that one in five American adults does not use the Internet.56 Other studies have demonstrated that the vast majority of users are not familiar with many of the techniques described above to fix rotten links found in Oklahoma attorney general opinions. In a study measuring Internet searching skills, only one out of 100 participants knew how to use the “find function (available in all browsers and on all platforms) to search for a term on a Web page.”57 This technique was used to find the interview cited above in Opinion 08-2.58

¶31 As these studies demonstrate, many members of the general public do not possess basic Internet research skills. When these citizens encounter link rot in attorney general opinions, they almost certainly will presume the cited source is unavailable. If a rotten link is cited to support something significant, they may lose confidence in the opinion’s reasoning, doubt its conclusion, and question the underlying authority of attorney general opinions.

¶32 The research skills of law students and recent graduates have also been called into question. Unlike members of the general population, law students and


55. Id.


recent law school graduates receive basic legal research instruction as part of their law school’s curriculum. Some take advantage of courses in advanced legal research. Studies examining the research abilities of law students have revealed deficiencies relating to specific skills needed to find information made unavailable by rotten links. For example, sixty percent of students surveyed in a 2011 study reported not validating information they find on free websites.59 Another study of nearly 3600 law students revealed that “it was unclear if the respondents understood that reliability might be an issue with the sources that they use.”60 The research abilities of recent law school graduates were critiqued in another study concluding that “[l]egal professionals in particular are critical of new lawyers’ research skills; they say that these new lawyers are unprepared to conduct legal research and that their research skills are unsophisticated.”61

¶33 More experienced lawyers may not have the advanced research skills required to locate information made inaccessible by link rot. A recent study found that “[e]mployers, particularly those with more years in practice, rely on new attorneys to be research experts.”62 One attorney commented “I really have a huge reliance on [the person] . . . doing my research for me because I don’t do it.”63 Another study found a “decline in the research competency of legal practitioners” and found “a gap in the research skills and knowledge of legal resources among attorneys in general, not just new associates.”64

¶34 The availability of roughly half of the rotten links in Oklahoma attorney general opinions through advanced Internet searching does not diminish their harm. As the studies mentioned above demonstrate, the general public and many lawyers do not possess the advanced legal research skills needed to locate information hidden by link rot. As explained below, opinions that link to unavailable information can reduce the public’s confidence in law, weaken the doctrine of stare decisis, and thwart the development of law.

63. Id.
The Consequences of Link Rot

¶35 The prevalence of link rot in attorney general opinions erodes the public’s confidence in the opinions and the broader legal system. Thomas Jefferson and James Madison firmly believed that for the American people to govern themselves, they had to know what their government was doing. Contemporary legal scholars share the founding fathers’ concerns. In the context of judges searching the Internet, Collen Barger warns:

When, however, a court purportedly bases its understanding of the law or the law’s application to case facts upon a source that cannot subsequently be located or confirmed, the significance of the citation to that source becomes more ominous. If present readers of the opinion cannot determine how much persuasive weight was or should be accorded to the unavailable source, they have little reason to place much confidence in the opinion’s authoritativeness.

¶36 The common law values transparency and accountability. The Canadian legal scholar Karen Eltis provides the following example from a decision of the Supreme Court of Canada: “[R]easons for judgment are the primary mechanisms by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done.” In the context of judges citing unreliable information, Eltis notes:

Public access to the court’s “thought process” is an integral element of the much-cherished value of transparency and forms the basis for the public’s confidence in the judiciary. These “thought processes,” however, cannot be subject to proper scrutiny—be it public, academic, or appellate—unless the sources that nourish it are clearly and verifiably identifiable.

¶37 Although these examples deal with judges and judicial opinions, they are applicable to attorney general opinions. Attorney general opinions, like judicial opinions, are primary legal authority and are “binding on state officials until a court of competent jurisdiction renders an inconsistent decision.” The public’s confidence is eroded when these primary sources of law cite unavailable sources.

¶38 Link rot in attorney general opinions is harmful to the doctrine of stare decisis. For centuries lawyers, judges, and the public-at-large could readily access the sources cited in legal opinions. Citations in these opinions have traditionally been to a “stable universe of settled sources.” These settled sources consisted of

68. Id.
print materials that are “essentially fixed for all time.”\textsuperscript{72} Citations to sources in a legal opinion are more than just a reference to the source’s content. They send a signal to the reader of “the nature of the authority upon which a statement is based.”\textsuperscript{73}

\textsuperscript{¶}39 When sources cited for something important in an attorney general’s opinion disappear, a component of the opinion vanishes as well.\textsuperscript{74} Lawyers, judges, or members of the public who are unable to access the sources cited in support of the opinion’s conclusion may reasonably question the opinion’s validity. The inaccessibility of these sources undermines the opinion’s authority and introduces instability and uncertainty into the law.\textsuperscript{75} As Michael Whiteman explains, “legal arguments are constructed on a foundation of supporting authorities, and, like any construction, they can fail if their foundation is not secure.”\textsuperscript{76} Courts may no longer be able to “let the decision stand if the cited authority is no longer available.”\textsuperscript{77}

\textsuperscript{¶}40 The unavailability of sources cited in attorney general opinions will hamper the development of the law. Citations “leave bread crumb trails for future readers allowing them to retrace the logical steps of an argument. Accurate and complete citations are essential for unpacking legal arguments, advocating for their expansion or contraction in future cases, and for developing the law.”\textsuperscript{78} An essential component of lawyering is analogizing and distinguishing sources cited in primary legal authority.\textsuperscript{79} When sources cited in attorney general opinions are unavailable, it becomes difficult or impossible for lawyers to develop creative legal arguments based on cited sources.

### Link Rot and Lost Context

\textsuperscript{¶}41 The impact of a link not taking the researcher to the correct source is mitigated if the opinion includes a quotation from the source or paraphrases the source. Including language from an Internet source in an opinion is a prudent way to preserve the source’s content. Language quoted or paraphrased will be preserved indefinitely as part of the text of the opinion. Seventy-four out of the ninety-five Internet sources examined in this study were quoted or paraphrased in the text of the opinion.

\textsuperscript{¶}42 Unfortunately, merely quoting or paraphrasing an Internet source in an opinion is not a perfect solution to the problem of link rot. Researchers are not able

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Paul Axel-Lute, Legal Citation from Theory to Practice, 75 LAW LIBR. J. 148 (1982).
\item Whitman, supra note 70, at 33. This paragraph was adapted from Whiteman’s discussion of these concepts in the context of case law. These concepts are applicable to attorney general opinions because opinions, as binding primary legal authority, are used to make legal arguments in the same manner as case law.
\item Id. at 48.
\item Id. at 33.
\item Peoples, supra note 71, at 36.
\item Aldrich, supra note 8, at 220.
\end{enumerate}
\end{footnotesize}
to place the cited language in its proper context when a cited source becomes unavailable through link rot. Disappearing sources rob researchers of the ability to judge for themselves whether cited language was taken out of context or used to support a strained analogy.

¶43 Opinion 08-33 considers whether “an Oklahoma public school’s interlocal agreement with a Texas purchasing cooperative, which follows Texas competitive bidding procedures,” satisfies the requirements of Oklahoma’s public bidding act. The opinion provides a link to the Texas Interlocal Purchasing System (TIPS) and to the specific purchase agreement at issue in the opinion. The link to the TIPS website is active, but the link to the agreement is rotten. Searching the TIPS website returns no mention of the agreement, and it cannot be located using any advanced searching techniques. According to the opinion, “Under the agreement with the Texas purchasing cooperative, Oklahoma schools would contract with these pre-selected vendors.” The opinion does not indicate whether this language came from the text of the purchase agreement, the TIPS website, or other information provided by the state senator who requested the opinion. The fact that Oklahoma schools would contract with preselected vendors is critical to the opinion’s conclusion that the agreement does not satisfy Oklahoma’s competitive bidding law. The rotten link to the specific purchase agreement at issue prevents researchers from verifying its terms or placing them in context.

¶44 Opinion 2013-16 considered several questions related to the Oklahoma Tourism and Recreation Department including whether the department’s partnership with the Oklahoma Travel Industry Association (OTIA) was exempt from compliance with the state’s competitive bidding law. The Tourism Department enjoys a specific statutory exemption from the competitive bidding law when entering into “partnerships for promotional programs and projects” with private entities that involve the promotion of “tourism and tourism economic development.”

¶45 The opinion concludes that the partnership in question qualifies for this exemption by quoting language from the Tourism Department’s website:

In our view, the partnership between the Tourism Department and OTIA falls squarely within this category of contracts. As discussed above, the statutory purpose of the Conference is “to promote the tourism and recreation industry” within Oklahoma, 74 O.S. 2011, § 2232. The OTIA website describes the purpose of the Conference in more detail, stating that attendees are informed of, among other things, “the latest trends, tactics and tools needed to . . . energize marketing efforts” and “how to reach more prospective travelers each day,” OTIA website. Based on these descriptions, the Conference qualifies as a promotional program or project that is intended to promote tourism and tourism economic development.

84. Id.
85. Id.
A researcher who attempts to view the website using the link provided in the opinion will see only a generic “404” error page. The language taken from the website was critical to the opinion’s conclusion that the Tourism Department’s partnership with OTIA fell within the statutory exemption to the competitive bidding law. While it is helpful to have the language quoted in the opinion, the rotten link prohibits researchers from viewing the language themselves or reading other parts of the website to put the language in context.

¶46 Opinion 07-37 answers the question of whether a policy council and task force “preempt the statutory authority of the State Board of Corrections to establish policies for the operation of the Department of Corrections.” The opinion cites several policies at the Department of Correction’s website in support of this conclusion. The opinion includes quotations and paraphrased language from several of the policy documents cited at the department’s website. The documents are cited to show that the department is making the policies at issue in the opinion. None of the links to these policy documents work. The links direct researchers to the generic State of Oklahoma “404” error page.

¶47 A savvy researcher who tracks down the Department of Correction’s website and searches for the names of the policy documents can retrieve some relevant documents by searching for the titles included in the opinion. Unfortunately, the documents are not the same documents cited in the 2007 opinion. For example, a link was provided in the opinion for a document titled “Community Corrections Assessment.” Searching the Department of Correction’s website for “Community Corrections Assessment” retrieves a document containing that title, but the document includes the effective date “11/18/2014.” Clearly, this document dated 2014 was not referenced in Opinion 07-37, released in 2007.

¶48 The opinion cites another Department of Correction’s webpage in support of the opinion’s essential conclusion that “the Board establishes policies for the Department of Corrections” but does not include a quotation or paraphrased language from that page. The link provided as support for the opinion’s conclusion returns the generic State of Oklahoma “404” error page.

86. The OTIA website was accessed by removing parts of the link cited in the opinion. Okla. Travel Industry Ass’n, http://www.otia.info/ (last visited Aug. 24, 2015) [http://perma.cc/RL2W-86WY]. Many researchers are not familiar with modifying links to make them function properly. See Hargittai, supra note 57, at 832.

87. See also Okla. Att’y Gen. Op. No. 09-17 (June 23, 2009). This is another opinion citing to an Internet source that is no longer available to support an essential part of the opinion’s reasoning. Language from the website is quoted in the opinion, but the website is unavailable. Researchers who want to review the website to place the quoted language in context are out of luck.


89. Id.

90. Id.


92. The link was to http://www.doc.state.ok.us/offtech/policies.htm.
Opinion 2011-4 explores the question of whether participating in the Nurse Licensure Compact would “constitute an unlawful delegation of the State’s sovereign power as the Compact authorizes the legislatures of other states, through absolute reciprocity, to determine the qualifications of persons authorized to practice nursing in Oklahoma?”

The opinion cites the website of the national organization that created the compact, the National Council of State Boards of Nursing (NCSBN). The link returns a “404” error message, but the website can be found using Internet searching techniques. Several paragraphs of the opinion include quotations and paraphrased language from the website. The opinion includes a discussion of the legislative history of the adoption of the compact. Quotes attributed to the NCSBN website in the opinion cannot be found in content currently available at the website.

The reasoning of the opinion includes several assertions and hypotheticals referencing the terms of the compact. For example, the opinion states:

Under the Compact, nurses licensed to practice in any state that is a party to the contract would be authorized to practice in Oklahoma. See Compact, art. III(a). There are no standards or guidelines in the Compact for determining whether nurses meet the requirements for qualification established by the Oklahoma Legislature to engage in the practice of nursing in Oklahoma. See Compact.

Similarly, a nurse could practice in Oklahoma who has a recent felony conviction if such were not disallowed in another party state. Id. Further, Oklahoma would not be assured that the licensing restrictions which are in place in other states at the time of joining the Compact would remain in place throughout the terms of the contract.

These examples are the primary justifications offered to support the crux of the opinion’s reasoning “that the Compact constitutes unlawful legislative delegation.” A researcher reviewing this opinion may want to verify the assertions and hypotheticals by reviewing not only the text of the compact but the legislative history surrounding its adoption by the NCSBN and other information at the NCSBN website. The opinion’s rotten link robs researchers of the chance to verify its assertions and view the quoted language in the context of the entire website.

Implications of Lost Context

The impact of link rot is softened when an opinion includes language from an inaccessible source. However, the unavailability of a source in its entirety keeps researchers from viewing cited language in context. Sources cited in primary legal authority like attorney general’s opinions are often used to analogize or distinguish
the opinion they are cited in from factual situations that arise in the future. It is impossible for the author of an attorney general’s opinion to envision the multitude of ways the opinion and all the sources it cites will be used in the future. Citations to sources for points that seem insignificant at the time an opinion is drafted may take on more significance in the future.

Even dicta . . . can provide the inspiration for someone’s good faith argument to change the law at a later date. The principles of the common law that we rely on today were developed through centuries of “application, re-application or non-application to varying fact situations. They are re-phrased, re-stated and re-iterated over and over again, and what eventually emerges is often startlingly different from that from which one started. The great principle of the common law in this context is that ‘great oaks from little acorns grow’—this is the leitmotif of the judicial process.”

Researchers who have access to sources cited in opinions will be able to test assertions made about underlying sources and view cited sources in their proper context. Opinions are more likely to be used in arguments for the development or expansion of legal concepts when their underlying sources are accessible. The recommendations given near the end of this article could be useful in preserving access to Internet resources cited in opinions.

Reference Rot

The opinions discussed above provide examples of link rot. Link rot is frustrating for researchers attempting to verify the content of a cited source or view cited language in its proper context. Researchers attempting to access web links in Oklahoma attorney general opinions will also be frustrated by the prevalence of reference rot. Dealing with citations afflicted by reference rot has been compared to “trying to stand on quicksand.”

The term “reference rot” is used to describe a link that “still works but the information referenced by the citation is no longer present, or has changed.” A recent study found that seventy percent of links in Harvard law journals and fifty percent of links in U.S. Supreme Court opinions were compromised by reference rot. Links in Oklahoma attorney general opinions fare comparatively better: only thirteen percent of links in Oklahoma attorney general opinions suffered from reference rot.

98. Aldrich, supra note 8, at 220.
100. Lepore, supra note 1, at 36.
101. Zittrain et al., supra note 4, at 166.
102. Id. at 167.
103. Six of the forty-eight working links did not contain the information they were cited for. The forty-eight working links included links that could be fixed by removing extra spaces inserted by WestlawNext. The twenty-six links that could be found by other means were not included in this figure in order to directly compare with the study examining Harvard journals and U.S. Supreme Court opinions. In that study, no extra steps were taken to locate broken links. When all seventy-four working links and links that could be found by other means were examined, ten were found to suffer from reference rot.
¶56 Opinion 08-2 cites an organizational chart to support the conclusion that
the Office of Faith-Based and Community Initiatives functions within the Depart-
ment of Human Services, despite the fact that the office is not listed in DHS’s
rules.\(^{104}\) A researcher who clicks on the link provided for the organizational chart
will be taken to a “404” error page.\(^{105}\) A researcher who searches the DHS website
can locate an organizational chart containing the notation “Updated 10/31/2014.”
Obviously this was not the organizational chart cited in the opinion issued Febru-
ary 19, 2008. The organizational chart dated 10/31/2014 does not show an Office
of Faith-Based and Community Initiatives, but instead shows an “Office of Com-
munity and Faith Engagement.”

¶57 Another example of reference rot is found in Opinion 06-24, which cites a
Wikipedia entry about American jurist John Forrest Dillon.\(^{106}\) The opinion’s foot-
ote mentions that Dillon “authored the first treatise on the law of municipal
corporations”\(^{107}\) and cites the Wikipedia page as support. A researcher who visits
John Forrest Dillon’s Wikipedia page will not find a reference to Dillon authoring
the “first treatise on the law of municipal corporations.”\(^{108}\) Instead, the Wikipedia
entry credits Dillon as being the “author of a highly influential treatise on the
power of states over municipal governments.”\(^{109}\) The footnote citing the Wikipedia
page includes the date the page was visited, June 20, 2006. A researcher possessing
advanced Wikipedia search skills will know to consult the page’s history tab and
review a version of the page as it existed on June 20, 2006. Many researchers do not
possess this advanced knowledge, as discussed above. The reference to Wikipedia
as a source of information about John Forrest Dillon’s treatise was not essential to
the opinion.\(^{110}\) However, this instance of reference rot demonstrates how dynamic
sources like Wikipedia change frequently over time and are not always the best
sources to include in judicial or attorney general opinions.\(^{111}\)

¶58 Opinion 12-13 examines two sections of the Oklahoma Sex Offender Regis-
tration Act to determine whether they conflict with each other.\(^{112}\) The opinion
includes a paragraph of text paraphrased and quoted from the Department of Cor-
eroctions Sex Offender Registry website in explaining how the Act functions. The

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105. Organizational Chart, http://www.okdhs.org/NR/rdoonlyres/0AEA7176-CDB6-443B-874F-
     7PDY-U9Z4].
     D6WQ-7PZ9]. Wikipedia is an online encyclopedia containing content created and edited by the
general public.
108. John Forrest Dillon, supra note 106.
109. Id.
110. Another example of reference rot that is not essential to the opinion comes from
     Okla. Att’y Gen. Op. No. 05-4 (Feb. 3, 2005), citing the website bondbuyer.com for an example of
     a derivative swap as background information not essential to the opinion’s logic or legal reasoning.
     Researchers visiting bondbuyer.com will not find the example provided in the opinion.
111. See generally Peoples, supra note 71.
opinion includes a link to a PDF document that returns a “404” error message. A Google search for the Department of Corrections Sex Offender Registry retrieves the current website. The site includes language explaining how the Oklahoma Sex Offender Registration Act functions. The language at the website differs from the paraphrased and quoted language found in the opinion. This discrepancy might prompt readers to conduct additional research to determine whether the Act changed following the opinion’s publication.

Another example of reference rot is found in Opinion 05-44, where a website is quoted for background information about an association “comprised of 41 designated not-for-profit youth service agencies.” Researchers visiting the link will discover that the association now includes only forty agencies. This discrepancy is minor as the number of not-for-profit youth services agencies was not an essential part of the opinion’s logic or reasoning. However, the inconsistency might cause researchers to question the accuracy of other aspects of the opinion.

The Implications of Reference Rot

Links that have succumbed to reference rot share all the negative attributes of rotten links. Reference rot links weaken the public’s confidence in law, undermine the doctrine of stare decisis, and hinder law’s natural growth and expansion.

The category of links affected by reference rot could also include Internet resources that are intentionally changed to mislead or deceive. Wikipedia, blogs, and other platforms that allow crowdsourced content are susceptible to “opportunistic editing.” A Wikipedia entry could be edited by an unscrupulous lawyer (or client) . . . to frame the facts in a light more favorable to the client’s issue. Likewise, an opposing lawyer critical of the Wikipedia reference could edit the entry, reframing the facts and creating the appearance that the first lawyer was misrepresenting or falsifying the source’s content.

Lawyers or parties to a case could create a blog, edit existing blog content, or leave anonymous blog comments in an effort to impact litigation. The perpetual malleability of Internet content creates the possibility of more “Orwellian” examples of reference rot. The White House has changed the content of press

116. This change is similar to reference rot in a U.S. Supreme Court opinion citing the website of the Corporation of Public Broadcasting for the total number of public television stations. F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 559 (2009).
119. Zittrain et al., supra note 4, at 177.
The world of e-books provides simultaneously entertaining and disturbing examples of publishers surreptitiously deleting or altering e-book text. An e-book version of *War and Peace* sold through the Barnes & Noble Nook store had every instance of the word “kindle” in *War and Peace* replaced with “nook.” Amazon mistakenly sold e-book copies of George Orwell’s *1984* without obtaining proper copyright clearance. Amazon removed copies of the novel from the devices of those who had purchased it without their knowledge.

The impermanence of Internet content invites changes to sources cited in opinions for nefarious purposes. Future opinions that cite Internet content should take steps to preserve sources as cited to avoid the impact of reference rot. The disappearance or change in content of sources cited in the Oklahoma attorney general’s opinions discussed in this study can be attributed to routine website updates and reorganizations. None of the content appears to have been changed or removed for any reason related to the opinion’s citation of the content. In the future, authors of attorney general opinions should take steps recommended near the end of this article to reduce the occurrence of reference rot.

### Citation of Questionable Sources

Some of the opinions examined in this study include links that are functional but lead to sources that are not stable, reliable, or authoritative. Several of these opinions rely on questionable sources to explain terms that are not defined under Oklahoma law. Stable, reliable, and authoritative sources should be used when giving meaning to previously undefined terms or otherwise developing new law.

Opinion 07-33 explored the question of whether the commissioner of labor has jurisdiction over the inspection of water rides at amusement parks. The opinion notes that the term “water ride” is not found in Oklahoma statutes or in agency regulations. Statutory construction is used to define the term according to its common meaning. *Webster’s Third New International Dictionary* is cited for definitions of “water” and “ride.” *Webster’s* does not include a definition of the term “water ride.” Several Wikipedia entries are cited including the pages defining...

120. *Id.*
123. *Id.*
125. *Id.* (citing OKLA. STAT. ANN. tit. 25, § 1).
126. *Id.*
“water rides,”127 “log flumes,”128 “water slide,”129 and “river rafting ride.”130 Cautionary language is included in the footnote reminding readers that Wikipedia “is not generally recognized as authoritative.”131

§66 Oklahoma attorney general opinions have shown restraint in their citation of Wikipedia. Only four of the ninety-five citations to Internet resources in opinions cite to Wikipedia. A 2010 study revealed that more than 400 federal courts had cited Wikipedia.132 Judicial opinions “have taken judicial notice of Wikipedia content, based their reasoning on Wikipedia entries, and decided dispositive motions on the basis of Wikipedia content.”133 Refraining from extensive citations to Wikipedia in the future will help preserve attorney general opinions’ authority, consistency, and stability.

§67 Opinion 10-2 provides another example of an opinion attempting to explain a term that has no definition in Oklahoma law. The opinion answers the question of whether weight limits in the Oklahoma Highway Safety Code apply to vehicles with split tandem axles or tri-axles. The opinion cites a definition from the website logisticsworld.com, noting that these terms have not been defined under Oklahoma or federal law.134 The opinion could have referred to the law of other states for a definition of the term before citing an online transportation dictionary. For example, a Kansas statute has defined the term “triple-axes.”135 Looking to Kansas law for a term’s definition is consistent with the historical development of Oklahoma law. The Legislature of Oklahoma Territory adopted the Kansas Code


131. Okla. Att’y Gen. Op. No. 07-33 (Oct. 16, 2007). As discussed above with Opinion 06-24, only savvy researchers may know how to use the page’s history tab to view the entries as they existed on the dates they were cited.


133. Id. at 1.


135. KAN. STAT. ANN. § 8-1908 (d) (3) (West, Westlaw through laws enacted during the 2015 Regular Session of the Kansas Legislature).
after a failed experiment with the Indiana Code.\textsuperscript{136} Oklahoma courts have looked to Kansas judicial opinions for the definition and construction of terms.\textsuperscript{137}

\textsuperscript{68} Another questionable source is cited in Opinion 12-11, which addressed several issues, including the following:

Once a county has elected to be governed by the County Budget Act, do the provisions of the County Budget Act require that the budget format which is to be prescribed by the State Auditor and Inspector include the same funds and accounts that are subject to audit and the same funds that are included in the county’s Comprehensive Annual Financial Reports (“CAF\textsuperscript{R}”)? Must the county budget board include in its budget the actual funds and accounts that are included in the county CAF\textsuperscript{R}?\textsuperscript{138}

\textsuperscript{69} In answering this question, the opinion correctly notes that CAF\textsuperscript{R} is not defined in the County Budget Act. The opinion cites the online source yourdictionary.com to define a CAF\textsuperscript{R} as “the official annual report of a government. The report includes a balance sheet, a statement of changes in financial position, and a statement of revenues and expenses.”\textsuperscript{139} The opinion concludes that

[a]s such, a CAF\textsuperscript{R} is a distinct document from a county budget, serving a different purpose. . . . The County Budget Act does not address a county’s Comprehensive Annual Financial Report. Thus, there is no requirement in the County Budget Act that a county’s budget include the same funds and accounts as included in the Comprehensive Annual Financial Report.\textsuperscript{140}

\textsuperscript{70} A researcher who visits yourdictionary.com\textsuperscript{141} to confirm the definition of CAF\textsuperscript{R} as stated in the opinion will discover yourdictionary.com no longer contains a definition of the term. CAF\textsuperscript{R} is a technical accounting term defined by the Governmental Accounting Standards Board (GASB), an “independent organization that establishes and improves standards of accounting and financial reporting for U.S. state and local government.”\textsuperscript{142} “The GASB is recognized by governments, the accounting industry, and the capital markets as the official source of generally accepted accounting principles (GAAP) for state and local governments.”\textsuperscript{143} The GASB issues Statements of Governmental Accounting Standards. Statement 34

\textsuperscript{136} Orben J. Casey, And Justice for All: The Legal Profession in Oklahoma 66 (1989); see also Kansas City, M. & O. Ry. Co. v. Shutt, 1909 OK 110, \textsuperscript{3} \textit{104 P. 51}, 52 (noting that “Section 4224 (Code Civ. Proc. \textsuperscript{\textsection} 26) Wilson’s Rev. & Ann. St. Okl. 1903, was borrowed from Kansas”).

\textsuperscript{137} See Cahill v. Pine Creek Oil Co., 1913 OK 489, 34 P. 64; Holland v. Cofield, 1910 OK 336, 112 P. 1032.


\textsuperscript{139} \textit{Id}. \textsuperscript{140} The opinion notes that whether certain requirements are mandated by generally accepted accounting principles is beyond the scope of the opinion.

\textsuperscript{141} The “About Us” page for yourdictionary.com states: “YourDictionary is owned by LoveToKnow Corporation, an innovative online media company with rapid fire growth. The family of privately-held LoveToKnow web sites is dedicated to providing useful, high quality and unique content to Internet users.” About YourDictionary, YOURDICTIONARY (1996–2015), \textit{http://www.yourdictionary.com/about.html} [http://perma.cc/9A9G-GGJH].


defines and explains the term “Comprehensive Annual Financial Report.” Statement 34 devotes more than ten pages of text to explaining what a CAFR is, what it contains, and the level of detail, notes, and narrative statements that it must include. Statement 34 provides a detailed discussion of why a CAFR should include this information. The text of Statement 34 mentions several of the terms quoted in the opinion from yourdictionary.com, including “balance sheet” and “statement of revenues.” Statement 34 also includes many terms not found in the yourdictionary.com definition, including “proprietary funds” and “fiduciary funds.”

¶71 The opinion should have cited the GASB definition instead of yourdictionary.com. CAFR was not defined in the statute, and the opinion reached the conclusion that the County Budget Act does not require counties to include the same funds and accounts as are included in the CAFR. Researchers consulting the opinion in the future could justifiably be curious about the contents of a CAFR. If these researchers visit yourdictionary.com for more context, they will find nothing. Citing the GASB definition would have placed this opinion on a firmer foundation.

¶72 Several other opinions cite questionable Internet sources. Opinion 11-10 cites the website emedtv.com for the definition of “pseudoephedrine.” A reliable print or online medical dictionary would have been a more authoritative source. Opinion 07-25 cites an online quotation dictionary, quotedb.com, for the Benjamin Franklin quotation “In this world nothing is certain but death and taxes.” Any number of authoritative print quotation dictionaries would have been a better choice than the quotedb.com website, which may change or disappear at any time.

Consequences of Citing Questionable Sources

¶73 The citation of sources that are not stable, reliable, or authoritative in attorney general opinions can have the same negative impact as link rot and reference rot. Citing these sources can diminish the public’s confidence in law, weaken stare decisis, and make the development of the law more difficult. Citing sources like Wikipedia can weaken the authority of an opinion and also weaken any future judicial opinions or briefs citing the opinion. Oklahoma attorney general’s opinions are not alone in citing sources that are not stable, reliable, or authoritative. Michael Whiteman has traced a shift away...
from citing “old” more stable sources toward “more ephemeral, but easily accessi-
ble, Internet sources.”\textsuperscript{151} The citation of these sources is part of a broader trend of
citing nonlegal sources described as the “de-legalization of law.” This trend has
occurred gradually, described by Frederick Schauer as an “informal, evolving, and
scalar process by which some sources become progressively more and more
authoritative as they are increasingly used and accepted.”\textsuperscript{152} Continued citation of
these sources serves to legitimize their use.\textsuperscript{153} Schauer sees de-legalization as a reflection of “something deeper: a change in what counts as a \textit{legal} argument. And
what counts as a legal argument—as opposed to a moral, religious, economic, or
political one—is the principal component in determining just what law is.”\textsuperscript{154}

¶75 Authors of future Oklahoma attorney general opinions should carefully
consider the Internet sources they cite. Including Internet sources in opinions
legitimizes their use and gives the sources an imprimatur of authority. The sugges-
tions offered in the next section can help ensure that citations to Internet resources
are stable and reliable over time.

\textbf{Recommendations}

¶76 Many causes are responsible for the link and reference rot discussed in this
study. Websites are reorganized over time and links change; content is updated,
revised, or removed entirely; organizations responsible for websites change focus
or are dissolved. Authors of attorney general opinions have no control over the
longevity or stability of the Internet resources they cite. But authors can reduce the
chances that cited links will suffer reference rot or link rot by judiciously choosing
which links to include their opinions.

¶77 Opinion authors should consider the advice provided to the federal judi-
ciary in the Judicial Conference of the United States’ \textit{Guidelines on Citing to, Cap-
turing, and Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in
Judicial Opinions}.\textsuperscript{155} Released in May 2009, the guidelines provide a set of criteria
to use when determining whether to cite an Internet resource. The guidelines state
that it may not be necessary to cite an Internet source if there is a “readily accessible
and reliable print version.”\textsuperscript{156} Judges are urged to evaluate Internet sources using
the same criteria that apply to traditional media, including accuracy, scope of cov-

\begin{enumerate}
\item [151.] Whiteman, \textit{supra} note 70, at 30.
\item [152.] Peoples, \textit{supra} note 71, at 47–48 (citing Frederick Schauer, \textit{Authority and Authorities}, 94
VA. L. REV. 1931, 1956–57 (2008)).
\item [153.] \textit{Id}.
\item [154.] Peoples, \textit{supra} note 71, at 47–48 (citing Schauer, \textit{supra} note 152, at 1960).
\item [155.] Judicial Conference of the United States, \textit{Guidelines on Citing to, Capturing, and
Maintaining Internet Resources in Judicial Opinions/Using Hyperlinks in Judicial Opinions}
(2009) [https://perma.cc/QJL3-AQFH?type=pdf]. As noted with irony by Liebler and Liebert, an
Internet search for the guidelines returns a page that has succumbed to link rot. Liebler & Liebert,
\textit{supra} note 2, at 291.
\item [156.] Judicial Conference of the United States, \textit{supra} note 155 at 2. This is similar to the
stance taken by Bluebook Rule 18.2.1, which “requires the use and citation of traditional printed
sources when available, unless there is a digital copy of the source available that is authenticated, offi-
cial, or an exact copy of the printed source.” \textit{The Bluebook: A Uniform System of Citation R.18.2.1,
at 179 (20th ed. 2015) [hereinafter The Bluebook]}.
verage, objectivity, timeliness, authority, and verifiability. Cited Internet materials “should be stable and likely to remain accessible using the citation the judge employed when originally visiting the site.”

¶78 Additional helpful advice comes from a set of “linking best practices” prepared in conjunction with a 2014 symposium titled “404/File Not Found: Link Rot, Legal Citation and Projects to Preserve Precedent” sponsored by the Georgetown Law Library. The best practices suggest including only links that “are essential to the subject at hand.” Several of the opinions examined in this study link to websites for background information that is not essential to the questions at issue. For example, Opinion 09-23 includes a rotten link for the background information that “there are currently 28 Oklahoma Indian Housing Authorities.” This information is dicta and is not relevant to the questions addressed in the opinion. Including this rotten link needlessly diminishes the perceived authority of the opinion.

¶79 The best practices suggest not linking to materials that might go away or change, similar to the Judicial Conference Guidelines’ advice on citing stable sources. Wikipedia should be cited only when something on Wikipedia “is the subject at hand.” Opinions citing a Wikipedia entry should cite to the “cite this page” link available on the left-hand side of each entry. Future researchers who click a “cite this page” link in an opinion will see the page exactly as it looked when the opinion author viewed it. Changes made to the page by Wikipedia contributors after the opinion author copied the “cite this page” link will not be displayed.

¶80 When opinion authors are given a choice of linking to content available in a PDF document or webpage, they should link to the webpage. The best practices explain that webpages are generally more stable, links to PDFs tend to change frequently as they are moved around on websites, and PDF links contain “unsafe” characters like commas, spaces, and accent marks that cause link failure. The opinions examined in this study included links to twenty-two PDF documents. Only four of the twenty-two PDF links worked. Sixteen suffered link rot, and two suffered reference rot. The eighty-two percent failure rate of links to PDFs in opinions validates the best practices suggestion to avoid linking to PDFs when possible.

157. JUDICIAL CONFERENCE OF THE UNITED STATES, supra note 155 at 1–2.
158. Id. Bluebook Rule 18.2.2 takes a similar approach, urging citation “to the most stable electronic location available.” THE BLUEBOOK, supra note 156, at 182.
160. Id. at 15.
162. Linking Best Practices, supra note 159, at 16. The crowdsourced nature of Wikipedia content makes it potentially useful in other instances. Courts have cited Wikipedia entries for definitions not found in traditional dictionaries including slang terms, popular culture references, or technical jargon or lingo; for evidence of the common usage or ordinary and plain meaning of a contract term; and to determine the perception of the public or community standards. Peoples, supra note 71, at 30–34.
¶81 The best practices recommend simplifying links whenever possible by “removing all unnecessary information after the core of the URL.”164 Text following “.html” or “?” characters can normally be removed without breaking the link. This extra text is typically “dead weight, and could, down the line, break a link that is actually good.”165 Any link that is modified should be tested to verify that it functions properly. Several links included in opinions suffer from link rot caused by extra information in the URL. Opinion 13-16 cites to the Oklahoma Travel Industry Association website using a link that does not work (http://www.otia.info/displaycommon.cfm?an=2). Removing all text after the “.info.” makes the link operable.

¶82 Another helpful suggestion is to avoid linking deeply into websites. When websites are rearranged, these deep links frequently break. Opinion 03-50 provides an example of unnecessary deep linking. The link http://www.occ.treas.gov/aboutocc.htm is provided as a source of background information on the history of the Office of the Comptroller of the Currency. The link suffers from reference rot as the page it retrieves does not say what it is cited for.166 If the opinion author had linked to the main page (http://www.occ.treas.gov), the link would not have failed.

¶83 Opinion authors can reduce instances of link and reference rot by using links sparingly and applying the recommendations described above. The Attorney General’s Office could take the additional step of archiving any web content cited in future opinions.

¶84 Three opinions examined in this study include language explaining that the opinion authors have kept a copy of cited Internet content “on file.”167 Keeping paper copies of web content cited in opinions is one method of preservation. However, only a handful of opinion authors are keeping copies of web content cited in opinions. Paper archives kept in the files of opinion authors are not easily accessed by the general public.168 Researchers wanting to view a copy of a cited resource would at the very least have to track down the author and request a copy. A visit to the Attorney General’s Office in Oklahoma City may be required.

¶85 The best solution for archiving and providing access to online resources cited in opinions is to store copies of cited resources in a digital archive. The most

164. Id. at 17. Bluebook Rule 18.2.2 offers similar guidance: “The Internet citation should include information designed to facilitate the clearest path of access to the cited reference . . . .” The Bluebook, supra note 156, at 182.


166. The text of Okla. Att’y Gen. Op. No. 03-50 (Nov. 24, 2003) cites the Office of the Comptroller of the Currency webpage for the statement “The OCC was established in 1863 as a bureau of the U.S. Department of the Treasury. The OCC is headed by the Comptroller, who is appointed by the President, with the advice and consent of the Senate, for a five-year term.” The language is available from the link following the OCC’s main page by clicking the link “About the OCC.”


168. Similar criticisms have been made of the U.S. Supreme Court’s practice of keeping print copies of cited Internet resources. See Liebler & Liebert, supra note 2, at 300.
reliable archive currently available is Perma. A description of how Perma operates is found on its homepage:

When a user creates a Perma.cc link, Perma.cc archives a copy of the referenced content, and generates a link to an unalterable hosted instance of the site. Regardless of what may happen to the original source, if the link is later published by a journal using the Perma.cc service, the archived version will always be available through the Perma.cc link.\(^\text{169}\)

\(^\text{86}\) Perma was developed by the Harvard Library Innovation Lab and was initially used by law journals. Currently more than 100 law journals and courts from Colorado, Indiana, Maryland, Massachusetts, Michigan, and the Virgin Islands archive cited Internet resources using Perma.\(^\text{170}\) Any user can create a Perma link that will be preserved for two years. Libraries, journals, and courts that serve as “vesting organizations” have the authority to permanently preserve web content submitted to Perma.

\(^\text{87}\) Perma distributes “the Perma caches, architecture, and governance structure to libraries across the world. So long as any library or successor within the system survives, the links within a Perma architecture will remain.”\(^\text{171}\) Several other webpage archives exist, but none have Perma’s collaborative roots and distributed architecture. WebCite is a “free on-demand archiving service that allows users to enter a specific URL to be archived.”\(^\text{172}\) It is hosted by the University of Toronto and run by academic editors and publishers.\(^\text{173}\) Concerns over the long-term viability of WebCite surfaced in 2013 when it withdrew its membership from the International Internet Preservation Consortium and announced that new submissions for preservation would not be accepted unless a fund-raising goal was reached.\(^\text{174}\) A fee-based preservation option is offered by the organization behind the Wayback Machine called Archive-it.\(^\text{175}\) The expense of Archive-it might deter governmental entities like the Oklahoma Office of the Attorney General from adopting it.

\(^\text{88}\) Perma is clearly the best option given the financial difficulties that WebCite has experienced and the extra cost associated with Archive-it. Perma would welcome the Oklahoma Attorney General’s Office to join as a vesting institution.\(^\text{176}\) Perma is the most stable web archival solution available because of its collaborative roots in the law library community and the distributed architecture of its network. Opinion authors may consider retaining paper copies of Internet sources cited in opinions as an extra level of security.


\(^\text{170}\) Id.; E-mail from Claire DeMarco, Research Librarian, Harvard Library, Cambridge, Mass. (Feb. 18, 2015, 09:22 CST) (on file with author).

\(^\text{171}\) Zittrain et al., supra note 4, at 167.


\(^\text{173}\) Id.

\(^\text{174}\) Liebler & Liebert, supra note 2, at 304–05. The WebCite webpage indicates that it is still accepting submissions. WebCite Consortium FAQ, supra note 172.


\(^\text{176}\) E-mail from Claire DeMarco, supra note 170.
¶89 If this suggestion is adopted, future opinions should use a parallel citation format when citing Internet resources. The citation should include the original online resource’s link and a link to the version available from the digital archive. For example, the Michigan Supreme Court recently began preserving Internet resources cited in its opinions using Perma. Michigan Supreme Court opinions include the online resource’s original link and a link to the version preserved in Perma. See State ex rel. Gurganus v. CVS Caremark Corp.’s citation of an Internet resource:


¶90 Clicking on the Perma link pulls up a version of the article captured very close to the date it was accessed by the court. See figure 3. The article is time- and date-stamped June 5, 2014 8:46 am, approximately three days after it was viewed by the court. The time and date stamp assures researchers they are viewing the cited resource as it existed exactly or extremely close in time to when it was viewed by the opinion’s author.

Figure 3

Perma Archived Webpage with Time and Date Stamp

¶91 The recently released 20th edition of The Bluebook encourages archiving Internet sources using a reliable archival tool. A Perma citation is included as an example following the text of the rule in The Bluebook. This clearly indicates that Perma meets The Bluebook’s definition of a reliable tool.

177. 852 N.W.2d 103, 111 n.35 (Mich. 2014).
178. R. 18.2.1(d). The Bluebook, supra note 156, at 181.
Conclusion

¶92 Oklahoma attorney general opinions serve an important function in Oklahoma law. The prevalence of link rot and reference rot in opinions is roughly comparable with the link and reference rot in judicial opinions from other state and federal courts found by other studies. The unavailability of cited sources in attorney general opinions could have negative implications for the authority, stability, and growth of Oklahoma law.

¶93 While this study examined link and reference rot in attorney general opinions, additional research could shed light on the prevalence of link and reference rot in Oklahoma appellate judicial opinions and appellate briefs written by Oklahoma lawyers. Lawyers, judges, assistant attorneys general, and legal scholars should carefully evaluate any Internet resource before citing it. Link and reference rot can be prevented through the use of digital archives.
John West and the Future of Legal Subscription Databases

Taryn Marks

* John West founded West Publishing with one goal: to respond to lawyers’ research needs by providing efficient and inexpensive access to legal materials. When adhering to this goal, West Publishing dominated the legal research market; when it did not, customers left. As West Publishing and all legal subscription databases look to the future, they must consider John West’s original vision.

Introduction

§ When John West established West Publishing Company in 1872, he asked himself a question: what role will legal publishers play in legal research? To answer this question, he evoked a very different model of case publishing than that of his
competitors: “I believe it to be the principal business of American law publishers, to enable the legal profession to examine the American case law on any given subject, as easily, exhaustively, and economically as possible.”

§2 John West’s decision to publish and index all judicial decisions indelibly changed legal publishing, potentially having “the greatest impact on American jurisprudence from its civilized formation to the present.” West Publishing’s National Reporters have achieved “quasi-official status as the place of record for American case law,” and the company’s “form of standardized case reporting, with unified indexing, became the accepted standard for case information.”

§3 West Publishing as a company no longer exists today, having been bought by an enormous transnational corporation in the 1990s. But that company still brands its legal database with the name “West.” It is a remarkable feat for a salesman, a nonlawyer, to have created a legal publishing company that had, and that continues to have, such a dramatic impact on legal research. West Publishing survived for more than one hundred years, due in no small part to the ingenuity of its founder. Will West Publishing survive another hundred years? Should the company look back to John West’s business model to consider what he would say about the future of legal research and the role that West Publishing should play in that future?

¶4 This article addresses these questions. Legal research is, and will continue to be, a fundamental component of the law and all aspects of legal practice, so any changes to how legal research is conducted will impact all legal professionals. The impact will likely be greatest on law librarians, who not only tend to be the heaviest

3. F. Allan Hanson, From Key Numbers to Keywords: How Automation Has Transformed the Law, 94 LAW LIBR. J. 563, 567, 2002 LAW LIBR. J. 36, ¶ 12.
5. See Berring, supra note 4, at 192; see also Ross E. Davies, How West Law Was Made: The Company, Its Products, and Its Promotions, 6 CHARLESTON L. REV. 231, 231 (2012) (noting that “West was acquired by Thomson Reuters in 1996, but the brand and identity survived that development”). John West lost control of his name long before that, though, when he left West Publishing Company in 1899. See infra ¶¶ 9–19, “West Publishing in 1890: Establishing a Culture of Change.”
6. WestlawNext, of course, is that legal database. See Berring, supra note 4, at 192; see also Davies, supra note 5, at 231.
7. For consistency, I refer to the company that produces the West products as “West Publishing” or “West Publishing Company,” even though the name of the company that owns West Publishing has changed over the years. See Berring, supra note 4, at 192; Davies, supra note 5, at 231. When I am talking about John West the man, I use either “West” or “John West.” Later, when I discuss the legal databases Westlaw and WestlawNext, I use Westlaw or WestlawNext when referring only to the online database. Similarly, LexisNexis is used as the company name throughout, while database names are referred to as they changed over time.
8. See Yasin Sokkar Harker, “Information Is Cheap, but Meaning Is Expensive”: Building Analytical Skill into Legal Research Instruction, 105 LAW LIBR. J. 79, 81, 2013 LAW LIBR. J. 4, ¶ 6 (stating that “everything a lawyer does, from writing a motion to conducting discovery, must be firmly rooted in sound legal research.”).
users of legal research databases, but who also frequently stand as intermediaries between the users of the databases (attorneys, students, and professors) and the companies that control the databases.

¶5 In this article, I focus on West Publishing because of the dynamic growth and challenges that West Publishing faced throughout its history and the innovative ways the company overcame those challenges. West Publishing’s history and actions evidence the constantly changing legal research environment and the evolving role that legal publishing companies have and will play within that environment in a way that no other company does. Consider three examples from West Publishing’s history: First, a salesman, not a lawyer, founded what is now a billion-dollar empire, and the company still retains that salesman’s name today. Second, West Publishing survived the transition from print to electronic to become one of the two main players in legal research databases, but did so in an extremely bumpy way. Finally, West Publishing was the first of the large legal databases to adopt a Google-like interface that mirrored Google’s single search bar.

¶6 In the section that follows, I trace the historical developments in West Publishing’s history that are relevant to a discussion of the future of legal databases. By focusing on West Publishing when John West led it, I can do two things: first, highlight company trends that impacted the company’s growth and development; and second, provide context for analyzing the future of West Publishing.

¶7 Then, in the next section, I review the movement to online legal databases that occurred in the late 1970s, examining how West Publishing’s failure to quickly adapt to the online market set it back to such an extent that West Publishing needed several decades to recover.

¶8 I then analyze the current market of legal research, including the rise of smaller, niche databases, and the challenges that West Publishing faces in the future. The legal research market attracts many companies because of its size and potential, so West Publishing faces constant competition from smaller, niche databases. These databases are potentially the wave of the future, the new model for legal research. But the size and ubiquity of West Publishing means that as new challengers enter the field of legal research, West Publishing has the luxury of time and money, allowing it to wait and to focus on the innovations that are most likely to succeed as the market shifts, as new databases develop, and as technology changes. Because of West Publishing’s entrenchment, in this article’s conclusion I tentatively cast my vote in favor of West Publishing continuing to dominate the legal research market—but I do so with a grain of salt. West Publishing must be able to flexibly and competitively respond to changes in legal research methodology and it must address the cost of its database. John West understood these two key issues when he started his company. If West Publishing wants to excel for another hundred years, it must revert to its roots.

West Publishing in 1890: Establishing a Culture of Change

¶9 In reviewing the history of West Publishing and considering the man who started that company, I selectively focus on two historical aspects that most impacted the future of the company. First is John West himself: a nonlawyer salesman who
named the company after himself and created an empire that still retains his name.9 Second, and more pragmatically, is West Publishing’s National Reporters and Digest System and John West’s promotion of the two, both of which fundamentally altered how lawyers access, perceive, and research the law.10

¶10 In 1872, John West started a business designed to satisfy a pressing demand he had observed as a traveling salesman for a bookstore: lawyers’ need for current legal materials, such as dictionaries, treatises, and state cases.11 Situated in St. Paul, Minnesota, John West’s location allowed him to avoid notice and thus direct competition from the far-off publishing centers of New York and Massachusetts.12 West’s location also allowed him easier access to reach out to the frontier lawyers who required his services.13 In addition to these advantages, John West’s publishing company succeeded primarily because of two business decisions: first, to publish all cases (in what became the National Reporter System); and second, to build an indexing system that would eventually become West Publishing’s Key Number System.14

John West’s Early Innovations Were Key to West Publishing’s Success

¶11 For the first four years of his business, John West focused on obtaining and selling general law books, though he also dabbled in the production of legal forms.15 In 1876, however, John West’s brother, Horatio West, joined John West in the business and the two began work on the Syllabi. The Syllabi eventually became the National Reporter System and catapulted John West to national attention and made his publishing company a favorite in the courts.16 He continued that success with the American Digest Classification System.

National Reporter System Established West Publishing in the Courts

¶12 The Syllabi was the first innovation of West Publishing and appeared to identify West Publishing as a pioneering, open access company. The first Syllabi, an eight-page weekly newsletter that printed Minnesota Supreme Court cases, served John West’s goal of “provid[ing] lawyers with a cheap and efficient means for learning about new cases.”17 The Minnesota Syllabi proved so popular that by 1879 John West had added coverage of Iowa, Michigan, Nebraska, Wisconsin, and the Dakota Territory, and renamed the Syllabi the Northwestern Reporter.18

13. See id.
14. Id. at 119.
15. Id. at 115; see also Marvin, supra note 9, at 28.
16. Woxland, supra note 12, at 116; see also Marvin, supra note 9, at 30.
17. Jarvis, supra note 11, at 6.
18. Id.
13 In 1882, John West and his brother partnered with two investors, and the four incorporated as West Publishing Company. John West became the president, with Horatio West as the treasurer, and the two partners served as secretary and stockholder. Over the next three years, the company expanded its reporter system, adding several regional reporters until the reporter system reached national coverage in 1885. The success of the National Reporter System demonstrated the company’s popularity and drive: West Publishing went from reporting the cases of a single state to reporting the cases of almost forty states in less than ten years.

14 John West’s success derived from two key decisions: he published the entirety of court opinions and he published all court opinions. His business model differed radically from that of the courts and of other publishing companies. Until John West, not all courts published their opinions, and those that did frequently delegated publication to the court’s reporter. The court’s reporter printed cases under his own name, making it difficult to determine the court from which the opinion came. The reporters could be unreliable, and publication occurred at random intervals and in varying formats. To further muddle the system, courts frequently awarded publishing contracts based on political associations rather than on publishing merit. As a result, opinions were often poorly edited, incorrect, and published at irregular or rare intervals.

15 John West changed this by releasing court opinions quickly and at consistent intervals, and sold the opinions at a relatively inexpensive price. He requested that judges send him opinions and curried strong relationships with courts and judges: relationships that the company maintained until the 1970s. Additionally, John West earned customers because “all of the Reporters were edited and published on one uniform plan.” Mistakes were rare, and opinions were formatted in a consistent manner. Every word of an opinion and only the words of an opinion were published. West Publishing’s success meant that over time, West’s . . . became the reporter of record for many jurisdictions. Even when a state published its own case reports, the West reporter versions were preferred because of the widespread distribution, reliability, and speed with which they were published.

19. Id.; see also MARVIN, supra note 9, at 40.
20. MARVIN, supra note 9, at 40; Jarvis, supra note 11, at 6.
22. Id. Although West Publishing Company faced several lawsuits over whether the individual states held copyrights in their own court opinions, the courts ruled in West Publishing’s favor, and the issue was settled in 1888 when the Supreme Court announced that court opinions “were freely available to anyone.” Id. at 122 (citing Banks & Bros. v. Manchester, 128 U.S. 244 (1888)).
23. MARVIN, supra note 9, at 32–33; Woxland, supra note 12, at 118.
24. MARVIN, supra note 9, at 32–33; Woxland, supra note 12, at 118.
25. Hanson, supra note 3, at 567, ¶ 13.
26. MARVIN, supra note 9, at 44.
27. Id.
28. Hanson, supra note 3, at 567 n.13.
29. Richard A. Leiter, The 21st Century Law Librarian Conundrum: Free Law and Paying to Understand It, 29 LEGAL INFO. ALERT, no. 1, 2010, at 1. The same was true for statutes: “Although [West’s state and federal codes] were considered ‘unofficial’ versions, [West’s] annotated codes became well regarded and authoritative. In some cases, the West codes were adopted as official versions.” Id.
By 1889, two-thirds of judges of the highest courts had endorsed West Publishing’s reporter.30

¶16 John West’s decision to publish all opinions in their entirety also differed markedly from the publishing standard set by his most immediate competitor, the Lawyers Cooperative Publishing Company.31 The Lawyers Cooperative decided not to publish all cases, reasoning that many cases merely echoed law that had already been settled.32 Instead, the Lawyers Cooperative chose to publish only those cases that its editors believed demonstrated legal issues that were “new or unusual, or [that] show[ed] development of the law.”33 The Lawyers Cooperative especially favored cases that dealt with laws relevant to the growing legal fields of commercial litigation and politics.34 But John West won out, recognizing that his customers preferred to have access to all cases, printed in their entirety.

The American Digest Classification System Solidified West Publishing’s Reputation

¶17 Soon after his success as a national publisher, John West introduced his second important innovation: the American Digest Classification System. Started in 1887, the digest system aimed to classify every case according to its subject content.35 West Publishing was not the first to index cases: Little, Brown & Company had started a similar classifying system, the U.S. Digest, which indexed cases back to the early 1800s.36 But West Publishing had two distinct advantages over Little, Brown & Company: West Publishing already received all opinions through the National Reporter System, and the company had started indexing some of the cases that it published.37 Little, Brown & Company needed to locate and request all new opinions and did not have the benefit of the National Reporter on its side, and the resulting cost of its digests far exceeded the cost of West Publishing’s digests.38 Additionally, as with the National Reporter System, John West provided quick, reliable, and relatively inexpensive access to the classification system.39 Members of the bar loved the digest, and the publication soon “outgr[e]w its original format and coverage.”40

¶18 Due to the growth and popularity of his digest system, John West outpaced his competition and bought the U.S. Digest from Little, Brown & Company in 1889.41 Ten years later, in 1898, the American Bar Association (ABA) endorsed West

30. Symposium, supra note 1, at 405 (written comments of John B. West).
31. Woxland, supra note 12, at 119.
32. Byron D. Cooper, The Role of Publishing Houses in Developing Legal Research and Publication: The United States, 38 Am. J. Comp. L. Supp. 611, 618–19 (1990); see also Symposium, supra note 1, at 409 (The president of the Lawyers Cooperative stated that such “reiterations” were “of no general value; indeed many of them had no value whatever, except to the parties and their counsel.”).
33. Symposium, supra note 1, at 409–10.
34. Id. This system eventually became the basis for annotated selective reports such as the American Law Reports. Cooper, supra note 32, at 619 & n.46.
35. Jarvis, supra note 11, at 8.
36. Marvin, supra note 9, at 68.
37. Id. at 69.
38. Id. at 68–69.
39. Id.
41. Marvin, supra note 9, at 68–69.
Publishing’s American Classification Plan as “the model for modern digesting.”

The classification scheme eventually formed the basis for West Publishing’s Key Number System, through which all cases are uniformly and permanently assigned numbers that are associated with specific subjects, or “points of law.”

Judges and lawyers adapted their method of research to the digest and key number system established by West Publishing—a method that continues today.

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John West the Man

In addition to smart business decisions, John West’s personality and strengths markedly contributed to the success of West Publishing. Before founding West Publishing, John was a salesman. When his brother Horatio West joined the company, John reverted to an advertising role and left Horatio in charge of operations. John then spent much of his time traveling around the country, selling his product, meeting with judges and attorneys, and convincing the ABA to endorse his company.

Through John’s salesmanship, West Publishing ingratiated itself into the legal community, especially with judges who cared about the publication quality of their opinions. Eventually, John established a system of cooperation, through which judges would send their opinions to West Publishing and only to West Publishing, a system that continued into the 1970s. John succeeded so well at marketing his company and the company did so well at backing John’s claims that eventually even John could not compete with his empire. In 1899, due to disagreements with his partners, John left West Publishing to form a new legal publishing company. But his new company shut down within twenty years, unable to compete with West Publishing.

John West died in 1922, leaving West Publishing to continue his legacy.

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West Publishing’s Folly: Failure to Adapt to the Internet Era

From West Publishing’s early establishment and success in the late 1800s, I fast-forward to the late 1960s, and the creation of the first legal databases. The concept of legal databases first arose in the mid-twentieth century, coinciding with the development of the computer. At this time, West Publishing still had a strong reputation within the legal community. That reputation faltered, however, when West Publishing did not move quickly enough into the computer era.

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42. Id. at 74.
43. Marvin, supra note 9, at 80; see also WestlawNext: West Key Number System on Westlaw Next (2012), available at https://info.legalsolutions.thomsonreuters.com/pdf/wln2/L-374484.pdf. Estimates as to the number of Key Numbers vary; West Publishing’s most recent estimate is 100,000. Id.
44. Cheskis, supra note 2, at 12.
45. Marvin, supra note 9, at 53; Woxland, supra note 12, at 116.
46. Marvin, supra note 9, at 74.
47. Jarvis, supra note 11, at 1.
48. Id.
49. For the purposes of this article, which focuses on the future of legal electronic databases and how West Publishing Company’s early years could frame that future, West Publishing’s pre-computer-assisted legal research years will not be explored outside of the second section, “West Publishing in 1890: Establishing a Culture of Change,” supra ¶¶ 9–19.
LexisNexis Dominated Early Electronic Legal Databases

¶21 Computer-assisted legal research first developed in the late 1960s and early 1970s as a project of the Ohio Bar Association. The Ohio Bar, in conjunction with Data Corporation, created a product called OBAR—the Ohio Bar Automated Research. The creators of OBAR decided to place the full text of cases online, searchable through Boolean operators. OBAR’s creators wanted to shift away from West Publishing’s system of digests and indexing and to focus on the database’s search engine. OBAR would be nonindexed full text. To replace the digests and indexing of the West Publishing system that lawyers and librarians had come to rely on for research, the OBAR team created the KWIC (key word in context) system. If OBAR’s Boolean search operators, search logic, and KWIC system functioned efficiently, then indexes and digests would be unnecessary. OBAR became Lexis and in 1973 entered the market through proprietary terminals installed in law firms.

¶22 West Publishing responded slowly to this new challenger. Westlaw—West Publishing’s digital database—appeared in 1975, but it included only West Publishing’s headnotes (without the full text of any corresponding cases), and the search function was clunky and hard to use. Unlike John West, who had developed his company based on understanding and anticipating lawyers’ needs, West Publishing wrongly thought that lawyers would wish to search only headnotes. The folly of West Publishing’s prediction soon became apparent: Lexis had changed the game and surged ahead. West Publishing eventually added full text to its database in December 1976, but by then Westlaw had fallen far behind Lexis in terms of searchability and functionality. Not until the mid-1980s did Westlaw overcome its poor entrance and become a reliable, user-friendly legal database.

¶23 Despite the gains West Publishing made, the Westlaw database remained inferior to the Lexis system. When West Publishing first entered the digital research scene, LexisNexis responded by improving its own system. In 1980, Lexis added Nexis to its legal database, incorporating news and business reports into its...
The LexisNexis team started to draft its own version of headnotes and to develop a LexisNexis equivalent to West Publishing’s Key Number System. LexisNexis began writing summaries of cases that mirrored West Publishing’s Syl-labus. Perhaps most important, Shepherd’s Citations were added in 1981. West Publishing’s KeyCite did not appear until mid-1997. As a digital legal research system, Westlaw did not truly challenge LexisNexis until the mid-1980s: even then, LexisNexis still “outpace[d] Westlaw sales nine to one.” LexisNexis clearly won the first round.

¶24 Throughout the rest of the 1980s and into the early 1990s, West Publishing and LexisNexis continued to develop their databases, to enhance their content, and to add features. The companies adhered to a competitive theme, mirroring each other’s growth and innovations. For example, LexisNexis added the first state administrative code in 1988, and West Publishing added the same to Westlaw in 1989.

¶25 Fierce competition followed the two databases into the Internet era, and they continued to closely watch and mimic what the other did. Again, LexisNexis led the online movement: it was the first to create a website, establishing LexisNexis.com in 1997; Westlaw.com followed in 1998. Even as the two companies moved online, firms and customers consistently preferred the LexisNexis legal database to the Westlaw legal database.

¶26 Preference for LexisNexis continued as both databases grew and the content offered by each started to mirror the content offered by the other. Although the LexisNexis and Westlaw databases initially focused on different areas of law and on different jurisdictions, increased demand for services, the growth of the Internet, and Westlaw’s and LexisNexis’s individual desire to become the ultimate legal research database culminated in two vast systems of national information. Each became indispensable: even in 1986, LexisNexis and Westlaw “already [had] become an integral part of the arsenal of research tools available to the lawyer.”

63. Harrington, supra note 50, at 553.
66. Id.
71. Kathleen Kelly, Update VI: Westlaw and Lexis, Legal Info. Alert, Oct. 1989, at 1. As an interesting, albeit unscientific, example of West Publishing’s fall from monopolistic grace and rise back to prominence, prior to 1989 the Legal Information Alert published its annual update with the title Lexis & Westlaw. From 1989 until the publication ended in 2010, the title remained Westlaw & Lexis. The publication also added (and dropped) various other legal databases as they rose and fell in popularity, including HeinOnline, VersusLaw, and Loislaw. See, e.g., Donna M. Tuke, From the Editor, Legal Info. Alert, Jan. 2009, at 2 (noting that VersusLaw had been dropped from the annual review and anticipating that Bloomberg Law would soon be added).
73. Id. at 152.
74. Berring, supra note 10, at 28; see also SveNgalis, supra note 72, at 149, 151.
But growth also resulted in the two companies becoming indistinguishable: as early as 1987, the two legal databases were garnering commentary because of their similarities, and that same year within law firm libraries, the term “Wexis” gained recognition. By 1996, LexisNexis and Westlaw had become “[t]wo commercial concerns providing the same [database] of information organized in the same way, even using the same search strategy.” An addition or innovation by one of the two was a “significant enhancement” until it was adopted by the other. The content competition between the two revolved around the provision of legal services, for as early as 1995, the databases (and the companies) grew mostly in services, not in customers. As such, each needed to find different ways to distinguish itself, though doing so proved difficult.

**West Publishing’s Failures Were Symptoms of an Old Company**

West Publishing’s failure to dominate the electronic database field in the way that it had dominated print legal publishing would have made John West shudder. West Publishing initially failed in the digital legal database competition because it did not recognize its customers’ preferences for online resources, believing instead that print resources would remain the dominant source. West Publishing had started as an innovative company but had shifted to a conservative company over time. In 1969, all of West Publishing’s top managers had risen from the ranks of the company, resulting in a team devoted to print. The company had never gone through a fiscal reorganization, a consequence of relative financial conservatism and an aversion to risks. Though West Publishing’s culture promoted good business practices, it ultimately held the company back several years, despite its potential to be the leading online database.

West Publishing’s several advantages should have guaranteed its dominance of online databases: West Publishing had already created its Key Number System and had vast experience indexing cases under that system, while Lexis had to start from scratch. West Publishing had established itself as the “quasi-official arm of the American judiciary,” so much so that judges were at first reluctant to send their opinions to LexisNexis. And West Publishing had almost a century of infrastruc-

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75. Durako & Stivers, *supra* note 70, at 3.
80. Marvin, *supra* note 9, at 1–2.
81. Id.
82. See Gold, *supra* note 59, at 3 (emphasizing how much easier West Publishing’s key number and digest systems made searching, and lauding West Publishing’s case summaries).
84. In fact, when LexisNexis first began putting the full text of opinions online, it obtained those opinions from West Publishing.
ture and experience in the legal publishing market compared to LexisNexis’s paltry decade.\footnote{Abrahamson, supra note 62, at 41.}

¶30 West Publishing’s apparent advantage over Lexis should have been substantial: when first creating its electronic database, “Lexis hired workers to scan and enter data from West reporters . . . . The result was a competing product that used public information but was taken from a format initially published by West.”\footnote{Krause, supra note 65, at 45.} Rather than capitalizing on these advantages and revolutionizing the legal research market as John West had done, West Publishing waited on the sidelines while LexisNexis reinvented the legal research field. Indeed, it was not until the late 2000s and early 2010s that West Publishing moved ahead of LexisNexis in its innovations, largely due to the release of WestlawNext and the failures of Lexis Advance.

**West Publishing Speeds into the Future with WestlawNext—Maybe**

¶31 In February 2010, to big fanfare, West Publishing revealed WestlawNext at LegalTech.\footnote{Jennifer Frazier, Perspective: WestlawNext, AALL Spectrum, May 2010, at 28.} West Publishing invested an estimated $1 billion in creating WestlawNext, a new, advanced product designed to mirror Google’s search engine.\footnote{Svengalis, supra note 72, at 152.} WestlawNext marks West Publishing’s first successful innovation in the Internet era: West Publishing clearly is winning the second round.


¶33 WestlawNext’s development would have made John West proud because the database tries to provide legal researchers and lawyers with what they want: ease of searching that mimics Google’s.\footnote{See, e.g., Gail Herrera, Google Scholar Users and User Behavior, 72 C. & R.S. Libr. 316, 319 (2011) (noting that Google and Google Scholar are becoming the preferred sources for students and researchers).} Both WestlawNext and Lexis Advance bear a striking resemblance to Google, using a single search bar at the top of the databases’ respective homepages. Even more revolutionary, subscribers no longer have to choose which database to search. Previously, researchers needed to select which database they wished to search within Westlaw, whether it was secondary sources, case law within a specific jurisdiction, or statutes. In WestlawNext, researchers can
search the database’s entire content through the single search bar.\textsuperscript{93} Additionally, in theory, WestlawNext’s Boolean operators function even better in the system through an advanced search function, making Boolean logic more effective.\textsuperscript{94} For many, the introduction of WestlawNext represent[ed] a significant departure from how online legal research databases have traditionally worked.\textsuperscript{95}

\textsuperscript{93} WestlawNext also continues to update its database system based on changes in technology and how research is done. WestlawNext added shareable folders that allow better management of research, continuation of research among different people, and organizational functions. And, in moves that John West would have approved, the database added a mobile app that is designed to seamlessly sync between computer devices and allow subscribers to shift from laptop to tablet without needing to retrace any research steps.\textsuperscript{96} Plus, in the spring of 2015, Westlaw incorporated Dropbox into its platform, allowing users to "drop documents directly from Westlaw."\textsuperscript{97}

\textsuperscript{94} WestlawNext did receive complaints, however. Scholars are already concerned with the impact that WestlawNext will have on the future of legal research. In many ways, Google-like searches that do not require the user to select a database source may "assume[] a lack of skill and understanding of material, and attempt[] to reduce complex and nuanced problems to the lowest common denominator."\textsuperscript{98} Commentators also express concern that when students are not required to choose a database, those students lose perspective and an understanding of the context of a case, a statute, or an administrative regulation.\textsuperscript{99}

\textsuperscript{95} Another area of potential concern is how WestlawNext’s search algorithm ranks sources. Like Google’s, WestlawNext’s search engine relies in part on users to determine the strength of its different searches. If a researcher runs a search and then clicks on a certain result in that search, the WestlawNext algorithm may assume that the result the user clicked on is the result that all users who run the same (or a similar) search will want. As a result, less-used sources could become lost underneath frequently used sources.\textsuperscript{100} Unskilled researchers or users unac-

\textsuperscript{93} Leiter, supra note 29, at 1; see Christine L. Sellers & Phillip Gragg, Back and Forth: WestlawNext and Lexis Advance, 104 LAW LIBR. J. 341, 344, 2012 LAW LIBR. J. 25, ¶18; Sokkar Harker, supra note 8, at 84, ¶ 16.

\textsuperscript{94} Sonnet Ireland, WestlawNext: The Next Generation of Legal Research, 29 LEGAL INFO. ALERT, no. 8, 2011, at 3.

\textsuperscript{95} Ronald E. Wheeler, Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research, 103 LAW LIBR. J. 359, 360, 2011 LAW LIBR. J. 23, ¶ 2.

\textsuperscript{96} Ruth S. Stevens, Legal Research: Is There an App for That?, MICH. B.J., June 2012, at 54. Notably, HeinOnline, FastCase, and Intelliconnect also have mobile apps. Id. See also Alex Berrio Matamoros & Mary Ann Neary, Librarians, Legal Research, and Classroom iPads—A Winning Combination, AALL SPECTRUM, Sept./Oct. 2012, at 28.


\textsuperscript{98} Sellers & Gragg, supra note 93, at 344, ¶ 13.

\textsuperscript{99} See, e.g., Wheeler, supra note 95, at 374, ¶¶ 46–47; Sokkar Harker, supra note 8, at 84–85, ¶ 16.

\textsuperscript{100} Wheeler, supra note 95, at 368–69, ¶¶ 25–27. Note too, that like Google, WestlawNext does not reveal the algorithm behind its search engine.
customed to clicking beyond the first page of results could suddenly become the drivers of research results and upend the value of WestlawNext’s search algorithm.\footnote{101. Id. This is especially concerning given that studies show that many researchers rarely click beyond the first page of results. See, e.g., Laura A. Granka et al., *Eye-Tracking Analysis of User Behavior in WWW Search*, in *PROCEEDINGS OF THE 27TH ANNUAL INTERNATIONAL ACM SIGIR CONFERENCE ON RESEARCH AND DEVELOPMENT IN INFORMATION RETRIEVAL* 479 (2004); Andrew D. Asher et al., *Paths of Discovery: Comparing the Search Effectiveness of EBSCO Discovery Service, Summon, Google Scholar, and Conventional Library Resources*, 74 C. & RES. LIBR. 464, 474 (2013).}

\¶37 Concern about the impact that online research will have on the practice of law and legal research, however, arises whenever new online research tools become available. As early as 1996, commentators complained that the biggest disadvantage to online legal databases was the new “tendency among many attorneys to leap to the computer without having first conducted manual research, or to use [computer-assisted legal research] exclusively without consulting other, less costly, sources.”\footnote{102. Kendall F. SveGalIs, LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL 1996, at 130 (1996).}

¶38 For the purposes of this article, though, the concern about WestlawNext’s impact on legal research only serves to emphasize that West Publishing will continue into the future as a major player in legal research. The creation of WestlawNext, the constant updates being made to WestlawNext, and the relative failure of LexisNexis to offer a competitive product\footnote{103. Yet. The grain of salt for this argument is LexisNexis's newly designed Lexis Advance released in summer 2014. See LexisNexis Legal, *What's Coming to Lexis Advance*, YouTube (May 14, 2014), https://www.youtube.com/watch?v=sZdBWH7s6Y (last visited Nov. 2, 2015). Lexis for Microsoft Office also offers some interesting functionality with the potential to challenge WestlawNext. Press Release, LexisNexis, New Version of Lexis for Microsoft Office Integrates with Lexis Search Advantage (Apr. 14, 2015), http://www.lexisnexis.com/en-us/about-us/media/press-release.page?id=1428949898225949&y=2015.} have placed West Publishing in a strong position relative to the future. WestlawNext’s success, though, also provides additional monetary incentive for those companies seeking to enter the legal database market.

**The Rise of Smaller, Niche Databases: Challengers to West Publishing?**

¶39 Since 1977, the number of major legal electronic subscription databases has decreased from more than twenty-five to three.\footnote{104. See SVENGALIS, supra note 72, at 3. Some would argue that Bloomberg Law has yet to earn a place with Westlaw and LexisNexis, but its acquisition of BNA and its continuing provision of all content to law school subscribers at a steep discount make it a significant player.} The legal research market is a tough one to break into: WestlawNext and Lexis Advance market themselves as one-stop shops. For law students, these two databases are frequently the only sources of legal information.\footnote{105. See Sokkar Harker, supra note 8, at 84–85, ¶ 16.} For practicing attorneys, the two databases are among the most-used sources for research.\footnote{106. See Interview with law librarian I, in Seattle, Wash. (May 3, 2014) (notes on file with author) [hereinafter Librarian I interview] and Interview with law librarian II, in Seattle, Wash. (May 7, 2014) (notes on file with author) [hereinafter Librarian II interview]. For a variety of reasons, my interviewees are being kept anonymous.} For library patrons, whether in law school librari-
ies, law firm libraries, or public law libraries, Westlaw and LexisNexis are the preferred databases. And even for law librarians, these two databases still stand as top sources of information.\footnote{Librarian I interview, supra note 106.}

Companies Will Always Want to Enter the Legal Research Market

\footnote{Svengaïs, supra note 72, at 3.} \footnote{Kurt Mattson, Why Do I Need Books; Isn’t Everything Online?, 21 Nев. Law. 20 (2013).} \footnote{Id. Even the quantity of volumes—thirty-nine—is misleading: that number includes only published cases, which account for less than twenty percent of cases in the federal courts. Id.} \footnote{Cheski, supra note 2, at 8; see also Hanson, supra note 3, at 564, ¶ 5 (calling the volume of recorded common law information “toxic”).} \footnote{Librarian I interview, supra note 106; Librarian II interview, supra note 106.}

Legal publishing is undoubtedly one of the most dynamic sectors of the American economy, evolving into a multi-billion dollar business that has attracted the interest of leading foreign investors."\footnote{Legal research is always an enticing market because of the law’s heavy reliance on easily accessible, accurate legal information. Despite West Publishing’s and LexisNexis’s dominance, small (and large) companies continue to enter the market. Part of the draw to new market entrants can be explained by the sheer amount of money available, but the legal research market is also attractive to new companies because the law constantly grows and because much of the legal information relied on by attorneys, librarians, and law students is publically available but not easily accessible. The legal research market thus offers a unique opportunity for value-added services. As technology develops and as the amount of legal information available increases, new entrepreneurs with new products that creatively and uniquely aid lawyers in their research will become only more prevalent.}

The Amount of Law Constantly Increases

\footnote{Kurt Mattson, Why Do I Need Books; Isn’t Everything Online?, 21 Nev. Law. 20 (2013).} \footnote{Id. Even the quantity of volumes—thirty-nine—is misleading: that number includes only published cases, which account for less than twenty percent of cases in the federal courts. Id.}

Smaller, niche databases can compete with WestlawNext and Lexis Advance because the sheer amount of information available cannot be contained in a single database. An astounding amount of legal information exists, and it grows (and will continue to grow) at an incredibly rapid pace. Consider just the snippet of legal materials made up by federal cases: in 1972, 43,000 opinions were published; in 2012, there were 75,000.\footnote{Kurt Mattson, Why Do I Need Books; Isn’t Everything Online?, 21 Nev. Law. 20 (2013).} In 1972, sixteen volumes were added to the Federal Reporter; in 2012, there were thirty-nine volumes published.\footnote{Id. Even the quantity of volumes—thirty-nine—is misleading: that number includes only published cases, which account for less than twenty percent of cases in the federal courts. Id.} Even in the 1880s, the number of cases was “staggering.”\footnote{Cheski, supra note 2, at 8; see also Hanson, supra note 3, at 564, ¶ 5 (calling the volume of recorded common law information “toxic”).}

Cases and statutes are not the only sources of legal information, however. Law firms’ transactional practices require accurate business and market information on companies and accessible databases with financial data, for example. Any service of process requires people-finder information and skip-tracing data.\footnote{Librarian I interview, supra note 106; Librarian II interview, supra note 106.} Regulatory attorneys must have access to administrative materials in addition to
applicable regulations. Additionally, materials frequently need to be available at both the federal and state levels.

¶43 Niche and smaller databases thus have a fighting chance to compete against WestlawNext and Lexis Advance because the amount of information that needs to be processed and available for legal researchers is astronomical. Niche and smaller databases can also capitalize on legal researchers’ need to update search results: legal information used by attorneys, judges, and librarians must be current to be accurate. The legal community relies on a vast amount of information, and West Publishing and LexisNexis will never be able to collect all of that information, much less provide the same level of service within their platforms for all available information to the extent they do for cases and statutes.

*Almost All Legal Information Is Publicly Available*

¶44 The sheer amount of legal information is only part of the picture, however. Another reality is that much of the material behind the paywall of legal databases is publicly available information. This means that the underlying content of many databases, such as cases, statutes, and regulations, are public domain material, exempt from copyright protection.¹¹³ It can be galling to look at the information in WestlawNext and Lexis Advance and realize that the two databases are “virtual monopolist[s] of a great deal of free, public legal materials.”¹¹⁴

¶45 West Publishing and LexisNexis based their businesses on adding value to this public domain information. The two companies index cases and statutes, provide updating services, and link to other relevant documents within the system. Ultimately, a legal database must set itself apart from others not by its public domain content but by its value-added content.¹¹⁵ “The companies in the best position to prosper in the coming years will be those which provide ‘value-added’ information.”²¹⁶ At the same time, companies need to protect the vast amount of labor and “information” that goes into every document uploaded to a database, whether it be indexing, paginating, editing, hyperlinking, adding headnotes, creating access points, or simply harvesting information from government websites.¹¹⁷

Consider the legal battles that occurred over several decades between West Publishing, LexisNexis, and other legal publishers regarding star pagination and licensing of both headnotes and Shepard’s Citations, among many other disputes.¹¹⁸

¶46 These two realities of the legal research market (vast amounts of information and publicly available information) continue to attract new market entrants. A new company’s success and commercial viability in this market will ultimately depend on the unique value-added services it offers and its ability to protect that value from competitors.

¹¹⁵. See, e.g., *SveGALIS*, *supra* note 102, at 10.
¹¹⁶. *Id.*
¹¹⁸. For a more in-depth discussion of these legal battles, see *SveGALIS*, *supra* note 72, at 10–11, and Cheskis, *supra* note 2, at 2–3, 13–25.
Smaller, Niche Companies Can and Do Challenge WestlawNext

¶47 Many smaller companies, enticed by the legal research market, created databases that they hoped would challenge West Publishing and LexisNexis. Most failed. In 1977, there were at least twenty-three legal publishers; as of 2014, three umbrella corporations controlled the vast majority of legal research: Thomson Reuters, which owns West Publishing; Reed-Elsevier, which owns LexisNexis; and Wolters Kluwer, which owns Aspen Publishing, CCH, and Loislaw.119

¶48 A few other competitors make up a significant portion of the remaining market: Bloomberg Law, HeinOnline, and FastCase. But previous failures of smaller companies do not teach the right lesson: WestlawNext and Lexis Advance do have gaps in coverage of legal material, ripe for filling by smaller companies. Additionally, WestlawNext and Lexis Advance have weak coverage in some areas, again providing a niche for another database to fill. Finally, researchers demand user-friendly search platforms that allow subscribers to find the information that the researcher needs, and they require accurate and current databases that are constantly updated so that subscribers can trust the content. It is impossible for two databases to meet these high research demands for every legal researcher. WestlawNext and Lexis Advance may be attempting to become one-stop shops for all legal research. But they are not, and likely never will be.

Westlaw and LexisNexis Are Not One-Stop Shops, and Niche Databases Are Offering Alternatives

¶49 WestlawNext and Lexis Advance take advantage of peoples’ desire for ease of access that does not require shifting between databases to research different topics. But both databases are incredibly expensive, increasing in price at a rate that appears exponential at times.120 Cost factors into researchers’ decisions as to which database to use. Additionally, neither database can maintain the amount of legal information available or the amount of legal information that all legal professionals (attorneys, law professors, law students, law librarians, paralegals, etc.) may need in any given situation.

¶50 Thus, smaller alternatives to WestlawNext or Lexis Advance are frequently good sources of limited types of information that cater to various legal information niches. HeinOnline, for example, provides access to law reviews and bar journals back to the periodical’s inception, a service not offered by Westlaw or LexisNexis. Another competitor, Casetext, allows users to comment on and analyze cases, statutes, and regulations, combining legal research with crowdsourcing to create annotations that can be “upvoted,” i.e., bumped to a higher position, if readers find them more useful. Business development and competitive intelligence databases such as Accurint and TLO allow users to search for information in public records and to locate witnesses through skip traces. BNA’s Portfolios, especially the tax, labor, and employment portfolios, are other excellent examples of a company stepping into a gap left by WestlawNext and Lexis Advance. Ravel Law provides visualizations of

120. Id.
relevance and precedent, a feature both WestlawNext and Lexis Advance sorely lack. But success outside WestlawNext or Lexis Advance can be difficult to maintain: Practical Law, which tailors its information to business attorneys seeking information such as checklists or standard documents and clauses, and offers efficiency tools such as brief banks and market updates, was acquired by West Publishing. Knowledge Mosaic, which allows subscribers to search SEC filings and provides model documents and law firm memos, is now owned by LexisNexis.

§51 Small law firms and solo attorneys are targeted by Casemaker and FastCase, which provide free access through an attorney’s bar membership. Even larger firms encourage attorneys to use these cheaper alternatives rather than relying on WestlawNext or Lexis Advance. State and local government websites too are loading more primary law sources (such as statutes, codes, and cases), making those materials more accessible to anyone. Though some government websites are clunky, and some are almost unusable, others provide effective access points to the legal information available in their databases.

§52 Smaller, niche databases can also offer alternative solutions to the concerns raised by scholars about WestlawNext. HeinOnline provides an excellent example of how forcing a researcher to choose a smaller, more limited source can impact research quality. Although HeinOnline does allow a researcher to search the entire subscription database, the search engine is not intuitive, and filtering search results is a demanding, often futile task. The researcher who first chooses a smaller library within the HeinOnline database, however, has a far greater chance of locating a relevant source. A search within HeinOnline’s Law Journal Library database, for example, yields far different results than does a search within HeinOnline’s U.S. Congressional Documents database. Researchers must understand what they are seeking and what each database contains to yield optimum results.

§53 Last, smaller, niche databases can highlight weaknesses in WestlawNext’s and Lexis Advance’s coverage. Consider research in foreign and international law. Although both WestlawNext and Lexis Advance offer some international and foreign law in their databases, the information is not comprehensive and is limited to only a few countries. Experienced researchers know that neither database is a strong


122. Librarian II interview, supra note 106.

123. For example, consider the North Carolina Court System’s publication of opinions from the North Carolina Court of Appeals and Supreme Court: opinions are available back to only 1998, limited searching is available, and opinions can be browsed only by clicking into a zip file of opinions from a single year. N.C. Appellate Courts, N.C. COURT SYSTEM, http://appellate.nccourts.org/opinions/ (last visited July 5, 2015).

124. Examples range from DeKalb, Illinois, which posts its municipal code on its website though it does not have a search function other than the page search function, see Office of the City Clerk, MUNICIPAL CODE, http://www.cityofdekalb.com/CityClerk/Municipal_Code.htm (last visited July 5, 2015), to the City of Lynn, Massachusetts, through which I could locate its code only by searching the website, at which point a static PDF file could be found, Welcome to the City of Lynn Website, CITY OF LYNN, http://www.cityoflynn.net/index.shtml (last visited July 5, 2015), and City of Lynn Ordinances, http://www.ci.lynn.ma.us/cityhall_documents/clerk/2013/City_Ordinances.pdf (last visited July 5, 2015).

125. See supra ¶¶ 35–36.
starting point for foreign or international law. A smart foreign or international legal researcher would start with GlobaLex, with the ABA’s International Law Section, or with the Foreign Law Guide, or even with a non-updated print resource such as Germain’s Transnational Law Research. International organizations are also better alternatives to WestlawNext or Lexis Advance: both the United Nations and the European Union archive documents and allow access to the respective organization’s documents, as well as organization-specific research guides.

¶54 As different publishing companies develop alternatives to WestlawNext and Lexis Advance, the two databases face several concerns. Link rot, authenticity, reliable and continued access, and citator services are some examples. State governments, with the support of the American Association of Law Librarians, are attempting to address some of these issues through the Uniform Electronic Legal Material Act. Both Casemaker and FastCase are developing citator services, although neither yet compares to WestlawNext’s or Lexis Advance’s. But smaller, niche databases do have the ability to garner subscribers from the ranks of Westlaw and LexisNexis, so long as they provide user-friendly services, relatively inexpensive access, and high-quality material.

¶55 West Publishing and LexisNexis are aware of the gaps in their coverage and of the need to fill them. Both companies are responding to evolving research needs organically—for example, through the development of new search tools such as WestlawNext and Lexis Advance—and through expansions like West Publishing’s purchase of Practical Law and LexisNexis’s acquisition of Knowledge Mosiac. Because of their size and available resources, West Publishing and LexisNexis are also better positioned to take advantage of coming technological changes and anticipated technology revolutions. The companies could research and implement new innovations such as network analysis, which “evaluate[s] the strength of a precedent by considering how much other cases rely on it,” effectively allowing WestlawNext or Lexis Advance to determine which precedents should be used in a given situation.

With established reputations and impressive revenues, West Publishing and

126. LexisNexis does have some foreign and international law sources, but compared with the other available databases, it is surprisingly weak.
LexisNexis each have an array of options for how best to remain competitive. But both companies must remain vigilant in exploring and implementing changes or their respective market shares will be stolen by niche competitors entering the legal research market.

Can Bloomberg Law Prove a Competitor?

¶56 One of the newest, and certainly the largest, challenger to West Publishing and LexisNexis is taking a different approach than that of the smaller, niche databases. Rather than fill in gaps, Bloomberg Law is attempting to challenge Westlaw and LexisNexis as an equal. Backed by the Bloomberg name, money, and experience, Bloomberg Law has the potential to eliminate the competitive duopoly. It does have some advantages. First, it owns BNA, a well-respected database heavily relied on by tax, labor, and employment researchers.136 Second, due to Bloomberg L.P.’s reputation as a securities and stock market corporation, Bloomberg Law has immense drawing power in its tax, securities, business, and corporate resources.137 Finally, Bloomberg also offers its database to law schools at a significantly reduced subscription price in an attempt to entice law students to its platform before those students enter the legal world.

¶57 But Bloomberg Law faces several challenges as it tries to compete with two well-entrenched companies quite unwilling to relinquish control over any aspect of the legal research market. Within law firms, Bloomberg Law costs as much as WestlawNext or Lexis Advance. Bloomberg has not mastered the sales pitch and advertising techniques of WestlawNext and Lexis Advance. For example, though Bloomberg Law launched in 2009, it only recently appeared in law schools. Law firms and law libraries are reluctant to pay for a third database that does not appear to offer substantially different material than that already offered by WestlawNext, Lexis Advance, and other smaller and cheaper niche databases. Bloomberg Law has not yet fully developed indexing, digest, or citator services robust enough to compete with WestlawNext’s and Lexis Advance’s equivalent services. Last, Bloomberg Law currently only offers a single subscription option: subscribers must pay for all content, at a rather hefty price. WestlawNext and Lexis Advance continue to offer flat rate and subscription options, allowing subscribers to bundle and to choose which database streams will be part of the subscription.138 Ultimately, Bloomberg Law may become a temporary experiment by a large company attempting to fight its way into the billion-dollar legal research market.

Conclusion: The Continued Dominance of John West

¶58 As a businessman, John West saw a gap in legal information: lawyers needed efficient and inexpensive access to recently published cases. Driven by the demands of his customers, John West provided uniform access to cases, he created an indexing

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136. Librarian II interview, supra note 106.
service for those cases, and he delivered these services inexpensively, quickly, and reliably.

¶59 Because of his business acumen and willingness to listen to customers, John West and his business made a substantial profit.139 The company that he started in 1872 makes an even more substantial profit now140 and has ingratiated itself so much within the legal community that many find it difficult to imagine legal research without West Publishing.

¶60 But it is entirely possible that in ten years, West Publishing will no longer exist, unable to survive the technological and cultural changes of the future. Smaller, niche databases are developing increasingly sophisticated systems, and many of those databases are significantly less expensive than WestlawNext. Additionally, many of these new legal research companies have attracted the attention of venture capitalists willing to provide the seed money and resources to support a new company.141 A large corporation such as West Publishing cannot adapt or innovate as quickly as smaller, more flexible companies. An increasing amount of legal material is easily available for free. Calls for open access are gaining popularity and support.142

¶61 West Publishing has a distinct advantage over these smaller databases and a possible antidote to open access: enormous amounts of money behind it and the time to watch new developments carefully before taking any action. A new startup database must prove its usefulness, reliability, and user-friendliness before being adopted by the legal market. Many, though not all, of these startups must recoup the amount of money and labor invested in the database in a short period of time or risk bankruptcy. West Publishing, however, has already proved its reliability. When it introduces a new product, the success or failure of that product is unlikely to bankrupt the conglomerate. And West Publishing has the ability to purchase some of its strong smaller competitors and to incorporate them into its conglomerate of legal databases.

¶62 Consider LexisNexis: the company no doubt invested a substantial amount of money and time in creating the Lexis Advance platform. Its dismal reviews resulted in the company investing significant additional time and money into revamping the product, a luxury that most smaller databases would not have had. Just as West Publishing did when LexisNexis forged ahead in the creation of online legal databases, LexisNexis stumbled over a new technology. And also like West Publishing, LexisNexis can remedy its mistakes without tumbling into bankruptcy.

¶63 But West Publishing’s future depends largely on its ability to read the market, to change and adapt to consumers’ needs, and to offer a product that continues to meet and exceed lawyers’, professors’, students’, and librarians’ expectations of a legal research database, especially in light of WestlawNext’s current cost. West Pub-

139. See Davies, supra note 5, at 237.
140. SVENGALIS, supra note 119, at 11–12.
142. See, e.g., Arewa, supra note 4, at 834.
lishing’s future also relies on its ability to work with its subscribers to create a product that is feasible and affordable for both West Publishing and its subscribers. John West’s desire to provide inexpensive access to materials must again become a dominant marker for West Publishing.

¶64 West Publishing will likely continue to be a presence in the legal research market for at least the foreseeable future. Some lawyers will always prefer the one-stop shop that WestlawNext offers, unwilling to shift between different databases when doing research. Other researchers, frustrated with or no longer able to pay for WestlawNext, will abandon the database in favor of the smaller, cheaper alternatives that are getting better every day.

¶65 John West established a company that has transformed into something he likely never imagined: a company owned by a global conglomerate that leads the online legal research world in both technology and cost. He founded West Publishing with the goal of providing uniform, efficient, and inexpensive access to legal materials, in response to the needs of lawyers. As West Publishing’s history demonstrates, the company succeeded when it adhered most closely with these simple goals. And as long as West Publishing responds to the needs and demands of the legal community, as it did when John West himself ran the company, it may have the chance to evolve with, or even to lead, the legal research industry in the next century.143

143. The company may have the chance: West Publishing’s president has stated that innovations by the competition “invigorate” the company, “making [West] revamp to become nimbler and quicker.” Baker, supra note 113, at 44.
Empirical Legal Research Support Services: A Survey of Academic Law Libraries*

Allison C. Reeve** and Travis Weller***

Empirical legal research is a significant and growing portion of legal scholarship; however, it has received little attention in the law library literature. In this article, the authors share and discuss the results of a nationwide survey on the extent and nature of empirical research services provided by academic law libraries.

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* © Allison C. Reeve & Travis Weller, 2015. We would like to acknowledge the support and consultation of Joyce McCray Pearson, Christopher Steadham, and Ja’net Miles throughout the development of this project. Additionally, we thank the respondents who participated in our survey, as well as the law library faculty members who sent notes of encouragement. Allison would also like to acknowledge that much of the credit for the work on which this article is based goes to her time as the Cataloging & Technical Services Librarian at University of Kansas School of Law Wheat Law Library.

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Introduction

¶1 A central component of the mission of academic law libraries is supporting law faculty research. Recently, we have noticed a handful of papers discussing law librarians working on empirical legal research questions. However, we find no attempts to comprehensively examine what academic law libraries are doing, if anything, to support law faculty empirical legal research.

¶2 In this project, we set out to define the extent and nature of empirical legal research services offered by academic law libraries. In addition, we wanted to determine whether the level of support varies at law schools of different ranks. We predicted that some law libraries are supporting empirical legal research, but very few. Also, we inferred that libraries at institutions considered “top tier” or ranked higher by U.S. News & World Report would offer more empirical legal research support and have plans to increase that support.

¶3 The goal of our study is to inform law libraries of the trends in empirical legal research support and gain an understanding of its prevalence. In January and February of 2015, we conducted a nationwide survey of academic law libraries to address these questions. In this report, we outline the results of that study and recommend next steps for law libraries.

Literature Review

Defining Empirical Legal Research

¶4 Empirical research can be defined quite broadly and encompass multiple methodologies. However, empirical legal scholarship has at times been more narrowly examined. A recent definition points to a broad understanding of the types of studies considered when one says, “empirical.” Empirical research is the umbrella under which both quantitative and qualitative methods of research lie,¹ meaning that the evidence may be numerical or not,² but it is usually both theoretically and data driven³ and meets conditions of a random selection of subjects from a population and random assignment of a control group.⁴ Lee Epstein and Andrew D. Martin assert that both quantitative and qualitative measures are equally empirical⁵ as both devise conclusions based on data⁶ and share the end goals of “summarizing the data, making descriptive or causal inferences, and creating public multi-user datasets.”⁷

¶5 Many agree that empirical legal research is interdisciplinary in nature, relying on social science methodologies⁸ and traditions.⁹ For example, Mark C. Suchman

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2. Id. at 3.
3. Id. at 4.
4. Id. at 6.
5. Id. at 3.
6. Id. at 4.
7. Id. at 15.
and Elizabeth Mertz cite a difference between empirical legal studies, which leans toward quantitative measures, and the New Legal Realism theory, which includes qualitative approaches. This distinction means that legal empiricism can be either qualitative or quantitative.

¶6 Contrary to this broad qualitative- and quantitative-encompassing definition of empirical research, many legal scholars define empirical legal research in narrower terms when addressing data-based studies in the law. One author acknowledges that empirical legal research can include case studies and historical analyses, but focuses on the lack of statistically driven, large dataset analysis in legal scholarship. In a 2006 article, empirical legal scholarship is defined solely as that employing quantitative methodology. In a later article on trends in legal research, another author focuses only on statistical analyses, or quantitatively based inferences, to define empirical scholarship.

¶7 For more in-depth definitions of empirical research, empirical legal research, and how these studies are conducted, one may look to multiple sources. It may be that legal scholars are differentiating between the broad definitions of empirical research and empirical legal scholarship that tend to focus on the quantitative. However, the purpose here is only to define empirical legal research as it relates to the current study.

¶8 Our definition of empirical legal research leans on Epstein and Martin by asserting that it is the investigation of legal- and justice-system-related questions that attempt to understand a topic through data-driven, statistically based, controlled experiments, interview responses, case studies, historical analyses, or other quantitative or qualitative data collecting mechanisms. This broad approach to legal empiricism fits our need to better understand law library services. It is important to note, however, the various methodological distinctions made by legal scholars when discussing empirical legal research as practiced by law faculty.

Empirical Legal Research as the “Next Big Thing”

¶9 Empirical legal research has been the “next big thing” in legal scholarship for at least the last decade. Generally, there are two reasons cited for the increase in empirical legal research: (1) more law professors have advanced experience in social science disciplines and (2) more law journals exist that focus on empirical legal research. One study found that, in addition to the J.D., possession of a Ph.D. in the social sciences or science, technology, engineering, and mathematics (STEM) fields

11. Id. at 562.
12. Id. at 563.
14. George, supra note 9, at 141.
16. George, supra note 9, at 141.
increases potential job offers to new law faculty candidates. Scholars are also finding more practical applications for empirical legal scholarship, such as criminal justice data analyses for decision making.

¶10 Over the last decade, a distinct community of empirical legal scholars has developed. The Journal of Empirical Legal Studies launched in 2004 and has published continuously since then. The Conference on Empirical Legal Studies was created in 2006 in response to a noticeable increase in the amount of empirical legal research conducted by law faculty. The Society for Empirical Legal Studies, the international professional organization focused on empirical legal studies that publishes the Journal of Empirical Legal Studies, has a large and highly esteemed board of directors.

¶11 However, empirical legal research is also conducted by law faculty members who do not necessarily consider themselves part of the Empirical Legal Studies community. For example, law and economics scholars may examine how regulations impact the economy. Additionally, the law and society community investigates the impact of social structures on questions of law and justice. Scholars in both of these traditions may engage their questions by gathering data and analyzing it—meeting the definition of empirical legal research—even if they would not consider joining the Society for Empirical Legal Studies because they belong to professional organizations that more closely fit their theoretical frame.

¶12 No official statistics exist on how many law faculty members engage in empirical research. However, one rough proxy is to examine the number of law faculty members who have Ph.D.s, under the assumption that the empirical research emphasis of nonlaw Ph.D. programs indicates an interest in empirical work. A recent article that examined the 2007–2008 AALS data on law faculty hiring found

23. See George, supra note 9, at 145 (some have speculated that this area of scholarship led to increases in the amount of empirical legal research).
24. We acknowledge the debate about the role of scholarship in the legal academy and whether this is in conflict with the role of law schools to provide professional training to its students. See, e.g., Danielle Douglas-Gabriel, Why Law Schools Are Losing Relevance—And How They’re Trying to Win It Back, WASH. POST, Apr. 20, 2015, http://www.washingtonpost.com/business/economy/why-law-schools-are-losing-relevance—and-how-theyre-trying-to-win-it-back/2015/04/20/ca0ae7fe-cf07-11e4-a2a7-9517a3a70506_story.html; David Segal, What They Don’t Teach Law Students: Lawyering, N.Y. TIMES, Nov. 20, 2011, at A1, A23 (quoting Chief Justice John Roberts saying “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”). In this article, we are not engaging in that debate. Instead, our goal here is to describe the trends in scholarship as they exist so that law libraries can respond to the needs of their faculty.
that twelve percent of law faculty candidates had a nonlaw Ph.D., though nearly all of them also graduated from law school. The same article reported that it seemed that the number of these nonlaw Ph.D. candidates was increasing each year, though the authors acknowledged that the single-year scope of their study did not present them with enough evidence to confirm this. A more recent report on law faculty hiring confirms that individuals with Ph.D.s are regularly hired for law faculty positions. Twenty-one of the 127 new 2013 tenure-track law faculty hires had Ph.D.s (seventeen percent). A more recent, though admittedly less reliable source, is the self-reported law hiring statistics aggregated by PrawfsBlawg. For new faculty starting in tenure-track law faculty positions in the fall of 2014, 18 of the 73 hires had Ph.D.s (nearly twenty-five percent). Their Ph.D.s were in a range of areas, with economics and history being the most common.

Certainly some law faculty members who engage in empirical research have not earned Ph.D.s, but, at a minimum, these numbers indicate that some law faculty members have an empirical research background. This increased interdisciplinary nature of legal scholarship was previously noted by the continued addition of law faculty—refereed journals featuring empirical legal scholarship. Legal researchers look to the social sciences for instruction on empirical methodologies, and Jonathan Simon contends that interdisciplinary studies can provide added value to legal education through broadened intellectual values. A review of the increasing value and attention paid to interdisciplinary research indicates that empirical legal scholarship is an important piece of the work that law faculty conduct.

Empirical Legal Research and Services in Law Librarianship

In recent years, empirical legal research has received some attention in the law library literature. As the Law and Legal Studies Librarian at Princeton, David A. Hollander exemplifies how law librarians might broaden their research skill sets to incorporate the interdisciplinary nature of empirical legal scholarship and support new and nontraditional (or nondoctrinal) research. The author asserts that “law librarians rank among the most skilled legal researchers in the country. Our well-honed skills enable us to effectively support the work of the attorneys, judges, professors, students, and others with whom we work. . . . We support faculty research by finding legal resources and information without which important legal scholarship could not occur.”

26. Id.
29. Suchman & Mertz, supra note 10, at 558.
30. Simon, supra note 19, at 80.
31. Simon, supra note 19, at 80.
32. Hollander, supra note 8, at 771–72, ¶¶ 2–4.
33. Id. at 771, ¶ 1.
¶15 Thus, broadening those skills to more interdisciplinary social science methods of research, academic law libraries will be equipped to support the trend toward empirical legal research. Hollander goes on to describe the four types of interdisciplinary legal reference situations, the first being “Law and” questions and the fourth being assisting the nonlaw patron who may be a novice to legal research and resources. An important focus for the current study is on the second and third types of legal reference he identifies: “data and statistical legal research” and “nontraditional legal research,” both being interdisciplinary and empirical according to our definitions.

¶16 In 2010, Stephanie Davidson addressed the lack of studies on how legal research is conducted, speculating that a gap may exist between theory and scholars’ actual practice. There is a crucial need to expand our understanding of how scholars practice legal research so that librarians may collaborate with faculty and increase their own value as experts on the research process. Davidson also contributes to the discussion of the interdisciplinary trend of law faculty and their increasing need to understand social science methodologies, noting the increasing prominence of empirical legal research and the need for law librarians to market and provide their skills in this area.

¶17 Darla Jackson explored reasons for potential service barriers after conducting a survey in which feedback pointed to a misunderstanding among law librarians of what empirical legal research means. Drawing on the quantitative methods of George’s empirical legal scholarship definition and incorporating qualitative measures, Jackson broadened the research landscape and disciplinary methodologies that librarians might support. Jackson concluded that barriers might include knowledge of those methods or economic restraint, but also noted that interest in empirical legal research is increasing. In a later reiteration of these initial thoughts, Jackson went on to search for instances of empirical research cited in cases within U.S. and Australian Westlaw databases, asserting that perhaps empiricism is beginning to influence legal systems and noting that academic and firm law libraries are finding the need to increase empirical research skills and support.

¶18 Meg Butler conducted a search of law library websites to gauge the level of service marketing. At the time, three libraries reported having librarian staff dedi-
cated to empirical research support. Other services communicated on law library websites were also presented in the report. It is important to note that this study, through reviewing the public websites of law libraries, did identify those libraries that offered empirical legal research support. However, we can also assume that most libraries are performing more services than what they list on the public interface of their websites. The author made a critical point, however, in asserting:

When considering the services that the academic law library provides to its faculty users, a primary consideration should be the alignment of the library’s mission (and the services provided) with the mission of the law school and its university. By aligning the library services and mission, the library receives several advantages. These include raising the profile of the library within the school, providing support for the library’s fiscal needs, and clarifying and prioritizing the responsibilities and duties of the librarians.

This statement underscores the idea that law library services should be relevant to the needs of their institutions and that new skills may be necessary to accommodate new information and resource needs.

Most recently, in two companion articles, librarians at Yale described the process of their recent hiring and role development of an empirical research law librarian. Motivated by faculty needs, the Yale Law Library decided to create a new librarian position focused on empirical research. Hired in the fall of 2012, the empirical research librarian in her first six months at Yale Law Library helped faculty with research ideas, purchased data, and created data-focused workshops and handouts on using statistical software.

From the review of the field completed by the Yale Law Library librarians prior to hiring their new empirical research librarian, they concluded that no other law school library had a librarian position focused on empirical research. However, they found that some other law schools offered empirical research support such as a statistician or a data analyst.

Academic Libraries and Data Services

With the known increase in the use of social science research methodologies among law faculty, we can also look to general academic libraries for trends that may impact law school libraries. Law libraries are not alone in questioning which services to offer when supporting faculty research. Academic libraries, in general, have been struggling with this question as well. However, in academic

46. Margaret (Meg) Butler, Law Library Faculty Services Web Sites: Effectively Communicating Services Provided for Faculty, 31 LEGAL REFERENCE SERVICES Q. 239, 250 (2012).
47. Id. at 240.
50. Miguel-Stearns & Ryan (Part 2), supra note 48, at 8.
52. Id.
libraries, empirical research has long been the norm, rather than the exception. So, instead of discussing “empirical research” support, academic libraries are reviewing their role in the provision of research data services. As academic libraries are oftentimes microcosms of the greater university system, there is much that may be gleaned regarding skills being developed by librarians to meet the needs of various researchers.

¶22 For example, a large survey conducted for the Association of College and Research Libraries in 2012 found that while relatively few libraries at research institutions offered data-related services at that time, a significant number planned to expand these services in the near future.53 In a similar survey conducted the following year by the Association of Research Libraries (ARL), seventy-four percent of institutions reported that they offered some research data management services, and another twenty-three percent planned to offer them soon.54 These data services vary but often include reviewing data management plans for grant applications, consultations on data-related issues, and workshops on data management best practices.55 To support its member institutions, ARL released a set of materials for academic libraries to use when expanding their data services, including draft policies and job descriptions.56

¶23 Even as academic libraries expand their data-related services, the role of librarians in providing data-focused services is unclear. Only a small number of academic librarians directly interact with faculty members on data issues,57 and few see research data services as “integral” to their job responsibilities.58 It is easy to see parallels between the new and unsettled ground of academic libraries providing data services and law libraries providing empirical legal research services.

¶24 Unlike the multiple institutional assessments done in academic libraries on the nature and extent of data services,59 no similar data has been gathered about

55. See generally id.
56. See generally id.
the empirical legal research services provided by law libraries. Which law school libraries offer empirical research support and what exactly comprises those services is unclear. Keeping in mind the trends of law libraries, law faculty, and companion academic research libraries, the focus of this piece is to provide an overview of the empirical research services provided by law libraries in the United States. These precursors have guided the implementation of our study and the analysis provided.

### Methods

#### Background

§25 Despite the reported increase in the amount of empirical research that law faculty are conducting, thus far no attempt has surfaced to comprehensively examine what empirical research services law libraries provide. Our overarching goal for this project is to identify the services that law libraries provide to support empirical research. We also look at the frequency or commonality of those services. To achieve this goal, we conducted a survey. We acknowledge concerns that librarians are oversurveyed and that surveys are often not the best method for gathering certain types of information.60 However, a survey was the appropriate data collecting method for this research project because we wanted to gain information about the state of empirical research services across the entire population of law libraries, and not simply look at individual case studies or anecdotes.61

§26 During January and February 2015, we conducted a survey of the empirical research support services being provided by academic law libraries in the United States. To draft the survey, we considered each stage of an empirical research project, from conception to archiving the project after completion. Utilizing the research data lifecycle as a model,62 we constructed questions based on each step of the lifecycle to address whether the law library assisted researchers at each stage. Through the survey instructions, we focused on services that were currently and systematically offered, rather than on whether librarians would assist faculty on these projects if requested.

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61. Cf. id.
¶27 Information about the individual completing the survey was not requested. Instead, we asked only for the name of the law school the respondent represented. We requested only one response per institution.

¶28 The survey was pretested and revised in response. The final survey instrument was loaded into Qualtrics, an online survey software program that the University of Kansas licenses for conducting surveys. It was distributed to members of the law library directors listserv in January 2015 with a completion reminder sent in February 2015. The survey was distributed again to the American Association of Law Libraries (AALL) Academic Law Libraries SIS listserv in February 2015. Also in February 2015, responses were solicited by distributing the survey link to the Mid-America Association of Law Libraries (MAALL) listserv. Additional responses were solicited through targeted e-mails requesting that interested individuals share it with their colleagues. The survey was closed and our population recruiting efforts ceased on February 23, 2015.

¶29 The survey instrument is now publicly available online in the institutional repository for the University of Kansas.

Response Rate and Distribution

¶30 A total of 101 responses were received. Of these, 36 were recorded, but none of the questions were answered. Of the remaining responses, one institution submitted two responses but answered only the question regarding its institution. As a result, the blank response was removed from analysis. Another institution submitted two complete responses. Any of the responses that conflicted were removed, and the remaining identical responses were counted only once. An additional 9 respondents did not identify the institution that they represented. We were informed by another respondent that she had completed the survey twice, one time leaving off the institution, so using auto-collected information from the survey system, we eliminated the duplicate response.

¶31 This results in a total of 62 responses available for analysis, although not every question was answered in each response. Of these, 54 responses identified an institution.

¶32 At the time of publication, there are 205 law schools accredited by the American Bar Association (ABA). Our survey results represent thirty percent of the law schools in the nation.

¶33 To determine whether faculty scholarship varies with law school ranking, we also analyzed our survey responses based on the status of the school. For this analysis, we chose to rely on the U.S. News & World Report rankings due to the continued prominence that these rankings receive, acknowledging that critiques of these rankings exist.

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65. George, supra note 9, at 142–44 (calling for scholarship inclusion in ranking because U.S. News & World Report is retrospective and not based on faculty scholarship); see also Russell Korobkin, Essay: In Praise of Law School Rankings: Solutions to Coordination and Collective Action
¶34 Using the U.S. News & World Report Rankings published March 2015, we tiered the 54 survey responses that included institutional identification. When presenting and discussing survey responses by institutional rank, we exclude schools listed in U.S. News & World Report as “not listed” or “unranked.” As a result, 51 survey responses are available for analysis by institutional rank. Our groupings, detailed in table 1, were chosen based on common tier practices among law schools and to keep a roughly equal number of schools in each group.

<table>
<thead>
<tr>
<th>U.S. News &amp; World Report Rankings</th>
<th>Number of Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>1–25</td>
<td>12</td>
</tr>
<tr>
<td>26–50</td>
<td>11</td>
</tr>
<tr>
<td>51–100</td>
<td>10</td>
</tr>
<tr>
<td>101–150</td>
<td>9</td>
</tr>
<tr>
<td>“Rank not published”</td>
<td>9</td>
</tr>
</tbody>
</table>

**Table 1**

**Groupings Based on U.S. News & World Report Rankings**

**Limitations**

¶35 Various limits exist in representing the results of this study. First, we cannot be certain how respondents interpreted the questions presented in the survey. Instructions stated, “We are interested in service[s] as they are currently offered or have been offered in recent years.” However, some may have responded intending
to convey that services would be offered or skills developed if requested by faculty rather than as a currently practiced or formalized service.\(^67\) It is always the case that survey respondents may misunderstand the question or respond inaccurately.\(^68\) We also acknowledge that those law libraries that offer more robust services or that place more value on empirical legal research services may have been more eager to engage in this survey than those that offer fewer services.

¶36 Another limit is that we do not know how many people the law library director listserv reaches. Attempts to obtain additional information from the organizers of the listserv were unsuccessful. We also cannot be sure how many librarians were reached in our request posted to the AALL ALL-SIS listserv or in the targeted attempts sent to MAALL and by individual interested librarians. Aside from not knowing these numbers, we do not know from which request respondents chose to participate. We take our total responses as a percentage of the 205 law schools accredited by the ABA in 2015.

Results

¶37 In this section, we share the results of our survey. These results are discussed in more detail below in the section titled “Discussion.”

Prevalence of Empirical Legal Research by Law Faculty

Question: Approximately how many of your law school faculty members do you believe conduct empirical legal research?

Question: Do you think the number of law school faculty members at your school conducting empirical legal research has increased or decreased in the last five years?

¶38 Our survey results confirm that empirical legal research is occurring at law schools across the country (see figure 1). Of our respondents to this question, eighty-three percent (fifty law libraries) indicated that some of their faculty members conduct empirical legal research. Most often, it is a small subset of faculty who do this type of work; seventy-nine percent responded that “a few” of their faculty members conduct empirical legal research. These results were relatively evenly distributed across schools of different U.S. News & World Report rankings. The only notable variation between different ranks was among the nine schools that fell in the “rank not published” category: two (twenty-two percent) of them indicated that none of their faculty conduct empirical legal research. Ten percent of respondents (six) did not know how many of their faculty conduct empirical research, a concerning result given the role that law libraries play in supporting their faculty members’ research.

¶39 We also inquired about whether the numbers of faculty conducting this work had increased or decreased in recent years (see figure 2). A great majority (eighty-one percent) indicated that the number of their faculty members conducting empirical legal research has increased in the last five years. We note, though,

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67. One of our original pretesters alerted us to this potential interpretation. We attempted to edit survey questions to reflect actively provided services and included our intentions in survey instructions.

68. Epstein & Martin, supra note 1, at 78.
that we presented respondents with only two options (increased or decreased), so no response was appropriate for a respondent who believed that the number had remained static.

§40 Schools in the “rank not published” category were most likely to report a decrease in empirical legal research among their faculty; four of the nine respondents in this tier stated that this work has decreased in recent years. By contrast, all nine schools ranked 101 to 150 reported that empirical legal research has increased in the last five years. Similarly a majority of law libraries in all the other rank groups reported an increase in empirical research.
Identifying and Using Existing Datasets

Question: Does your library assist law school faculty with identifying and using existing datasets, such as the U.S. Census?

¶41 Given the increasing number of faculty conducting empirical legal research, we must then turn our attention to the nature of services that law libraries provide.

¶42 Overwhelmingly, the most common service that law libraries provide is assistance with existing datasets; eighty-seven percent (fifty-four) of respondents help faculty members identify and use existing datasets (see figure 3). These results were relatively consistent across all ranks of schools.

¶43 The prevalence of this service is logical because it is the data-related service that most closely resembles traditional reference activities of locating and accessing materials created by others. Here, it is just applied to a different area—identifying data rather than books, journal articles, or judicial opinions.

Research Design, Analysis, Storage, and Archiving

Question: Does your library assist law school faculty with designing empirical legal research projects?
Question: Does your library assist law school faculty with analyzing data?
Question: Does your library provide assistance to law school faculty with storing and managing their empirical research data while a project is active?
Question: Does your library provide assistance to law school faculty with archiving their empirical research data once a project has concluded?

¶44 While assistance with identifying and using existing datasets is common, other empirical research services are not. Only a small set of libraries are involved with research design (sixteen percent), and eighteen percent assist with data analysis. A slightly larger number are involved with data storage during the project (twenty-six percent) and archiving following the conclusion of a project (twenty-four percent) (see figure 4).
Despite the relatively low number of schools that offer them, these services are much more common at schools with a higher rank (see figure 5). Among the law librarian respondents at institutions ranked in the top fifty, thirty percent provide research design assistance and thirty-two percent provide assistance with analysis. Law libraries representing schools ranked 101 to 150 and those in the “rank not published” category have the lowest offerings of these types of services, with only zero to two libraries at schools in these rank categories responding “yes” to any of these questions.

**Staff Support**

*Question:* Is there a person on the law library staff who is solely dedicated to empirical legal research support?  
*Question:* Are any of the law library staff proficient with quantitative data software, such as SAS, SPSS, etc.?  
*Question:* Are any of the law library staff proficient with qualitative data software, such as NVIVO, Atlas.ti, etc.?

Only a small number (ten percent) of libraries reported having a staff person solely dedicated to empirical legal research support (see figure 6). Only schools ranked in the top fifty reported having this type of position on the staff of their

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69. We should note that we received some feedback indicating that this question is confusing. Some respondents might have interpreted this question to refer to a person on staff who is dedicated full-time to providing support for empirical legal research. At the same time, others may have thought that this question referred to a single individual on staff to whom all empirical research questions may be directed, but whose position would entail duties beyond empirical research support. Despite this potential ambiguity, the results can still be used to indicate the availability of support within libraries for empirical legal researchers.
library. No school from rank fifty-one through the “rank not published” group indicated availability of this type of support.

Although libraries rarely reported having a solely dedicated staff person, they are more likely to have at least one individual on staff who is proficient with quantitative (thirty-two percent) or qualitative (seventeen percent) data analysis software.

While proficiency with data analysis software was more common among staff at higher ranked schools, some libraries at schools with lower ranks reported having these skills among their staff as well (see figure 7).

**Future Plans**

*Question: Do you plan to increase law library provided empirical legal research support in the next five years?*

Finally, we asked law libraries to report on whether they plan to increase the empirical research services that they provide in the near future. Approximately one-third of all law library respondents plan to increase these services over the next five years. Libraries representing institutions ranked 101 to 150 were more likely than all others to have plans to increase these services (see figure 8).
**Figure 6**

Frequency of Staff Available to Support Empirical Legal Research

<table>
<thead>
<tr>
<th>Staff Proficiency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solely Dedicated Library</td>
<td>10%</td>
</tr>
<tr>
<td>Staff Proficient with</td>
<td>32%</td>
</tr>
<tr>
<td>Quantitative Software</td>
<td></td>
</tr>
<tr>
<td>Staff Proficient with</td>
<td>17%</td>
</tr>
<tr>
<td>Qualitative Software</td>
<td></td>
</tr>
</tbody>
</table>

**Figure 7**

Law Library Staff for Empirical Research Support, by Institutional Rank

*Legend:*
- Solely Dedicated Library Staff
- Staff Proficient with Quantitative Software
- Staff Proficient with Qualitative Software
Discussion of Findings and Implications

Overview of Results

¶50 These results represent law librarian–reported trends in the prevalence of empirical legal research taking place among law faculty. Additionally we note specific services and frequency of offering within academic law libraries.

¶51 Academic law librarians are deeply engaged with the research efforts of their faculty members. Law librarians see a small but increasing number of law faculty members, spread throughout academic institutions of all ranks, engaging in the practice of empirical legal research.

¶52 To serve these faculty members, law libraries have, thus far, primarily assisted with identifying and using preexisting datasets. However, a sizable minority of law libraries provide more in-depth services including assistance with during-project data storage, after-project archiving, data analysis, and research design. These more intensive services tend to be offered more frequently at schools with a higher ranking. In addition, law libraries at higher-ranked schools are more likely to have a staff person dedicated to providing empirical legal research services.

¶53 Quantitative services tend to be offered more frequently than qualitative services. This is consistent with the focus that quantitative analysis receives among those defining empirical legal research. Nevertheless, nearly one in five law libraries has someone on staff who is proficient with qualitative data analysis software.

¶54 In response to an anticipated increase in empirical legal research by law faculty members, one in three law libraries intends to increase these services in the future. We hypothesized that libraries at top-tier institutions would be most likely

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70. George, supra note 9, at 141; Heise, supra note 15, at 810.
to plan to increase empirical legal research services in the near future. While a number of survey respondents from libraries in the top 100 schools do plan to increase these services in the future, we found that schools in rank 101 to 150 were slightly more likely than all others to have plans to expand empirical research services. This may indicate that law libraries at higher-ranked schools have already implemented the services needed to support the research being conducted by their faculty.

¶55 These results present a broad overview of the services being offered by the academic law library community. We encourage law librarians at each institution to determine whether these trends are, in fact, occurring at their institutions and to consider the services that they need to offer to best serve their faculty members. Individual institutions and law libraries must analyze their goals and missions to evaluate and determine which services are necessary and at what rate.

Opportunities for Cross-Campus Collaboration

¶56 The majority of law schools are embedded in larger academic institutions. Our survey results allow us to draw parallels between empirical legal research services at law libraries and data services provided at academic research libraries and law libraries. Our survey revealed that most law libraries assisted faculty with identifying and using existing datasets. This same service was the one most commonly offered by academic libraries.71 Additionally, our survey revealed that a small but notable number of law libraries plan to expand the services that they offer in the near future. Similarly, a large number, but still less than half of academic libraries, plan to expand various research data services offerings, though the number varies with the nature of the service.72

¶57 These parallels present opportunities for collaboration. In light of reports that academic research libraries are planning to increase their services in the area of data storage, archiving, and analysis,73 law libraries may consider strengthening (or establishing for the first time) relationships with research data services units in their campus libraries. This may be particularly advisable while the number of law faculty who conduct empirical research remains small. Through partnership, law libraries may meet the needs of their faculty members while not incurring additional costs or expanding the number of staff. With these services largely still in development, law librarians have an opportunity to participate in their design to ensure that they meet the needs of law faculty and broaden empirical research skills alongside campus colleagues.

¶58 Other cross-campus partnerships, outside of libraries, may also be helpful. For example, many campus IT departments are considering how research data is handled. Sponsored research offices, discipline- or department-specific research centers, and social science methodology courses could all be opportunities for law librarians to connect on campus with those who may have more empirical research support experience.

71. Tenopir, Birch & Allard, supra note 53, at 17.
72. Id. at 17–19.
73. See generally id.
Areas for Future Study

¶59 We also note that ten percent of overall respondents, all from higher-ranking institutions, reported having staff solely dedicated to empirical legal research support. It would be an interesting question to explore how quickly this hiring trend is catching on considering the recent publication date of the Yale articles and Butler’s study, at which time there seem to have been fewer staff with this position description. This may imply that services are increasing quickly.

¶60 Since this survey solely asked questions of law librarians, rather than law school faculty members themselves, this area could benefit from additional study to verify the prevalence of empirical legal research. As Davidson points out, little is known about the research practices of law faculty members. So an additional study of law faculty members or deans of research may reveal whether law librarians are accurate when they report that a small and increasing number of law faculty members engage in empirical research.

¶61 In addition, given that law librarians currently believe this type of research is increasing, a follow-up study in a few years to determine whether that increase is in fact happening is advisable.

Conclusion

¶62 Our goal in conducting this survey was to gain a better understanding of the nature and extent of empirical research services being offered by academic law libraries. The survey was meant to be descriptive. As libraries consider changing or expanding the services they offer, a wide snapshot of what is occurring can prove helpful, so that we, as a community, can learn from each other.

¶63 When the results are compared by school rankings, responses support the hypothesis that higher-ranking schools will offer empirical legal research support more often than lower-ranking schools. However, we did find that it was those schools of lower rankings that were looking toward expansion of empirical legal research support services.

¶64 It is not our intention to persuade law libraries to offer a certain level of empirical legal research services. We believe strongly that there is no one-size-fits-all suite of services that all libraries should offer. Instead, we encourage law librarians to engage with their faculty and institutions to determine and then meet specific research needs. For example, if a new faculty member arrives who conducts qualitative interviews, then we believe it is the responsibility of the law library to either develop capacity at the library to offer qualitative data support or to forge partnerships with others who can collaborate in these services. Our goal should be to support and advance faculty scholarship, in whatever form it takes.

¶65 As law schools discuss the scholarship that meets the goals of their institutions, we encourage law librarians to participate and collaborate by offering best practice services. We anticipate that different schools will come to different conclusions, and that, as a result, the nature of faculty scholarship across institutions will vary even more significantly than it already does.

74. Davidson, supra note 38, at 565, ¶ 8.
%66 It appears from this survey that law librarians believe that empirical research is happening more often. If that is true, then we recommend that law librarians ensure that their libraries provide the empirical research support that these scholars need. Responsiveness to the needs of faculty demands constant assessment and flexibility to make changes in response to that assessment, but a requirement for librarians to be flexible is not new. Regardless of where each institution settles on this question of faculty scholarship, it is the responsibility of law libraries to support their faculty members. This may mean that law libraries have to modify or expand the empirical research support to their faculty members. Other avenues of support may derive from cross-campus collaborations. If that occurs, we hope that these survey results can be a guide.
Law librarians are experts in instruction, databases, scholarship, and more. This broad expertise has exacerbated an identity crisis in the profession. The author argues that law librarians must develop a core identity, such as legal literacy, to navigate an ever-changing legal landscape that questions the future necessity of law librarians.

Introduction

Law librarians are experts. They are experts in legal information literacy, information systems, databases, archives, repositories, and much more. This is both a blessing and a curse. Law librarians can be classified into various categories performing similar job duties and functions across all types of law libraries while uniquely adapting to the needs, goals, and missions of their parent organizations. Without law librarians, the legal information and related educational needs of the parent organizations would either go unmet or be satisfied through other means. Unfortunately, defining what it means to be a law librarian can be difficult since law librarians have developed such a widespread expertise that is both taken for granted and generally misunderstood.

The legal profession and the field of legal education is in a period of rapid evolution, and law librarians must adapt to keep pace. In terms of the evolution of legal resources, materials are increasingly available, and often preferred, in digitized...
Despite the removal of costs related to the creation and distribution of physical materials, the price of digitized legal materials continues to skyrocket. The assumption is that without physical materials in the library, law librarians are unnecessary. Therefore, the library, with expensive materials, databases, and personnel, is an easy target for budgetary savings for the institution. This places law librarians in the difficult situation of working with less while striving to maintain services. And it gives the inaccurate appearance that budget cuts are justified, possibly subjecting the library to even more cost-cutting measures. To counter these inaccurate and damaging perceptions, law librarians must assert their value in a meaningful way that is relevant to the parent institution.

¶3 Defining the core purpose of the profession will provide the foundation on which to build arguments proving the value of law librarians to a parent institution and enable law librarians to leverage their skills in more comprehensive ways. In Law Librarianship in the Twenty-First Century, Robert C. Berring summarizes the history of law librarianship to lay the foundation for understanding the current state of the profession. In doing so he boldly questions the core mission of law librarianship and asserts that “[f]orm follows function,” meaning that the description of the profession may vary depending on what tasks each individual performs in a specific institution. “Given the nature of the law,” writes Berring, “perhaps this is as it should be. Still, we need to find some way of locating the heart of the profession of law librarianship. . . .”3 Berring gives no further insight into or suggestion for a standard definition of “the heart of the [law librarianship] profession.” However, he later raises an interesting question about the future of the profession:

[S]ome feel that the term librarian itself should be abandoned in favor of a term that is more reflective of a professional who manages knowledge by working with information, systems, and databases. The entire profession of librarianship has struggled to find its identity and its place at the table in the information economy. Will the term librarian become synonymous with a middle management position in which one reports to a manager to whose job one cannot aspire?4

¶4 Would changing the title of librarian to something else create a more accurate image of who they are? Does it really matter? Does law librarianship need a clear definition and purpose beyond the role of caretaker of information? The answer is a resounding yes.

3. Id.
4. Id. at 11.
5. Although this analysis offers a different solution, this is a fascinating question worthy of robust discussion. In fact, on February 27, 2015, AALL asked a similar question: “Is the title ‘Librarian’ still appropriate today?” TIMELINE PHOTOS, FACEBOOK, https://www.facebook.com/aallnet/photos/a.452274066805.246610.103201871805/10152671855956806/ (last visited Aug. 13, 2015). As of March 2, 2015, the results indicated more than seventy percent answered affirmatively. AM. ASS’N OF LAW LIBRARIES, http://www.aallnet.org/ (copy on file with author).
Law librarianship needs a succinct and powerful statement of purpose. An unambiguous definition of law librarianship will provide clarity for both law librarians and those who employ them. Roy Mersky has argued, in response to his own intentionally inflammatory statement that there is no future in law librarianship:

To rebut my own statement that “there is no future in law librarianship,” the profession is increasingly important, and the future is bright with tremendous prospects for those with degrees in library science, law, computer science, language, management, and other specialized credentials. The challenge to emerging and veteran law librarians is to take a hard look at what we are doing and how we are doing it. There is a need to educate new law librarians and to reeducate existing librarians with skills and knowledge to meet the challenges of the profession and to ensure a proactive approach to services.

While this is an excellent and hopeful assessment of what law librarians can expect, it still fails to provide a core statement of purpose. Law librarians must create a common vision of the profession to solidify its identity and purpose. Creating a common and holistic view that highlights the importance and value of the profession brands law librarians and defines their purpose. Having a strong core identity will give law librarians the leverage they need to meet and overcome challenges inherent in the rapidly changing legal environment.

In Law Librarianship in the Digital Age, Jean O’Grady argues that “the core mission of the profession—matching people to knowledge—remains intact and drives a vision of the future that distinguishes our profession from all others. We are charged with preserving and optimizing access to knowledge.” Later in the book, Scott D. Bailey and Julie Graves Krishnaswami provide a useful analysis of what law librarians must do to succeed in a service model for the law library and law librarianship. The statements are not necessarily wrong, but they lack a meaningful and powerful statement of purpose that defines the profession and distinguishes it from other similar professions.

One frequently sees powerful statements in sales and marketing, but what about professional mission statements? Patch Adams is reputed to have said, “The purpose of a doctor or any human in general should not be to simply delay the death of the patient, but to increase the person’s quality of life.” The power and simplicity of this statement continues to resonate and has morphed into a cultural meme. Similarly, the national Future Farmers of America (FFA) solicited T-shirt designs for the organization. One winner, having used the slogan he created for his mission.

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state FFA organization, designed the best-selling FFA T-shirt, which highlights the importance of agriculture: “Naked & Hungry: What you would be without agriculture.” It’s hard to argue with that! A clear statement of purpose makes a powerful impression on the speaker and the listener. It anchors the profession within the larger world and gives meaning to both the individual and the field.

¶9 Professor Robert Jarvis has boldly preached the imminent demise of law libraries and law librarians. He states that, in the future, law faculty will want law librarians to advocate for the digitization of legal information in support of the scholarly activities of the law faculty, and, once this is complete, law librarians will no longer be necessary. He assumes that online resources are self-selecting, self-sustaining, and intuitive to use. In an effort to be extremely inflammatory, Jarvis compares law librarians to elevator operators and doormen who were once necessary and common in everyday life but have outlived their usefulness. His final argument, meant to place the last nail in the coffin of law librarianship, is, “Although I suspect that most professors do not realize it, what they want is for you to become victims of your own success and put yourselves out of business.” It is unnecessary to take the time to refute all of the inaccurate assertions that Jarvis makes; law librarians know he is wrong, and they need to show that he is wrong. Unfortunately, this argument regarding the purpose of law librarians and their impending demise is a common, persistent, and problematic myth, one made more attractive by declining law school budgets.

¶10 Once all legal resources are online, who will be the experts to replace law librarians? Legal information vendors are marketing themselves as a one-stop resource for all legal information needs making law librarians unnecessary. Surveys on the legal information needs of practicing attorneys have focused on the importance of digital resources, from which one can conclude that without books, law librarians are no longer necessary. And, while it is fascinating that newly licensed attorneys rely heavily on digital resources, it is inappropriate to take this as proof that legal information vendors are the best instructors to train attorneys. Newly licensed attorneys may not be as skilled in legal research as they think they are.

¶11 With this widespread digitization of legal materials, derogatory marketing campaigns by legal information vendors, and a sustained misunderstanding of the purpose of law librarians, some fear that law librarians are, or soon will be, obsolete. These depressing and antagonizing arguments can quickly become the dominant influences that push the profession to be reactive rather than proactive. Law librarians, understandably, feel the need to prove themselves as being something

13. Id. at 504, ¶ 8.
14. Id. at 505, ¶ 17.
more than the caretakers of books. Faced with these challenges, law librarians have struggled to find meaningful ways to assert and prove their value to their parent institutions.

¶12 One suggested approach to proving the value of law librarianship is to create a structured educational requirement to enter the field. In her article, Is This a Profession? Establishing Educational Criteria for Law Librarians, Elizabeth Caulfield has outlined the history of the profession’s inability to reach a consensus on the educational needs of law librarianship and whether specific educational requirements are necessary to be a law librarian.17 Caulfield’s goal “is to encourage discussion that leads to the standardization of educational qualifications for law librarians and the establishment of law librarianship as a distinct profession.”18 Although an admirable goal worthy of discussion, defining educational requirements risks ostracizing skilled law librarians, may exclude qualified individuals, and may artificially limit the future scope of the profession. Perhaps the problem is that the profession cannot agree on educational requirements because it cannot agree on a common identity that covers all aspects of librarianship. Perhaps both issues are merely symptomatic of the ever-changing and somewhat chaotic nature of law librarianship. Whatever the reason, law librarianship continues to suffer from an identity crisis.

¶13 The 2013–2016 Strategic Directions document of the American Association of Law Libraries (AALL), provides some guidance. It sets out a core ideology for the organization, a vision, and the list of goals and objectives of the organization.19 All of these concepts focus on the organization as an “advocate and supporter” of the profession of law librarianship. Perhaps the most useful statement regarding the identity of law librarians is the vision that states, “AALL and its members will be the recognized authority in all aspects of legal information.”20 Given that membership is not restricted to law librarians,21 this statement does not explicitly define the purpose of law librarianship. AALL should not be responsible for defining the profession; instead law librarians must leverage the resources of the organization to develop, define, and support the core purpose of law librarianship.

¶14 AALL has supported many initiatives to assist law librarians in developing key arguments that assert their value to parent institutions. Most recently, AALL sponsored a study entitled The Economic Value of Law Libraries: A Report of the American Association of Law Libraries Economic Value of Law Libraries Special Committee.22 The importance of this report cannot be overstated. Every law librarian should read and use this resource. The report includes broadly written best practices that it then applies to specific types of law libraries. The primary goal of this

18. Id. at 288, ¶ 3.
20. Id.
report is to enable law librarians to effectively communicate about the law library and their work. It also provides the framework in which to make the arguments asserting the value of the law library, although the substance of the arguments must be tailored to each unique situation. The only issue with this report is that it still ties law librarians to the library, even though the library is not tied to physical space.

The library is no longer a “place.” The library is a collection of information across multiple formats, organized and disseminated in a method designed to provide access to high-quality resources. Library services reach beyond the mere collection and organization of information. Library professionals provide services that deliver content, as well as providing instruction on accessing that content effectively through training, teaching, and demonstration. The report provides a contemporary and robust definition of the law library, highlighting that law library services are not tied to the collection. Teaching users that the library is not a physical space is one of the greatest challenges facing librarianship. However, it asserts that library professionals exist as the facilitators of library content. Can a law librarian exist without a law library? Yes, but defining the purpose of law librarians will advance the idea that a library need not exist as a physical space with physical collections.

The scholarly literature produced by law librarians proves that they excel at improving their professional practice. Law librarians should leverage that expertise to create a narrative that articulates how their work fits within the larger field of law librarianship. Ideally, it should become commonplace that when anyone hears the term “law librarian” he or she knows the primary purpose of a law librarian, what defines the “heart of the profession.” Any further explanation would explain the role of the law librarian within a specific organization. This definition would not alter the work performed by law librarians but instead how they view themselves, how they approach their work, and how they present their work to others. Legal literacy is that purpose, the core concept, the heart of law librarianship. The purpose of law librarianship is legal literacy.

What Is Legal Literacy?

Literacy, according to its dictionary definition, is the ability to read and write. This concept, fundamental to our daily lives, involves layers of complexity and analysis that scholars are just beginning to unravel. Literacy is far more than simple reading skills, but “[u]nfortunately, the definition of literacy one finds is often simplified, even reductive: Literacy is the straightforward encoding or decoding of print. Literacy is a single thing, measurable through a standardized test. Literacy means the reading of one kind of text but not another.” This is the most simplistic definition of literacy and has little relation to contemporary discourse on

23. Id. at 1.
24. This is a good argument in favor of Berring’s suggestion of finding a new word for librarians. Berring, supra note 3, at 11.
literacy. Some of the central themes in literacy studies include the relationship between literacy, knowledge, and cognition plus the inherent power imbalances that occur when individuals do not have sufficient basic literacy skills or literacy skills in subject areas. An expanded meaning of literacy, “being knowledgeable in a particular subject or field,” which includes a deeper subject understanding, is used throughout this paper.

§17 But what about legal literacy? The concept of legal literacy has been around for decades in various forms. Within the United States, definitions of legal literacy have been posited in scholarly work, usually related to education or law, and have been stated either as singular concepts or as a spectrum of knowledge. James Boyd White argues that legal literacy can range from the mere ability to recognize legal words as being “part of the world of the law” but nothing more, to achieving competency as a reader and writer of the law, which expertise can only be developed after professional education and years of practice. This idea of the spectrum of legal knowledge provides a useful framework for understanding other definitions of legal literacy.

§18 In the context of civics education, Suzanne Bolton argues for a singular definition of legal literacy:

[L]egal literacy could be defined as the background information stored in one’s mind that enables them to take up a legal document, read an article in the newspaper on a law-related event, with an adequate level of comprehension, getting the point, grasping the implications, relating what they read to the unstated context which alone gives meaning to what they read.

In this context, legal literacy is a general and indistinct concept comprising merely the ability to understand, when reading text, that something is legally significant and even possibly understanding the legal implications of that text, which frankly may be more than one could expect at a secondary civics education level. As stated above, this would be the lower end of White’s spectrum. However, Bolton attempts to further refine this idea by breaking it into component parts:

The major objectives and rationale of legal literacy a.k.a. (also known as) law-related education are succinctly put forth as follows: “1) broad understanding of basic legal concepts, principles, and the valued ideals of our constitutional democracy, 2) awareness and increased understanding of the rights and responsibilities of citizenship, 3) growing respect and appreciation for legal processes and rational legitimate authority, and 5) [sic] the knowledge skills and attitudes that promote citizenship participation.”

§19 Note that Bolton refers to legal literacy as “a.k.a. law-related education.” Arguably, law-related education is the precursor to basic legal literacy in that one

27. Id. at 5.
31. Id. at 143.
33. Id. at 16.
must develop an understanding of certain government structures and requirements before undertaking the development of legal literacy skills. The component parts make no reference to reading and understanding legal documents, but highlight that legal literacy includes the ability to function in a democracy. This definition of legal literacy is more expansive than simply reading legal documents, as she initially asserts, but requires having background knowledge to draw on to understand what has been read. This definition requires substantive education in current and historical facts and the development of analytical skills to apply that knowledge. While at first her definition may appear to be a simplistic focus on reading, falling at the lower end of White’s spectrum, it actually requires a sustained or broad education to develop.

¶20 The Report of the Canadian Bar Association Task Force on Legal Literacy also asserts that the ability to read and understand words forms the basis of legal literacy:

The Task Force soon recognized that the ability to use and respond to words as they are used in the context of legal documents and procedures was also basic and essential to a society that relies heavily on law. Literacy means something more than an ability to recognize and decode words. It is a cumulative process that must also include the ability to respond: to understand words, to draw conclusions from them, and then to use those conclusions to take action. Specific to the law, literacy must also include the ability to understand words as they are used in a legal context. 34

Both Bolton’s definition and the definition of the Canadian Bar Association Task Force rely on the functional definition of legal literacy encompassing both reading and comprehension of legal words and texts.

¶21 At the other end of White’s spectrum, Leonard J. Long makes an argument in favor of supporting legal literacy initiatives that focus on reading. Long emphatically argues that legal literacy means being well read in the law35 and that to become legally literate, students must read books about the law and gain a “mastery of law literature.”36 Without this background gained exclusively through reading the law, one cannot hope to be legally literate.37 The main premise of his argument is that law school is not enough to become legally literate.38 Law school is merely the first step toward legal literacy. Thus his argument, while focusing on the fundamental educational needs of would-be attorneys, also excludes a large segment of the population from ever hoping to become legally literate, leaving legal literacy to the professionals.

¶22 Legal literacy should be defined to encompass all individuals. Although White has created a broad concept, he does not explain what skills would be needed to achieve competence in legal literacy. A legal professional, as discussed by Long, would exist at one end of the spectrum, with the other end of the spectrum being

34. CANADIAN BAR ASS’N, REPORT OF THE CANADIAN BAR ASSOCIATION TASK FORCE ON LEGAL LITERACY 23 (1992).
36. Id. at 24.
37. Id. at 10.
38. Id.
inhabited by those who have no more knowledge than the ability to identify that a word or concept might be legal in nature. Within White’s spectrum of knowledge, all individuals no matter their expertise can have an identifiable level of legal literacy, and he believes there is a nonprofessional ideal in the middle of the spectrum. A midpoint of legal literacy would encompass the competence needed to function within our “increasingly legalistic and litigious culture.” Although Bolton and White seem to agree that a functional level of legal literacy is required to be a good citizen in a democracy, they have not provided concrete guidance, leaving the requirements for that achievement unfocused.

¶23 Mary Sarah Bilder’s definition of legal literacy is also a spectrum concept and provides the most useful definition for law librarians:

Legal literacy refers to the reading, writing, speaking and thinking practices that relate to the conduct of litigation. Instead of forcing a binary decision of whether a legal practitioner is a lawyer or not, consideration of legal literacy allows us to identify and to place participants in the legal system along a spectrum of functional skills.

This broad definition, though similar to White’s, highlights the need to identify skills and provides for a range of skills among legal professionals. Although this definition refers to participants in the legal system, the context of the assessment does not lend itself to a thorough analysis of nonprofessionals. However, one can extrapolate from this definition a range of functional skills, rather than the more ephemeral concept of understanding a body of knowledge, to define the level of legal literacy.

¶24 A synthesized definition of legal literacy is the ability to read, write, and understand concepts, which abilities exist on a spectrum of skill levels ranging from having no skills to having all of the knowledge and skills necessary to function as a legal professional. Because of the iterative nature of law and technology, all individuals can improve their personal level of legal literacy. This enhanced definition would apply to everyone, therefore representing the full range of clientele who might be encountered in any law library, whether or not an actual assessment of skills is undertaken.

¶25 A simplified definition of legal literacy is the ability to understand the law and apply the law. The skill level of each individual is based on his or her education, background, and life experience. Again, form follows function such that the level of legal literacy education provided at the institutional level varies depending on the needs and legal fluency of the patrons. A law firm librarian would not be expected to provide reference services to an attorney in the same manner that an academic librarian might instruct a law student or a public law librarian might work with a member of the public.

¶26 All law librarians engage in legal literacy in one form or another because everything law librarians do ultimately serves the purpose of understanding and applying law. The connection between legal literacy and the law librarian roles of legal research instructor, faculty services librarian, scholarly communications

39. White, supra note 30, at 144.
librarian, and reference librarian is easy to make. Working directly with individuals, assisting them in understanding and accessing the law, is clearly legal literacy. Other law librarians may be more hesitant to assert that they engage in legal literacy. However, catalogers create records containing information vital to accessing and understanding the law; acquisitions librarians select materials tailored to the needs of the patrons of a particular institution to guide patrons’ understanding and application of the law; electronic resources librarians provide access to legal resources leading to the improvement of legal literacy; and law library administrators coordinate these activities with the ultimate goal of satisfying the needs and demands of their parent institutions, which, whether they realize it or not, are grounded in legal literacy. Therefore law librarians can assert that legal literacy is the “heart of the profession” because it encompasses the work of all law librarians working with all patrons, no matter their skill level, at all law libraries.

Why Should Law Librarians Embrace Legal Literacy?

¶27 The core concept of legal literacy provides a goal to which all of the various types of law librarianship aspire. It is the heart of law librarianship. Without the core concept of legal literacy to define law librarianship, the daily tasks performed by law librarians would be nothing more than administrative tasks to keep the machinery of the parent institution moving. Legal literacy gives purpose to the work of the law librarian and leverage to use when faced with budget cuts or the suggestion that law librarians are no longer needed as print materials become digitized. Creating a holistic framework where legal literacy forms the foundational concept of law librarianship allows individuals to explain the purpose of the law library, law librarianship, and their individual function within the parent institution. This is necessary to counterbalance the challenges facing librarians.

¶28 Samantha Hines argues that to improve the standing of librarians, librarians must address the challenges of “deprofessionalism,” the proliferation of online sources, and the expectation of immediate gratification by users.41 The first challenge, deprofessionalism, strikes at the heart of librarianship and threatens the meaning of librarianship. In 2007, Casey Schacher argued:

However valuable library professionalism may be, the attitude of many toward librarianship has grown increasingly hostile. Maurice Freedman, former president of ALA, painted a vivid portrait of this fact when he said, “the chorus decrying the need for and continued existence of professional librarians has grown like a disease.” Despite the efforts of librarians to firmly entrench themselves in professionalism, a growing trend toward deprofessionalization has threatened their status. Deprofessionalization has become what Crowley calls the “fundamental transformation” of libraries. This means that the number of full-time, professional library positions is being reduced and replaced by part-time, nonprofessional positions. Furthermore, job functions once performed by librarians, such as reference and storytelling, are routinely being transferred to library workers with minimal training.42

For law librarians, deprofessionalization may not yet be the “fundamental transformation” that is seen in public libraries, but it is visible at the highest level as law library administrators in law firms are eliminated and, at least at Harvard, schools are no longer sure that law librarians should be library directors. Without a core concept to define law librarianship, it becomes more difficult to argue why certain professional qualifications are necessary. By asserting the core concept of legal literacy as the foundation of the profession, one can easily make the argument that certain professional standards must be maintained for the law library and the parent institution to succeed in their missions.

¶29 The second challenge asserted by Hines is the proliferation of online sources. Hines fails to explain the concept, but one might make several opposite inferences based on the statement. In one instance, a librarian might be expected to master all online resources available at an institution, thus expanding the performance requirements of the position. Or, in the opposite situation, the challenge may be the persistent, albeit incorrect, idea that librarians exist only in relation to print resources and are increasingly superfluous as materials become available in a digitized format. The real challenge here is that law librarians find it necessary to justify their positions in so many and varied ways because they lack a succinct statement of core purpose.

¶30 The final challenge that Hines perceives is the need for immediate gratification by users. Although Hines is specifically referring to the perceived need of instant service, the problem runs much deeper. Patrons may view librarians simply as a walking, talking encyclopedia from which they can obtain an immediate answer. Librarians may view the reference interview as a teaching moment to help the patron both in the immediate instance and in developing skills to be used in future research endeavors. Again the problem goes back to lack of understanding of the purpose of librarianship and specifically law librarianship. If all law library users understood that the core purpose of law librarians is to improve legal literacy, the user expectation would shift such that users may be less insistent on immediate gratification and appreciate the assistance in developing legal literacy skills. This function has been traditionally defined as legal information literacy and, it is argued, is a smaller part of the larger field of legal literacy.

¶31 Legal information literacy is recognized as a fully integrated part of law librarianship. This concept has been embraced by law librarians who teach. There is a robust collection of scholarly literature focusing on improving, changing, and refining instruction for attorneys, law clerks, law students, and others. In this narrower aspect of legal information literacy, the role of the law librarian is clear. It is easy to connect the role of the law librarian as instructor to the information found

43. For an extensive analysis of the movement toward deprofessionalism, see DEFENDING PROFESSIONALISM: A RESOURCE FOR LIBRARIANS, INFORMATION SPECIALISTS, KNOWLEDGE MANAGERS, AND ARCHIVISTS (Bill Crowley ed., 2012).
45. HINES, supra note 41, at 5.
46. Id.
47. Am. Ass’n of Law Libraries, supra note 19.
in legal materials, thus supporting the law librarian’s role in improving legal information literacy.

¶32 The AALL appointed a committee to develop the *Principles and Standards for Legal Research Competency*, which states:

The American Association of Law Libraries (AALL) has developed a set of principles and standards for legal research competency, drawn from information professionals’ deep involvement in legal research within academe, law firms, the courts, government agencies, and other related settings, as well as the literature of the legal profession indicating that research competency directly impacts professional efficiency and effectiveness.48

The foundation of these standards was developed from the *Information Literacy Competency Standards for Higher Education* as approved by the Association of College and Research Libraries.49 The legal research competencies have a basis in information literacy and have been adapted to the legal field as a function of legal research. However, not all law librarians engage in instructional or other activities that would fall within the purview of the *Principles and Standards for Legal Research Competency*. If law librarians do not teach, they may not see themselves as being integral to legal information literacy. Therefore, it is necessary to expand that concept to legal literacy so it encompasses more than just legal information, allowing all law librarians to be defined by the core function of legal literacy.

¶33 In its Strategic Directions document, the AALL states that the core purpose of the organization is to “advance[] the profession of law librarianship and support[] the professional growth of its members.”50 Implicit in the statement is the assumption of a common understanding of the core purpose of law librarianship. The document lists the Core Organizational Values as

- Lifelong learning and intellectual growth
- Equitable and permanent public access to legal information
- Continuous improvement in access to justice
- Community and collaboration
- The essential role of law librarians within their organizations and in a democratic society51

All of the core values are clearly elements of legal literacy. However, the Strategic Directions document loses sight of this when it explains its goals and objectives almost exclusively in terms of legal information literacy. It is easy for the organization to develop visions and goals around tangible features of legal information. However, focusing on the core concept of legal literacy as the heart of the law librarian profession would provide the holistic view to encompass all law librarians and ground their work in a solid foundation.

51. *Id.*
¶34 Legal literacy is a broader concept than legal information literacy. Focusing only on the role of legal information literacy creates a self-imposed limitation on the work of law librarians. The broader concept of legal literacy encompasses the entire profession and creates a powerful statement of purpose. It is hoped that a strong statement of purpose will enable law librarians to successfully counter the challenges facing the profession.

Professional Sentiment

¶35 A systematic survey is necessary to establish a consensus regarding adopting legal literacy as the purpose of law librarianship. However, three reasons that law librarians may be reluctant to adopt legal literacy as the purpose of law librarianship are (1) because the concept may seem too basic or obvious and therefore lacks the air of professionalism needed to function within the legal profession; (2) because law librarians perceive a different purpose to law librarianship; or (3) because law librarians so clearly know that this is the purpose of law librarianship that it is not worth discussing any further. The problem is that although law librarians have not made the field of legal literacy a primary topic of professional conversation, others have.

¶36 An individual’s interpretation of legal literacy is entirely based on the prevailing view of legal literacy within his or her professional realm. As previously discussed, legal scholars have addressed the definition of legal literacy in broad terms. Other discussions of legal literacy have put law librarians in the cross-hairs. Law faculty have directly attacked traditional legal research instruction as focusing on “finding” as the primary topic of instruction within print resources.52 Ellie Margolis and Kristen Murray assert that “legal researchers are increasingly going directly to the web to conduct their research. Most legal research courses have not yet caught up to this reality, however and devote substantial time to teaching legal research in print materials.”53 After a blistering assault on traditional legal research instruction, the authors acknowledge that the AALL had, at that point, already engaged a task force to develop legal research competency standards, which would later become the Principles and Standards for Legal Research Competency.54 The authors then analyze the document and conclude that “these Principles can provide both a framework for legal research pedagogy, and a tool for assessment.”55 (Well, of course they can, that’s why they were developed!) The problem is not the analysis of the usefulness of the competencies but the clear disconnect between law librarians as legal research instructors and their development of the competencies. In essence, the authors failed to acknowledge that law librarians in their role as legal research instructors have kept abreast of the needs of legal research instruction and developed tools to address those needs. Again, law librarians are not viewed as integral parts of legal information literacy, let alone the broader field of legal literacy. Law librarians

53. *Id.* at 125.
54. *Id.* at 129.
55. *Id.* at 130.
must take action and assert themselves as leaders in legal literacy and make sure that the legal academy, law firms, the courts, and other parent institutions know it.

¶37 The American Bar Association (ABA) has been working with legal literacy issues for decades in ways too numerous to list here. The ABA has been instrumental in creating resources for children. A few examples are *Daring to Dream: Law and the Humanities for Elementary Schools*, intended for the classroom in the 1980s, and a contemporary collection of books for children intended to introduce them to legal situations and help them understand situations they may encounter in real life. In addition, the ABA has resources to help lawyers use legal literacy tools in a variety of settings. These few examples are in addition to pro bono, legal aid, and access to justice programs that promote legal literacy and are sponsored by the ABA. There is not a clear connection between law librarians and the ABA to promote legal literacy, but the opportunities are wide open.

¶38 Similarly, non-law librarians have been active in literacy campaigns. Literacy campaigns have a history dating back to the sixteenth century, and although early campaigns focused on reading and writing, more recent campaigns have focused on basic literacy and subject-specific literacy. For example, legal literacy is an element in a statewide literacy campaign in Pennsylvania. The Pennsylvania Library Association has created a literacy initiative called PA Forward, which focuses on improving the five “types of knowledge essential to success”: Basic Literacy, Information Literacy, Civic and Social Literacy, Health Literacy, and Financial Literacy. PA Forward relies on a network of libraries, librarians, and partner organizations to promote the five literacies highlighted by the initiative. Legal literacy is an integral part of the work of the Civic and Social Literacy team on which the Judicial Independence Commission of the Supreme Court of Pennsylvania is a key partner. PA Forward is changing the landscape for libraries and literacy in Pennsylvania and could become a model for other states and countries. The mission statement of the PA Forward initiative is inclusive to all libraries and librarians. Law librarians, especially those in Pennsylvania, should learn more about the work being accomplished by PA Forward and consider working with PA Forward as an extension of their work.

56. *DARING TO DREAM: LAW AND THE HUMANITIES FOR ELEMENTARY SCHOOLS* (Lynda Carl Falkenstein & Charlotte C. Anderson comps. & eds., 1980) (sponsored by the ABA’s Special Committee on Youth Education for Citizenship).


Law librarians should affirm that the purpose of law librarianship is legal literacy and embrace the work being done in the field of legal literacy. By expanding their view of their work and, by extension, others’ view of their work, law librarians will prove that they are leaders in legal literacy. Law librarians will be proactively taking a leading role in a field in which they are already experts.

How to Embrace Legal Literacy

The ways in which law librarians can embrace legal literacy are as varied as the individuals working in law librarianship and the jobs they perform for their parent institutions. Individuals must embrace the concept of legal literacy and use that concept as a framework to explain their work and show their value within the institution. In addition, the profession must shape the conversation and promote legal literacy as a core concept and as the “heart of the profession.”

One way law librarians can embrace legal literacy is to acknowledge the ways law librarianship has already contributed to legal literacy. As an advocate for the profession, the AALL is an excellent resource for information about law librarians. One item in particular, the AALL History in Brief: A Chronology, is an abbreviated history of the professional organization.

A nonexhaustive list of events related to legal literacy in the last few years includes the following:

- April 28, 2004—AALL leadership advocates at the national level for the right of citizens to no-fee access to government information.
- May 2006—The AALL Speakers Directory is launched in support of continuing education programs.
- April 20–21, 2007—The AALL Summit on Authentic Legal Information in the Digital Age includes attendees such as judges, state government officials, attorneys, and leaders of AALL and the ABA to discuss the status of primary legal sources.
- November 5, 2011—The AALL Executive Board approves the creation of an AALL Caucus on Consumer Advocacy.
- October 31, 2012—The AALL bylaws are changed to eliminate the requirement that an active member work in a library or information center.
- July 12, 2013—The AALL Executive Board adopts the AALL Principles and Standards for Legal Research Competency. This document improves legal research best practices in law schools, law firms, and CLE program development.

63. Am. Ass’n of Law Libraries, supra note 19.
64. Houdek, supra note 21, at 13.
65. Id. at 31.
66. Id.
67. Id. at 32.
68. Id. at 32–33 (thus highlighting the purpose of law librarians to educate other legal professionals).
69. Id. at 35.
70. Id. at 36 (reinforcing the idea that the work of librarians is not tied to a location or entity).
71. Id.
This short list of examples enumerates only a few of the many individual legal literacy initiatives already underway.

§42 Law librarians can leverage the prior work of their professional colleagues and use existing tools to promote legal literacy as the heart of law librarianship. Specifically, the Principles and Standards for Legal Research Competency is a primary document on which to rely when teaching legal information literacy to professionals. In addition, it would be possible for these principles to be simplified for application to the broader spectrum of legal literacy. By expanding these principles for a larger audience, law librarians show their value in promoting legal literacy beyond the needs of parent institutions, providing proof of the social value of the profession beyond its integrated function within, and exclusive to, an organization.

§43 The other area in which law librarians promote legal literacy is by providing access to law libraries for indigent or pro se patrons. Although the past focus has been primarily on access, this work is closely tied to and somewhat encompassed by the access to justice movement. Much has been written about how law libraries can promote access to justice, what obligation law libraries have to permit and promote access to justice, and how law librarians can provide services to pro se patrons as an aspect of access to justice. While all of this work focuses on providing access and services to those who would not otherwise have access to legal materials and services, merely opening the door to them does not solve the problem. To adequately promote access to justice, law librarians must help these patrons learn how to use legal materials. Law librarians will not deliver actual legal services to these patrons, but by permitting access to the libraries and materials, which have been intentionally curated and presented to help patrons understand the law, and by offering reference assistance in navigating the materials, law librarians are providing legal literacy instruction to those who fall on the lower end of the spectrum of legal literacy. Again, law librarians are already doing this work but are not discussing or promoting it in terms of legal literacy.

72. AM. ASS’N OF LAW LIBRARIES, supra note 48.

73. One could argue that there is a meaningful difference between providing access to law libraries and providing access to justice. However, describing this work as part of the access to justice movement provides a clear statement of purpose that simply providing “access to a library” does not. Perhaps in this respect one should look to Canada as a model. See Daniel Poulin, Free Access to Law in Canada, 12 LEG. INFO. MGMT. 165 (2012).

Law librarians are engaged in legal literacy every day. They need to leverage their technological and teaching skills with tools such as the *Principles and Standards for Legal Research Competency* and the *Economic Value of Law Libraries* to rebrand the profession as experts in legal literacy. To find the “heart of the profession,” law librarians must make a collective decision on what it should be. As Robert Berring writes, “In the information wars, the law librarians wear the white hats. We have to make sure that they know it.” We have to make sure everyone knows that the purpose of a law librarian is legal literacy.

**Igniting the Conversation**

Law librarians must initiate and lead the conversation with each other, with legal professionals, and with the public. In the field of communications, there is a theory regarding developing *idioms of practice*, which relates to a discussion of creating a sustained conversation about legal literacy within the field of law librarianship. Ilana Gershon argues that “the medium is part of the message.” She explains:

> The medium shapes the message in part because people have *media ideologies* that shape the ways they think about and use different media. Media ideologies are a set of beliefs about communicative technologies with which users and designers explain perceived media structure and meaning. That is to say, what people think about media they will use to shape the way they use media. . . . People do not concoct their media ideologies on their own; they develop their beliefs about media and ways of using media within *idioms of practice*. By idioms of practice, I mean that people figure out together how to use different media and often agree on the appropriate social uses of technology by asking advice and sharing stories with each other.

What does this mean for law librarianship? Law librarians can use media in a way that supports and promotes law librarianship. They simply have to take action.

By utilizing the best practices reported in *The Economic Value of Law Libraries*, law librarians are creating their own *idioms of practice* to shape the conversation about law librarianship. These best practices give law librarians the framework to build a strong system of communication between themselves and their administration. While this report tells law librarians how to convey their message, it fails to articulate what the message should be. The core message to administration must include legal literacy as the primary role of law librarians.

Law librarians should also develop communication strategies designed to address common misperceptions about the purpose of law libraries, what law librarians do, and how they are a vital part of the improvement of legal literacy. This conversation would differ slightly from the communications outlined in *The Economic Value of Law Libraries*, which highlights the value of law librarians to the

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79. Id. at 3, 6.
81. Id.
parent institution. These strategies should use cutting-edge social media as a way to reach out to various users (students, lawyers, and the public). It is hoped that by highlighting the relevance of the profession in a sophisticated and contemporary way on social media, some misperceptions about law librarianship being tied to books will disappear. This will require a combination of appropriate content and strategic placement in various social media platforms.

¶48 The future of the profession is at stake. Law librarians must proactively shape the conversation. If law librarians know their purpose, they can make stronger arguments asserting their value to their parent institutions and can strategically market themselves on social media in ways that show their value and purpose.

Counterarguments

¶49 At this point one must consider the counterarguments to branding the purpose of law librarianship as legal literacy. There is a potential risk that the legal academy will feel threatened by the assertion that legal literacy is the heart of law librarianship. It may assert that law librarians are attempting to launch a coup on legal education rather than seeing law librarians as the integral partners they are. Perhaps that is overstating, but as academic law librarians know, some law faculty are not shy about making sure that law librarians know their place in the law school hierarchy. Even so, any such argument is unfounded and based in a persistent misunderstanding of what law librarians do. Opening and sustaining channels of communication about the purpose of law librarianship will help these concerns fade.

¶50 There is an argument to be made that law librarians should be relegated to the narrower field of legal information literacy rather than the broader field of legal literacy. While this appears to be a strong argument, especially for those who actively engage in teaching and other instructional activities, it is not expansive enough to include all aspects of law librarianship. In addition, one could argue that, in fact, legal information literacy is identical to legal literacy because becoming literate in a topic requires understanding information in that subject. Therefore, to say that one is legally literate implies a degree of skill in legal information literacy. However, defining the purpose of law librarianship as legal information literacy has the potential to unnecessarily restrict the role of the law librarian. Defining the purpose of law librarianship with the more limited term of “legal information literacy” also has the potential to undermine the good work being done by all law librarians. By using the broader concept of legal literacy, there is no confusion about whether a law librarian must be engaged only in instructional activities.

¶51 Adopting legal literacy as the core purpose of librarianship may not be an easy change to make. However, one must also consider the alternatives. If law librarians do not come together in a proactive way to alter the view of law librarianship, then the profession is at risk. When considering the risk versus benefit

82. See Holly Ricco, Getting the Most from Major Associations, Publications, and Conferences, in LAW LIBRARIANSHIP IN THE DIGITAL AGE, supra note 7, at 282–84 (for a short discussion on getting started with social media).
equation, Bill Crowley argues that one must consider the double standard proposed by Garrett Hardin, which suggests, “New proposals can be rejected over a single flaw, while the status quo will continue to be accepted despite numerous problems ‘while we wait for a perfect proposal.’” So the question is, should any counterargument prevent law librarians from uniting and declaring their purpose? No, there is no counterargument for sustaining the status quo.

### Conclusion

Law librarianship has an undeserved reputation for being rooted in the costly world of print resources and not adapting to the evolving digital world of legal information. The profession must be proactive in reshaping these beliefs to highlight the actual work being done by law librarians across a myriad of law libraries. Law librarianship must create a clear and powerful message of purpose to counter inaccurate beliefs that jeopardize individual jobs and the entire profession. Legal literacy is the core mission that encompasses all law librarians. We need to unite and carry that message forward, loud and clear, promoting what we already do for professionals and nonprofessionals with the goal of improving legal literacy, one person at a time.

## Keeping Up with New Legal Titles*

Compiled by Benjamin J. Keele** and Nick Sexton***

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* The works reviewed in this issue were published in 2014 and 2015. 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 Amy Burchfield*

¶1 The International Human Rights Law Sourcebook and the International Humanitarian Law (Law of Armed Conflict) Sourcebook (Sourcebooks) are reference volumes published by the American Bar Association. Edited by three experts in international law, the volumes collect important documents—treaties, resolutions, and other statements of law—in two easy-to-use desktop handbooks. While the physical format of the volumes makes them handy desk references, this characteristic may be one of the only good things going for the works. The static nature of the volumes, along with a lack of editorial enhancement, leaves me wondering whether these types of reference books are still viable research tools.

¶2 In an earlier “Keeping Up with New Legal Titles” column, Sara Sampson reviewed a compilation of federal and state abortion laws.¹ Like the Sourcebooks,

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* © Amy Burchfield, 2015. Head of Research and Instructional Services, Cleveland State University Cleveland-Marshall College of Law, Cleveland, Ohio.

this collection of abortion laws is another reference set that collects primary sources. In her review, Sampson sets out criteria that can be used in evaluating the Sourcebooks, stating that “[b]ecause much of the content included in this set is freely available online, the value of the set must come from both the editorial enhancements, such as selection, comprehensiveness, and indexing, and the need to preserve the documents.” Since the content of the Sourcebooks is also freely available online, their utility, as Sampson suggests, must come from editorial enhancements and preservation value.

§3 The selection and comprehensiveness of the basic documents collected in the Sourcebooks is careful and thorough. However, a researcher in international law would not be able to rely on the information in the Sourcebooks pertaining to treaties without further consulting online sources for the ratifications, reservations, and declarations that go along with the core documents. For example, the text of the relatively recent Convention on the Rights of Persons with Disabilities is reprinted in the human rights Sourcebook. A researcher would have to check online to learn, for example, that the United States is a signatory but not a state party to the treaty or that Kuwait has made a declaration regarding a conflict between the treaty text and Kuwaiti law on extramarital relations. Reading the bare text of a treaty without understanding the status of ratifications, reservations, and declarations gives only one piece of the complete research picture.

§4 The Sourcebooks do not have indexes. Paying for professional indexing significantly adds to the production cost of any volume, and the publisher likely wanted to save on this editorial enhancement. This is unfortunate because indexing could have made the volumes incredibly useful research tools. Indexing would have pulled together concepts, themes, and terms that are scattered across myriad documents with different authors and publication dates into scannable entries that would allow researchers to see the complex web of ideas that is the bigger picture of human rights and humanitarian law.

§5 The Sourcebooks are not annotated. American legal researchers are familiar with annotated state and federal codes and recognize the usefulness of this editorial enhancement. Again, like indexing, annotating a text with related cross-references and background sources is expensive, but it adds so much to the utility of the text. The Sourcebooks would be powerful research tools indeed if they included the detailed annotations of a federal code. Even without going to the level of editorial work required to produce annotations, the Sourcebooks would benefit from any type of scholarly footnotes or commentary.

§6 In her review of the abortion law compilation, Sampson notes that the resource “may be invaluable to future scholars” because of the difficulty in finding the superseded versions of state statutes. It is unclear whether the Sourcebooks will be invaluable to future researchers. Unlike state statutes, finding the superseded versions of treaties and other statements of international law and policy may not be that difficult. On the whole, international law develops and changes at a much slower pace than U.S. state legislation, and authoritative bodies such as the United

2. Id. at 556, ¶ 68.
3. Id. at 556, ¶ 69.
Nations make documents publicly available online. This criteria may not be enough to solidify the utility of the Sourcebooks.

¶7 I was curious to know, despite my misgivings about the Sourcebooks, if patrons used these and similar books in the library. The Sourcebooks are part of a series that the American Bar Association has been publishing for several years. Other topics covered include immigration law, the U.S. intelligence community, labor law, and military law. Our library has all of these sourcebooks in its collection. Circulation statistics show that none of them have been checked out or counted for internal library use. The Sourcebooks are expensive, and I question whether libraries should continue buying compilations of legal texts that can be obtained freely online, especially if these books do not provide sufficient editorial enhancements to make them essential to researchers.


*Reviewed by Hugh J. Treacy*

¶8 Oyez! Oyez! Oyez! Excitement and anticipation abound at the marshal’s intonation as a new session of the U.S. Supreme Court begins. I felt nothing less as I began reading Erwin Chemerinsky’s new book, *The Case Against the Supreme Court.* Throughout this well-written and thorough examination of the Court’s performance over two centuries, Chemerinsky asks, “Has the Supreme Court been a success or a failure?” (p.5). He concludes it has failed.

¶9 Chemerinsky begins with the majority opinion in the *Slaughter-House Cases.* He criticizes its interpretation of the Equal Protection and Privileges or Immunities Clauses of the Fourteenth Amendment, the former defined very narrowly and the latter emasculated to the point of uselessness. In subsequent cases, the Court failed to overturn a state law on equal protection grounds that outlawed women’s suffrage until passage of the Nineteenth Amendment in 1920. Nearly one hundred years after those decisions, the Court found that sex discrimination violated equal protection. The Court could have done more, and even when minority rights were upheld, the Court could have acted sooner with the same result. For examples, see *Minor v. Happersett* and *Reed v. Reed.*

¶10 During wartime and other times of crisis, the Court was swayed often by the exigencies of the moment to uphold suppression of speech, according to Chemerinsky. Examples include *Schenck v. United States,* *Frohwerk v. United States,* *Debs v. United States,* and *Dennis v. United States.* More recently, Chemerinsky finds

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* © Hugh J. Treacy, 2015. Interim Director, Library and Information Services, Whittier College School of Law Library, Costa Mesa, California.
5. 88 U.S. 162 (1874).
8. 249 U.S. 204 (1919).
deplorable outcomes in a handful of post-9/11 cases where the Court failed to uphold constitutional protections for individuals. He points to Clapper v. Amnesty International USA,\(^{11}\) Rumsfeld v. Padilla,\(^{12}\) Hamdi v. Rumsfeld,\(^{13}\) and Boumediene v. Bush.\(^{14}\)

\(^{11}\) Next, Chemerinsky’s discussion of the Court’s historical approaches to protection of property rights and states’ rights takes the reader from the late nineteenth century to recent cases, from which he draws the convincing conclusion that Lochner-era cases protecting businesses at the expense of workers and consumers were as misguided as contemporary opinions favoring states’ rights, such as National Federation of Independent Business v. Sebelius,\(^{15}\) will likely be viewed in hindsight.

\(^{12}\) As to the efficacy of the Warren Court, Chemerinsky notes that cases aggregated into Brown v. Board of Education,\(^{16}\) now celebrated by conservatives and liberals alike, were groundbreaking. The Court found that segregation by race promoted a sense of inferiority in black children, interfering with their learning processes. In 1955, Brown II required states to integrate black and white students in public schools “with all deliberate speed.”\(^{17}\) While Brown is praiseworthy, Chemerinsky laments that integration was too slow and harmed minority schoolchildren. The Warren Court could have done better.

\(^{13}\) Comparing the Warren Court (1953–1969) with the Roberts Court (2005–present), Chemerinsky notes that the Warren Court did not become a stalwart of protection for minorities until Arthur Goldberg’s arrival in 1962. In that year, Baker v. Carr held that federal courts could invalidate gerrymandered election districts on equal protection grounds.\(^{18}\) Notable political cases decided by the Roberts Court raise red flags to Chemerinsky. One, Shelby County v. Holder, eliminated “preclearance” requirements in section 4(b) of the Voting Rights Act of 1965, virtually nullifying section 5 of the Act without stating any constitutional grounds.\(^{19}\) Another, Citizens United v. Federal Election Commission, upheld unrestricted corporate contributions to political campaigns as protected speech.\(^{20}\) Chemerinsky sees the Warren Court as ineffective but lustrous in comparison to the Roberts Court, whose judicial activism can no longer be closely identified only with liberal justices.

\(^{14}\) Chemerinsky sees judicial review as necessary. Changes favored by Chemerinsky focus on the selection process. The Court should clarify its role, a task not clearly expressed in the Constitution. Chemerinsky suggests that a merit selection system similar to that provided by the Alaska Judicial Council would be effective.

Finally, Chemerinsky concludes with a discussion of the role of the Court. The Court is not an umpire interpreting the rules, as Chief Justice John Roberts has said. Instead, it makes law through its decisions. It is those decisions that have failed adequately to safeguard individual and minority rights against the majority, either by conservative majorities deciding wrongly or by liberal majorities that did not go far enough.

How does the Constitution figure into his evaluation of the Court? Chemerinsky views the Constitution as society’s effort to protect cherished values. It is no accident that the Constitution is difficult to change; it is intended to be so to protect the rule of law. To ensure the continued viability of the Constitution to protect minorities in cases where constitutional issues are considered, Chemerinsky recommends the Court arrive at outcomes shaped by its value judgments just as much as by other rationales.

Readers positioned across the political spectrum will enjoy this book. Offering us an intriguing assessment of the Supreme Court, Chemerinsky has succeeded in writing a very lively, convincing work that faithfully supports his thesis. It is highly recommended for all academic and law school library collections.


Reviewed by Susan David deMaine*

The U.S. Supreme Court is simultaneously transparent and secretive. All of its decisions—the work that truly counts—are widely and publicly available. Alternate views and disagreements are recorded in concurrences and dissents. Oral arguments are open to the public and covered by the press. Transcripts of these arguments are available the same day, and audio is available at the end of the week. At the same time, all deliberations are done behind closed doors. Neither the Justices nor any representative of the Court comment on decisions. The Justices’ clerks stay off social media and never discuss their work. And no cameras or other electronic devices are ever allowed in the courtroom.

The question of cameras in the courtroom during oral arguments comes up frequently, and the Justices always say no. They insist that cameras would change the dynamic of the Court, threaten their relative anonymity, and do little other than provide fodder for misleading sound bites on the evening news. At the same time, however, Justices have appeared on Sunday morning talk shows and even on Jon Stewart’s *The Daily Show*.

This apparent contradiction is somewhat characteristic of the relationship between the Court and the media. The Court keeps the media at a very long arm’s length, yet the Justices get frustrated when the press spends more time on the politics of a decision than the legal developments. The challenges posed by the relationship between the Court and the media form the overarching theme of *Covering
the United States Supreme Court in the Digital Age. This collection of thirteen original chapters covers all aspects of the relationship between the press and the Supreme Court, from changes in news content over time to “war stories” from reporters on the Court beat. All in all, the book provides an in-depth and largely readable look at how the American people learn about the work of the Court.

¶21 The book opens with two chapters that provide a sense of the interplay between the Court and the press. The Court’s aloofness is evident, as is its contentment to do things much as they have always been done. Over time, the Court has made several accommodations to requests for greater access: same-day transcripts, end-of-week audio, and spacing decision announcements with more awareness of the demands on journalists (until 1965, the Court handed down decisions only on Mondays; now Mondays and Thursdays are big days, but decisions come on other days as well, and the Court tries to limit blockbuster decisions to one a day). Also evident is the deference shown the Court by the press. Generally speaking, members of the Supreme Court press corps do not attempt to go beyond the bounds set by the Court, accepting that they will have access to extensive amounts of paper but no comments, leaks, or interviews.

¶22 The Court’s accommodations have not yet embraced the fact that coverage of the Court is shifting from traditional media outlets to online news sources, particularly blogs. Several chapters in Covering the United States Supreme Court in the Digital Age discuss the changes in media coverage of the Court over time. The general consensus is that coverage in traditional sources is both relatively sparse and declining. Elite newspapers such as the New York Times and Wall Street Journal have the best coverage unless a decision has a big effect locally, in which case the local paper may provide good coverage. Television news coverage has never been extensive and has diminished in both breadth and depth over time. The blogosphere, and SCOTUSblog in particular, is now the go-to source for thorough coverage of the Court and its decisions. This phenomenon comes up again and again in the book, as does the Court’s refusal to change the rules governing press passes to allow bloggers—regardless of their qualifications or reputation—into the press corps. SCOTUSblog relies on Lyle Denniston, who holds press credentials from WBUR in Boston, for its access.

¶23 One remarkable aspect of SCOTUSblog is the detailed attention it gives to so many decisions. As chapter 5, “Explaining Intermedia Coverage of Supreme Court Decisions,” makes clear, in traditional media it is the decisions that cause the most deviance from the status quo or from accepted norms which get virtually all the coverage. This is borne out in chapter 6, “Constructing Harry Blackmun,” which discusses how the Roe v. Wade opinion became Justice Blackmun’s legacy despite the fact that it was one decision out of many written during his twenty-four years on the Court. Along similar lines, chapter 8, “The Placement of Conflict: The Supreme Court and Issue Attention in the National Media,” uses Brown v. Board of Education to examine how Supreme Court decisions that disrupt the status quo and garner lots of media attention affect the national issue agenda.

¶24 Unlike the majority of the chapters, four of the five final chapters are written by journalists. Not surprisingly, these chapters offer great stories and a high level of readability. David G. Savage of the Los Angeles Times writes about the inner
workings of a typical day covering the Supreme Court. Slate correspondent Dahlia Lithwick’s chapter stands out as a must-read, and the closing chapters on Justice Brennan and Justice Stevens provide interesting close-ups of two Justices and their relationships with the press. Although there is some repetition in content—several chapters decry the state of media coverage of the Court, and several chapters discuss the impact of SCOTUSblog—this book provides intriguing details and many thought-provoking insights about the reserved yet symbiotic relationship between the Supreme Court and the press covering its work. It is a worthwhile read for journalists, political scientists, law librarians, and lawyers alike.


Reviewed by Alyssa Thurston*

¶25 The cover of The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press displays a photo of a man in casual garb and of indeterminate profession typing away at a laptop, an empty but darkened desert background looming behind him. This image encapsulates one of author Amy Gajda’s primary messages: that present-day media has entered a sort of Wild West in which the Internet has enabled nearly anyone with access to a computer or mobile device to widely disseminate content. Indeed, the pervasiveness in the twenty-first century of seemingly endless new forms of technology-enabled expression—including social media, blogging, reality television, and even public comments in online news articles—has made it increasingly difficult to define just which information providers can and should come under the “‘media’ umbrella” (p.14).

¶26 Moreover, many new media providers, typically unencumbered by the training or ethical codes of mainstream journalism, consistently tend to overstep boundaries of privacy in their constant quest to gain readers or viewers. It is now not uncommon for the most intimate personal details of the lives of both public and private figures to be published at various online outlets without those individuals’ consent, all in the supposed name of newsworthiness and public interest. Many traditional news outlets, their previous dominance in the information space challenged by new technologies and new players, have also resorted to adopting privacy-invasive practices to compete and survive in the new media landscape. The interplay of these varying tensions, Gajda argues, has created a perception by the courts and society that we are living in an “age of over-exposure” (p.23) and “irresponsible journalism” (p.21), which leads to the “beginning of a realignment of First Amendment freedoms” (p.222) for the modern-day media.

¶27 Gajda, a law professor at Tulane University, is uniquely positioned to address the state of media and journalism from a legal perspective. She is a former journalist and journalism teacher with experience in television and broadcast media. Throughout eight exhaustively researched chapters, Gajda traces the history of and shift in the courts’ treatment of First Amendment freedoms afforded to the

* © Alyssa Thurston, 2015. Research and Electronic Services Librarian, Jerene Appleby Harnish Law Library, Pepperdine University School of Law, Malibu, California.
press. Most of the twentieth century was a “golden age for journalism” (p.36), when courts subscribed to a “media-protective First Amendment doctrine” (p.21) that tended to defer to the news provider’s definition of what should be considered newsworthy and in the public interest. As a result, the media’s claims of First Amendment freedoms have historically tended to trump claims of personal privacy, even in cases in which the person claiming a violation of privacy had appeared to suffer actual harm as a result of the media’s actions.

§28 In recent years, however, the tide has begun to turn against this “growing First Amendment” (p.220). Gajda argues that the privacy-intrusive practices of both journalists and “quasi-journalistic publishers” (p.224) have led to a sense that the “media is spinning out of control, creating harm that is both individual and collective, and that something needs to be done about it legally before we suffer tremendous societal loss” (p.12). She uses copious and detailed real-world case law illustrations to show how courts now are more likely to find in favor of plaintiffs claiming invasions of privacy and to rule against media providers claiming freedom of the press in their reporting or publishing practices. While these lengthy case retellings occasionally bog down the text, Gajda succeeds in conveying that this judicial redrawing of First Amendment freedoms could well lead to a “calamitous collapse of the First Amendment bubble” (p.221) or have a chilling effect on journalists’ ability to gather information that is truly in the public interest. Gajda concludes with suggestions on how journalists, quasi-journalists, and the courts can act to help strike a better balance between the freedom to report on legitimate news stories and maintaining respect for personal privacy and human dignity.

§29 The First Amendment Bubble is recommended for the collection of any academic law library, especially one at a school with curricular offerings in First Amendment law, media and entertainment law, or privacy law.


Reviewed by Christine Bowersox*

¶30 Much has changed in the field of fashion law since the 2010 release of the first edition of Fashion Law: A Guide for Designers, Fashion Executives, and Attorneys. The first edition was a comprehensive resource at the time, and the second edition has been updated to include an even broader look at the ever-expanding field. Editors Guillermo C. Jimenez and Barbara Kolsun, well versed in the field as both attorneys and professors of fashion law, have updated information contained in the previous edition and added sections on international fashion law, celebrity and model agreements, fashion finance, and others.

¶31 The treatise is broken into four main sections. The first section provides a complete overview of the world of fashion law, defined as “the legal specialty that addresses the legal issues typically faced by fashion companies and fashion design-
ers” (p.2). Fashion law borrows from the worlds of business and intellectual property (IP), as well as numerous other fields of law. This section opens with a Fashion 101 guide, offering a glimpse of potential issues that lawyers may tackle when dealing with the fashion industry. Text in boxes found throughout this section (and the whole book) on fashion law cases and legislation provide real-world examples.

¶32 The second section focuses on IP, trademarks, and licensing. When IP relates to fashion, an important concept is multiple protection: “a single garment or product may be covered by several different forms of legal protection at the same time” (p.26). An example is a dress with a photo and logo adorning it, which may have both trademark and copyright protection.

¶33 Establishing a trademark early is important. Copyright protection will not extend to fashion designs typically, but it can be used if separability and creativity can be established, such as with a piece of jewelry or a unique pattern. Patenting pieces will offer protection to a garment. A utility patent can offer protection for a technique, like the dying of a garment. However, the fashion industry is one of imitation, and knockoffs are not going away any time soon. Should a business think its IP is being infringed, litigation is an option and is covered in detail in chapter 6. Counterfeit goods are covered in more detail in chapter 8.

¶34 Licensing is key in the fashion industry. A good licensing agreement “should be mutually advantageous to the parties involved” (p.115), and the strongest agreements allow people and companies to work together in a partnership benefiting both sides.

¶35 The third section focuses on the commercial aspect of the fashion industry, namely the development of the company from the ground up. This section also covers the financing of a business through debt and equity financing. Or, if a company has done really well, it can raise funds through an initial public offering of stock.

¶36 Companies can enter into one of three key types of agreements for sales. These are sales between the fashion company and the retailer customer, the purchase order or sales contract for acquiring the merchandise, and the sales agreement between the fashion companies and the representatives selling the items.

¶37 Labor and employment issues are often discussed in fashion law. Attorneys working in the fashion industry may consider many issues, including complying with the Fair Labor Standards Act, anti-sweatshop movements, health concerns of underweight models, and endorsement of a fashion item by a celebrity.

¶38 Advertising is important to the industry but can be fraught with legal issues. Chapter 14 covers all of the potential copyright and trademark issues that can develop, as well as public and private rights within an ad.

¶39 The fourth and final section focuses on international aspects of fashion law. These last few chapters cover international sourcing of materials, employment, and export and import of said materials and employment. Customs will examine all goods entering the United States and assign them a taxable rate and duty rate. International development is important for any company, and this is no different in the fashion industry. Overseas markets are enthusiastic about fashion, and international business relationships can be lucrative for both parties.
The book closes with a discussion of the options companies have for building relationships, and how they can protect their goods with IP, contracts, and a solid understanding of the business practices of overseas companies.

*Fashion Law* is a well-written and comprehensive treatise, and I would recommend this book to any attorney or firm that has even a budding interest in fashion law. I would also highly recommend it to those who have already established their practice in fashion law.


Reviewed by Margaret Butler*

In response to accreditation requirements and popular demand, law schools are increasingly emphasizing practical skills for students. Schools are promoting clinical experiences, externships, and other opportunities to experience client relationships and improve graduate preparation for practice and employability. Graduates from the class of 2013, the most recent for which data is available, more often than not accepted law positions in small firms. For the 2012 academic year, average borrowing for public law school students was $32,289, while private school students borrowed an average of $44,094. With these trends, law students need opportunities to learn how to manage their own finances as well as their firms. For that reason, academic and firm libraries should add *Lawyer Finances: Principles and Practices for Personal and Professional Financial Success* to their collections and promote it to their users.

*Lawyer Finances* is different from many books about starting a firm because of its singular focus on money management. The book is organized in two parts. The first focuses on personal finances—applicable to librarians and lawyers alike. Advice describing recommended after-tax spending, debt ratios, the price of debt, and the need for insurance are of general interest. The second part focuses on the management of firm finances. The material is not high level, and it is organized in small, discrete chunks that lend themselves to readers familiar with online content. In fact, each paragraph has its own heading and each chapter has a “Reflection/Checklist” to remind readers of the chapter highlights. There is also a glossary of financial terms. Illuminating the content throughout the book are brief vignettes featuring a fictional couple of lawyers addressing both their family and professional

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21. The number of jobs in small firms has generally been increasing in recent years, and for every job in a large firm taken by a 2013 graduate, two were taken in a small firm. Nat’l Ass’n of Legal Career Prof’ls, For Second Year in a Row New Grads Find More Jobs, Starting Salaries Rise—But Overall Unemployment Rate Rises with Historically Large Graduating Class, NALP (June 19, 2014), http://www.nalp.org/uploads/PressReleases/Classof2013SelectedFindingsPressRelease.pdf.

lives. Though the vignettes may be preachy, they make abstract concepts more concrete.

¶44 The value of the advice contained in the personal finance portion of *Lawyer Finances* comes not from the depth of analysis but from the comprehensive coverage. It addresses a variety of subjects from insurance, debt management and budgeting, financial literacy, and investing. However, the personal finance advice presents what may be an overly optimistic perspective in its description of lawyers’ earnings. When describing income levels, the authors quote a survey by a consulting firm that describes partner pay for small firms as $164,000 and large firms as $270,000 annually. The Bureau of Labor Statistics indicates that the median annual wage for lawyers was $113,530 in 2012, with a range from $54,310 to $187,200.23 Further, the advice may strike some as having a puritanical tone: “With personal finances, savers win while spenders lose. The amount of your income is not the most important factor. First recognizing that you can already save, and then committing to do so, are the critical factors, both entirely within your control” (p.19). On the other hand, the authors should be commended for noting the relationship between troubled personal or firm finances and unethical conduct by attorneys. “Indeed, our licenses do not last long when we treat finances irresponsibly” (p.3).

¶45 The discussion of law firm finances in the second part of the book would benefit solo, small firm, and large firm attorneys. The book describes the function of bookkeepers and accountants, and suggests standards to keep in mind when evaluating firm finances. A number of sample calculations are included, illustrating, for example, how to calculate hourly rate reductions and write-offs when planning a firm budget. The sample documents and financial statements are helpful to review, but they are even more beneficial because the authors include in-text references to particular resources that will stimulate a deeper discussion. This complements the seven-page bibliography.

¶46 *Lawyer Finances* provides readers with useful tools and an easy-to-understand, narrative explanation of financial concepts and practices. In addition to providing sample profit and loss statements and other calculations necessary to determine the financial health of a law practice, the book offers basic recommendations for personal financial health.


*Reviewed by Stephen Parks*

¶47 Justice Oliver Wendell Holmes once famously wrote that it was his job to help his fellow citizens go to hell if they chose to do so by virtue of their decision to elect politicians who craft ridiculous laws. It was a classic expression of his philosophy of judicial deference; he believed it to be his role to strike down laws only when they were clearly unconstitutional. Laws not clearly unconstitutional, albeit


stupid and unnecessary, should be left alone by the Court. Years later, Chief Justice John Roberts adopted this approach in upholding the constitutionality of the Affordable Care Act, writing in National Federation of Independent Business v. Sebelius that it was not the job of the Court to protect the people from the consequences of their political choices. In other words, Roberts would join Holmes in helping us all on the pathway to hell.

¶48 Damon Root begins Overruled: The Long War for Control of the U.S. Supreme Court with a short introduction into Chief Justice Roberts’s Holmesian approach to the Affordable Care Act (ACA). Using the Act as a backdrop to the long war for control of the Court, Root lays down the groundwork for the overall theme of his book with an informative, concise discussion of the competing visions of judicial deference and judicial activism. Control of the Supreme Court is a war that still rages with new milestone events and new unique personalities added to its history each day. In each chapter, Root discusses major developments in the long war and the individuals fighting the battle.

¶49 Chapter 1 traces the war from the slavery era to the Reconstruction era. Concepts of free labor and liberty of contract, the adoption of the Fourteenth Amendment, the Slaughter-House Cases, the personalities of Frederick Douglass, Justice Stephen Field, and others are all discussed by Root as the competing visions of judicial deference and judicial activism that took place on the Supreme Court. Chapter 2 introduces the reader to Justice Oliver Wendell Holmes, liberty of contract and Lochner, the Progressive era, the New Deal, and Franklin Roosevelt’s court-packing plan as the pendulum swung in the direction of judicial deference. Chapter 3 covers a wide range of issues from footnote 4 of Carolene Products, the rational-basis test, stricter judicial scrutiny for noneconomic matters, Justice Felix Frankfurter, penumbras leading to the Griswold and Roe decisions in an era of judicial activism, and Robert Bork’s use of judicial minimalism.

¶50 Chapter 4 devotes itself to explaining the rise of the battle between conservatives and libertarians on the proper role of the judiciary. The chapter details the creation and rise of the Federalist Society, the conservative legal movement, Bernard Siegan and libertarianism, the gay rights cases of Bowers and Lawrence, the Cato Institute, and other clashes and personalities as a mini-war within the long war raging over what is the conservative approach to legal battles. Chapter 5 profiles Chip Mellor and his Institute for Justice, the libertarian mantra of finding “sympathetic clients, outrageous facts, and evil villains” (p.144) in order to attack the regulatory state, appellate courts beginning to strike down regulations, and eminent domain in Kelo, which became a rallying cry for the libertarian legal movement.

25. 83 U.S. 36 (1873).
Chapter 6 focuses heavily on gun rights. Root discusses *Heller*, 33 *McDonald v. City of Chicago*, 34 the concept of originalism, and the ultimate libertarian goal of overruling the *Slaughter-House Cases*.

¶51 From the slavery era to the competing visions between conservatives and libertarians today, Root’s examinations of key events and key players shed light on this long war. It is a conflict that still rages as many of these battles over economic rights, privacy, and the like are won only in the form of closely divided Supreme Court opinions that can be reversed years later as new personalities enter the war. Undeterred, parties will continue to fight for control.

¶52 Root ends *Overruled* where he began, the ACA, in chapter 7. With meticulous detail, Root takes the reader down the path of Commerce Clause jurisprudence to set the stage for the showdown over the ACA. Each day of the historic oral argument in 2012 is discussed as the clashing visions of congressional authority and the proper role of the judiciary were discussed before the Court. Closing the government’s argument on the final day of oral argument, Solicitor General Donald Verrilli maintained that it should be the people of the United States who ultimately decide the wisdom of the ACA. The Justices, according to Verrilli, should defer to the Congress. In writing the majority opinion, Chief Justice Roberts agreed. Echoing Holmes in upholding the legislation, Roberts wrote that it was not the job of the Court to save the people from the consequences of their political choices. Judicial deference had won the day’s battle in the long war for control.

¶53 Root’s book is very detailed and organized. Readers not well versed in legal issues should be able to read *Overruled* and gain a better understanding of the competing visions of judicial deference and judicial activism, due in large part to Root’s writing style. Each case is discussed without becoming overly laden with legalese. Each personality is given a short biographical sketch to help readers gain a better understanding of these individuals and the way they approached the law. From the descriptions of each chapter above, it may seem that Root covers too many cases, too many philosophies, and too many personalities. However, each case, philosophy, and personality plays a role in developing the long war for control of the Supreme Court, and Root does readers a great service in discussing them all. *Overruled* is a great addition to your personal bookshelf as well as to the collection of an academic law library.


Reviewed by Morgan M. Stoddard*

¶54 The Copyright Clause of the U.S. Constitution enables Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and

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34. 561 U.S. 742 (2010).
Discoveries.” One of the basic principles underlying this provision is that a limited monopoly on creative works and inventions and the attendant financial rewards are necessary to encourage creation and innovation. In *The Eureka Myth: Creators, Inventors, and Everyday Intellectual Property*, Jessica Sibley refers to this principle as the “incentive story” (p.15) of intellectual property rights. While this is often taken for granted and regularly used as an argument for robust intellectual property rights, *The Eureka Myth* questions the incentive story by examining whether modern creators and inventors are actually incentivized by economic rewards and “[w]hat effect, if any, . . . intellectual property laws have in facilitating innovation and creativity in the United States” (p.4).

§55 The foundation for *The Eureka Myth* is fifty interviews conducted over four years with a range of artists, writers, musicians, engineers, and scientists, as well as intellectual property lawyers and business professionals in intellectual property industries. The interviewees were asked questions primarily related to how and why they worked. Silbey also inquired about ownership and intellectual property. The responses provided a wealth of qualitative data that Silbey used to present her argument as to why the incentive story is mistaken.

§56 *The Eureka Myth* begins with an examination of the “origin stories” (p.25) of creative and innovative work—that is, why individuals embark on creative and innovative endeavors—and then turns to what encourages the continuation and completion of work. Silbey finds that “intellectual property appears not to be the initial trigger for creative or innovative work” (p.53) and that interest in intellectual property appears only “sporadically and tangentially” (p.81) during the daily grind. Rather, factors such as problem solving and sufficient time and adequate work space are important to the interviewees.

§57 Most of the remainder of *The Eureka Myth* focuses more directly on how intellectual property meets (or often does not meet) the needs and goals of creators and innovators. Silbey describes an “ill-fitting” (p.18) intellectual property system in which the interviewees are unaware of, or misunderstand, intellectual property; regularly express their desire for benefits not provided by the current law; over- or under-enforce their rights; and utilize various mechanisms other than intellectual property law to meet their needs, generate revenue, and disseminate works. An entire chapter is devoted to one of the biggest shortcomings of intellectual property law as identified by the interviewees: limited protections for reputation, which “appears to be the aspect of professional and personal life that [they] care most about” (p.149). Silbey also devotes a chapter to considering the role of the many attorneys she interviewed in ensuring protection for creative and innovative works and maximizing the monetary and nonmonetary benefits of intellectual property law.

§58 *The Eureka Myth* concludes that “the interview data overwhelmingly indicate that those in IP-rich industries can make do with less IP and that IP does not always incentivize production or facilitate dissemination of creative or innovative work” (p.284). Silbey advocates for a realignment of intellectual property law with

the needs and desires of the creators and innovators she interviewed, and briefly outlines a few legal reforms, such as providing for a right of attribution.

¶59 *The Eureka Myth* is subject to one noteworthy criticism. The incentive story seems to be defined quite narrowly as something along the lines of the following: the ability to maximize wealth (as a result of intellectual property rights) is a primary and necessary incentive to create and innovate. Sibley presents numerous examples demonstrating that this may not be true. However, there is arguably more to the incentive story. While interviewees indicate that they are not necessarily driven to maximize wealth, they do greatly value the ability to earn a living. In fact, *all* the interviewees “find . . . earning a living to be imperative to professional happiness” (p.106). Since at least some of their income comes from revenue generated by—or as a result of—intellectual property, is not intellectual property incentivizing creation and innovation? Additionally, interviewees discuss how intellectual property acts as a “fuel” (p.211), enabling the development of creative and innovative work. Even if the financial rewards of intellectual property are only a means to an end, again, are they not acting as an incentive? It seems, therefore, that *The Eureka Myth* provides evidence that may actually support the argument that a limited monopoly on creative works and inventions and the attendant financial rewards are needed to “promote the Progress of Science and the useful Arts.” However, the probative value of this evidence is not adequately addressed due to *The Eureka Myth*’s constricted version of the incentive story.

¶60 Ultimately, *The Eureka Myth* does truly “chart new terrain for our understanding of . . . scientific and artistic innovation and the intellectual property that purports to sustain them” (pp.5–6). Silbey offers unique insights into the work and motivations of creators and innovators and makes an original and thoughtful contribution to the discourse on intellectual property rights. *The Eureka Myth* would be a good addition to an academic law library collection, and it is a worthwhile read for anyone interested in intellectual law and policy.


*Reviewed by Nick Sexton*

¶61 One day in the fall of 2006, I was staffing the reference desk when a third-year law student asked a question that I could not quickly and easily answer. The student had never had a summer job that required her to do legal research, had not taken our advanced class in legal research, and could not recall much from the first-year legal research program that all students must take at my law school. Now the student was facing a situation where she had to do legal research (I believe she was working for a professor), and she did not know how to begin. She wanted me to send her to a place where, in a short period of time, she could pick up most of what she needed to know.

More than eight years later, I do not recall many details about the answer I gave that student (except that it involved showing her legal research textbooks from our reserve room collection). But if I got that question today, I would send the student to Tobin A. Sparling’s *Strategic Legal Research: Finding the Information You Need Efficiently and Cost-Effectively*. Sparling’s book has not solved the problem of putting together the one volume that answers all legal research needs, but if your understanding of legal research is sketchy, and what you would like is someone to take you by the hand and in a relatively short time tell you what to do and when to do it, Sparling’s book is the one you are looking for.

The backbone of Sparling’s book is the ten steps of strategic legal research that he lists on pages 9 and 10. Chapter 4, which follows that list, uses almost 100 pages to go into detail about what should be done during each step. For example, step one is “[g]et the facts of the case through an effective assignment interview” (p.11). Sparling then spends about two pages providing junior associates, and anyone else who has been given a legal research assignment, information they should keep in mind prior to, during, and after an assignment interview. In this section, as he does in others, Sparling gives a lot of practical advice, from “[b]e sure to bring materials for note-taking; there will be too much information to keep in your head” (p.11) to “[v]erify what is expected of you” (p.12). If you believe such advice is obvious and unnecessary to mention, talk to a law student sometime.

Other steps, such as step four, “[c]hoose the most useful research format for the job at hand” (p.20), spend many more than just a couple of pages discussing the details of what to do. In the case of step four, readers learn the advantages and disadvantages of paper and in-house electronic resources, including Bloomberg Law; get tips for using indexes, tables of contents, and spine labels; and find out how to best conduct searches in LexisNexis and Westlaw. Information in step four also suggests that researchers should not ignore the invisible web, which Sparling defines as “online materials that are not accessible through search engines” (p.35). As examples of the invisible web, he cites ipl2, Infomine (which ended service on December 15, 2014, a few months after the publication of Sparling’s book), and the Law Library of Congress’s Guide to Law Online.

Along with instructions for determining the governing jurisdiction of your research (step three), advice about beginning your research in free secondary sources, digests, and annotated codes (step five), and guidance for when to stop researching (step ten), Sparling’s book features tables on West digests (what they are named and what they contain), the features included in annotated codes, and the Boolean connectors in WestlawNext, Lexis Advance, and Bloomberg Law. There are also moments when Sparling provides a little history, as when he explains how John West, in the late 1800s, “recognized that legal research was ineffective and inefficient for a variety of reasons” (p.47) and solved that problem with his reporters and Key Number System. Sparling even has a section on Google Scholar, with (of course) steps on how to use it.

*Strategic Legal Research*’s strength is in providing step-by-step instructions for conducting legal research that give every novice (that is, all law students and many first-year associates) a way of getting started and completing a research assignment. The book is a guide with relevant information that a legal researcher
needs to know. It is as if a thick, overly explanatory volume on legal research had been edited down almost to actions alone. This makes Sparling’s book exceedingly useful, the type of resource a law student or new practitioner would want to keep close at hand. However, the book’s strengths (succinctness and step-by-step instructions) do not always provide the researcher with sufficient information. In a standalone chapter on researching administrative law, Sparling correctly points out that “[f]inding administrative law is much easier if one understands how regulations are enacted and announced to the public” (p.119). But the textual explanation that follows, with its mention of registers, proposed regulations, comment periods, administrative codes, and “a publication called a list of sections affected” (p.120), would probably mystify most law students. They need show-and-tell: illustrations of what a register and a list of sections affected look like. This just means that, like every other legal research guide, Sparling’s should not be used alone.

Sparling’s Strategic Legal Research is a great first place to go when confounded by how to start a legal research project. Along with its ten steps, it includes short chapters on researching statutory interpretation, court rules, and what Sparling calls “nonlegal authority,” which is “any kind of information that, although not the law itself, illuminates the setting in which the law operates” (p.131), such as public records, governmental publications, and polling data. Sparling’s book is relatively short but packs a lot of useful information into its thin frame. Strategic Legal Research is highly recommended for locations where legal research takes place, such as academic, private, and public law libraries.


Reviewed by Deborah L. Heller*

No Day in Court: Access to Justice and the Politics of Judicial Retrenchment chronicles the access to justice movement and its effect on judicial retrenchment and the inability of many to have their rights vindicated in court. Through seven chapters, Sarah Staszak weaves her way from the beginnings of the judicial system to the administrative state, access to justice movement, the rise of alternative dispute resolution systems, and the current state of conservative judicial retrenchment. Her arguments consider the roles that history, politics, and the actors involved have played in slowly removing the ability of many Americans to access courts in order to enforce individual rights.

The introduction presents judicial retrenchment, the practice of restricting access to courts, by looking at the U.S. Supreme Court’s decision in Walmart v. Dukes. In the heyday of the rights revolution (the Warren and Burger Courts), the idea that a sex discrimination case would turn not on the issue of constitutional law, but rather on class certification procedure in class action litigation, was unthinkable. Yet that is exactly the stance the Court took in dismissing the case, thus restricting access to the legal system for these women. The introduction also

outlines the four principal strategies employed in judicial retrenchment: changing the decision-makers, changing the rules, changing the venue, and changing the incentives.

¶70 Chapters 3 through 6 form the backbone for the arguments in this book. Each chapter follows the same formula: there is an introduction to the topic, followed by a discussion culminating in a conclusion that summarizes the concepts discussed. Chapter 3 discusses judicial retrenchment against the backdrop of arbitration and alternative dispute resolution. The movement from a system based on litigation to one that mostly requires arbitration as a first step naturally impinges on access to the courts. Chapter 4 focuses on the proliferation of procedural rules and its ensuing complication of the process of initiating a lawsuit. For years, to commence a civil action, a plaintiff merely had to provide a short statement of the claim. Procedural rules have increased the pleading requirements, thus limiting the number of cases that reach judgment on the merits. Chapter 5 charts the rise of the administrative state and the increase in quasi-judicial proceedings that take place outside of the courts. Finally, chapter 6 notes the decrease in rights and remedies that have been afforded to litigants. Tort reform, the reduction of punitive damages, immunities from suit, and the limitation on awarding attorney’s fees all serve to limit access to the courts by providing fewer incentives to sue and even reducing the ability to commence a suit.

¶71 Although the formulaic approach to each chapter can be helpful in the retention of information, it does tend to become a little too repetitive. I found myself avidly reading the introduction, slogging through the heart of the chapter, and then often skipping the conclusion since I found it to be redundant. The book uses endnotes broken down by chapter. Although this results in an uncluttered page of text, the page flipping it requires is not the most practical means of checking citations and interrupts reading. The index is top-notch, providing plenty of detail and references to the aforementioned endnotes.

¶72 The bold title leads the reader to believe that a riveting and perhaps even crusading discussion of rights and the failure to provide every citizen with her day in court will ensue. Unfortunately, the book does not quite live up to the title. First and foremost, the author discards the entire sphere of criminal law, choosing to focus all her arguments on the civil side. The descriptions of the book provided on the publisher’s website and on the back cover do not make this fact abundantly clear, leading to slight disappointment.

¶73 This book is part of the Oxford Studies in Postwar American Political Development series. Although the focus is on access to justice and the courts, the book leans more to a political science text than a legal one. Despite its slant toward political science, it has merit in an academic law library because it combines the fields of politics and law, and many professors engage in interdisciplinary research.

Reviewed by Nicole M. Downing*

¶74 As with the previous five editions, the subtitle of William Strong’s *The Copyright Book* explains that it is “a practical guide” to copyright. Among the trend of titles teaching copyright to one particular audience, *The Copyright Book* manages to stand out for its ability to instruct about copyright in a way that will appeal to a broad range of readers. It is a testament to the breadth of experience Strong brings to the table that he is able to fulfill the promises on his cover.

¶75 The author’s extensive knowledge of copyright law shines through in his ability to take complex topics and translate them into plain English rules. He balances straightforward statements of the law with his own interpretations of cases and legislation. He does not shy away from critique of past judgments and convoluted rules. By interjecting his own views of the law periodically, he manages to keep the work light while providing an interesting peek inside the mind of someone who is well versed on copyright law. This will engage more experienced readers. Also appealing are his predictions of areas ripe for future controversy. He uses insightful hypotheticals to explore as yet unrealized issues in existing law.

¶76 Strong’s book gives a thorough analysis of major areas of copyright law, from the basics of the subject matter of copyright to the intricacies of fair use, as well as more administrative aspects, such as how to register a copyright. Each area Strong tackles gets a full discussion, breaking the topic down into easily understood rules while presenting the law without getting bogged down in statutory or case citations. These details are left for the notes gathered at the end of the work. Although this can be a bit frustrating for someone wanting to know the source for a particular statement, it does help improve general readability. The book favors practical knowledge and advice over an in-depth analysis of any one area.

¶77 To cover such a complex subject area in less than 400 pages, it must pack in all the content readers would need to know when a copyright issue comes up at work or in their personal lives. Strong uses terms of art in context, keeping *The Copyright Book* from feeling like a textbook with bolded definitions. Where applicable, he lists numbered instructions for copyright actions that involve numerous parts. Not much can be done to liven up nine pages of instruction on making a registration deposit; such a section is incredibly helpful for one with such a task, but can be easily skipped when that information is not needed. The appendix offers a clear and useful copyright duration chart to help decipher the various terms of copyright. It also includes applicable rules from the *Code of Federal Regulations*; but those who want to view parts of the heavily cited Copyright Act will have to seek them out on their own.

¶78 For a book with such a broad audience, *The Copyright Book* manages to present a balanced look at copyright law that can appeal to people approaching the subject from all sides. Copyright owners and users of copyrighted works alike can

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sit down with this book and expect to have their questions answered. Strong’s views in contentious areas never seem extreme, but instead come off as balanced and thoughtful. When talking about the rights that come with copyright law, he encourages registration to protect them. When he is discussing fair use, he encourages readers to make use of what the law allows. Before litigating, he advises potential litigants to make their own honest evaluations of fair use before getting the court involved.

Overall, Strong’s book caters to those with less copyright experience and who are looking for a readable overview and reference. Attorneys looking for a copyright refresher may also enjoy this engaging read, while advanced copyright professionals may be less inclined to revisit this work unless they are interested in Strong’s updated commentary on copyright or the final chapter covering his predictions for the future. With the last edition published more than fifteen years ago, the sixth edition of *The Copyright Book* covers a significant amount of recent copyright developments. Open access, the proposed Stop Online Piracy Act, electronic reserves, and Google Books are all covered in this update and worth reading for Strong’s clear explanations and subtle commentary. This book belongs in all academic law libraries and is highly recommended as an addition to the personal collection of anyone who works with copyright.


*Reviewed by Matthew E. Flyntz*

Inspired by the damage she believes the U.S. Supreme Court’s campaign finance jurisprudence is doing to American democracy, Zephyr Teachout, a law professor at Fordham University, delves into the history of corruption in America, assessing how our concept of corruption has changed over time. Teachout, known for her surprisingly strong showing against Andrew Cuomo in the 2014 New York Democratic gubernatorial primary, contends that the Court’s current understanding of corruption does not comport with the beliefs of the founders.

Teachout begins with a history of famous gifts from foreign dignitaries, including a Spanish horse for John Jay and an elaborately bejeweled snuff box for Benjamin Franklin, and the founders’ attempts in both the Articles of Confederation and the Constitution to rid the new nation of what she calls “a culture of gift giving” (p.28). She stresses that the founders intended to ban gifts altogether, not simply bribes, reflecting a broad understanding of corruption. In other words, the founders believed that gifts, in and of themselves (at least from foreign gift-givers), have the potential to be corrupting.

Teachout also discusses various influences on the framers’ thoughts during the revolutionary period. She argues that the founders shared the belief that “corruption precluded liberty” (p.38). She states that “[b]y corruption, the early...
generations meant excessive private interests influencing the exercise of public power,” not the quid pro quo formulation of corruption employed by the Supreme Court (p.38). She also discusses the philosophical trends of the era, including the founders’ embrace of Montesquieu and Locke, and rejection of Hobbes, and how these beliefs shaped their perceptions of human nature, good government, and corruption.

¶83 Teachout provides a detailed history of the Constitutional Convention’s treatment of corruption. She demonstrates how the fear of corruption guided many decisions about the structure and functioning of the new government. Overall, she paints a compelling picture of a group of people very concerned with eradicating corruption, broadly understood.

¶84 She traces the history of corruption in American thought and law in great detail and with excellent supporting citations. She makes a convincing argument that corruption meant far more to the founders and has meant more throughout our history than the quid pro quo concept that the current Supreme Court espouses. She concludes that she is “trying to bring corruption back” (p.276). That is, she wants the American public to care about corruption as the founders did and for this anticorruption principle held by the founders to guide our courts’ handling of campaign finance issues.

¶85 The writing is generally brisk and compelling, but it could use a bit more editing. For example, in a description of Thomas Jefferson’s efforts to get around reporting a gift (another snuff box—did Louis XVI not realize that it is rude to give everyone the same gift?), Teachout writes, “he asked his secretary to take the gilded frame, remove the diamonds, catalogue and value them, sell the most valuable, put the money toward Jefferson’s own private account, and not report it” (p.29). Three sentences later, she writes, “He asked [his secretary] to take out the diamonds and sell them . . . .” (p.29). Aside from a few moments like this, though, the writing is enjoyable.

¶86 Given the ongoing political and legal discussions surrounding campaign finance regulations, this book provides an interesting and worthwhile take on the subject. By providing insight into the way the founding generation viewed corruption, Teachout sheds new light on this issue and even provides fodder for jurists more inclined to originalism in dealing with these matters going forward.

¶87 While this book is written to be accessible to the interested public, it is certainly scholarly enough to be worthy of a home on the shelves of an academic law library, especially one where there is faculty interest in campaign finance and related issues.


Reviewed by Franklin L. Runge*

¶88 If you have a fear of germs, you should not buy this book. If you are looking to start a new diet, you should buy this book. If you play a role in the collection

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development decisions of an academic law library, you should buy this book. In Food We Trust: The Politics of Purity in American Food Regulation is a comprehensive and readable account of how our food safety regulatory scheme got its start in 1906 and has yet to find its way.

§89 In Eating Animals, Jonathan Safran Foer recounts that people, on hearing he was writing a book about eating meat, assumed he was arguing for vegetarianism.\textsuperscript{37} Perhaps we all know that something rotten is happening in our food’s journey from farm to fork. In Food We Trust gives the legislative history of why our collective intuition is correct.

§90 In 1906, Congress passed the Pure Food and Drug Act\textsuperscript{38} and the Federal Meat Inspection Act\textsuperscript{39} in the first federal attempts to address the adulteration of food products (a legislative way of asking meat producers to please stop tossing rats into the sausage and chocolatiers to stop putting soap flakes into candy bars). Over the next century, food production would change radically, and scientists would advance their knowledge of \textit{E. coli} O157:H7 and \textit{Salmonella}. The problem is that food statutes and regulations remained focused on additives and did not evolve in response to scientific advancements.

§91 Courtney I.P. Thomas establishes early in her book that she does not have an ideological axe to grind. Her core belief is that food safety regulations should be designed to protect consumers. All producers should be held to “science-based safety standards” (p.4), whether they are the hippy organic farms five miles from your home or large agribusinesses hundreds of miles away. Approximately 3000 people die each year from foodborne illnesses, and Thomas argues that food safety regulations should be updated as technology allows, regardless of the current president’s political party.

§92 Thomas’s normative arguments are in response to her compelling description of the regulatory process. Any author who can turn administrative law into a page-turner deserves accolades. She sets the table by recognizing that the problem is not only the statutes, but also the fragmentation of authority. Fifteen agencies help oversee food safety, which results in inefficiencies. The two major agencies are the Food and Drug Administration (FDA) and the U.S. Department of Agriculture (USDA). Notably, while the FDA is responsible for regulating eighty percent of food entering the market, it is receiving roughly one-fifth of federal funds allocated for food safety.

§93 Thomas writes that the \textit{Code of Federal Regulations} is more than a collection of “technical standards”; it is an expression of “political values and cultural attachments” (p.163). In the case of America’s dinner table, the values expressed in regulations are those of corporations and agribusinesses. Thomas does an excellent job of unpacking the goals behind our food safety standards, which are (1) securing a market share for the largest participants (for example, introducing requirements that well-established companies can achieve, but are too onerous for smaller


producers in the supply chain); (2) opening up international markets for American companies; (3) preventing the collapse of food industries (in 1906 Congress passed legislation to restore public faith in the meat industry after Upton Sinclair published *The Jungle*, which caused meat sales in the United States to plummet by half); and (4) redirecting consumer rage at foodborne illnesses from the industry to the government. Thomas infuses her arguments with detailed case studies, including chapters on the Cranberry Crisis of 1959 (the inability to trace cranberries coated by a carcinogenic substance), the Jack in the Box incidents in 1989 (*E. coli* O157:H7 found in undercooked hamburgers due to a corporate decision to have a juicier product), and the Peanut Butter Crisis of 2009 (*Salmonella* found in numerous peanut products because a company with a filthy factory shopped around for a testing laboratory that would give its product more favorable results).

Thomas concludes that all attempts to improve the FDA’s and USDA’s regulatory powers have failed. The most damning evidence presented is that, throughout the twentieth century, federal agencies lacked the authority to issue mandatory recalls of contaminated foodstuffs. The government could make recommendations, but it was up to the private producers to recall their own products.

The book ends with a glimmer of hope. In 2011, the FDA Food Safety Modernization Act was enacted. This transformative legislation aligns with Thomas’s hopes for the FDA, but it does not address the USDA. We are now in a holding pattern to see whether the statute emboldens the FDA to promulgate regulations that align with Thomas’s goal: protection for all consumers. Until then, we will have to live with a faint suspicion of peanut butter, spinach, ice cream, cranberries, and everything else in the grocery store.


*Reviewed by Deborah L. McGovern*

Judicial activism is a hot topic in the United States. Many argue that when judges “legislate,” they usurp the constitutionally mandated role of the legislative branch and hence violate the rule of law. Whitehead examines the impact that judges have on the rule of law and discusses which of the four judicial values he introduces in his book, *Judging the Judges: Values and the Rule of Law*, is most faithful to the concept embodied in the rule of law.

Respect for the rule of law inclines citizens to obey the laws. When judges deviate from interpretation into lawmaking, the public perceives them as threatening the rule of law, and its promise to be a government of laws, not of men. According to Whitehead, for the rule of law to remain salient, “judges must feel sincerely bound by the law” (p.9). The judge must feel that she serves the law, not that she is free to decide that the law is whatever she wants it to be.

The rule of law is a social construct because even though judges are interpreting objective texts, they bring the subjective input of their humanity to their


task. Whether a judge demonstrates judicial fidelity depends on his background within the community, on legal language, and on the judicial virtues. First, judges develop fidelity to law through interaction with community values and norms. Second comes exposure to the influence of legal language. Through social interaction, study, and practice, judges are exposed to legal phrases and the concepts they embody. These become a part of their working legal vocabularies. This shared language enables a judge to recognize legal concepts and to situate the cases that come before her in the body of applicable precedents. Finally, through exposure to judicial virtues (particularly impartiality and fairness), judges may come to desire deciding cases in a way that exhibits fidelity to the law.

¶99 Whitehead’s book is based on the results of a study he conducted by interviewing state and federal appellate judges, using an interview guide, which he appends. Whitehead asked questions that implicated each of the four judicial values he propounds: formalist values, good faith values, cynical values, and rogue values. As Whitehead himself recognizes, there are problems with his study, which does not produce precise scientific results. If, as Whitehead maintains, a judge may hold more than one type of value, the most parsimonious explanation of Whitehead’s data may be that judges decide the issues that implicate their political preferences according to those preferences, while deciding other issues according to law.

¶100 Whitehead devotes a chapter to each of the judicial values and where it falls on the continuum of fidelity to the rule of law. First, formalist thinking embraces the idea that there is always one right legal decision. Judging, for formalist thinkers, is a matter of correctly characterizing the facts and then applying the only possible rule to those facts. The community attitudes that affect the formalist thinker can produce judges who mechanically follow the rules. Formalist values center on successfully setting aside one’s personal preferences.

¶101 Second, judges with good faith values aspire to support the rule of law. They recognize that personal opinion will affect their judicial deliberations; but they also feel obligated to subordinate their own opinions to the objective meaning of the law. Judges with good faith values often absorb those values in childhood, when they learn respect for others’ opinions. Unlike formalist judges, they do not believe that a given legal text has only one possible meaning. They strive to remain within the legal tradition and follow precedent, even when that precedent must serve as a bridge to a new legal meaning.

¶102 Next on the continuum of fidelity to the rule of law are the judges who hold cynical values. These judges lack the sincere commitment to the rule of law that characterizes the formalists and the judges with good faith values. Judges with cynical values perceive the law as ambiguous and the norms of the judicial community as unworthy of respect. Although such judges may go through the motions of interpretation and application, they do so not out of deference to the rule of law but because they perceive the necessity of counterfeiting a virtue that they do not possess. Opinions are merely stalking-horses that hide what is actually being imposed—the judge’s personal preference.

¶103 Finally, rogue judges step off the judicial cliff. To the holders of these values, law is just a tool to accomplish other purposes. They feel entitled to decide cases according to their own preferences and then use legal reasoning to support their opinions.
¶104 Whitehead hopes that by judiciously examining the degree to which a candidate has incorporated community values, legal language, and the influence of judicial virtues to determine her fidelity to the rule of law, decision-makers and the electorate will be able to choose the best judicial candidates with more ease and less rancor. This book would be suitable for academic libraries, particularly law libraries. It would be more accessible if it used footnotes rather than endnotes.
Professor Wheeler discusses the police killings of Michael Brown and Eric Garner. He posits that racialized fear is part of what fuels such violence and discusses examples of how racialized fear have impacted his personal life. Wheeler then discusses how and why law librarians can and should be prepared to discuss such events with their law library patrons.

There are times in our history when societal events cause us to step back and reflect on the severity, significance, and impact of the developments of the day. For me, the summer of 2014 was one such time. During that summer we saw the fatal police chokehold of forty-three-year-old Eric Garner in July, the fatal police shooting of eighteen-year-old Michael Brown in August, and the resulting national outcry in cities and towns across the United States. I found myself struggling to make sense of these events and to sort through the almost constant barrage of related media stories, commentary, and protest coverage. For those of us working with the public, with students, or with legal professionals, current events frequently come up in conversation or in the course of our duties. Thus impromptu discussions of these events with coworkers, law library patrons, students, and others grappling to comprehend these seemingly senseless occurrences were almost unavoidable. So, as a way to make sense of these events for myself and to describe their potential impact on our lives as law librarians, I penned this installment of Diversity Dialogues.

The Facts

On Thursday, July 17, 2014, forty-three-year-old Eric Garner was approached on Staten Island, N.Y., by police officers who suspected him of selling cigarettes ille-
 Garner, who was unarmed, pulled away when officers tried to handcuff him, and he was put into a chokehold, pulled to the ground, and held around the neck until he lost consciousness. Garner went into cardiac arrest as he was being placed into custody and died a short time later. The entire scene was caught on video where Garner “can be heard saying ‘I can’t breathe’ over and over again as officers swarm about.” The medical examiner’s office determined that the chokehold, as well as compression to the chest, caused Mr. Garner’s death, and ruled it a homicide. In September 2014, a grand jury “heard testimony from the officers involved and twenty-two citizen witnesses. All of the officers, with the exception of Officer [Daniel] Pantaleo, were granted immunity.” Officer Pantaleo, who administered the fatal chokehold on Garner, testified before a separate grand jury, which cleared him of any criminal charges. Although many of the early newspaper accounts contain no mention of race, widely circulated video footage of the incident shows that Eric Garner was black and the officers involved in his detention and killing were white.

¶3 Unrelatedly, on the afternoon of August 9, 2014, an unarmed, black eighteen-year-old Michael Brown and another man were approached by an officer in a patrol car as they were walking home from a convenience store in Ferguson, Missouri. As the officer began to leave his vehicle, an altercation ensued, there was a struggle, and at least one shot was fired. Brown allegedly ran, the officer gave chase, and at some point Brown turned to face the police officer who then opened fire. The officer, Darren Wilson, fired a total of twelve times, and Brown was killed. A grand jury met twenty-three times between August 20 and November 21, 2014, hearing testimony to decide whether to indict Wilson for his part in Brown’s death. Ultimately, the grand jury brought no criminal charges against Wilson, who is white.

5. Id.
17. Id.
My Social Reality

¶4 These two incidents and the protests that they generated caused me to ask myself, “What is really going on here?” Let’s think about this. Armed police officers are empowered to use force in the course of their regular duties, and sometimes suspects and others are injured or killed as these officers attempt to keep the peace. I doubt that anyone would dispute this characterization. However, the simultaneous reality is that “young black males . . . are . . . at a far greater risk of being shot dead by police than their white counterparts—21 times greater, according to a ProPublica analysis of federally collected data on fatal police shootings.”

¶5 My ten-year-old multiracial godson is unusually tall for his age. I am shocked that he is so young and yet just a couple of inches shorter than me—even though his Garifuna-Honduran father and Trinidadian-American mother could both be described as tall. To the average person, my godson could appear, even at ten, to be a tall, teenaged, black youth. I think about this all of the time, and I am terrified.

20. Id.
21. Those of us with biracial or multiracial families and friends understand that it is the appearance and not the reality of race that determines how one is treated by society and by the police.
22. Walters, supra note 3.
23. Black men in the United States live with a universal fear and commonly held understanding of the danger implicit in and the possibility of police interactions because of the likelihood of misidentification, unjust or unlawful stops, police harassment, or even violence. See, e.g., Charles M. Blow, Library Visit, Then Held at Gunpoint, N.Y. TIMES, Jan. 26, 2015, at A21 (N.Y. Times columnist’s account of his son, a Yale student, being stopped at gunpoint by the Yale police).
both unarmed, gave voice to grievances of my own that until now had remained unspoken.\textsuperscript{24}

## The Fear Behind the Reality

\textsuperscript{6} It is an oversimplification at best to say that black youth being disproportionately killed by police officers is merely the result of racially motivated hate. It is just too easy to say that white police officers hate black people (and other people of color), so here we are with our current social reality. I simply don’t buy it. I think the problem is far more complex than that. What it comes down to, in my mind, is fear—fear and the irrational things that fear can drive people to do or not do.\textsuperscript{25}

\textsuperscript{7} Quite recently, I was attending a conference in Washington, D.C. I had made my way out to the American University Washington College of Law for a meeting, and I wanted to get a taxi back to my hotel.\textsuperscript{26} I asked the extremely accommodating reception personnel at the law school to call me one, and I stood out on the sidewalk waiting. I soon noticed a taxi approaching. I moved closer to the curb, and stuck my hand out to indicate that I was, in fact, seeking a taxi. I then watched the taxi slow down while the driver leaned over to examine me visually. The driver then picked up speed and drove past me without stopping. Well, I thought, that must not have been my taxi. So, after waiting another twenty minutes, I asked the reception folks to call a taxi for me a second time. Unbelievably, the exact same scenario played out a second time. Shockingly, it then happened a third time all within an hour. Three taxis, three drive-bys, and not one stop. After waiting for an hour, I angrily downloaded the Uber app\textsuperscript{27} on my phone, entered my credit card information, and got myself a ride in minutes. My point here is that it did not matter at all that I am perhaps the least scary cab fare on the planet; what mattered was that taxi drivers are sometimes afraid to pick up black men. The fear evinced here is irrational and misplaced, but it is nonetheless real, and it impacts my life in real and thankfully non-life-threatening ways. Moreover, this very same racialized fear can cause much more serious harms than the mere inconveniences that I suffered that day.

\textsuperscript{8} Years ago—I must have been in college then—I found myself walking down a fairly deserted city street just after dark. I am a relatively fast walker, and I often find myself overtaking and passing pedestrians incapable of keeping pace with me. That night, I noticed that I was walking up behind a young white woman. Imme-

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\textsuperscript{24} Part of the public response to these incidents included young people and parents talking about and using the phrase “Hands up, don’t shoot” as both a political critique and sign of defiance and protest, as well as providing last resort guidance for young black people when dealing with police. See, e.g., Landon Jones, How “Hands Up, Don’t Shoot” Could Start a Real Revolution, \textit{Time} (Dec. 4, 2014), http://time.com/3618295/eric-garner-ferguson-hands-up-dont-shoot/.

\textsuperscript{25} I don’t suggest here that fear is the only factor. Nor do I mean to minimize the existence of systemic racism, which I believe to be a major factor. What I suggest is that our racialized social and political histories combine to infuse our everyday interactions with elements of fear that are exacerbated by race.

\textsuperscript{26} For a map of the exact location of the Washington College of Law, see https://goo.gl/maps/jkTQe.

\textsuperscript{27} \textit{UBER}, https://www.uber.com/ (last visited Aug. 24, 2015), is an electronic application that connects drivers to riders and thus bypasses traditional taxi services.
Immediately the thought occurred to me that this scenario could play out badly. She will undoubtedly be frightened by the swift approach of a young black man behind her. Might she scream? Run? Pull a weapon? How will I be impacted? If she screams, might someone come to the rescue? How should I then respond? At best it will be an embarrassing scene. At worst it could be deadly. All of these thoughts converged in my mind, and I felt obliged to act to prevent what I felt was the inevitable result of fear. So I slowed my pace and crossed the street taking pains to tread loudly to signal my presence. I noticed her turn and take note of my presence and my movement away from her. Her expression was one of concern but not panic. I felt relieved and also irritated. This circumstance was neither my fault nor hers. We were both pawns in a game whose rules were not of our making. Scenarios like this one have happened to me many times throughout the years. I continue to feel helpless and trapped in an unfortunate reality dictated by fear.

¶9 It is far too easy to dismiss these anecdotes as isolated incidents or to chalk them up as misinterpretations on my part. But they no doubt ring true and are familiar to black men reading this piece. Stereotypes about race underlie the fear that fuels these occurrences. “There exists [in our society] a stereotypical, yet robust, understanding of blackness as ‘badness.’”28 “The social distance between blacks and whites in America fosters the possibility of misunderstanding and mistranslation of communications and behavior.”29 This social distance, this mistranslation, the stereotypes and the fear converge, and the result is that I become one to be feared by taxi drivers and women alone on the streets.

Fear, Blackness, and Mental Illness

¶10 One of the things that came to mind for me immediately after reading about Eric Garner and the circumstances surrounding his death was the likelihood that mental illness may have been a factor. This man was forty-three years old, formerly employed, and selling single cigarettes on the streets.30 “He had been arrested more than thirty times, often accused of selling loose cigarettes bought outside the state.”31 The idea that a forty-three-year-old man continued to commit misdemeanors over and over seemed telling to me. Others have pointed out that repeatedly committing nonviolent misdemeanors like peeing in public, littering, panhandling, and selling single cigarettes is often associated with “immaturity, low social status, mental illness, low intelligence” and other problems.32 However, as is all too often the case, race and fear combine to turn what may have been an unthreatening

29. Id.
30. Goldstein & Schweber, supra note 4.
31. Id.
mentally ill black man into a dangerous threat to public safety. Part of what we do know is that “people of color who are mentally ill, or whose mental situation is unstable, are at greater risk of being subjected to police brutality.” Rightly or wrongly, “the convergence of criminality and mental impairment often leads to stereotyping of the mentally ill as violent.” Add to that the potential influences of racialized fear, and the probability of violent police responses to mentally ill suspects of color escalates.

**Race and Law Librarianship**

¶ 11 So where do all of these events and all of these phenomena leave us as we navigate our daily lives as law librarians? How is any of this relevant to those who may feel somewhat unaffected by the race-related occurrences described above?

¶ 12 Simply put, “race affects our day-to-day work as law librarians . . . , [and] . . . this includes those of us who are white.” In her piece *Race and the Reference Librarian*, Mary Whisner correctly points out that race and racial issues permeate almost every aspect of the law, both criminal and civil. Yet racial issues are not always clear. Even though issues of race may be present and even salient, they may also remain unmentioned in legal opinions. Uncovering these racial issues may require extralegal research, statistical analysis, social science inquiry, and more. As Whisner so aptly puts it, “not all of our work is simply reacting to someone else’s questions, and we can incorporate race ourselves.” When we know that race impacts a particular patron’s query, we can suggest they investigate the racial issues. We can be ready with sources or we can suggest examples. We can choose not to ignore what we know to be part of our social reality. We can demonstrate through our professional interactions with patrons what legal scholars have proven to be true, that racial issues are interesting and important.

¶ 13 Showing an interest in racial justice and issues of race helps to break down barriers, expose as false perceived misunderstandings, and shed light on commonly held perceptions of a race-infused reality. As Whisner quite astutely points out, it helps law students of color (and patrons of color more generally) feel more wel-

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33. *See generally* Nelson, *supra* note 28 (analyzing how the police and the criminal justice system are ill equipped to deal with the intersection of race and mental illness).
34. *Id.* at 7; *see also* Nat’l Inst. of Justice & Bureau of Justice Statistics, *Use of Force by Police: Overview of National and Local Data*, at viii (1999), *available at* https://www.ncjrs.gov/pdf files1/nij/176330-1.pdf (finding that “use of force is more likely to occur when police are dealing with persons under the influence of alcohol or drugs or with mentally ill individuals.”).
37. *Id.* at 626, ¶ 2.
38. *Id.* at 629–30, ¶ 5 (providing examples of rulings where race remained unmentioned but was nonetheless profoundly important or determinative).
39. *Id.* at 630, ¶ 5.
40. *Id.*
I would add to that, it helps people of color feel more understood, and it unmasksthe truth that even those of us who are white can have a common understanding of how race impacts us all daily. It may even help to erode the fear that lies beneath our racialized reality.

¶14 On August 3, 2015, I happened to very briefly glance at Facebook while at work (something I almost never do), and I saw the following editorial cartoon on a longtime friend’s page.

¶15 She’d commented, “I’m still thinking about this. You?” This friend happens not to be a person of color. She is, however, incredibly smart, indescribably funny, and devoted to issues of social justice. Days later, I am only now realizing the impact this illustration had on me. It caused me to smile, and then it caused me to question its humor. I wondered what must be wrong with me that I find humor in this dark cartoon. Yet I kept thinking about it. Then I found myself going back to Facebook, after work of course, to read the comments posted by other

42. Whisner, supra note 36, at 631, ¶ 7.
45. Id.
46. See Law Office of Lynn Perls, http://www.perlslaw.com/about.html (last visited Aug. 24, 2015) (describing Lynn Perls’s family law practice, which has done cutting-edge work for nontraditional families for more than twenty years but which only hints at her lifelong devotion to and ongoing work for issues of social justice).
47. In fact, I was so affected by this illustration that I felt compelled to contact the editor of this journal and add it to this essay long after the editorial deadline had passed.
friends. I even searched the Tulsa World website to read the more than fifty comments posted there. What I discovered is that this process was healing for me. It gave me an outlet for my anger and helplessness and discontent. It showed me that, indeed, others were still thinking about this. The comments taught me that opinions differ about these issues and that respectful, sometimes collegial, and earnest discussion is extremely useful. More than anything, however, this illustration taught me that humor, irony, and art are powerful and important tools for a society grappling with difficult social and political problems. So I will now add irony and humor to the law librarian’s toolkit for engaging on difficult societal issues like the intersection of race and police violence.

¶16 What I have found most important, for myself and for the students, faculty, and others whom I serve is to remain willing to engage with them about the difficult developments of the day. As I struggled to make sense of the events of the summer of 2014, I very often felt ill equipped to engage with patrons. I wanted to retreat from discussions of Garner, Brown, and their aftermath. Yet I ultimately found that maintaining a willingness to grapple with these topics, especially in conversations with students, was useful and healing and restorative and educational. It signaled to students my willingness to go the extra mile, to struggle along with them to make sense of difficult and emotional issues. It exposed to them my humanity, my vulnerability, and my empathy. It made us all closer and more engaged with one another, even when we disagree.

Conclusion

¶17 Most legal information professionals are tasked, at least in part, with keeping up with legal, business, and sociopolitical current events. That work informs our work with patrons attempting to solve legal problems, students learning to solve legal problems, patrons analyzing the law, or those applying the law to contemporary legal issues. Thus when current events involving the law, the criminal justice system, law enforcement, and race relations ignite in the way that the Garner and Brown events did, they can have a profound impact on our professional lives. I found this to be true in my own professional life. In particular, my commitment to contributing a regular piece to Law Library Journal on issues of diversity seemed to require me to comment on these issues. So I offer these musings as part of our profession’s ongoing dialogue on diversity. In part, my goal here is to publicly grapple with my own emotions around these events. But, perhaps more important, I hope to illustrate to my professional colleagues that your patrons, your coworkers, and your professional peers may also be struggling to make sense of these events.

48. Plante, supra note 43.

49. It is important to acknowledge that these issues are more far-reaching than Michael Brown, Eric Garner, and the summer of 2014. One estimate found that in the year following Michael Brown’s death, 314 black Americans were killed by police. See Elizabeth Kiefer, 314 Black Americans Have Been Killed by Police Since Michael Brown’s Shooting, REFINERY29 (Aug. 7, 2015, 6:00 PM), http://www.refinery29.com/2015/08/92023/ferguson-anniversary-black-people-killed-by-police-officers#kt7l4cHmkM.
Living in a diverse society demands that we all do exactly that, continue to struggle with events like these. We may not all agree on causes or solutions, but it is the willingness to struggle as a profession and as a society that ensures our collective humanity.
Professor Maxwell suggests that academic law library directors take a look at the “big picture” by looking at the demands placed on their law school deans and to work positively within the administrative systems for ultimate success.

¶1 For better or worse, my preparation for library leadership included exposure to and, to some extent, involvement in the larger administration of the law school. My mentor, an “Associate Dean for Everything” (a sanitized version of what he actually called his position), was charged with overseeing all law school personnel save for faculty, facilities, Admissions, IT, and, of course, the law library. As associate dean, he was privy to upper-level law school planning and discussion. Moreover, he was a master delegator who assigned me to take his place on law school and university committees. He also asked me to serve as director of academic excellence for the semester during which the incumbent was out on maternity leave. Additionally, he appointed me to the Self-Study Committee as our law school prepared for its imminent site visit. And more. The point, though, is that I learned a great deal about the law school as a whole and benefited from this larger vision as I moved on to become an academic law library director. In essence, I learned to see the law library as an integral piece of the law school, not just a self-contained island to be defended from budgetary predators. Consequently, I recommend that library leaders, present and future, avail themselves of similar opportunities. If nothing else, you will learn to speak the same language as your boss, and this is a very good thing.

¶2 Recently, I have been thinking a great deal about my accidental preparations for assuming an administrative position within a law school, and I have Katie Brown, Associate Dean of the Charlotte School of Law Library, to thank for this recent rumination. While I do not know Katie personally, I want to give her a shout-out for her panel presentation at SEAALL this year. Entitled “Becoming a ‘Budget Whisperer,’” this program provided advice for new library directors on how to master the devilish budgetary/financial details that accompany the job. Perhaps the most valuable “takeaway” for me, however, was a bibliographical suggestion, and I do love a reading list! Katie highly recommended that (new) library
directors read Jeffrey L. Buller’s *The Essential Academic Dean: A Practical Guide to College Leadership*. How might this text be useful? After all, a library director is hardly a dean. On reflection, however, it becomes evident that there are indeed crucial commonalities in leadership demands of the two positions. An even more valuable insight, though, is the fact that it behooves an academic law library director—or other law library leader or librarian—to better understand the nature and scope of a dean’s concerns. This can facilitate more effective communication, while providing for realistic and productive discussion. This appreciation also will enable the law library leader to advocate more powerfully for the law library.

¶ In this column, I hope to distill from *The Essential Academic Dean* a handful of key points that a law library leader should bear in mind. A selection of chapter headings will provide the structure for my discussion. While not every chapter is useful for my purposes here, most chapters are very much on point, and I will focus on them. Accordingly, I will discuss “The Dean’s Role,” “The Dean’s Constituents,” “The Dean’s Staff,” and “The Dean’s Budget.” While *The Essential Academic Dean* is designed as a general guide for university—and not exclusively law school—deans, its content is germane to the legal academy. Bear in mind, however, that there will be variations in applicability when factoring in the very different structures of public, private, and freestanding law schools. Nonetheless, any law library leader would do well to internalize the overarching information that Buller sets forth.

¶ Buller begins unpacking “The Dean’s Role” by discussing “The View from the Middle,” which describes the dean’s actual position within the university structure: betwixt and between. Although law librarians may be inclined to think of the dean as occupying the pinnacle of the pecking order, it is helpful to remember that the dean actually reports to administrators at higher levels of the university (provost, president, chancellor, etc.). Thus, she may have higher-level mandates to which we in the library are not privy. In other words, the dean must take marching orders from her boss and, in turn, give them to administrators and, perhaps, faculty in the law school. It can be extraordinarily frustrating for a law library administrator to communicate with a dean absent an understanding of multidirectional demands upon a dean and the gyrations a dean must undergo to optimally satisfy multiple constituencies, particularly the upper echelon of university administration. Remember, it isn’t (all) about you and the library. More likely than not, your dean will be working from a perspective to which you are not—and never can be—fully privy. It is your job to empathize—and listen. This may encourage your dean to be more open with you, as you operate within your own “view from the middle.”

¶ Who are “The Dean’s Constituents?” Their numbers are legion, and, by proxy, they are your constituents as well, despite the fact that you may not work directly with many of them on a regular basis, if at all. According to Buller, “The Dean’s Constituents” consist of the following individuals and groups: students, parents, faculty, challenging employees, department chairs, staff, other deans, upper administrators, friends of the college, donors and potential donors, along

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with boards, trustees, and legislators. This is a daunting list of stakeholders, to be sure, so it is helpful to library leaders to understand the scope of decanal fealty. Fortunately, most of us are insulated from the university president and provost, as well as from other deans and upper administrators. Happily, we are also removed from the fundraising function of the dean. We aren’t the ones who constantly need to be “on” to court donors and alums. Similarly, we are not directly accountable to boards, trustees, visiting committees, boards of consultors or legislators, but the law school dean is very much beholden to these governing bodies and must work with them successfully. At times, the dean may be responding to demands from these groups in ways that are not apparent or transparent to you as a library leader. Nonetheless, it can be helpful to you to be aware of such larger pressures on your dean and to be sensitive to potentially competing demands. Most of all, you should communicate with your dean and attempt to determine ways in which you and your library might fit into the big picture of the law school.

Not only must a dean work with numerous constituencies and their varying needs, but she must also build a strong administrative team to aid in implementing her—and her bosses’—vision. Remember, it is the dean’s prerogative to select the best team that she can—and it is her choice to make. At times it may be difficult for you to understand the particular merits of some of these administrators. In fact, it may be especially difficult to work with the law school’s budget administrator, whose priorities of parsimony may seem to be completely at odds with your need to expand the library staff and holdings. Nonetheless, the law school itself is likely experiencing financial shortfalls in this dire economic climate and shrinking legal market, and, unfortunately, the library, with its apparently large budget, is an easy target for cost cutting. While it is wholly human and entirely reasonable to react viscerally to demands to cut the library budget, nevertheless it can be helpful for you to take a step back and a deep breath to consider the request. You may be able to negotiate with the dean and the finance officer, but you should also be prepared to bite the bullet. Guess what? If you were the administrator in charge of balancing a shrinking law school budget, you would do the same thing! The administration’s request to reduce the library budget is not an intentional attack on you and the library, however much it may feel like one. Rather, the request is reasonable from the perspective of the administration. It is your job as library leader to negotiate for what you need, insofar as that is possible, given pressing financial constraints. It falls on you to educate the dean and her administration about the library and the value it confers on the entire law school and university. You may not succeed—but you will definitely fail if you abdicate rationality and enter the discussion with guns blazing. In the end, you owe it to your staff and your library to work with the administration to enhance the organic growth of the law school, even during times of visibly diminishing returns. Again, the dynamic need not be adversarial. After all, it’s not about you!

Ultimately, I hope I have made a successful case for mindful examination of the big picture at your law school, particularly as it relates to the multitudinous demands on your dean. As a library leader, you have a better chance of surviving and thriving if you can put demands from your dean into perspective and act accordingly. Your dean will appreciate your insight, and your library will emerge in a positive light. Finally, it’s not about you! And that’s a very good thing!
Memorial: Mario Angel Ceresa (1932–2015)

¶1 Professor Emeritus Mario Angel Ceresa, Detroit College of Law (now Michigan State University College of Law) Library Director, 1970–1999, passed away April 2, 2015, after a long battle with cancer. He was 83.

¶2 Mario Ceresa was born in Puerto Padre, Cuba, and attended the Colegio de Bel. He graduated from the University of Havana Law School in 1956 and served as a public defender for ten years, leaving Cuba when it became clear he must either join the revolution or go into exile. With his wife and children, he boarded the midnight TWA flight, leaving everything else behind.

¶3 He relocated to Ann Arbor, Michigan, and in 1970 completed his M.A.L.S. at the University of Michigan. He also attended his first AALL conference. He would always smile at the memory. “I couldn’t afford to attend because I was so poor, but I knew I had to find a job so I registered anyway. Then I got a dream job as the Director of the Detroit College of Law Library. It was too late to get my money back so I went and had the best time of my life.” So began his lifelong support of the AALL. He made sure the library budget would cover AALL memberships for every librarian. He lobbied with the administration to ensure that librarians enjoyed the same travel funding as faculty members, and he always granted leave time for AALL activities.

¶4 In his thirty-year tenure as library director, his accomplishments were legendary. He started his career by overseeing a 12,500 square foot addition to the Detroit facility and ended his career by overseeing a new 42,000 square foot library in East Lansing, Michigan. He was an innovator who was regularly at the forefront of technology. In 1983 he decided to link the library’s two computers, so he coaxed the janitor into laying a coaxial cable, hidden on top of bookcases. He went on to wire three networks and build several computer labs, purchase the first online integrated library catalog, and subscribe to all of the “new” databases like Westlaw and LexisNexis. But he never turned his back on tradition. He also built up the print collection by adding more than 70,000 volumes, joined the GPO Depository program, and made sure the library owned every title identified in the accreditation guidelines.

¶5 He expressed himself with such zest and exuberance, it was easy to lose sight of his accomplishments in the presence of his laughter. Everyone has a different Mario story. One librarian described her first AALL conference in 1983 in Houston, Texas. “We were all very conscientious and attended every possible conference on Monday. Then Mario announced he had rented a car. ‘It would be a shame to get this close to the Gulf of Mexico and not see the ocean.’ So on Tuesday our boss took us all to the beach.”

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¶6 He counseled his staff through big decisions, “there are certain imponderables,” and on the best course of action, that is, “do not burn your boats behind you, like Cortez.” He knew how to make solid decisions, “I will go home and talk to my pillow,” and when to cut his losses and move on, “I wash my hands, like Pontius Pilatus.” Every day he would come to work with a story about his family. Big of heart and generous of spirit, everyone counted as family for Mario. “I loved coming to work with my mom to see Mario,” observed one Bring Your Child to Work alum. “He acted surprised with every ’peek-a-boo.’”

¶7 We honor his accomplishments. We mourn the man. He is survived by his wife, Marica; his children, Mario, Juan, Deris, Patricia, Maria, and Robert; and nine grandchildren.—Hildur Hanna¹ and Janet Hedin²

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