ARTICLES

Possible Futures for the Legal Treatise in an Environment of Wikis, Blogs, and Myriad Online Primary Law Sources [2016-1]
Peter W. Martin 7

Who Owns This Article? Applying Copyright's Work-Made-for-Hire Doctrine to Librarians’ Scholarship [2016-2]
Paul Hellyer 33

From Rome to the Restatement: S.P. Scott, Fred Blume, Clyde Pharr, and Roman Law in Early Twentieth-Century America [2016-3]
Timothy G. Kearley 55

Yellow Flag Fever: Describing Negative Legal Precedent in Citators [2016-4]
Aaron S. Kirschenfeld 77

Mentoring Across Generations: The Training of a Millennial Librarian [2016-5]
Renee Rastorfer and Liza Rosenof 101
American Association of Law Libraries

Editorial Staff
Editor: James E. Duggan
Production: ALA Production Services

2015–2016 Association Officers
Keith Ann Stiverson, President; Ronald E. Wheeler, Jr., Vice President/President-Elect; Katherine K. Coolidge, Secretary; Gail Warren, Treasurer; Holly M. Riccio, Immediate Past President; John W. Adkins, Femi Cadmus, Emily R. Florio, Kenneth J. Hirsh, Mary E. Matuszak, Donna Nixon, Board Members; Kate Hagan, Executive Director.

2015–2016 Law Library Journal Board of Editors
Richard A. Danner, James E. Duggan (ex-officio), Frank G. Houdek, Anne Klinefelter, Janet Sinder, members.

Law Library Journal® (ISSN 0023-9283) is published quarterly in the Winter, Spring, Summer, and Fall by the American Association of Law Libraries, 105 W. Adams Street, Suite 3300, Chicago, IL 60603. Telephone: (312) 939-4764, fax: (312) 431-1097, e-mail: aallhq@aall.org. Nonmember subscriptions are $125 per year; individual issues are $31.25. Periodicals postage paid at Chicago, Illinois, and at additional mailing offices. POSTMASTER: Send address changes to Law Library Journal, AALL, 105 W. Adams Street, Suite 3300, Chicago, IL 60603.

Advertising Representatives: Innovative Media Solutions, 320 W. Chestnut Street, PO Box 399, Oneida, IL 61467. Telephone: (309) 483-6467, fax: (309) 483-2371, e-mail: bill@innovativemediasolutions.com.

All correspondence regarding editorial matters should be sent to James E. Duggan, Law Library Journal Editor, Tulane University Law School, 6329 Freret St., New Orleans, LA 70118. Telephone: (504) 865-5950; fax: (504) 865-5917; e-mail: duggan@tulane.edu.

This publication is provided for informational and educational purposes only. The American Association of Law Libraries does not assume, and expressly disclaims, any responsibility for the statements advanced by the contributors to, and the advertisers in, the Association’s publications. Editorial views do not necessarily represent the official position of the Association or of its officers, directors, staff, or representatives. All advertising copy is subject to editorial approval. The Association does not endorse or make any guarantee with respect to any products or services mentioned or advertised in the publication. Law Library Journal is printed on acid-free paper.

Notice
All articles copyright © 2016 by the American Association of Law Libraries, except where otherwise expressly indicated. Except as otherwise expressly provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use or for any other educational purpose provided that (1) copies are distributed at or below cost, (2) author and journal are identified, and (3) proper notice of copyright is affixed to each copy. For articles in which it holds copyright, the American Association of Law Libraries grants permission for copies to be made for classroom use or for any other educational purpose under the same conditions.
Law Library Journal is the official journal of the American Association of Law Libraries. It is published quarterly and circulates to more than 5000 members and subscribers. This guide is provided to assist authors in preparing articles for the Journal.

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

In preparing a manuscript, an author may use any approach appropriate to the topic: case studies, descriptive or historical narratives, commentaries, or reports on research projects. Bibliographies on topics of substantive law or of law librarianship are welcomed; annotated bibliographies and bibliographic essays are preferred.

2. Author’s Responsibilities. Manuscripts are accepted for review with the understanding that they have not been published elsewhere and are not currently being considered for publication elsewhere. Authors are responsible for the accuracy of statements in their articles and for the accuracy and adequacy of the references. Citations to published literature should be carefully checked. References to unpublished material may be included; however, the author is responsible for securing approval, in writing, from any person cited as the source of an unpublished work. The author is also responsible for obtaining permission to use copyrighted material. Such permissions should be secured in writing. By submitting a manuscript to Law Library Journal, an author is certifying that he or she has obtained all necessary approvals and permissions. Copies may be requested by the editor.

3. Editorial Policies. Manuscripts are evaluated for their appropriateness for Law Library Journal, significance, and clarity. If accepted, manuscripts will be edited for clarity of expression and to remove any ambiguities in the presentation. If extensive revisions are indicated, manuscripts are returned to authors for approval of changes and corrections before type is set. Throughout the editorial process, the editor’s purpose is to assist authors in effectively communicating their ideas. The editor welcomes advance queries from authors about possible Journal articles.


5. Bibliographies. All bibliographies, whether submitted independently or to accompany a substantive article, should follow the bibliography style described in paragraphs 14.56–14.317 of The Chicago Manual of Style. Prospective compilers of bibliographies or authors of bibliographic essays are encouraged to contact the editor about their projects before committing them to final form.
Instructions for Preparing Manuscripts

1. Title and Author Page. Provide a title that is brief, specific, and descriptive of the article’s content. Below the title, provide the name(s), professional title(s), and affiliation(s) of the author(s), and the address of the author to whom correspondence should be sent.

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

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

4. Text. The entire text, including quotations, should be typed double-spaced with 1½ inch margins on all sides. Quotations of fewer than fifty words should be enclosed in quotation marks; quotations of fifty or more words should be blocked off and indented an additional inch on the left and right. Footnotes should be identified in the text by superscript numbers.

5. Footnotes. Acknowledgments (if any) should be preceded by an asterisk and placed before the first footnote. Footnotes should follow the form of the AALL Universal Citation Guide (3d ed. 2014) where applicable. For matters not covered in the UCG, use the form of The Bluebook (20th ed. 2015).

6. Appendices, Bibliographies, Tables, and Illustrations. Supplementary materials, such as appendices and bibliographies, should be provided on separate pages. Each table, illustration, and all similar material that is to be published within the text should be individually numbered (e.g., “Table 1”). Indicate the desired placement by providing an appropriate instruction within brackets in the text (e.g., [Insert Table 1]). Camera-ready copy must be supplied for all illustrations.

7. Submitting the Manuscript. Manuscripts should be sent to the editor, James E. Duggan, Tulane University Law School, 6329 Freret St., New Orleans, LA 70118. Telephone: (504) 865-5950; e-mail: duggan@tulane.edu. Electronic versions in either Word (preferred), WordPerfect, or PDF may be sent by e-mail. If manuscripts are submitted in paper format, two complete copies should be mailed to the address above.

The editor will notify the author that the manuscript has been received and inform the author when an acceptance decision may be expected. After an article has been accepted, the editor will require an electronic manuscript, either on disk or as an e-mail attachment.

The author (one designated author, if there are multiple authors) will receive a clean copy of the manuscript before it is sent to the printer. The copy must be proofread, approved, and returned within 15 days. Before publication, the author will be asked to agree to the Journal’s policy on classroom photocopying, which is published in each issue of the Journal. Upon publication, the author will receive two free copies of the issue in which the article appears, plus twenty-five individual offprints of the article itself. A form for ordering additional reprints will be sent to the author at the time the issue is published.
Table of Contents

General Articles

Possible Futures for the Legal Treatise in an Environment of Wikis, Blogs, and Myriad Online Primary Law Sources [2016-1]  
Peter W. Martin  7

Who Owns This Article? Applying Copyright’s Work-Made-for-Hire Doctrine to Librarians’ Scholarship [2016-2]  
Paul Hellyer  33

From Rome to the Restatement: S.P. Scott, Fred Blume, Clyde Pharr, and Roman Law in Early Twentieth-Century America [2016-3]  
Timothy G. Kearley  55

Yellow Flag Fever: Describing Negative Legal Precedent in Citators [2016-4]  
Aaron S. Kirschenfeld  77

Mentoring Across Generations: The Training of a Millennial Librarian [2016-5]  
Renee Rastorfer Liza Rosenof  101

Review Article

Keeping Up with New Legal Titles [2016-6]  
Benjamin J. Keele Nick Sexton  119

Regular Features

Practicing Reference . . .  
Mary Whisner  141

Animal Stories for Good Reference Librarians [2016-7]
Possible Futures for the Legal Treatise in an Environment of Wikis, Blogs, and Myriad Online Primary Law Sources

Peter W. Martin

Law treatises published in e-book form have begun to appear. The article compares this latest format to alternatives, print and electronic, and traces the corporate and technological developments that have brought treatises to their current place and role among legal research tools. It concludes by reviewing a range of possible futures for this classic form of legal scholarship.

The Appearance of Law E-books

Law Treatises at the Dawn of Computer-Based Legal Research

Print Treatises and Online Primary Sources

Online Sources and Treatises Brought Under Common Ownership

Electronic Treatises and Online Primary Sources—Stage 1

Electronic Treatises and Online Primary Sources—Stage 2

Treatises in E-book Format and Online Primary Sources

The Open Web as a Possible Environment for Legal Commentary of Scale and Longevity

The Necessary Primary Sources Are Now Accessible

Missing Middleware and Data Structures

A Need for New Kinds of Publishers or Hosts

Existing Institutions Becoming Publishers of Significant Online Commentary

New Forms of Production and Dissemination—Blogs, Wikis, and...  

Concluding Reflections

The Appearance of Law E-books

¶1 Recently Thomson Reuters and LexisNexis began releasing e-book versions of some of their treatises and other legal reference works, in the United States and elsewhere.1 Wolters Kluwer has followed suit, publishing numbers of its Aspen

---

imprint law titles in e-book form. Bloomberg BNA appears headed in the same direction.\(^3\)

\(^2\) \(\S 2\) While the distribution strategies of these companies differ, the marketing materials of all four highlight a similar list of asserted advantages of this new electronic format over print, on the one hand, and online access to treatise-length commentary, on the other. Having works in e-book form, it is argued, allows one (1) to carry around many volumes’ worth of material on a phone, tablet, or laptop; (2) to search a book’s contents; (3) to move directly along its internal cross-references; and (4) with an Internet connection and subscription, to follow its citations of primary legal sources into the publisher’s online system.\(^4\) However, unlike books held within Westlaw, LexisNexis, or Bloomberg Law,\(^5\) once loaded on a portable device, these do not require Internet access for use. The lawyer or other legal researcher can consult an e-book anywhere. Not stressed, but also true, is that these e-books don’t require a subscription to the publisher’s database. A lawyer who relies on Fastcase or Google Scholar for her case research can, nonetheless, use *Nimmer on Copyright* published by LexisNexis or Thomson’s *Title Insurance Law* by Joyce Palomar. While she can’t follow the *Nimmer* citation links into LexisNexis or *Title Insurance Law’s* links into Westlaw, she can insert them into a browser aimed at the online service of her choice. Lastly, the software platforms employed by all four publishers enable readers to personalize their e-books with project-specific notes, tags, and bookmarks.\(^6\) For all of that, these remain, at core, minimally enhanced books, tied down by the print form for which they were originally prepared even more than their online counterparts. As a result, they fall short of what a commentary work of treatise-like scope might be in the present legal research environment. Not clear is whether it is in the interest of their publishers to transform them into anything more.

\(^3\) \(\S 3\) How the expert law treatise has evolved in the digital era has been as much a story of ownership and commercially grounded choice among competing revenue streams as of technology and fresh possibilities. This article begins by tracing the several stages of that still-unfolding story. It concludes with speculation about

---


\(^5\) Rather than follow the vendors’ shifting names for their services, classic and next generation, this article will refer to them by their historic names throughout.

the institutional arrangements that might foster the creation and maintenance of treatises free of the limits imposed by print and of the incentives that lead the major legal publishers to tie them to their proprietary online services.

**Law Treatises at the Dawn of Computer-Based Legal Research**

¶4 While the earliest law treatises predate the systematic dissemination of court opinions, by the early twentieth century this form of legal commentary had become an essential tool for lawyers and judges seeking to organize and understand the growing quantity of published case law. That was a period of monumental treatises, books that brought order to large sectors of the common law and caused authors’ names to become synonymous with their fields—evidence (Wigmore), contracts (Williston), trusts (Scott), and so on. Brian Simpson's history of the legal treatise, first published in 1981, documented the importance of those works but concluded that they marked a culmination. The title of his essay, *The Rise and Fall of the Legal Treatise*, summarized Simpson’s view of the status and future of the genre. Undoubtedly he was right to conclude that individual works of such dominance were not likely to be seen again. It is also true that even at the time Simpson wrote, other forms and outlets for scholarship were attracting more of the creative energy of U.S. legal academics. But empirically he was flat wrong. Law treatises proliferated during the latter half of the twentieth century. Many were summoned by new fields grounded on statute rather than common law. The new titles did not necessarily supplant old ones. Existing treatises were sustained through successive editions. In time these became the responsibility, in whole or part, of second- and third-generation authors and revisers. Reference works of this type expanded in scope and detail. Because of their very number, individual works and their authors grew less conspicuous. In time, most legal fields, from admiralty to zoning, were covered by multiple treatises marketed by the country’s then still numerous law publishers.

¶5 While coming in different sizes and formats, what distinguishes the legal treatise from other categories of commentary is that it aims to survey a complete field, providing organized, efficient, and relatively up-to-date access to the law on its many topics. Examples range from multivolume works covering the Uniform

---


Commercial Code, bankruptcy, or copyright to stand-alone books on practice under the civil procedure rules of a particular state. Such works may advocate a distinct view, favor one line of authority over another, or present greater clarity or certainty on a point than current case law. Yet in theory, no treatise holds authority independent of the statutes, regulations, and judicial opinions on which it is based. When written by a widely acknowledged and respected expert, lawyers and judges may, it is true, rely on the legal analysis set out in a treatise without performing a comprehensive, independent review of the underlying primary law sources, or yield to its persuasion on a point to which such sources do not speak clearly. On the other hand, when a treatise comes into direct conflict with statute or case authority, there is little doubt about which ought to prevail.

These are not books written to be read from cover to cover in the manner of a work of fiction, history, philosophy, or even a student introduction to the field. Their principal intended use is by the lawyer or other legal adviser, judge, or other decision-maker—assessing a problem; confronting an unfamiliar, novel, or complex situation; and needing a helpful starting point. Standing between the relevant primary authority and the legal professional, when they work as intended, treatises save time and improve the quality of legal analysis and decision making in some of the following ways:

- By providing an overview, good treatises assist the researcher in placing a particular issue or problem in broader context.
- Unlike annotations appended to statutes or headnotes attached to decisions, they organize the primary authority from the outside (not being a captive of either the statutory structure or any particular judicial schema). That is not to say that effective treatises do not strive to make it easy for researchers working from a statute or a judicial opinion to enter the work at the pertinent spot. Typically they do so by means of highly explicit analytic structures and indices keyed to the specialized terminology of the field.

10. See, e.g., In re Beaubouef, 966 F.2d 174, 178 (5th Cir. 1992) (quoting Collier on Bankruptcy); Kelley v. Chi. Park Dist., 635 F.3d 290, 303–04 (7th Cir. 2011) (quoting Nimmer on Copyright and Patry on Copyright). For a historical survey of judicial citation practice in England, see Alexandra Braun, Burying the Living? The Citation of Legal Writings in English Courts, 58 AM. J. COMP. L. 27 (2010).


13. Explanations of the important role of treatises in the legal research process remained quite consistent throughout the twentieth century. See, e.g., Frederick C. Hicks, Materials and Methods of Legal Research 154–59 (1923); Miles O. Price & Harry Bitner, Effective Legal Research 266–67 (3d ed. 1969); Christina L. Kunz et al., The Process of Legal Research 86 (4th ed. 1996).
Treatises synthesize the multiple strands of primary authority by identifying, summarizing, and analyzing the points of intersection among the principal statutory provisions, regulations, and judicial decisions.

On issues to which numerous judicial opinions speak, good treatises highlight the better reasoned or more persuasive, enabling researchers, through the use of citators and other updating methods, to trace their influence.

Where differences in treatment or application exist among jurisdictions, judicial circuits or departments, thorough treatises array them, providing references.

When opinions on a topic are confused, hard to reconcile, or conflicting, treatises are expected, at a minimum, to identify the difficulty. Generally they go further to attempt a synthesis or provide the author’s evaluation of competing approaches.

Finally, because law does not stand still, by the 1970s and 1980s most treatises had moved to a regular updating cycle. Whether by means of supplements designed to be slipped into the back of the original volumes, replacement pages that had to be inserted throughout loose-leaf binders, or periodic new editions, treatises were converted into ongoing information services. To the treatise user, updates offered currency. For publishers and authors, they provided a way to convert previously sold books into continuing sources of revenue.

The traditional publication model in which the author traded ownership and dissemination control for a share of revenue provided the framework for assuring that treatises could be maintained over lengthy periods of time. In varying degrees the publisher’s editorial staff might assist in the updating of a work, even while the initial author or authors remained actively involved. Later, when the original author or authors lost the interest or ability to produce revisions or subsequent editions, the publisher had both the authority and incentive to bring in successors.

Despite being tightly connected to primary authority, treatises were produced and marketed independently. There was no need for a treatise publisher also to put out the statutes and decisions to which its publications referred. True, firms

---

14. Writing in 1969, Raymond Taylor complained that not all publishers then followed this practice:

> While it is customary for reputable lawbook publishers to provide for appropriate supplementation of their books, some publishers seem unmindful of the fact that this custom is the only reasonable way of justifying a high initial cost for a book or set that soon will become obsolete if not kept up-to-date for a reasonable period of time.


that marketed editions of primary authority did generally use their line of treatises to promote them in minor ways. A common practice was to express citations within a publisher’s treatises in terms of the same company’s editions of case reports or statutes. However, citation norms, which required, where necessary, the addition of parallel citations, allowed the purchaser of a treatise published by West Publishing Company to use it with statutes published by the Michie Company or law reports published by Lawyers Cooperative Publishing. This “interoperability” enabled a large number of companies including Little, Brown & Company; Warren, Gorham & Lamont; and Matthew Bender & Company to publish highly successful treatises without having any involvement in the publication of primary authority.\footnote{16}

**Print Treatises and Online Primary Sources**

\textsection 10 During the 1980s, as the competition between Westlaw and LexisNexis became heated, the West Publishing Company saw opportunity for cross-platform synergy. It had a line of treatises. Mead Data Central, then the owner of LexisNexis, had none.\footnote{17} West began inserting Westlaw references at the conclusion of treatise sections.\footnote{18} Prepared by its editors, not the treatise author, these held out the promise of breaking through two limitations of the print work. While the treatise author’s citations might include few or no cases from the jurisdiction or circuit of particular concern to a researcher, these preformulated queries keyed into the relevant Westlaw database and, appropriately modified, could fill the gap. The added queries also dealt with a researcher’s need for the most recent authority. Even with systematic supplementation, treatises lagged primary law developments by months, if not years. Use of embedded Westlaw references offered greater currency. By the mid-1990s, West had shifted from a section-by-section approach to treatise integration with Westlaw to the insertion of appendices that explained how Westlaw could be used to extend treatise coverage.\footnote{19}

\textsection 11 The 1990s also saw publishers experimenting with straightforward ports of individual treatises to CD-ROM.\footnote{20} These were, as the current e-books are, a bit like the earliest examples of the horseless carriage. While not designed for the medium,
they offered distinct advantages over the original print form. Importantly, they enabled full-text searching. Some of their references could be followed with a mouse-click. Copy and paste functions facilitated easy extraction of passages for insertion in notes or a brief. And to the extent the authors or publisher personnel took advantage of the medium’s fluidity, electronic treatise editions could be kept dramatically more up to date. Nonetheless, these electronic works remained tightly conformed to the print original.

Online Sources and Treatises Brought Under Common Ownership

¶12 Law publishers were able to insert preformulated queries and appendices tying treatises to their online services; to move treatises onto optical discs, later into their online systems; and eventually onto portable devices as e-books because they held full copyright rights in them. Most treatises were initially prepared, updated, and periodically revised by individual authors—academics or practitioners expert in the field; but the standard publication agreement contained a full assignment of the author’s copyright to the publisher. In return the publisher made a number of commitments, including the promise to pay royalties.

¶13 Because publishers held copyright, as the law publishing industry consolidated in the final two decades of the twentieth century, so did treatise ownership. The paths traced by the leading treatises on land use regulation illustrate these twin points and their consequences. During the mid-1960s, Professor Robert M. Anderson of the University of Syracuse law faculty prepared a five-volume work. He assigned copyright to the Lawyers Cooperative Publishing Company of Rochester, New York, and in 1968 it published the American Law of Zoning. Professor Anderson sustained the work through two subsequent editions. By the time the publisher was looking for a fourth, two things had happened. Anderson had retired from teaching and treatise writing, and the publisher was no longer Lawyers Cooperative. The Thomson Corporation had acquired that company in 1989. Thomson subsequently transferred the Anderson treatise along with others to Clark Boardman Callaghan, a subsidiary it created in 1991 through the merger of two earlier acquisitions. Clark Boardman Callaghan assigned preparation of the fourth edition of the Anderson treatise to a member of its editorial staff. That edition appeared in 1995, not long before Thomson acquired the West Publishing Company. The West purchase led to further shifts in brand and editorial responsibility. A fifth edition of the work, one no longer carrying Anderson’s name, appeared in 2008 in loose-leaf format under the imprint of Thomson/West (today simply Thomson Reuters). It was prepared by Professor Patricia E. Salkin of the Albany Law School. Salkin (now dean of Touro Law Center) also carries responsibility for the fourth edition of West’s New York Zoning Law and Practice initially prepared by Robert Anderson and published by Lawyers Cooperative.21 Thomson’s successive acquisitions brought numerous competing works into the company’s treatise portfolio. They included Rathkopf’s Law

of Zoning and Planning (fourth edition), which was for years updated and revised by Edward H. Zeigler and is now in the hands of Sara C. Bronin and Dwight Merriam. Rathkopf came into Thomson’s ownership through its acquisition of Clark Boardman in 1980. A third treatise in the field, American Land Planning Law by Norman Williams, Jr. and John M. Taylor, was acquired along with Callaghan & Company in 1979. Thomson also owns and publishes works on the zoning law of several individual states. They include Connecticut, New Jersey, New York, Pennsylvania, and Ohio.

¶14 Reed Elsevier (which became the owner of LexisNexis in 1994) achieved a zoning collection of its own through acquisitions of the Michie Company, publisher of zoning treatises by E.D. Yokley22 and Daniel R. Mandelker,23 and Matthew Bender, publisher of both a single volume by Nyal A. Deems and N. Stevenson Jennette III24 and the massive Zoning and Land Use Controls by Patrick J. Rohan.25

¶15 Wolters Kluwer, too, assembled a large set of law titles through a series of publisher acquisitions in the 1990s—CCH in 1996; Little, Brown’s medical and legal division in 1996; and Wiley’s Law Publications division in 1998.26 The company’s purchase of Loislaw in 200027 brought the resulting treatise catalog together with an online legal research service. After the combination failed to capture significant market share, Wolters Kluwer licensed some of its treatise content to Westlaw and brought out a succession of specialty online services that incorporated its treatises. In late 2015 the company sold off Loislaw, while retaining its treatise portfolio.28

¶16 BNA survived as an independent publisher of legal commentary until 2012, when Bloomberg Law, a relatively new player in the online legal information market, purchased the company from its employee owners.29 That same year Bloomberg licensed exclusive online distribution rights to the Practising Law Institute treatise titles.30

¶17 In summary, U.S. law treatises have come to be owned by a handful of information conglomerates of global reach for whom online data services constitute the principal distribution channel and profit center, at least for their law holdings. The largest ones have acquired zoning treatises, copyright treatises, tax

25. Patrick J. Rohan, Zoning and Land Use Controls (1977–78) (10 vols.) (now overseen by Eric Damian Kelly, who is described as the work’s “general editor”).
27. Id.
treatises, commercial law treatises, in duplicate and triplicate. Most of these works are now updated by second- and third-generation authors and editors, whose names may or may not be associated with the titles to which they contribute. In some cases, they are respected academics or practitioners; in others, members of the publisher’s editorial staff.

**Electronic Treatises and Online Primary Sources—Stage 1**

¶18 In the late 1980s, convinced that a treatise designed for use within (rather than apart from) the emerging virtual law libraries could provide levels of value only hinted at by digital conversions of existing print works, this author prepared and delivered papers with such titles as: “What a Computer-Based Legal Reference Work Can and Must Deliver.”31 These reflections were prompted by and drew on the effort to create such a work, a treatise covering the field of Social Security law liberated from the limitations of print and fully integrated with a supporting collection of primary authority.

¶19 The project not only led to investigation of what new forms of presentation and functionality were possible and desirable in this new legal information environment, but also provided (during the years running from 1988 through 1999) a bruising education in the shifting priorities and fortunes and consequent turbulence within the commercial legal information sector. *Martin on Social Security* debuted online in LexisNexis on June 1, 1991. The publication contract reflected the legal information vendor’s plan for the work to serve as a prototype for a future line of CD-ROM-based treatises. Both require a bit of context setting.

¶20 During the early 1990s, neither Westlaw nor LexisNexis was a hospitable environment for an electronic treatise. Their content did not scroll. Neither system contained hyperlinks. Display was character-based (see figure 1). It was not until 1998 that these competing systems moved to a fully scrollable, WYSIWYG, clickable Web browser interface.32

¶21 A foundational principle, visible even in this crude first version of *Martin on Social Security*, is that a treatise designed for electronic delivery requires a tight relationship to a congruent, fully integrated primary law collection of statutes, regulations, judicial opinions, and—at least in this particular field—agency rulings. Yet to move from electronic treatise to primary authority in the online systems of the period required keying in a lengthy sequence of commands. These typed commands could be stacked, but the resulting character string was typically long, ugly, and challenging to enter without error. To move from one section of this online treatise to the cases in LexisNexis dealing with its topic, one had to type: \`.es; df; PMSSCA; TOPIC(K100) and dom! or recognize. Retrieving the pertinent

---


32. See Peter W. Martin, Reconfiguring Law Reports and the Concept of Precedent for a Digital Age, 53 VILL. L. REV. 1, 21–22 (2008).
subsection of the Social Security Act on the same point required keying `\texttt{lxt 42 usc 416;fo; h determination family status;vk1;fu.}` Issue by issue, the treatise supplied the scripts necessary for such moves, but employing them was not easy.\footnote{By 1990, LexisNexis had released a Windows-based client that made it possible for a user to block and copy such long command strings and paste them, thereby removing the need to rekey. However, Windows penetration of the legal market was slow. Furthermore, because of the way this application parsed text, it was not possible to block strings this complex with a click. The client software interpreted nearly all punctuation marks as word separators. Consequently, one had to bring the cursor from the beginning to the end of a command stack, with precision, to block it. A final point about this early Windows interface is that it did not expand the amount of text that a user could see. Until the late 1990s, LexisNexis and Westlaw delivered text by the terminal screenful, with each screen containing eighty characters across and twenty-four lines top to bottom, and some of that limited display real estate was occupied by navigation markers.}

\%=^2\% Because of these and other limitations of the online environment of that era, CD-ROM publication offered distinct advantages. The path was especially attractive as a means of delivering coherent collections that could be fit onto a single disk. At a time when most users connected to online systems through slow dial-up connections, having the data locally meant faster and more reliable response. Software available by 1990 allowed CDs to provide true hypertext, full-text searching, and greater scope for structuring the data and therefore the user’s interaction with it. In addition, law CDs offered greater ease in printing and moving text from treatise, statute, or judicial opinion to research notes, memorandum, or brief than the online systems. By 1993, the best offered a choice of WYSIWYG and character-based display.
¶23 Thomson’s Clark Boardman Callaghan subsidiary released *Social Security Plus* on CD-ROM in 1994 (see figure 2). While not the very first treatise to be issued in that medium, it was the first to be designed and written specifically for it. Critical to that initial product were the primary authority data available because of the contractual terms of the prior LexisNexis experiment. In addition to the core treatise, the 1994 CD-ROM held well over 9000 federal court decisions, the relevant statutes and regulations, agency rulings and manuals—all drawn from LexisNexis. 34

That allowed it to offer levels of interactivity that were, until quite recently, simply not possible using standard web technology to access content held by any of the online systems. By 1996 several other publishers of treatises and loose-leaf services were offering CD-ROM versions, either bundled with print or by separate subscription. 35 When they had the choice, lawyers of the period preferred doing research on CD-ROMs to the online services. 36

¶24 Despite, or perhaps because of, the considerable market demand, there was no widespread exploration of what may have been the greatest advantage of the CD-ROM format: the opportunity it afforded to cut loose from the design constraints of

34. By 1999 the case count was 12,480, and due to Thomson’s acquisition of West, the bulk of them were at that point drawn from Westlaw.
print on the one side and the limitations inherent in large, decade’s old mainframe
data systems to create a new kind of specialized reference. Without a print original to
which it had to conform, *Social Security Plus* was able to explore that space. Its design
suggests some of the possibilities that, years later, remain largely untapped.

¶25 The introduction to this CD-ROM version of *Martin on Social Security*
asserted that the central value of a reference work written for electronic use ought
to reside in the links between its topical architecture and the supporting primary
sources. It argued that the explanatory text written to accompany those links
should focus on three principal goals: (1) providing context, (2) highlighting
particularly important primary materials among the many accessible to the user, and
(3) noting when relatively recent changes in law or regulation called for care when
reading older decisions. Because the detailed provisions of the statute and regula-
tions on any point were a click away, the work did not attempt to repeat their every
qualification or condition. Its description of governing rules was more general. On
matters about which the researcher sought precise and authoritative information,
she was instructed to follow the links to the pertinent sections of the statute, regu-
lations, and other identified primary material.

¶26 A second major design difference dealt with the difficult spatial tradeoffs
between exposition and citations that print treatises cannot escape. Where should
the references to primary authority go? How much of a page should be given over
to them? Taking advantage of the interactive possibilities of the medium, *Martin
on Social Security* held all or most references out of the reader’s path so that they
did not intrude until the reader chose to pursue them.

¶27 Limited page real estate also forces difficult issues of comprehensiveness on
a reference work, particularly on issues that are handled differently throughout the
fifty states or the thirteen regional circuits of the U.S. Courts of Appeals. Footnotes
that go on for pages as they inventory authorities from all jurisdictions impose a
very real burden on the reader. Yet the same reader will be frustrated by a list that
omits authority from the jurisdiction of particular concern. *Social Security Plus*
demonstrated that an electronic treatise linked to cases, rulings, and other author-
ity through topical metadata or other forms of linked search can give its users far
richer possibilities—ranging from browsing through all cases on a particular topic
(arranged hierarchically by court) to pulling only those from a particular judicial
circuit to adding words or phrases to search within the set defined by author’s
treatise (e.g., all those on a point that involve epilepsy) (see figure 3).

¶28 Lastly, a treatise prepared to do its work in an electronic environment need
not be so linear or text bound as one written for print. Each section of the CD-
ROM version of *Martin on Social Security* carried links (out of the reader’s field of
vision until summoned) to all other closely related sections. The work also con-
tained interactive diagrams that guided users along a decision tree to the ultimately
governing primary authority. Each branch of that tree offered those who were
uncertain about the meaning of the operative terms a direct path to the regulation
defining them. Commentary prepared for electronic delivery need not be limited
to text. It can incorporate images, audio, and video.
Electronic Treatises and Online Primary Sources—Stage 2

§29 Over the past decade and a half, advances in the web technology available to the major legal research services, together with the widespread availability of high bandwidth Internet connections, have largely eliminated the technological advantages of having a treatise and its companion materials on disk. As a result, CD- and DVD-based law publications have effectively disappeared from the market.\(^{37}\) By 2000 treatise content placed online as part of any of the major legal research services could be navigated through a graphical user interface. Programmatically inserted hyperlinks provided easy-to-follow pathways from treatise citations to the referenced statute sections and case authority. Block and copy and print were only mouse-moves away.

¶30 Until LexisAdvance and WestlawNext began to break down their rigidly compartmentalized data structures, however, a researcher had to know about a particular treatise, make her way to it, and select it for search to access its pertinent material. Citations to treatise provisions contained in judicial opinions did not provide a clickable path; they were not linked. It was only when the two major services began working toward their present global search paradigm that discovery of relevant treatise content in the course of searching primary authority became possible. Initially, this was accomplished through a window showing commentary and other items of possible interest placed beside the search results drawn from the database targeted by the user.\(^{38}\) With today’s latest generation systems, searches are launched by default against a full range of database content, including treatises. As run on WestlawNext, Lexis Advance, or Bloomberg Law, a search on “area variance” or “amortization of a nonconforming use” will retrieve commentary sources, including treatise sections drawn from works owned or licensed by the service provider, in addition to cases and statutes. And by default, the selection among treatises and between treatise content and other sources of commentary such as journal articles and legal encyclopedias will be governed by the service’s ranking algorithm, not the user.

¶31 Despite loading the treatises they own onto their comprehensive data services, the major publishers still maintain and market the parent print editions. Indeed, it is possible that some few treatises with active authors may continue to generate more revenue for publisher and author in print than in electronic format. Likely, little of that revenue is drawn from fresh customers. Those, however, who have long relied on the print version of a treatise are loath to let go. Among all types of legal research materials (case reports, statutes, journal articles, and so on), treatises and their like are the most likely to be consulted in print rather than digital format.\(^{39}\) But “most likely to be consulted in print” should not be confused with “more likely than not.” Since these are works for which one must continue to pay to receive updates and revisions, online use is likely to be more economic for the occasional user. For a firm or practice group, an online version avoids the challenge of sharing one or more physical copies. Furthermore, there is strong evidence that lawyers, particularly those recently graduated from law school, prefer to do nearly all their research at a computer, including review of treatises and similar secondary materials. Recent ABA technology surveys reveal that more than twice as many lawyers use an online source when researching a topic in a treatise or similar secondary reference as turn to print; and the gap between the two is widening.\(^{40}\) At least one major publisher is reinforcing that preference with financial incentive through steep increases in the price of treatise supplements.\(^{41}\)

38. On Westlaw this feature was called “Results Plus.” LexisNexis had a comparable “Related Content” window.
40. See id. at V-xv (50.1% versus 22.0% for 2013 compared to 42.6% and 29.1% for 2010); see also STEVEN A. LASTRES, REBOOTING LEGAL RESEARCH IN A DIGITAL AGE (2013), http://www.llrx.com/files/rebootinglegalresearch.pdf.
41. That is the Svengalis report on Thomson Reuters. See SVENGALIS, supra note 37, at 36.
POSSIBLE FUTURES FOR THE LEGAL TREATISE

¶32 Recall that these are not works to be read through. They are consulted, episodically, as needed. In electronic form, full-text search and hyperlinked navigation aids can dramatically speed access to the part or parts of a zoning treatise on point on any issue, such as the required amortization of a nonconforming use. Cross-references can be followed with a click. Once pertinent sections are found in an online work, there is no need to leave one’s desk or computer to read the cited authorities. Electronic publication also permits better integrated and more frequent updates.

¶33 To recapitulate, over the past three decades the rights to existing treatises have been gathered from the previous array of independent and competing publishers into large portfolios held by two conglomerates (three, if one includes Wolters Kluwer, the owner of Aspen Publishers, and CCH, or four, if one includes the most recent entrant, Bloomberg Law42). These companies have embedded the treatises they own within comprehensive subscription services.43 Online these commentary works have greater functionality but far less distinct visibility. And they are unavailable to nonsubscribers. The value of a Thomson Reuters treatise online cannot be separated from its Westlaw context. Its Matthew Bender counterpart is available only as part of LexisNexis. And even for subscribers, depending on the terms of their contract, consultation of treatise content may trigger a substantial additional charge. If the title is not included in a subscriber’s flat-rate plan, accessing a single section may cost up to $80.44

¶34 In print, treatises can be consulted without incurring incremental charges, they can be shared by multiple researchers, and they can be used with the full spectrum of online legal research services. These include the many smaller services in the United States (both free and fee) that have in recent years succeeded in securing respectable market or use share with collections of primary authority. While the likes of Fastcase, Casemaker, and Google Scholar don’t have online commentary, nor are they the targets of electronic treatise links, they can be used together with print treatises published by others.

42. Bloomberg Law offers secondary sources alongside its primary law databases. These include a decade or so of law journals and treatises published by the Practising Law Institute (PLI) and BNA. See generally Robert J. Ambrogi, Can It Be a Contender? Bloomberg Law, 70 OR. ST. B. BULL. 15 (2010). Very recently the company launched a specialist service combining commentary and primary law material in the field of financial services law. See Bloomberg Law: Banking, BLOOMBERG BNA, http://www.bna.com/banking-law/ (last visited Nov. 17, 2015).

43. As noted previously, supra ¶15, Wolters Kluwer’s treatment of its treatise inventory has taken a somewhat different path. By the time it sold Loislaw, only a relatively small number of the company’s legal titles were accessible through that service. Some of its strongest titles were bundled with appropriate primary law materials and offered online as specialist information services. See, e.g., Copyright Integrated Library, WOLTERS KLUWER LAW & BUS., http://www.wklawbusiness.com/store/products/copyright-integrated-library-prod-00000000010032166 (last visited Nov. 17, 2015); Products Liability Integrated Library, WOLTERS KLUWER LAW & BUS., http://www.wklawbusiness.com/store/products/products-liability-integrated-library-prod-00000000010016234 (last visited Nov. 17, 2015).

Treatises in E-book Format and Online Primary Sources

¶35 The newly released e-books might appear to offer the same benefit. Yet, unless one also subscribes to the publisher’s online service, the target of an e-book’s citation links, a major feature of the format is rendered valueless. Furthermore, it is not at all clear that in their present form and pricing they offer enough of an advantage over print, on the one hand, or over online access, on the other, to achieve significant market penetration. So far law publishers have rejected the Amazon pricing model; the current edition of American Law of Zoning costs the same in print and e-book form ($896). For subscribers to the online service that already holds a treatise, the only advantages the new format offers are a fixed price and continued usefulness at times when network connections are unavailable. When accessible, the online format provides substantially greater functionality.

¶36 To begin, the standard e-book applications are not designed for the type of use that law treatises normally receive. They have instead been optimized for sequential reading, for starting at the beginning of a work and paging through to the end. Ready access to a linked table of contents and the ability to bookmark and to search on individual words or exact phrases provide their only pathways out of that linearity.

¶37 The navigation features standard with online treatises and the now-disappearing disc publications are markedly superior. Those modes of digital publication remove the barriers resulting from the arbitrary division of printed text into volumes and pages. Readers are able to scroll as they examine an entire section, crossing page breaks with no loss of concentration. They can click through to content that, in print, resides in another volume.

¶38 With e-books, those print boundaries are back. The reader must choose a volume and then flip pages (sometimes back and forth if an important point is arbitrarily bisected). While e-books accommodate cross-reference and footnote links, standard e-readers deliver the reader to a page, not a point. This is particularly problematic with footnotes. It means that when one touches or clicks on a footnote callout, one merely ends up on the page where the referenced note appears, having to remember whether it was note 34 or 37 that was the goal. In contrast, all of the major online services deliver the note to which a link has led at the top of the browser screen. One system goes further and highlights the note’s background. Another system places footnote content in a popup window whenever the cursor hovers over the callout. All major services enable immediate access throughout to tables of contents that position the current paragraph or section in context. These are not flat tables through which one must page, but scrollable, interactive ones. Chapter headings can be expanded to show subchapters, subchapters to show sections, and so on. Far greater search capability and more useful display of search results also come with the online environment.

45. The Thomson Reuters e-book software, ProView, still a work in progress, does endeavor to address these shortcomings. In addition to providing reasonable Boolean search capability, it places links to material at the top of the screen and provides a table of contents that is both context sensitive and interactive.
¶39 Treatises embedded in the major online services are at once enhanced and diminished by their surroundings. A researcher who does not know of a work or its value may discover it in a set of search results. Those results will place it next to related primary and secondary materials. Once within a treatise the reader may be furnished pathways to related material beyond the author’s footnotes. The online versions of a number of the Thomson Reuters treatises now provide case law links that harness the West Key Number System and cross-reference links to discussion of the same topic in other treatises and practice guides held within the system.46 On the other hand, the merger of individual treatises into a vast ocean of content, alongside journal articles, practice guides, and directly competing works, ties their value ever more tightly to the database system of which they are a part. The individual work’s distinct vantage point or analytic framework, even its quality and reputation, are inevitably submerged. Whatever their stature, all treatises sit on the same plane (or within the same results window) as student journal notes, ALR annotations, and legal encyclopedia entries. Indeed, they may fall below the others in the service’s relevance ranking.47

¶40 Imagine, for a moment, an individual or a firm weighing which among major copyright treatises to acquire for ongoing use. The candidates would include Goldstein on Copyright, Nimmer on Copyright, and Patry on Copyright, published respectively by Wolters Kluwer, Matthew Bender (LexisNexis), and Thomson Reuters. All are available in print form, with regular updates, at a substantial subscription price. All three are also available online. In that (more useful) form, the choice would be heavily, if not decisively, influenced, would it not, by the comprehensive database employed by the individual or firm for case law and statutory research? An intellectual property lawyer who uses Westlaw would need a powerful attachment to the Nimmer treatise (far and away the most cited treatise of the three) to switch to LexisNexis, its online home, or even to justify acquiring and maintaining it in print. Were LexisNexis to offer Nimmer as a stand-alone online product, as Wolters Kluwer offers Goldstein on Copyright, that might well supplant the print. Conceivably the publisher’s hope for the e-book version is that it could do the same. At current pricing and functionality, that seems unlikely.

The Open Web as a Possible Environment for Legal Commentary of Scale and Longevity

The Necessary Primary Sources Are Now Accessible

¶41 Until very recently, a treatise had to reside within the same data space—that is, on the same disc or within the same commercial database—as the primary law sources it analyzed to take full advantage of the digital environment. That is no longer true. The primary law materials to which most treatises refer (the pertinent statutory provisions, regulations, agency materials of other kinds, and decided

46. See, e.g., RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 1:49, Westlaw (database updated Sept. 2015).

47. WestlawNext does offer a sort by citation frequency, but since it treats the company’s encyclopedias as single titles, they are ranked ahead of even the most cited treatise.
cases) have moved to the open web. No longer does an author or a publisher preparing a treatise designed to access supporting authority by linked citation and search need to secure, reformat, and update all the underlying sources as was necessary during the 1990s.

¶42 Concededly the web’s free legal materials lack the chronological depth and comprehensiveness of the major fee-based legal research services; however, those systems themselves have changed in ways that make it unnecessary for commentary to be located within their boundaries to connect directly to documents they hold. A text placed elsewhere on the web can link to cases, regulations, statutes, law journal articles, or other commentary on Bloomberg Law, LexisNexis, Loislaw, Westlaw, and most of their competitors. True, such links provide access only for subscribers to the target service, but it is possible for a work to give its readers a choice of source for cited and linked-to material or to be issued in multiple versions.

¶43 Because a treatise or shorter work can link to all cited primary authority, as well as law journal articles and other secondary material, without being located behind the same fee barrier, such a work can be made available, with full value, to subscribers to any of the major online services. Indeed, because of the existence of open access legal databases, such a work can also deliver a high degree of value to individuals who subscribe to none of the commercial systems.

¶44 For the author or independent publisher, distribution of commentary on the open web would appear to avoid having it buried deep in the pile of overlapping titles that the major online services have accumulated. The entities that own most U.S. legal treatises are, today, subject to incentives that seem quite at odds with the interests of individual authors.

¶45 Despite favorable conditions, enduring works of legal commentary designed for electronic delivery have not yet begun to appear in number on the Internet. Before that can occur, several issues, technical and institutional, have to be resolved.

Missing Middleware and Data Structures

¶46 Those who regularly work with commentary in digital format have been brought to expect a rich and intuitive set of navigation options, including full-text search. They assume that all explicit references to primary authority will be hyperlinked to the cited texts. If they are regular users of a particular online collection of primary materials, comfortable with its interface, familiar with its case citator and statutory annotations, and facile in pursuing fresh search trails from a relevant case or statutory section, they will carry a strong preference for online legal content that doesn’t force them into a different research environment when they follow its links. These factors produce the first challenge to the placement of commentary works on the open web. Binding a treatise through exclusive links to a particular collection of primary authority (Westlaw, say, or Bloomberg Law, or even Google Scholar) dramatically reduces its usefulness to those who lack access to that collec-

48. All four of the named services have link formulas that will retrieve a cited document when elements of its conventional citation have been embedded in them.
tion or are simply habitual users of some other one. The publicly sponsored primary authority sites do not solve the problem. Although they represent an attractive option for some users, compared to the commercial services they lack comprehensiveness. Moreover, they do not present a consistent interface, and, in far too many cases, do not enable retrieval using standard citation parameters. It is for good reason that legal professionals who can will turn to one of the commercial services that gather, organize, and add value to public law documents.

¶47 A partial solution lies in links that provide the user with a choice of source. Limited examples already exist (see figures 4 and 5). Because most of the commercial legal information services respond to links derived from standard citations or preformulated queries, and because general-purpose Internet search engines will, in similar fashion, retrieve legal documents from free sites that are open to them, this approach offers promise.

¶48 The technology required to generate “multiple-choice” links is straightforward. These links can even be produced on the fly. It would not be difficult to create a “citation link server” capable of receiving a link request delivered in a specified format and redirecting it to the legal database or law site of the researcher’s choice.49

---

**Figure 4**

Choice of Source Law Journal Links in SmartCILP Published by the M.G. Gallagher Library, University of Washington

<table>
<thead>
<tr>
<th>46 IIC: INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW, NO. 2, MARCH, 2015.</th>
</tr>
</thead>
</table>

**Figure 5**

Choice of Source Case Law Links in an Experimental Version of Martin on Social Security

---

**References**

- Act:
  - Misrepresentation: 42 U.S.C. § 402(q)(5)


- Cases:
  - In general: [Google] [Casertext] [Ravel] [LexisNexis] [Westlaw]
  - Incapacity and failure to file: [Google] [Casertext] [Ravel] [LexisNexis] [Westlaw]
  - Involving claims of Agency misrepresentation: [Google] [Casertext] [Ravel] [LexisNexis] [Westlaw]

- Social Security Rulings

- POMS: GN 00204.000 - GN 00204.034

49. In fact, a utility of this sort is forthcoming from Cornell’s Legal Information Institute (https://www.law.cornell.edu/).
¶49 A second form of integration suggested by the CD-ROM version of the Social Security treatise described earlier would require a more complicated data and search utility, one capable of associating topical tags with large sets of primary law documents. Going beyond static links between commentary text and individually cited authorities, the concept here is of a set of data tags that identify a population of primary law documents as lying within the scope of the commentary work and even go further, subdividing them along issue, topical, and jurisdictional lines. Such tags would be analogous, in a way, to the Thomson Reuters Key Number topic structure, the LexisNexis headnote topic hierarchy, or the topic categories of Bloomberg Law, but both organization and granularity would be tied to a specific treatise. Like the treatise itself, these would have to reside outside the individual information services relied on for primary authority. A case identified by an author as within the scope of a treatise and pertinent to one or more of its topics would for this purpose be specified by citation and tagged appropriately. By searching on the author-assigned tags, a researcher working from the treatise would be able to retrieve all cases bearing on a particular point, simply by following a link. Ideally, all tagged cases associated with a treatise would also be indexed in full text so that those following a query link based on the author’s tags could further refine the search. The software and database tools of which such a system might be constructed exist (see figure 6), but working examples in the field of law are few.50

A Need for New Kinds of Publishers or Hosts

¶50 If a public-interest organization or commercial entity were to create the linking and tagging utilities described above, would authors and publishers come? Without enthusiastic sponsorship combined with advocacy for and guidance on use of those integration tools, together with some conspicuous prototypes, it seems very unlikely that individual authors would discover and use them. Assuming clear theoretical advantages of an independent presence on the web over inclusion in the holdings and database of any of the major legal information providers, authors must still be persuaded of those advantages and helped to pursue them.

¶51 Writing more than two decades ago, Henry Perritt argued that the theoretical advantages of electronic publication would not prevail over print so long as print publishers continued to offer more of the “types of value” historically bundled together with book publishing.51 Perritt’s inventory of those “types of value” included quality assurance (both at the time of author selection and subsequently); support and assistance to authors in the preparation, organization, and maintenance of their works (on matters ranging from format and index preparation to updating); production; promotion; distribution; and sales.52 As noted previously,

---

50. There are a number of resource tagging tools on the web. Among them are Delicious (http://www.delicious.com) and CiteULike (http://www.citeulike.org). It is, however, the capability of the Zotero software to share tags that the author has found most adaptable to cited legal materials. See Zotero Groups, Zotero, http://www.zotero.org/groups/ (last visited Nov. 17, 2015). For an implementation tagging more than 4500 Social Security decisions, see Social Security Cases, Library, Zotero, http://www.zotero.org/groups/social_security/items (last visited Nov. 17, 2015).


52. See id.
with enduring law treatises, publishers have also assured maintenance over time, even to the point of bringing in collaborating and successor authors as needed. These multiple forms of value, commonly bundled with or lying in back of books, have been shaped by significant needs of authors and information product consumers. Perritt’s thesis was that while electronic media make it possible for “traditional information supplier functions to be disintegrated and performed by multiple suppliers in the place of single authors or publishers or combined in different ways,” the need for someone to perform them remains.\(^{53}\)

\(^{52}\) To date, no clear examples of institutional arrangements that offer comparable levels of value to potential authors of electronic legal commentary and consumers of such works have emerged. Yet suggestive possibilities do abound. Some of these involve existing organizations taking advantage of opportunities opened by electronic media and the web. Others consist of efforts to adapt novel forms of

---

53. See id. at 21.
intellectual production and distribution that have emerged on the web to the domain historically served by the law treatise. A few examples follow.

**Existing Institutions Becoming Publishers of Significant Online Commentary**

¶53 Some law firms have become serious web publishers, offering their clients and potential clients online or e-mail-delivered newsletters and exposition of the law on specific topics. In most instances, however, these works are not designed to be a starting point for additional research or reference works for legal professionals. Consequently, links to primary authority are rare. Organizations with distinctive issue-defined missions, legal information institutes, and other nongovernmental organizations, even public bodies focused on particular fields, are also potential online publishers of expert commentary. The Sargent Shriver National Center on Poverty Law, which supports the work of lawyers serving indigent clients, has taken a print treatise and moved it to the web with links to cited authority. The U.S. Court of Appeals for the Seventh Circuit maintains an online *Practitioner’s Handbook*, containing detailed commentary on federal appellate practice, richly supported by citations to primary authority. For a time, it was structured as a wiki.

**New Forms of Production and Dissemination—Blogs, Wikis, and . . .**

**Law Blogs**

¶54 The “blog” is a versatile genre. Within the field of law, blogs have been used to complement works of treatise-like scope and duration, but not to supplant them. Numerous treatise authors have or have had a blog. Charles Hall, author of *Social Security Disability Practice* and lead attorney for a law firm engaged in that line of representation, writes a “Social Security News” blog. Patricia Salkin, author of several land use books, including the *American Law of Zoning*, blogs on land use law and zoning. For several years William Patry, author of a multivolume copyright treatise, maintained a highly regarded blog in that field. All three illustrate ways in which a blog can be a natural extension of a treatise author’s

56. There are exceptions. The website of one highly regarded Social Security attorney is exclusively devoted to case references and other materials relied on by others practicing in the field. See schnaufer.com, http://www.schnaufer.com (last visited Nov. 17, 2015); see also Articles for Attorneys, The Law Offices of Martin and Jones, http://www.theatlantadisabilitylawyer.com/articles-for-attorneys/ (last visited Nov. 17, 2015).
59. See infra ¶ 56.
62. See supra ¶ 13.
ongoing need to track and analyze fresh legal developments within its scope. They also demonstrate how a blog can be used to display the author’s expertise and give greater visibility to the published work itself. Charles Hall’s blog includes links to an order form for his book and also to his firm’s site.66

§55 The inherent structure of a blog is chronological. It is therefore well suited to updating and current awareness. While postings on specific topics inevitably accumulate over time,67 neither the nature of the software environment nor the expectations of those visiting such a site encourage potential authors to see the blog format as congenial for constructing and sustaining a treatise-length work. When William Patry ended his blog in 2008, he was confronted with strong user demand that it be archived. In the end, he yielded,68 but only after explaining that despite the care that he put into writing its entries, he “regarded them as ephemera.”69

WIKIS

§56 A more likely electronic framework for handling some of the functions addressed by the traditional book publishing model is the “wiki” approach to collaborative authoring. Its content structure enables topical organization accompanied by limitless cross-linkages. Collaboration, including, importantly, collaboration over time (ongoing revision, elaboration, updating) is key to the concept, as reflected in its best known implementation, Wikipedia.70 Wikipedia itself contains a substantial amount of legal commentary.71 The companion textbook project (Wikibooks) contains a law category, but so far it contains comparatively little U.S. content.72 A few nonprofits (including Cornell’s Legal Information Institute73 and the Michigan Poverty Law Program74) sponsor openly accessible and editable law wikis. At least one law practice community tried to sustain a wiki as a way to organize, hold, and share member expertise, limiting both access and editorial privileges to members of the group.75 Within law firms, the wiki structure has been adapted to share knowledge and information among members of work groups and across

73. See Wex, Legal Information Inst., http://topics.law.cornell.edu/wex/ (last visited Nov. 17, 2015).
75. This wiki was limited to participants in a listserv whose members represent individuals pursuing Social Security claims. See SSL-Social Security Law for Non-Government Lawyers, http://sympa.theombudsman.com/sympa/info/ssl (last visited Nov. 17, 2015).
The Sargent Shriver National Center on Poverty Law has created a wiki containing “resources of interest to the new legal aid lawyer,” at least one of them being the Poverty Law Manual for the New Lawyer, previously published in print. Yet, to date, the wiki framework has not proven, in and of itself, to be the answer to treatise construction and maintenance. As the Seventh Circuit discovered with its Practitioner’s Handbook, converting an existing print work to a wiki, together with an invitation to any and all users to improve and update its content, can lead to discouraging results.

¶57 Lawrence Lessig’s Remix identifies several features shared by successful and sustainable Internet ventures built on collaborative or community production of content (and also approaches that appear not to work). Drawing on such examples as Flikr, YouTube, SlashDot, and Yahoo! Answers, Lessig argues that it is important to give contributors something they need, combined with a sense of ownership or responsibility. Simple calls for volunteerism are not enough. Ideally, users contribute value as a byproduct of getting something that they need. What they need may include sharing, helping, or showing their expertise. Overt commercialism can be a deterrent, and terms and conditions that appropriate ownership and control of all contributions to the site will almost surely be one. So far the sweet spot for collaborative production or maintenance of large-scale legal commentary on the web has not been discovered.

AN OPENING FOR NEW PUBLISHERS AND OTHER NOVEL WEB STRUCTURES?

¶58 One recent web venture, Spindle Law, tried a more radical break with the institutional and structural features of the conventional law treatise. Spindle Law’s ambition was to cover the principal practice areas of U.S. law with commentary supported by references to primary authority. This was to be no simple port of the print treatise model to electronic media but, according to the site, “a new kind of legal research and writing system.” Like a wiki, Spindle Law invited all registered users to add to its content, articulating propositions of law on a specific

---

76. See, e.g., David Hobbie, Technology: Legal Web 2.0: Personal Knowledge Management, LAW PRAC., Mar./Apr. 2010, at 26.
78. An Internet law treatise, hosted by the Electronic Frontier Foundation (EFF), provides another example. With the ambition of providing a “collaborative treatise summarizing the law related to the Internet with the cooperation of a wide variety of attorneys, law students and others,” the EFF placed a guide originally published in 2003 on the Internet in wiki format. Years later it remains in “beta.” The last changes appear to have been made more than five years ago. See Internet Law Treatise, http://ilt.eff.org/index.php/Table_of_Contents (last visited Nov. 17, 2015).
80. See Lessig, supra note 79, at 186–96.
81. Id. at 196–213.
82. Id. at 243–48.
point ("rules" or "exceptions"); adding, editing, or vouching for authorities in support of a point; and inserting comments. The topical architecture and editorial oversight within a branch of law were to be provided by Spindle-designated editors, termed "branch managers." Navigation was highly interactive. Search was controlled by topical structure. An extensive set of icons were available to signal case outcome, jurisdiction, and the nature of a legal proposition (e.g., topic, rule, rule with exceptions, exception to a rule). Cited authorities were linked to the full text at multiple sites, both free (e.g., Google Scholar, the Public Library of Law) and some that charge a fee (LexisNexis, Westlaw, Fastcase). A utility facilitated the exportation of both text and citations to a user’s research notes. Tellingly, Spindle Law failed to generate sufficient authorial involvement across the fields of law to attract a substantial user base. After a short span of time, it disappeared.

A more recent startup, Casetext, has also pursued a crowdsourcing model of commentary production. It is far too soon to see whether its combination of distinct communities of interest and helpful authoring tools will enjoy greater success than Spindle and whether, if successful, it will break out of the scope and temporal limitations inherent in the blogging genre.

**Concluding Reflections**

¶59 U.S. law treatise publication has consolidated in a handful of firms. Their incentives all point toward integration of commentary material of all sorts into their respective comprehensive, subscription-based information systems. Locating a treatise on the web outside those systems could well offer would-be authors, individually or in large-scale collaborations, a broader audience, particularly if that placement did not deny users the features of their favorite comprehensive source whenever they followed one of its links to a cited case, statute, or journal article.

¶60 What are the odds that authors will respond and create treatises or successor forms of quality legal commentary on the open web? The answer lies ultimately not in the existence of a congenial information environment (it already exists) or appropriate information management tools and web utilities (they are not difficult to conceive or build), but rather on whether entities emerge that are able to recognize the opportunity and to create the institutional supports and incentives necessary to draw legal authors into a new form of sharing individual and collective expertise.

¶61 The dominant commercial legal information services, having accumulated vast quantities of commentary through merger and acquisition, commentary to which they hold copyright and which they pay to sustain, are not likely to permit any of those assets to escape to the open web or be linked to primary law collections other than their own. They are also in a position to offer financial incentives to freelance writers and to deploy their own editorial personnel to create fresh content in legal fields not yet adequately covered. Unquestionably, they have the capability

---

to build or commission or reconfigure existing legal treatises in ways that break free from print constraints and are available apart from their comprehensive online libraries. But the brief history of the Internet strongly suggests that innovation is more likely to arise from other sources.

¶62 Putting out existing treatises in e-book form represents a clumsy attempt to map legal commentary publication onto the explosive growth in electronic distribution of other forms of book-length writing. Without far more sophisticated software, reconfiguration of content to fit this very different environment, altogether different pricing strategies, or a combination of all three it is not likely to change how lawyers, judges, and other professionals work with this kind of material.

¶63 It does seem probable that the fresh potential of the web, including the possibilities it opens for collaborative authorship and novel forms of presentation, will ultimately draw a new set of commentary publishers or hosts. Some may want their offerings to reside on the open web, available without charge to all who would find and use them. Others will explore the fresh possibilities for sharing expertise and information within an organization or practice community. Still others may pursue commercial opportunities through small-scale electronic publication of legal commentary. For treatises truly to bloom in this new environment, their sponsors, hosts, or publishers will have to find an effective mix of incentives to induce individual expert authors (academics, experienced practitioners) to undertake and later sustain large works of authorship, a credible framework for building a coherent and reliable work out of voluntary contributions by many, or some combination of the two.

¶64 What enticements might lead the expert lawyer or the academic specialist to prefer to publish on the open web? One possible answer is full personal control—retention of copyright and all that makes possible. At the other extreme, the collaboration possibilities on the open web may draw authors who would never imagine undertaking a full treatise on their own. Where personal financial return fits is a puzzle. More than a few legal academics of my generation bought second homes and financed their children’s college education with royalties from commercially published commentary works. If their treatise was a success, and the field active, those works continued to generate revenue and consequently royalties through annual or semiannual updates. Author returns on that scale seem unlikely to continue in the digital environment. However, the prospect of royalties alone cannot explain the authorial effort expended on most legal scholarship. Undoubtedly, a powerful motivator for the production of works of this sort has always been the desire to share and show one’s knowledge, to have professional impact, to gain recognition. There are by now countless examples that demonstrate how placing valuable content on the open web can expand the audience for it. For some potential treatise authors, perhaps a significant number, that may provide the most powerful inducement.
Who Owns This Article? Applying Copyright’s Work-Made-for-Hire Doctrine to Librarians’ Scholarship

Paul Hellyer**

The Copyright Act of 1976 provides that works—including scholarship—written within the scope of employment belong to employers. But copyright law and actual practices widely diverge. The academic community generally allows librarians to claim ownership of their writing, even when that ignores copyright law. Mr. Hellyer supports copyright ownership by librarians, and calls for the law and common practices to be harmonized.

Introduction

Part I: The Work-Made-for-Hire Doctrine

Are Librarians Employees Under the Work-Made-for-Hire Doctrine? .......................... 34
Does “Scope of Employment” Include Scholarship? Consider Professors’ Scholarship ...................................................... 35
Does “Scope of Employment” Include Librarians’ Scholarship? ................................. 39
Applying the Doctrine ................................................................................. 43
The Public Reference Librarian ................................................................. 43
The University Cataloger ................................................................. 43
The Tenure-Track University Reference Librarian ................................................. 44
Who Owns This Article? ........................................................................... 44


Intellectual Property Policies at ARL Universities ......................................................... 45
Copyright Notices in Librarians’ Articles ................................................................. 50
Submission Guidelines in Library Journals ................................................................. 52

Part III: Librarians’ Scholarship Should Belong to Librarians .......................... 53

Introduction

Many librarians publish scholarship under the assumption that they own the copyright to their own work, but the ownership question is far from clear under copyright’s work-made-for-hire doctrine. Generally, employers own the copyright to any works written by their employees acting within the scope of their employment.1 Commentators have closely examined the question of who owns

---


---

* © Paul Hellyer, 2016. I am grateful to James S. Heller and Benjamin J. Keele for their helpful feedback.

** Reference Librarian, William & Mary Law School, Williamsburg, Virginia.
scholarship written by professors, but the ownership of librarians’ scholarship has been largely unaddressed. This omission is significant because librarians and professors are situated differently in the work-made-for-hire analysis.

¶2 In this article, I consider the copyright ownership of librarians’ scholarship, such as books, articles, bibliographies, blogs, or other writings that are published for an audience beyond the librarians’ home institutions. I assume without discussion that materials written by librarians specifically for their libraries, such as content on a library’s website, a collection development plan, or teaching materials, are works made for hire belonging to their employers.

¶3 In the first part of this article, I present a legal analysis of the work-made-for-hire doctrine as applied to scholarship written by librarian employees. In part II, I review actual practices with respect to copyright ownership of librarians’ scholarship and find that librarians’ ownership is almost always recognized. In part III, I conclude that, as a matter of policy, librarians should own their scholarship in keeping with long-standing traditions.

**Part I: The Work-Made-for-Hire Doctrine**

¶4 Two broadly worded sections of the Copyright Act outline the work-made-for-hire doctrine, supplemented by a large body of case law and secondary sources that interpret and apply the sections. Section 101 defines an employee’s work made for hire as “a work prepared by an employee within the scope of his or her employment.” Section 201(b) provides that “in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”

¶5 Section 101 also recognizes that, for certain types of work, independent contractors may create works for hire, provided that the parties expressly agree to this in writing. Although librarians might create works as independent contractors, there should be no question as to who owns the resulting works because of the requirement for an express written agreement. Accordingly, this article focuses on the work-made-for-hire doctrine as applied to librarian employees.

**Are Librarians Employees Under the Work-Made-for-Hire Doctrine?**

¶6 In *Community for Creative Non-Violence v. Reid*, the U.S. Supreme Court established that the usual law of agency determines whether someone is an employee for purposes of the work-made-for-hire doctrine. *Reid* establishes that,

---

2. I use the term “scholarship” in a broad sense. My use of the term does not necessarily denote quality (as quality would be irrelevant to the work-made-for-hire doctrine), but rather it refers to any copyrightable contribution to an academic field.

3. I also assume without discussion that librarians’ fiction, poetry, or other writings unrelated to their professional field and written at home are not works made for hire.


5. *Id.* § 201(b).

for purposes of copyright law, most librarians are employees, and their libraries or parent institutions are their employers.

¶7 For the small number of librarians who are unsure whether they are employees or independent contractors, we turn to the factors set forth in *Reid*. In that case, a nonprofit organization that served the homeless hired a sculptor to create a sculpture, and the parties later disputed the copyright ownership of the resulting work. In deciding that the sculptor was not an employee, the Supreme Court identified the following factors, none of which is determinative on its own:

> [W]e consider the hiring party’s right to control the manner and means by which the product is accomplished . . . [;] the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.7

Because the Court found that the sculptor was not an employee, it did not reach the scope-of-employment question.

**Does “Scope of Employment” Include Scholarship? Consider Professors’ Scholarship**

¶8 For most librarians, the key question is not whether they are employees but whether their scholarship fits within the scope of their employment. In deciding whether a work falls within the scope of employment, the main factors are derived from the Restatement of Agency.8 They are (1) whether it is the kind of work the employee is employed to perform; (2) whether the work is done substantially within authorized work hours and space; (3) whether the work is actuated, at least in part, by a purpose to serve the employer; and (4) whether the employee is acting while subject to the employer’s control or right to control.9

¶9 I found no cases or secondary sources that closely examine the application of these factors to librarians’ scholarship.10 But a large body of work discusses whether professors’ (sometimes referred to under the broader term “academics”) scholarship are works made for hire, and these analyses are a useful starting point.

7. *Id.* (citing *Restatement (Second) of Agency* § 220(2) (1958)).
9. *Restatement (Second) of Agency* § 228. The first three factors are in the main text of the section, while the fourth factor is referred to in comment b, which states: “As stated in Section 220 [of the Restatement (Second) of Agency], one is a servant only if, as to his physical conduct in the performance of the service, he is subject to the control or to the right to control of the master.” The control factor is frequently cited in cases and secondary sources that discuss the work-made-for-hire doctrine, so I consider it as important as the other factors.
10. Laura Gasaway briefly considered this question in a 2003 article, but more from a policy perspective than a legal one. She wrote that librarians should own their scholarship the same way that teaching faculty do, pursuant to their employers’ policies. Laura N. Gasaway, *Copyright Ownership and the Impact on Academic Libraries*, 13 DePaul-LCA J. ART & ENT. L. 277, 284–87 (2003).
Before applying the usual work-made-for-hire rules, we should consider the so-called academic exception or teacher exception. This putative legal rule predates the 1976 Copyright Act and holds that an academic’s writings are not works made for hire, even if they are written within the scope of employment. In other words, this rule purports to override the work-made-for-hire doctrine altogether with respect to academics. Little legal authority supports this academic exception, and scholars differ on whether it survived the Copyright Act of 1976, which does not recognize it. Other than dicta, no appellate court has recognized the academic exception since the 1976 Act, and a district court that closely considered the matter in 2010 held that it did not survive.

My view is that the academic exception did not survive the 1976 Act. It cannot be reconciled with the plain text of the Act, which establishes one work-made-for-hire framework for all employees, not separate frameworks for teachers and nonteachers. In any case, the academic exception would be of little help to librarians because the scant authority for the exception does not address librarians, leaving us to guess whether librarians might or might not fit within the exception. The best course is to put the academic exception aside and focus on the usual work-made-for-hire rules.

Some observers may argue that these rules apply easily to academic scholarship: they note that universities almost never claim copyright in this scholarship, so surely scholarly works are not works made for hire. But we should not conflate legal analysis with actual practices, which are considered separately in part II of this article. The parties’ intentions do not determine whether an employee’s work is made for hire. Instead, we look to the conditions of employment, while remembering that copyright law does not always track popular opinion.

Courts have not provided clear guidance on how to apply the work-made-for-hire analysis to scholarship, and the Supreme Court has not addressed the...
issue at all. In dicta, the Seventh Circuit has observed that “copyright law gives an employer the full rights in an employee’s ‘work for hire’ . . . unless a contract provides otherwise. The statute is general enough to make every academic article a ‘work for hire’ and therefore vest exclusive control in universities rather than scholars.”\textsuperscript{20} The court did not explain the reasoning behind its dicta. Secondary sources provide more detailed guidance, although they do not always agree. First, let’s consider what the major copyright treatises say on whether professors own their scholarship.

\S\hspace{1em}14 Nimmer writes that the matter is “highly contested,” noting on the one hand that the “publish or perish” tradition suggests scholarship is within the scope of faculty’s employment, while on the other hand, the employer’s lack of control over the scholarship suggests that it is not.\textsuperscript{21} Patry writes that no bright-line rule exists with respect to faculty ownership, but acknowledges that in some situations the employer may own the copyright to works of scholarship, depending on the purpose of the creator’s employment. As a hypothetical example of a work made for hire, he mentions scholarship written by a nonteaching research academic whose job description includes publishing.\textsuperscript{22} Abrams views this as a close question but favors the argument that faculty members’ works of scholarship are generally not works made for hire because they are not prepared for the use or benefit of the employer. He notes that faculty do not generally breach their contracts when they fail to produce scholarship. At worst, he argues, their employers may choose not to renew their contracts if they are not yet tenured.\textsuperscript{23} Finally, Goldstein argues strongly against scholarship being made for hire. Although most of his argument relies on the academic exception (which he believes is still in force), he also notes that academic employers do not exercise supervision or control over scholarship, and he counts supervision and control as “the two most salient hallmarks of a work for hire.”\textsuperscript{24}

\S\hspace{1em}15 Many law review articles also address the question, and some go into greater detail than the treatises. Three of the most useful articles are by Todd F. Simon, Pamela A. Kilby, and Leonard D. DuBoff, respectively.\textsuperscript{25} In 1983, Simon offered one of the first detailed analyses of the work-made-for-hire provisions of the 1976 Act as applied to scholarship. Like Goldstein, Simon considers the control factor to be the most important one, but his analysis of the control factor is unusual. He believes that universities do exercise significant control over scholarship because they require professors to publish within their areas of expertise and require faculty publications to meet standards of quality, quantity, and frequency.\textsuperscript{26} In contrast,

\begin{itemize}
\item \textsuperscript{20} Weinstein v. Univ. of Ill., 811 F.2d 1091, 1094–95 (7th Cir. 1987). The relevant holding interprets the university’s intellectual property policy.
\item \textsuperscript{21} 1 Nimmer & Nimmer, supra note 8, § 5.03[B][1][b][i].
\item \textsuperscript{22} 2 Patry, supra note 13, § 5:71.
\item \textsuperscript{23} Abrams, supra note 13, § 4:21.
\item \textsuperscript{24} 1 Goldstein, supra note 11, § 4.3.2.1.c.
\item \textsuperscript{26} Simon, supra note 12, at 502–03.
\end{itemize}
most other sources maintain that universities do not exercise control over scholarship. Simon also believes that scholarship is a purpose of employment for professors, pointing out the tacit understanding that professors must publish and will receive support to do so, for example through sabbaticals, library resources, office equipment, funds to hire research aides, reimbursement of travel expenses, and other means. He concludes that universities have a strong legal basis for asserting ownership over professors’ scholarship.

In his 1985 article, DuBoff reaches the same conclusion as Simon. DuBoff correctly anticipated *Community for Creative Non-Violence v. Reid* by relying on the usual law of agency to determine who is an employee and what is in the scope of employment, although the specific factors he identifies are somewhat different from those of the Supreme Court. Like Simon, DuBoff notes that professors receive support from their institutions to create scholarship and that they must publish for tenure and promotion. Whereas Abrams asserts that professors’ employment contracts generally do not require them to publish, DuBoff claims that many professors do have publishing requirements in their employment contracts. As to the time-and-place factor, DuBoff writes that it sometimes helps to consider where faculty perform research and writing, but when it is performed is usually not relevant because professors have no regular hours for working on scholarship. He concludes that when professors publish works within their academic fields, they are acting within the scope of employment and the work belongs to their employers.

Kilby, on the other hand, argues forcefully against scholarship as made for hire. She wrote in 1995, after the *Community for Creative Non-Violence* decision, so she follows the same general law of agency that the Supreme Court applied. Unlike Simon, Kilby believes that universities do not control their employees’ scholarship. Unlike DuBoff, Kilby concludes that a failure to produce scholarship is not a breach of present employment obligations, but merely affects future employment. She also argues that professors publish to promote their own interests, not the interests of the university. She concludes that professors’ scholarship is not made for hire within the meaning of the Copyright Act. She goes on to argue that it would be unconstitutional to treat scholarship as made for hire. First, she points to the Constitution’s copyright clause, which allows Congress to confer copyright

---

29. *Id.* at 505.
32. *Id.* at 25.
33. *Id.* at 31–32.
34. *Id.* at 34.
36. *Id.* at 468.
37. *Id.*
38. *Id.* at 469 (citing U.S. Const. art. I, § 8, cl. 8).
ownership on “authors,” which in her view cannot be construed to refer to universities in this context. Second, she argues that professors have a First Amendment right to control the copyrights in their scholarship. Although I do not apply here a constitutional analysis to the ownership of librarians’ scholarship, Kilby’s constitutional arguments appear to apply equally well to librarians and professors.

¶18 In sum, the application of the work-made-for-hire doctrine to professors’ scholarship is difficult and uncertain. Part of the difficulty is that the second factor from the Restatement (“authorized work hours and space”) is hard to apply to professors, who are generally free to choose when and where they work on their scholarship. Usually, this factor is neutral or simply inapplicable for professors. As for the control factor, I agree with most commentators that universities do not control professors’ scholarship. Professors have wide latitude to decide what topics to cover, how to conduct their research, and what opinions to express. In my view, the fourth factor (the employer’s control) is the easiest to apply and almost always weighs against scholarship being made for hire—but one factor alone is not decisive. The first and third factors (whether it is the type of work the employee is employed to perform and whether it is actuated in part to serve the employer’s interests) are the most challenging ones in this context. For these factors, there seems to be no consensus among the commentators.

Does “Scope of Employment” Include Librarians’ Scholarship?

¶19 In considering whether librarians’ scholarship falls within the scope of employment, I rely in part on what commentators have written about professors’ scholarship. This can help us by way of analogy, although there are some key differences between professors and librarians. I also rely on the Restatement (Second) of Agency, which I believe is one of the best sources for this question. In Community for Creative Non-Violence v. Reid, the Supreme Court’s opinion closely tracked the Restatement and cited it repeatedly in deciding whether the sculptor was an employee under the work-made-for-hire doctrine. Because the Court found that the sculptor was not an employee, it never reached the scope-of-employment question. But if it had addressed that question, it seems a reasonable assumption that the Court would have continued to closely follow the Restatement. I next consider each of the Restatement factors separately.

¶20 The first Restatement factor is whether scholarship is the kind of work that librarians are employed to perform. Or, to phrase the question another way, is scholarship a purpose of librarians’ employment? The answer is generally not the same as for professors. For tenure-track professors, scholarship is often the most important part of their work, whereas librarians focus on serving patrons. For most librarians, scholarship is the “icing on the cake,” as the late Albert Brecht once told me. In this respect, librarians may be more similar to K–12 teachers than professors. Nimmer

39. See Kilby, supra note 25, at 468–74.
40. See generally id. at 474–85.
41. See, e.g., DuBoff, supra note 25, at 31–32; Simon, supra note 12, at 505.
43. Albert O. Brecht (1946–2012) was the law library director at the University of Southern California School of Law, where I worked as an intern.
notes that K–12 teachers are not subject to the same “publish or perish” pressures as professors, and for that reason, he concludes that their scholarly work is less likely to be within the scope of their employment.\textsuperscript{44} Of course, this point is a generalization. For library directors who have faculty status or for other librarians who may receive tenure, scholarship may indeed be a key purpose of their employment. The terms of a librarian’s employment contract may shed light on the question.

\[\textit{21}\] In assessing the first factor, we also have to consider the published work itself and how closely it fits with the librarian’s employment. If the subject matter of a work relates to an employee’s job duties, then it’s more likely to be made for hire, although this point by itself is not conclusive.\textsuperscript{45} For example, if I wrote an article about providing reference services at an academic law library, that article would fit very closely with my job duties, which makes it more likely to be made for hire. On the other hand, this article about copyright law is not a close match with the day-to-day work that I perform, which makes it somewhat less likely to be made for hire. If I wrote a detective novel, that clearly would be outside the purpose of my employment.

\[\textit{22}\] The recent proliferation of online institutional repositories for scholarship adds another twist to the first factor.\textsuperscript{46} These repositories are evidence that employers care about their employees’ scholarship, and the decision whether to include librarians’ scholarship within a repository may clarify what librarians’ scholarship means for that institution. Upon publication, this article will appear in my law school’s online repository,\textsuperscript{47} which may become the first Google result when readers search for the article. This strengthens the tie between my scholarship and my employer somewhat, although not enough, I believe, to tip the first factor in favor of this article being made for hire.

\[\textit{23}\] Looking back to the commentary on professors’ scholarship, there is only a weak argument that professors’ scholarship is made for hire under the first factor. Although professors are certainly expected to publish, publishing appears to serve less as a purpose of employment than as a qualification for continued employment. For librarians, it’s not clear that publishing is even a qualification for employment, let alone an actual purpose. It seems safe to say that the first factor weighs somewhat against librarians’ scholarship being made for hire, at least for most librarians. Scholarship is a minor purpose of employment for most librarians, if it is a purpose of employment at all.

\[\textit{24}\] The second factor is whether the work is done substantially within authorized work hours and space. Here we see an even sharper contrast between professors and librarians. While professors do not generally have authorized work hours and space when it comes to scholarship,\textsuperscript{48} librarians usually have regularly sched-
uled work hours, which they fulfill at the library. Some libraries permit or even encourage their librarians to work on scholarship during their regular workdays, while other libraries discourage or ban such activity. This makes the second factor very relevant to librarians and adds a great deal of clarity with respect to ownership of librarians’ scholarship.

¶25 At first glance, the third factor (whether the work is actuated, at least in part, by a purpose to serve the employer) may be difficult to distinguish from the first factor (purpose of employment). A helpful distinction is that the first factor considers the employer’s viewpoint (why did the employer hire the employee?), whereas the third factor considers the employee’s viewpoint (why did the employee decide to create the work?). Unlike the first factor, the third factor is very similar with respect to both professors and librarians. Most of the reasons for producing scholarship are the same regardless of who is writing it—to serve a professional or scientific community if not the broader public, to advance knowledge, to further the author’s career, to enjoy the pleasure of research and writing, and to benefit the author’s institution.49

¶26 Let’s stop for a moment to consider that last point. How does librarians’ scholarship benefit libraries? For academic librarians, the reputations of their parent institutions often rest largely on the scholarship of their employees. It might be countered that librarians’ scholarship plays only a small part in a university’s reputation (professors’ scholarship being much more important), but this doesn’t change the analysis under the third factor. Here we are judging the motivation behind the work, not the importance of the work. Even if my article contributes much less to my institution’s reputation than the work of a prominent professor, the professor and I may still have the same motivation to enhance our institution’s reputation.

¶27 The scholarship of nonacademic librarians also benefits their libraries. Public, corporate, or K–12 libraries may enhance their reputations through their librarians’ scholarship, just as university libraries do. Moreover, producing scholarship can serve as a form of continuing education, allowing librarians to expand their knowledge and refresh their research, writing, and analytical skills. This benefits librarians personally, but it also makes them better employees.

¶28 When discussing the first factor, I mentioned that the content of a work is relevant, and it can be relevant for the third factor, too. If a librarian writes an article praising the accomplishments of her library, you might conclude that she wants to serve her employer’s interests. But if she writes an article bemoaning the shortcomings of her library, she may have had other reasons for writing. The author’s biographical statement may also be relevant. Scholarship almost always identifies the author’s place of employment and position; when this information is omitted, we might conclude that the author does not wish to make any connection between his institution and his scholarship.

49. For a view on the different reasons why librarians write, see Mary Whisner, Writing Buddies, 103 LAW LIBR. J. 677, 677, 2011 LAW LIBR. J. 40, ¶ 3 (“For some, it might be external pressure—your boss or your promotion committee says that you have to publish to keep your job. Some might hope to make some money, although a lot of us write for journals, newsletters, and blogs without any prospect of financial reward. For me (and I suspect for many of us), writing stems from a basic social impulse: we want to connect with others.”).
Certainly, many librarians who publish scholarship do so mainly to serve their own interests or the interests of a community outside their home institution, but this alone does not decide the third factor. As long as the scholarship is motivated in part to serve the employer’s interests, the third factor weighs in favor of scholarship being made for hire. The Restatement provides some useful guidance here. The main text of the Restatement says that “conduct may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person.” 50 The comments to this section of the Restatement explain that even if the employee’s predominant motive is to benefit someone other than the employer, the work can still be within the scope of employment as long as it serves the employer to “any appreciable extent.” 51 To illustrate this point, the Restatement provides examples of acts that are predominantly intended to benefit someone other than the employer, but that are nonetheless within the scope of employment. 52 With this guidance from the Restatement, I conclude that the third factor usually weighs in favor of librarians’ scholarship being made for hire, just as it does with respect to professors’ scholarship. Most of the time, librarians who publish scholarship are motivated in part by a desire to serve their employer.

The fourth factor (the employer’s control or right to control) is also largely the same for librarians and professors. Simon made the unusual argument that universities do control their professors’ scholarship, 53 but the other commentators I reviewed come to the opposite conclusion—and I agree with the majority. Like professors, librarians generally choose what topics to write about and decide what they will say about the topics. Their employers exercise little if any control over the content of their scholarship. 54 The fourth factor weighs against librarians’ scholarship being made for hire.

Now let’s put the factors together. The application of the first, third, and fourth factors will be similar for most librarians. The first factor (purpose of employment) will usually weigh somewhat against librarians’ scholarship as made for hire, the third factor (motivation to serve the employer) will weigh in favor, and the fourth factor (control) will weigh against. Taken together, these factors will usually not provide a clear answer, leaving the second factor (time and place) to tip the scales. Unlike the other factors, the time-and-place factor will vary considerably from one librarian to another. One librarian might produce scholarship entirely within work hours at the library, another might produce scholarship outside regular hours at the library, and a third might produce scholarship outside regular hours at home—with gradations in between. The second factor will be relatively easy to apply, as it involves objective facts. Because the time-and-place factor involves a high degree of variability and easy applicability, I consider it to be the most decisive factor for most librarians, but this is not to say that it will always yield a clear answer.

51. Id. at cmt. b.
52. Id. at illus. 1–3.
53. Simon, supra note 12, at 502–03.
54. Exceptions might occur when librarians write about their own libraries, especially where sensitive policy issues are concerned. For example, a law librarian would be well advised to get his supervisor’s consent before writing an article about his library’s policies on the unauthorized practice of law.
In the end, the application of the work-made-for-hire doctrine to librarians’ scholarship will depend on individual circumstances. It is not possible to make any broad conclusions on whether librarians own their scholarship. To get a clearer picture, let’s consider several scenarios in which we assume that the employers do not have any written policies on who owns intellectual property created by their employees. We will address these scenarios using only copyright law.

**Applying the Doctrine**

*The Public Reference Librarian*

Diane works as a reference librarian at a public library. She has regular work hours, which she performs at the library. Her library encourages its employees to engage in professional activities, including publishing, but does not require them to publish and does not give raises based on publications. Nothing in her employment contract refers to scholarship. Diane writes an article on reference services for *Library Journal* on her own time at home, using her own computer. She does not discuss the article with her supervisors prior to publication. The published article identifies her job title and place of work.

First, let’s consider why this article might be made for hire. The subject matter is reference services, the same subject matter as her job, which carries some weight for the first factor (whether she is employed to write articles such as this). Also, she may have been motivated in part by a desire to serve her employer—her employer encourages her to publish and her employer’s name appears in the article. But these points are clearly outweighed by other considerations—she is not employed to produce scholarship; she wrote the article on her own time, outside her place of employment, using her own resources; and her employer exercised no control over the article. I conclude that Diane clearly owns the copyright to her article.

*The University Cataloger*

John works as a cataloger at a university library. He has regular work hours, which he performs at the library. His library has a system of ranks for its librarians, and promotions are based in part on professional activities such as publishing. John writes a regular column in a regional library association newsletter, mostly during his lunch breaks and during evenings after his regular work hours, sometimes using his own laptop, but usually using the desktop computer provided by his employer. He occasionally discusses writing topics with his supervisors, but they do not review any of his columns prior to publication. His columns identify his job title and place of employment. Sometimes, John writes about practices at his own library, but he is just as likely to criticize those practices as he is to praise them.

John’s newsletter columns present a closer question than Diane’s article, but the factors still weigh in favor of John’s ownership. Although publishing is a factor in promotions for John, it is not a requirement for his employment; the main purpose of John’s employment is cataloging, not scholarship. The time-and-place factor is neutral here because John wrote the columns under mixed circumstances—usually during his own time, but not always, and usually using his employer’s computer, but not always. His occasional criticism of his own library makes it less likely that he is serving his employer’s interests. As for the control factor, his discussions
with his supervisors do not amount to much; his employer does not exercise actual control. The balance of factors points against the columns being made for hire.

**The Tenure-Track University Reference Librarian**

¶37 Nancy works as a reference librarian at a university library and has regular works hours. She is on a tenure track and is required to publish scholarship to secure tenure and retain her position. Her supervisor has stressed that librarians’ scholarship is important to the library. Prior to starting her current job, Nancy had never considered writing an article for publication, but now publishing has become an important goal for her.

¶38 Nancy writes an article about collection development for *College and Research Libraries*, working mostly in her office and mostly during regular work hours. She uses a computer provided by her employer, and she has been allowed free use of her library’s interlibrary loan services and photocopiers. She is helped by a student research assistant who is paid by the library. Prior to writing, she discusses her topic with her supervisor, and prior to publication, she shares a draft with her supervisor, who suggests specific revisions. Nancy follows the suggestions because her supervisor’s opinion of her scholarship is critical to her continued employment.

¶39 For Nancy, the application of the first factor is complicated. It is clear that her employer cares about her scholarship: if her scholarship is inadequate, she will lose her position; moreover, her employer has provided her with substantial resources to write her article, in particular, the provision of a research assistant. But it could be countered that Nancy’s scholarship is what qualifies her for continued employment, and that it is not an actual purpose of her present employment—the actual purpose being service to patrons. On the first factor, Nancy is in the same ambiguous position as most professors. At most, the first factor weighs somewhat in favor of her work being made for hire.

¶40 As for the second factor, she has written the article mostly at work during her regular work hours, so that factor weighs in favor of her work being made for hire. On the third factor, Nancy never thought of publishing until she began her tenure-track position, so it seems clear that she is motivated in part (if not mostly) by a desire to serve her employer. Her supervisor even exercised a certain degree of control over the article. On the whole, it appears that Nancy’s scholarship is made for hire.

**Who Owns This Article?**

¶41 Now to answer the question posed in the title: who owns this article? Let’s consider the four factors one at a time. First, is it the type of work I am employed to perform? My library encourages its librarians to publish and engage in other professional activities, but it is not a requirement for my position, and we have no tenure track or ranking system for librarians. Although this article will be included in my library’s online repository, the first factor weighs mostly against this article being made for hire. Second, did I create it at work during regular work hours? Yes, I worked on this article mostly in my office during slower periods within my regular work hours, so this factor weighs in favor of this article being made for hire.
Third, was I motivated at least in part to serve my employer’s interests? Yes. Although I had mixed motives, I wrote it partly because my employer encourages publishing and I want to enhance my employer’s reputation, even if I accomplish that goal in only a small way. Fourth, did my employer exercise control over the article? Although my library director reviewed the article prior to publication and offered his comments, I chose the topic and made all the final decisions as to its content. So the fourth factor weighs against this article being made for hire.

§42 The first, third, and fourth factors put together do not give a clear answer. I believe the second factor (time and place) is decisive here. If I had written the article at home on my own time, I would say I own the article, but as it is, I conclude that my article is probably made for hire, and the College of William and Mary is its legal author. But under my employer’s intellectual property policy, any copyrights the College owns in the scholarship of its employees are assigned to the creators.55 That’s why you see the copyright notice in my own name.


§43 Although libraries often have a strong legal basis for claiming ownership of their librarians’ scholarship, they do not actually make these claims. To assess actual practices and policies, I reviewed written intellectual property policies at universities that are members of the Association for Research Libraries (ARL), copyright notices in articles authored by librarians, and submission guidelines in library journals.

§44 As expected, I found that libraries and the broader academic community almost always recognize librarians as the owners of their own scholarship, but there were some surprises along the way. I found several policies at ARL universities that discriminate between librarians and faculty when it comes to recognizing copyright ownership, and I discovered that it is not uncommon for U.S. government librarians to treat their scholarship as works of the U.S. government.

Intellectual Property Policies at ARL Universities

§45 Almost all major universities have responded to the work-made-for-hire doctrine by developing written intellectual property policies that purport to alter or clarify the default legal rules.56 Generally, these policies preserve the tradition that authors own the copyrights to their own scholarship, regardless of what the law would otherwise provide. But are these policies legally effective? And does their scope include librarians’ scholarship? To get a sense of what these intellectual property policies say, I reviewed all the policies I could find online from U.S. universities that are members of ARL. Before discussing these policies, we should first consider how the policies are supposed to work according to copyright law.


56. I base this conclusion on my own review of intellectual property policies. See also Ashley Packard, Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work, 7 COMM. L. & POL’Y 275, 294–97 (2002).
¶46 Even if an employee’s work is within the scope of his or her employment, it is possible for the employer and employee to alter the usual rules so that the employee will own the copyright. This can be done in one of two ways. The first method is set forth in section 201(b) of the Copyright Act, which provides that an employee’s work will not be made for hire if “the parties have expressly agreed otherwise in a written instrument signed by them.”\(^{57}\) The other method is to simply transfer copyright ownership pursuant to section 204 of the Act, which requires that the transfer be “in writing and signed by the owner of the rights conveyed.”\(^{58}\)

¶47 Each method has its pros and cons. If the parties opt for the section 201(b) method, the work will not be made for hire and the employee will be the original author and owner. However, section 201(b) requires stricter formalities than section 204. Whereas section 204 transfers may be signed only by the transferor, section 201(b) agreements must be signed by both parties—the employer and the employee.\(^{59}\) Also, section 201(b) specifies that agreements must be made “expressly,” a term that does not appear in section 204. Nonetheless, it is possible for a university to create an effective intellectual property policy under section 201(b). If the policy is incorporated into an employee’s written employment contract that is signed by both parties, it should meet the signature requirements of section 201(b).\(^{60}\) To ensure that the policy qualifies as an “express agreement,” the policy should explicitly state that the employee’s works of scholarship are not works made for hire.\(^{61}\)

¶48 Although the requirements of section 204 are easier to satisfy, the result may not be satisfactory. A section 204 transfer does not change the original authorship of the work; it merely transfers ownership from the original author (in this case, the employer) to someone else (the employee). A work that has been transferred to an employee under section 204 will still be a work made for hire, albeit one that has a new owner. This distinction matters because the Copyright Act treats works made for hire differently from other types of works. The duration of a copyright normally lasts for the life of the author plus seventy years; but if the work is made for hire, the term is disconnected from the author’s life and is set at ninety-five years from the date of first publication.\(^{62}\) More important, if an author trans-

\(^{57}\) 17 U.S.C. § 201(b) (2012).

\(^{58}\) Id. § 204(a). Section 201(d) establishes that copyrights may be transferred, and section 204 specifies the method.

\(^{59}\) For a discussion of what constitutes a signature, see 1 Nimmer & Nimmer, supra note 8, § 10:03[A]; 2 Patry, supra note 13, § 5:107.

\(^{60}\) Laura G. Lape, Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies, 37 Vill. L. Rev. 223, 248–50 (1992).

\(^{61}\) Using such explicit language is the safest approach, but it may not be necessary. At least one appellate court offers a relaxed interpretation of section 201(b). In Weinstein v. University of Illinois, the Seventh Circuit considered a policy that stated “a professor retains the copyright unless the work falls into one of three categories,” including one that excluded “works created as a specific requirement of employment or as an assigned University duty.” 811 F.2d 1091, 1094 (7th Cir. 1987). Although this wording is far from clear, the court held it was sufficient to exempt professors’ scholarship from the work-made-for-hire rule. Id. at 1094–95.

\(^{62}\) Or 120 years after the work is first created, whichever term expires first. 17 U.S.C. § 302 (2012). The copyright duration of works made for hire is not necessarily disadvantageous. The problem lies in the confusion this will create in the future, when the public tries to determine what works of scholarship are in the public domain. If a work made for hire is transferred under section 204, the public will have no way of knowing that it is a work made for hire with a different copyright duration.
fers his rights to someone else (such as a publisher), section 203 of the Copyright Act ordinarily gives him the right to regain ownership of the work after thirty-five years—except that section 203 is not applicable to works made for hire. Thus, a section 204 transfer may meet the parties’ immediate needs, but it is a messy solution that leaves some ticking time bombs. Furthermore, a federal district court has held that section 204 cannot be used to transfer copyright from an employer to an employee; although this ruling is almost certainly wrong, it adds some uncertainty to the use of section 204.

¶49 Another legal question that arises under both sections 201(b) and 204 is whether they can be used for works that have not yet been created. Intellectual property policies do not name specific works; rather, they issue a blanket statement about ownership that is usually intended to cover both existing and future works. According to Nimmer, parties may agree to transfer copyright of works that do not yet exist, but at least one case says transfers must name specific works.

¶50 Several law review articles have assessed the effectiveness of universities’ intellectual property policies, including a 1992 article by Laura G. Lape and a 2002 article by Ashley Packard. Lape reviewed the policies at seventy universities classified as “Research Universities I” by the Carnegie Foundation for the Advancement of Teaching, and Packard reviewed the same universities’ policies ten years later. Both Lape and Packard found that many policies were poorly drafted, with language that was ineffective in transferring copyright. Their articles are a good source for more information on the general effectiveness of these policies.

¶51 Twenty-three years after Lape’s original study, I conducted my own study of universities’ intellectual property policies. Using Google searches and menu navigation of university websites, I was able to access eighty-one policies at ARL universities in the United States that address the copyright ownership of employees’ scholarship. In reviewing the policies, I assessed their effectiveness in transferring

63. Id. § 203. Sections 302 and 203 are just two examples of how the Copyright Act treats works made for hire differently.

64. In Forasté v. Brown University, 290 F. Supp. 2d 234 (D.R.I. 2003), the court held that an employer could transfer ownership to an employee only through section 201(b), and not through section 204. The court reasoned that section 201(b) has stricter formalities than section 204, and that Congress could not have intended parties to bypass the stricter formalities by using section 204. Id. at 237–39. As Patry points out, this case is based on a misunderstanding of how sections 201(b) and 204 relate to each other. 2 Patry, supra note 13, § 5:47. As I have explained in the text, the two sections are designed to bring about different results. Still, Forasté has not yet received any negative treatment from other courts.

65. 1 Nimmer & Nimmer, supra note 8, § 10.03[A][8]; see also Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643 (1943) (holding that authors may transfer their rights for a renewal period before the renewal has been secured).

66. Forasté, 290 F. Supp. 2d at 239–41 (as an additional reason for rejecting a transfer under section 204, the court held that the university’s intellectual property policy failed to identify any specific works).

67. See generally Lape, supra note 60; see also Packard, supra note 56.

68. Lape, supra note 60, at 252.

69. Packard, supra note 56, at 294.

70. Lape, supra note 60, at 256; Packard, supra note 56, at 306.

71. In addition to these eighty-one policies, I found another three policies that I was unable to access because of password protections or technical problems. I was unable to find policies addressing copyright ownership at seven U.S.-based ARL universities, but this does not necessarily mean they had no such policies. I conducted my review in May and June of 2015.
copyright, and I counted the number of policies that did not include librarians within their scope.

¶ 52 Like Lape and Packard, I found that many policies are not well drafted, at least not from a legal perspective. Overall, the universities seem to be more concerned about providing information to employees than complying with the Copyright Act. None of the policies I reviewed specified whether they operated under section 201(b) or section 204. It is clear that many of them do not meet the requirements of either section.

¶ 53 A common problem is that many policies offer an explanation of copyright law (often an incorrect explanation) instead of actually effecting a transfer of ownership. For example, Kent State University’s policy offers a legal definition of “work made for hire” that excludes copyrightable works that result from “academic research or scholarly studies.” For the reasons discussed in part I, this definition is questionable, but more important, it does nothing to alter the default work-made-for-hire rules. A misstatement of law cannot function as a section 201(b) agreement or as a transfer under section 204.

¶ 54 Another common problem is that many policies disclaim university ownership rather than transfer ownership. For example, the University of Houston’s policy states that it will “not assert ownership” of books, journal articles, and other scholarly works. The Copyright Act does not recognize quitclaims, and this language is probably not effective under either section 201(b) or section 204. There is no language here that refers to the work-made-for-hire rule or to a copyright transfer. There is no statement about who will own the work if the university does not own it. It is not even clear that the university intends to disclaim ownership; perhaps the university intends to retain ownership but refrain from exercising its rights.

¶ 55 Other policies reveal a clear misunderstanding of copyright law. The University of Wisconsin’s policy states that “the UW System does not assert a property interest in materials which result from the author’s pursuit of traditional teaching, research, and scholarly activities.” But the next sentence undermines this position by stating that “the creation of materials such as theses, scholarly articles, journal articles, research bulletins, monographs, and books occurs, in most circumstances, as an integral part of the author’s position as a UW System employee.” The first sentence is probably not effective under section 201(b) or section 204, whereas the second sentence clearly supports a finding that scholarship is made for hire at the University of Wisconsin. Surely this is not what the university intended.

¶ 56 The only deficiencies I was able to review are in the language of the policies. A separate issue is whether the policies meet the signature requirements of sections

72. A policy does not need to cite the Copyright Act to be effective, but a statement that a policy is made pursuant to section 201(b) or 204 would certainly help lawyers and courts who are attempting to construe the policies.


201(b) or 204. On this issue, I did not obtain any information. Presumably, some of these policies were signed or incorporated by reference into signed employment contracts. But other policies may have been unsigned. For this reason, even the best-drafted policies may not be effective.

§57 Although others before me have studied the effectiveness of universities’ intellectual property policies, I believe this is the first study to consider whether the policies encompass librarians’ scholarship. I found that most of them do, typically by referring more broadly to “university employees,” “faculty and staff,” “the university community” or similar terms.76 But of the eighty-one policies I reviewed, I found eight that do not recognize ownership by librarians.77 None of these eight policies explicitly single out librarians for different treatment. Some of them confer copyright ownership on teaching faculty without mentioning other employees, which might only mean that the drafters failed to consider the status of other employees’ copyrights. Other policies clearly draw a distinction between faculty and nonfaculty employees in ownership of copyrighted material.

§58 Harvard University’s policy is one example of how faculty and nonfaculty are treated differently with respect to copyright ownership. Harvard’s policy provides that authors generally own the copyright in their own work, but a “work created within the scope of employment by non-teaching employees of the University shall be a ‘work made for hire’ . . . and the University shall be deemed the Author and shall own the copyright.”78 Other examples include policies from Howard University and the University of Utah. Howard University’s policy presumes that faculty’s work is owned by faculty, whereas nonfaculty employees’ work is made for hire.79 The University of Utah’s policy transfers copyright in traditional works of scholarship to faculty authors, but subjects staff to the usual work-made-for-hire rules.80 For joint works coauthored by faculty and staff, Utah’s policy provides that the collective rights of the authors are determined by the rights of the faculty author.81 Apparently, the policy drafters were aware that faculty and staff might produce the same types of works, but made a conscious decision to treat them differently.

§59 As it turns out, universities’ intellectual property policies are rife with problems. Considering the shortcomings in drafting effective language, the strict signature requirements of section 201(b), and the exclusion of librarians from some policies, it seems that these policies do little to change the work-made-for-hire
status of librarians’ scholarship. Many policies will not even be effective as transfers under section 204. However, they do evince universities’ lack of interest in owning their employees’ scholarship. When we consider copyright notices in the next section, we will see that universities are not claiming ownership of librarians’ scholarship, whatever the law or their policies may say.

Copyright Notices in Librarians’ Articles
¶ 60 To see who is claiming copyright in librarians’ scholarship, I reviewed the copyright notices in more than 400 articles written by U.S.-based librarians published in recent issues of *College and Research Libraries*, *Journal of Library Administration*, *Law Library Journal*, *Library Resources & Technical Services*, *Reference and User Services Quarterly*, and *Research Library Issues*. These articles were written by librarians from a wide range of employment settings, but academic librarians appeared as authors more often than any other type of librarian. *The Journal of Library Administration* is published by a for-profit company, and the rest are published by library associations. I found that the named authors or the journal publishers claimed copyright in all of the articles, with only one exception.\(^82\) In a 2015 issue of *Research Library Issues*, two employees of the National Library of Medicine disclaimed copyright in their article because they wrote it as federal employees acting within the scope of their employment.\(^83\)

¶ 61 The Copyright Act provides that works of the U.S. government cannot be copyrighted.\(^84\) A work of the U.S. government is defined as “a work prepared by an officer or employee of the United States Government as part of that person’s official duties.”\(^85\) The use of the phrase “as part of that person’s official duties,” in place of the standard “scope of employment” language used for other works made for hire, has been known to cause some confusion.\(^86\) But a House Report accompanying the 1976 Act clarifies that the work-made-for-hire doctrine is construed in the usual way when applied to U.S. government employees.\(^87\)

¶ 62 After discovering the aforementioned example of a copyright disclaimer, I searched for other articles authored by U.S. government librarians to see whether

---

82. I reviewed 414 articles, columns, and essays, excluding short pieces such as book reviews, in issues published from 2013 to 2015, through and including vol. 76, no. 4 of *College and Research Libraries*; vol. 55, no. 3 of *Journal of Library Administration*; vol. 106, no. 4 of *Law Library Journal*; vol. 58, no. 4 of *Library Resources & Technical Services*; vol. 54, no. 3 of *Reference and User Services Quarterly*; and no. 286 of *Research Library Issues*. Some of the copyright notices applied to individual articles, whereas others applied to journal issues. In these journals, I saw a small number of articles written by librarians from outside the United States or by nonlibrarians, including two in which the copyright was held by the author’s employer, but I disregarded these articles as not relevant.

83. The authors made the following statement in lieu of a copyright notice: “The authors’ contribution to this work was done as part of the authors’ official duties as National Institutes of Health employees and is a work of the United States Government. Therefore, copyright may not be established in the United States.” Kathel Dunn & Joyce E.B. Backus, *Pipelines and Partnerships in Diversity at the National Library of Medicine*, RES. LIBR. ISSUES, no. 286, 2015, at 3, 7.

85. Id. § 101.
86. See 2 PATRY, supra note 13, §§ 4:69, 4:73.
87. H.R. REP. NO. 94-1476, at 58 (1976) (“Although the wording of the definition of ‘work of the United States Government’ differs somewhat from that of the definition of ‘work made for hire,’ the concepts are intended to be construed the same way.”).
they also disclaimed copyright. This search was complicated by the fact that U.S. government librarians who publish often do so with coauthors who are not U.S. government employees, and in these situations I found no disclaimers. I managed to find nine additional articles (for a total of ten) authored exclusively by U.S. government librarians that include a copyright notice or disclaimer specific to the article. In all, three out of ten articles disclaim copyright as works of the U.S. government, and the other seven claim copyright by the named authors or publisher.

These results are curious. In theory, the scope-of-employment test is no different as applied to U.S. government librarians, but in practice clearly a difference is recognized. While I found no examples (out of hundreds of articles) of university librarians who recognize their scholarship as made for hire, I found that a significant proportion of U.S. government librarians are recognizing their scholarship as made for hire. Why the difference?

This is likely the result of both legal and policy differences with respect to U.S. government librarians. First, when U.S. government librarians create works while acting within the scope of their employment, the works are not copyrightable, and nothing can alter that outcome. In contrast, in nonfederal employment settings, the parties can alter the usual work-made-for-hire rules by written agreement or by assigning existing copyrights. Second, the U.S. government has a policy interest in disclaiming copyright in its works in accordance with federal law, and this may motivate the government to advise its employees to respect the work-made-for-hire rules. Universities and other nonfederal libraries usually have no comparable policy interest in claiming their employees’ scholarship as works.

I ran searches through journal databases in Lexis.com, WestlawNext, JSTOR, and Academic Search Complete, with no restrictions on date or source. Finding the articles was difficult since databases are generally not designed to identify articles by author’s affiliation. Lexis.com allows segment searching within an author’s biographical note, but in other databases I had to rely on unrestricted full-text searching. I also tried identifying U.S. government librarians and then searching for their publications by author name.

The additional copyright disclaimers I found were in the following: Bonnie Klein & Sandy Schwal, A Delicate Balance: National Security vs. Public Access, 25 COMPUTERS IN LIBR. 16, 23 (2005) (authors from the Defense Technical Information Center, part of the U.S. Department of Defense); Becky J. Lyon, Kathel Dunn & Sally Sinn, Leveraging Partnerships to Develop a Strong and Diverse Workforce, 51 J. LIBR. ADMIN. 231, 231 (2011) (authors from the National Library of Medicine).


See id. § 201(b).
Id. §§ 201(d)(1)–(2), 204.
For the public policy reasons behind section 105, see 2 PATRY, supra note 13, § 4:58.
made for hire. Thus, the differences we see between U.S. government librarians and their nonfederal peers is a good illustration of how law and policy intersect in determining who actually claims (or disclaims) ownership of librarians’ scholarship.

¶65 In addition to searching specifically for articles authored by U.S. government librarians, I also searched specifically for articles authored by librarians at the eight universities whose intellectual property policies do not recognize librarians as the owners of their own scholarship. If these universities and their librarians are taking their own policies seriously, we should expect to see that at least some of these librarians’ articles have copyright notices in the name of the universities. To test this theory, I searched issues of Law Library Journal published since 2000 for articles authored by librarians at these eight universities. 95 I reviewed seventeen copyright notices in these articles and did not find a single one that was held in the name of a university. It seems that these universities are not enforcing the work-made-for-hire law or their own policies.

Submission Guidelines in Library Journals

¶66 Library journals have reason to be concerned about who owns librarians’ scholarship. The journals all include copyright notices that routinely claim ownership by the librarians or the journals. At least some of these notices must be legally incorrect, a conclusion supported by the legal analysis in part I, as well as part II’s discussion of the deficiencies in intellectual property policies. If an article is made for hire and the journal gets no license from the employer, the journal is infringing the employer’s copyright by printing and distributing the article. 96 The journal would also be misleading its readers about who owns the articles, which could create further problems if readers ask permission to make copies.

¶67 To see whether the journals address the possibility that submitted articles are works made for hire, I reviewed the submission guidelines in College and Research Libraries, Journal of Library Administration, Law Library Journal, Library Resources & Technical Services, Reference and User Services Quarterly, and Research Library Issues. 97 I found that only the Journal of Library Administration addresses the issue at all, and then only briefly.

95. I searched on Lexis.com on June 30, 2015, using the search query AUTHOR(librarian /5 (“University of California” OR UCLA OR berkeley OR boalt OR “U.C. hastings” OR “hastings college” OR “U.C. Davis” OR “U.C. Irvine” OR “U.C. San Diego” OR “U.C. Riverside” OR “U.C. Santa Barbara” OR “U.C. Santa Cruz” OR “U.C. Merced” OR “Columbia University” OR “Harvard University” OR “Howard University” OR “Ohio University” OR Princeton OR “Rice University” OR “University of Utah”)). On Lexis.com, the AUTHOR segment includes the author’s biographical statement. The initial search retrieved twenty-four results, but I had to eliminate some of the results because they were false hits or lacked a copyright notice that was specific to the article.

96. Copyright infringement is based on strict liability, with damages assessed through joint and several liability. 6 Patry, supra note 13, § 21:38. Therefore, it is no defense for journals to claim that they were misled by the named author. But the journals’ liability for statutory damages might be limited by the innocent infringer provisions of 17 U.S.C. § 504(c)(2) (2012).

97. I reviewed guidelines printed in the journals or posted on the journals’ websites.
Taylor & Francis, the publisher of the *Journal of Library Administration*, offers a detailed FAQ webpage for authors. This webpage is for all Taylor & Francis journals, not just the *Journal of Library Administration*, and it addresses both U.S. and U.K. law. The guidance it provides is perfunctory, at best. For authors who are university employees, Taylor & Francis advises that “a university is not considered to be an employer if you are grant-funded,” a questionable statement that does not address authors who are not grant-funded. The work-made-for-hire doctrine is then succinctly explained in one sentence, with no link provided for additional information. No warnings are given.

Interestingly, Taylor & Francis provides very different advice for authors who are U.S. government employees. The FAQ page pointedly tells these authors that they should not claim copyright in their articles. Like the advice provided to university employees, this statement is an oversimplification, but this time it points in the opposite direction. As discussed previously, the scope-of-employment test is the same as applied to U.S. government employees, so the difference in advice probably arises from different customs and practices.

If their submission guidelines are any indication, library journals have a relaxed attitude about works made for hire. Copyright law does not give them any reason to be complacent, so they must be relying instead on the usual practice of libraries to forgo copyright claims in their librarians’ articles. The only exception is Taylor & Francis’ advice to U.S. government employees. Both the general practice and the exception are further evidence of how copyright law and actual practices diverge.

**Part III: Librarians’ Scholarship Should Belong to Librarians**

As a matter of policy, who should own librarians’ scholarship? My instinct is to immediately answer “librarians.” The arguments for this answer are easy to see. As an author, owning the copyright to my own article is meaningful. It gives me the freedom to do whatever I want with my article and grant whatever permissions I wish to give, while empowering me to halt any unfair use of the article. Knowing that I would own this article gave me additional incentive to write it. I don’t believe that ownership would mean anything to my library, and ownership wouldn’t give my library any incentive to produce scholarship.

But a recent article by Alissa Centivany has caused me to think twice about this issue. Centivany argues that if universities own their employees’ scholarship, they will be in better positions to promote open access. This is a timely argument, given the recent proliferation of online institutional repositories. The argument also happens to be particularly appealing to librarians, who have long advocated for

99. Id.
100. Id.
open access and have at times struggled to get faculty members on board. Although authors could freely distribute their own scholarship through individual effort, universities have more resources and expertise. Universities would also be in stronger bargaining positions vis-à-vis publishers. If major universities hold the copyrights and demand that publishers allow open access, publishers will have to comply or find themselves bypassed altogether. If institutions owned scholarship, librarians would probably play a key role in deciding how the copyrights should be exercised.

¶73 But as tempting as this idea may be, I must ultimately refrain from adopting it. There is an unshakeable tradition of universities recognizing authors as the owners of their own scholarship. Despite the dictates of the Copyright Act and the vagaries of intellectual property policies, we see that copyright notices in scholarly publications are not in the name of the employer. Any attempts to change this tradition are likely to provoke widespread anger, and ultimately fail. If librarians pushed for such a change, they would likely lose the trust of the communities they serve. And as long as librarians recognize that other authors own their scholarship, it seems only fair that librarians should be permitted the same ownership rights.

¶74 As this article has demonstrated, securing these rights is not a simple matter. The best solution would be to amend the Copyright Act to recognize an academic exception to the work-made-for-hire doctrine. As it is currently written, the Copyright Act’s work-made-for-hire provisions are a poor fit for the academic community. Universities have usually responded by ignoring the law or making a half-hearted effort to comply with its requirements. The divergence that we see between the law and actual practices suggests not so much that our practices are flawed, but that the law itself is flawed and needs to be amended to bring it in line with long-standing community standards.

¶75 Until we can achieve that amendment, I believe the best practice is for universities or libraries to develop written intellectual property policies like the one at my own institution, which is designed to operate as a copyright transfer under section 204.102 Although it is possible in theory to write a blanket policy that operates under section 201(b), the strict signature requirements of that section are unlikely to be met. A university or library might secure an employee’s signature as part of the hiring process, but they are unlikely to secure signatures from all employees every time an intellectual property policy is amended. For this reason, the section 204 method is more reliable. As part of their policies, universities and libraries should also offer to execute individual section 201(b) agreements with any employees upon request.103 This approach, together with efforts to lobby Congress to amend the Copyright Act, can best ensure that librarians and other scholars will own the rights to their own work.

102. Intellectual Property Policy, supra note 55, at § 3.2.
103. This could be achieved through a simple form that employees could access online. The form could be written to apply to any scholarship produced by the employee.
This article describes how the classical past, including Roman law and a classics-based education, influenced elite legal culture in the United States and university-educated Americans into the twentieth century and helped to encourage Scott, Blume, and Pharr to labor for many years on their English translations of ancient Roman law.

Introduction .......................................................... 55
Rome and the Classical Tradition in Early American History .................. 56
Roman Law, Civil Law, and Natural Law in Early America .................. 58
   Uses and Sources. ..................................................... 58
   Possible Adoption of the Civil Law in the United States ................. 60
Roman Law and Civil Law in the Later Nineteenth Century .......... 61
   The Codification Movement ........................................ 62
   Law School Education in the Nineteenth Century .................. 62
Roman Law in Twentieth-Century America. ................................ 65
   The Restatements and Roman Law .................................. 66
   The Classics and Roman Law in the Elite Bar ...................... 68
Scott, Blume, Pharr, and Classically Oriented American Education ...... 69
   Samuel Parsons Scott ............................................... 70
   Fred H. Blume ......................................................... 70
   Clyde Pharr ............................................................ 72
Early Twentieth-Century Support for Ancient Law Translations ........ 74
Conclusion .................................................................. 76

Introduction

1 A new English translation of the Justinian Codex using the most authoritative Latin and Greek sources, will be published early in 2016.¹ This translation, created by an Anglo-American panel, is based on an unpublished translation made by Wyoming Supreme Court Justice Fred H. Blume (1875–1971) in the early decades

---

¹ © Timothy G. Kearley, 2016.

** Professor Emeritus of Law, University of Wyoming, College of Law, Laramie, Wyoming.

1. The Codex of Justinian (Bruce W. Frier ed., forthcoming 2016). The publisher, Cambridge University Press, also plans to issue a new English translation of Justinian's Novellae Constitutiones (by David J.D. Miller and Peter Sarris) within the next few years.
of the twentieth century. The new translation almost certainly will replace the poorly received English translation by Samuel Parsons Scott (1846–1929) published in 1932. In the same era, Clyde Pharr (1883–1972) led a group (which included Justice Blume) that produced the only English translation of the Theodosian Codex.

\(\text{¶2}\) Each of these projects required countless hours of work over many years in the first half of the twentieth century. An observer situated in the second decade of the twenty-first century might well wonder why these men chose to devote such huge amounts of time to these efforts. What caused Scott, Blume, and Pharr to dedicate so much of their lives to translating ancient Roman law into English in that era? Were their activities related to a movement then prevalent in American law, or was each driven solely by personal interest? Also, what equipped these men for their arduous undertakings? How is it that three men from very different socio-economic origins were able, and inclined, to translate difficult, ancient Latin into English?

\(\text{¶3}\) This article examines these questions and concludes that the answer to the first two lies between the polar extremes. It suggests that although Scott, Blume, and Pharr probably were supported and encouraged by enthusiasms then prevailing in an elite segment of the American legal community—including the Restatement movement—each man seems to have been motivated mainly by a sense of personal mission and a desire to connect himself to the history of Western civilization. As to the second cluster of queries, the article finds that despite their very different backgrounds, Scott, Blume, and Pharr all shared a classics-oriented education, similar to that of the American Founders, which made them value highly the Roman legal tradition and gave them the tools for translating its laws. Few persons in the present day would be able to undertake similar projects.

**Rome and the Classical Tradition in Early American History**

\(\text{¶4}\) To understand why Scott, Blume, and Pharr devoted much of their lives to translating Roman law into English, we first need to examine the role the Roman Republic and the classical tradition played in American history from colonial times into the early twentieth century.

---


4. See generally Linda Jones Hall, *Clyde Pharr, the Women of Vanderbilt, and the Wyoming Judge: The Story Behind the Translation of the Theodosian Code in Mid-Century America*, 8 ROMAN LEGAL TRADITION 1 (2012), http://romanlegaltradition.org/contents/2012/RLT8-JONESHALL.PDF. While the work was undertaken in the 1940s, the translation was not published until 1952: *CLYDE PHARR, THE THEODOSIAN CODE AND NOVELS, AND THE SIRMONDIAN CONSTITUTIONS* (1952).
Most of the Founders received a classics-oriented education, whether at Latin schools or from tutors. Colonial education for the elite was modeled on the English grammar school, which emphasized Latin and the classics. Hence, most American leaders into the early 1800s could read Livy, Cicero, Justinian’s Digest, and the like, in Latin, and they shared common cultural references. The American Founders culled what they deemed to be most worthy from the thought of the founders of Western civilization and employed it in creating their new nation. The American Founders were particularly enamored of the Roman Republic. Modern students of the Constitution acquire a vague sense of this when they read the Federalist Papers and see that the writers signed themselves as Publius, Brutus, Cicero, Cato, and so on. However, as Helmholtz notes, the Founders’ esteem for the ancient Rome sometimes approached veneration. Most of them saw the Roman Republic’s mixed constitutional system as ideal and viewed themselves as creating a similar republic in the New World. As Mortimer Sellers succinctly states it, “The Roman example gave Americans heroes, the vocabulary, architecture, and constitution for their revolutionary experiment in governing without a king.” General Washington

5. “It is well known that most of the signers of the Declaration and the delegates to the Constitutional Convention had a classical education.” Meyer Reinhold, Survey of Scholarship on Classical Traditions in Early America, in CLASSICAL TRADITIONS IN EARLY AMERICA 1, 46 (John W. Eadie ed., 1976). Reinhold describes the shifts that have occurred in historians’ estimation of the importance of the classical tradition in America up to the early 1800s. The modern consensus is that it was substantial. See generally JAMES J. WALSH, EDUCATION OF THE FOUNGING FATHERS OF THE REPUBLIC (1935). Walsh describes the education of several Founders in detail at 33–63 and notes that “Virginians usually obtained their preliminary education from private tutors in their homes.” Id. at 38.

6. Reinhold, supra note 5, at 23 (noting that in colonial America “[t]he experience of the Latin grammar school, an institution transplanted from England, was a sine qua non for college bound students preparatory to training in the professions . . . . ”); see also R. FREEMAN BUTTS & LAWRENCE A. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 75–76 (1953); Francoise Waquet, Latin Language, in THE CLASSICAL TRADITION 509 (Anthony Grafton, Glenn W. Most & Salvatore Settis eds., 2010).

7. James Madison, John Jay, and Alexander Hamilton, for example, all read the same classical texts that helped inform their views expressed in The Federalist. George Kennedy, Classical Influences on The Federalist, in CLASSICAL TRADITIONS IN EARLY AMERICA, supra note 5, at 119, 120. Hamilton and Jay studied the classics further at King’s College (now Columbia University), while Madison learned more of the classics at the College of New Jersey (now Princeton). Id. at 119. Hamilton was largely self-taught as a youth, but he prepped at the Elizabethtown (New Jersey) Academy, where his studies included Latin and Greek. RON CHERNOW, ALEXANDER HAMILTON 33, 42 (2004).

8. “The ancestry of the Constitution in the thought of Plato, Aristotle, Polybius, Cicero, and Carthage is too authentic to require repeated legitimating any longer.” Reinhold, supra note 5, at 36–37; see also Kennedy, supra note 7, at 127 (noting Madison’s citation of Demosthenes, Polybius, and Plutarch).


10. “The American revolution was . . . a neo-Roman revolution from the start.” Mortimer N.S. Sellers, Founding Fathers in America, in THE CLASSICAL TRADITION, supra note 6, at 367. “Americans needed new models of government to replace the British institutions that had failed them. Rome supplied a name (‘republic’), a goal (‘liberty’), and a technique (‘checks and balances’) in the structure of the Roman constitution . . . . ” Id. at 369.

11. Id. at 368. The Founders were often depicted as Romans in art of the period. See, e.g., BARBARA J. MITNICK & WILLIAM S. AVERS, GEORGE WASHINGTON: AMERICAN SYMBOL 41 (1999) (“In the various busts . . . the artist [Jean-Antoine Houdon] evoked the classical past by depicting the figure [of George
demonstrated his own veneration of Roman heroes when, in the dire circumstances at Valley Forge, he staged a reenactment of Cato the Younger’s resistance to Caesar and his death at Utica trying to save the Roman Republic.  

Roman Law, Civil Law, and Natural Law in Early America

Uses and Sources

¶6 In addition to learning some Roman law as part of their classics-based education, elite colonial and early American lawyers found Roman law, as well as Roman-based civil law and natural law, to be of practical use in court. Roman law was particularly relevant in admiralty cases, 13 but it also was employed in the law of mercantile suretyship, conflict of laws, and public international law. 14 In addition, early in American history jurists made extensive use of natural law, 15 which borrowed Roman law concepts. 16

¶7 Moreover, the Founders and other Enlightenment thinkers were attracted to “scientific systems” generally, and they saw Roman law as such a system. Michael Hoeflich notes that early modern jurists were impressed by the orderly and logical nature of the arguments made by classical jurists in Digest fragments. 17 The Founders, and others who appreciated Roman law, considered it to be ratio scripta—reason in writing. 18

¶8 However, the Founders also were quite human, and they were not above using their classical educations, and specifically their knowledge of the Roman and civil law, 19 to elevate themselves above the majority of their “common” contempo-

13. See, e.g., Daniel R. Coquillette, Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758–1775, in 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 75, 82–87 (Steve Sheppard ed., 1999). As the title of the article implies, it provides an excellent overview of the status and use of Roman law during the colonial and early American eras. Regarding admiralty law in particular, see Max Radin, Roman Law in the United States, in 2 ATTI DEL CONGRESSO INTERNAZIONALE DI DIRITTO ROMANO, BOLOGNA 17-2-APRILE 1933, at 345, 353 (1935).
14. Radin, supra note 13, at 352; see also Helmholtz, supra note 9, at 1657–64.
15. Roscoe Pound, The Formative Era in American Law 12 (1938); see also Perry Miller, The Life of the Mind in America: From the Revolution to the Civil War 164–67 (1965) (stating that “the concept of a law of nature was deeply imbedded in their intellectual inheritance,” id. at 164). Helmholtz offers many instances of jurists’ use of natural law early in this country’s formative years. See Helmholtz, supra note 9, at 1671–76.
16. Radin points out that Grotius and other early modern natural law theorists used the classifications and categories of the Corpus Juris and its commentators. Radin, supra note 13, at 348–49.
19. The phrase “Roman and civil law” is often used in discussing together Roman law per se and the later continental legal systems founded on it. See, e.g., William Wirt Howe, Roman and Civil Law in America, 16 HARV. L. REV. 342, 344 (1903).
aries. John Adams (1735–1826) was clear about this in his diary: “Few of my con-
temporary beginners in the study of law have the resolution to aim at much knowl-
edge in the civil law. Let me therefore distinguish myself from them, by the study of
the civil law, in its native languages, those of Greece and Rome.”20 Adams went so
far as to refer to ordinary practitioners making a living litigating as “petty foggers”
and “dirty dabbler in the law.”21
¶9 To gain favor with Jeremiah Gridley and other elite Boston lawyers, whose
support he knew he would need to be admitted to the Suffolk bar, Adams studied
Justinian’s Institutes and Cicero.22 Not only did this strategy succeed for purposes of
Adams’s bar admission, but it led eventually to him being asked to join as a found-
ning member of the Sodalitas law club, an association of gentlemanly Bostonian
lawyers who read Cicero, the Corpus Juris Civilis, and other classics, together.23
¶10 James Kent (1763–1847), judge, law professor, treatise writer, and graduate
of Yale College, used his classical education similarly.24 Although by his own admis-
sion he was “a very inferior classical scholar” while at Yale, an embarrassing encoun-
ter with his classmate Edward Livingston a few years after they graduated motivated
him to much improve his Greek, Latin, and French.25 He confessed that later, as a
judge, “I made much use of the Corpus Juris, and as the judges (Livingston excepted)
knew nothing of French or civil law I had immense advantage over them. I could
generally put my Brethren to rout and carry my point . . . . ”26
¶11 As we shall see, acquiring Roman law knowledge as part of a gentlemanly
and scholarly legal education, to distinguish its holders from ordinary attorneys, is
a thread that runs through the history of Roman law in the United States into the
twentieth century. Hoeflich writes that Roman law was part of the “high legal cul-
ture” in early America.27 Classically educated lawyers considered themselves to be
part of a “philosophical and legal profession.”28
¶12 Finally, Roman law, and Roman-based civil law and natural law, flowed into
colonial and early American legal life via the influence of the many Scottish settlers

20. Coquillette, supra note 13, at 76 (quoting 1 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 44–45
(1964)).
21. Id.
22. Id. at 76–77.
23. Id. at 80–82.
24. For a relatively concise but informative sketch of Kent and his career, see John H. Langbein,
25. James Kent, Experiences as a Law Student, in 1 THE HISTORY OF LEGAL EDUCATION IN THE
UNITED STATES, supra note 13, at 122. Livingston, who later drafted the Louisiana Civil Code, dropped
by Kent’s office one day to share the beauties of Horace’s poetry with him, assuming Kent would grasp
the Latin—which he did not, causing Kent great chagrin. Id. at 120. Livingston’s assumption says
much about the elite culture of the day.
26. Id. at 122.
Hoeflich takes “high legal culture” to consist of the study of legal philosophy, as opposed to the study
of case law and precedent. Id. Roman law, in his view, was a fundamental part of American high legal
culture in the eighteenth and nineteenth centuries. Id. at 1724.
28. See id. at 1724. Hoeflich believes the high legal culture was at its apogee in the late eighteenth
and early nineteenth centuries. See id. at 1725.
who had lived under the civil law before immigrating to America. For instance, James Wilson, a Founder, a Declaration of Independence signer, and an original U.S. Supreme Court Justice, was born and raised in Scotland, and on account of his Scottish heritage, he argued for an American law that was independent from English common law and that incorporated much natural law.

**Possible Adoption of the Civil Law in the United States**

¶13 Contrary to what likely would be the assumption of most modern American lawyers, not only did the former colonies refrain from immediately accepting the English common law as the basis for their legal systems, many specifically rejected it, and they might have adopted a civil law system instead. After the Revolution, there was a lingering antipathy against what was seen by many to be the oppressive motherland and the legal system associated with it. This anti-English feeling was reinforced by the War of 1812. Perry Miller points to the “patriotic hatred of everything British” in explaining the hostility of most Americans to “any and every use of the English Common Law.” Typifying a common sentiment, Benjamin Austin asked: “Can the monarchical and aristocratical [sic] institutions of England be consistent with the republican principles of our Constitution? We may as well adopt the law of the Medes and Persians.” Other commentators have made similar points in noting the American reaction against English common law.

¶14 Some commentators believe there was a real possibility for a civil law system to take root in the United States. Stein has argued, “Immediately after the Revolution there was so little local authority in many areas of the law that American courts could have incorporated much civil law into their systems with little opposition.” He points out that not only were things British disliked, but that there was “a corresponding sympathy with things French. There could have been a reception of the civil law into the American corresponding to the French ‘Reception,’ which was a gradual process . . . .” Friedman also notes that the “civil law domain . . . encircled the domain of the common law” in the initial years of independence. In addition, as noted above, most elite American lawyers already were familiar with, and favorably disposed toward, the civil law and its Roman law roots.

29. See Radin, supra note 13, at 346, 349.
30. Stein, supra note 18, at 407–08.
33. Miller, supra note 15, at 106.
34. See, e.g., Lawrence M. Friedman, A History of American Law 108 (2d ed. 1985); Grant Gilmore, The Ages of American Law 22 (1977); Pound, supra note 15, at 40, 107; see also Radin, supra note 13, at 347–51, for a discussion of the attitudes of the colonists toward the English common law.
35. Stein, supra note 18, at 410.
36. Id.
37. Friedman, supra note 34, at 167–68 (referring to the French and Spanish civil law in effect along the Mississippi, and in New Orleans, the Floridas, and Texas).
§15 It is impossible to know whether civil law actually might have been adopted in the United States soon after the Revolution. However, it is clear that Roman law and civil law had lost their appeal for most American lawyers by the middle of the nineteenth century. There were several reasons for this. The decade of the 1830s marked a sea-change in American leadership, with the poorly educated populist, Andrew Jackson, succeeding the classically educated John Quincy Adams in 1829. One aspect of Jacksonian democracy was an anti-elitist sentiment that involved lowering bar admission standards to accommodate the less educated, who had either “read law” or learned it as a trade in their law office apprenticeships. These new lawyers could not read Greek, Latin, or French and were not inclined to favor foreign law. In addition, the anti-English feeling and the antipathy to English common law associated with it had dissipated as the Revolution and the War of 1812 receded from memory. The common law by then was less likely to be seen as an antiquated, feudal system and more as an ancient source of rights against the central government, whereas codes were associated with tyrannies. Moreover, by this time, a sufficient body of American case law and writing had developed to obviate the need to look abroad for authority.

Roman Law and Civil Law in the Later Nineteenth Century

§16 However, Roman law and civil law continued to be of interest throughout the nineteenth century to American jurists in the codification movement, which began in the 1820s, as well as to those in the movement to replace the legal apprenticeship system with law school education, which started around the same time but took hold only much later in the century.

38. Reimann finds that “[a]round 1820, the die was cast against a wholesale adoption of the civil law.” Mathias Reimann, Introduction, in THE RECEPTION OF CONTINENTAL IDEAS IN THE COMMON LAW WORLD 1820–1920, at 9 (Mathias Reimann ed., 1993). Stein holds that “[t]he 1820s and 1830s were the hey-day of civil law in the United States . . . . [y]et by 1850 it had probably ceased to be a real force in the development of American law.” Stein, supra note 18, at 431–32.


40. See Albert Harno, LEGAL EDUCATION IN THE UNITED STATES 39 (1953); see also Friedman, supra note 34, at 304; Alfred S. Konforsky, The Legal Profession: From the Revolution to the Civil War, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 68, 84 (Michael Grossberg & Christopher Tomlins eds., 2008).

41. By 1848, the overwhelming majority of lawyers in the United States had read law on their own or had done a law office apprenticeship. See Friedman, supra note 34, at 606.


44. Gilmore, supra note 34, at 23.

45. See Cook, supra note 32, at ix. Stein’s statement that the 1820s and 1830s were the heyday of civil law in America refers to the fact that Edward Livingston’s Civil Code for Louisiana was published in 1825 and seemed to foretell the adoption by other states of civil law–based codes. Stein, supra note 18, at 431–32.

46. See Robert Stevens, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 4–5 (1989) (noting the rise of private law schools and how, in the 1820s, “colleges began to provide an umbrella under which [the law schools] might find shelter”).

47. Jacksonian democracy is blamed for this false start. Id. at 10. But by the 1850s, “the pendulum began to swing back, with the re-founding of law schools.” Id.
The Codification Movement

¶17 It is hard for a modern American lawyer to fathom the intensity and importance of the codification debate. “No technical issue of law reform so agitated the elite and academic lawyers of the nineteenth century as codification.”48 Many ordinary citizens complained of the complexity of law, and progressive forces wanted to achieve change through law, while lawyers were frustrated by the many conflicting statutes and case law among the states.49 Jeremy Bentham (who coined the term “codification”)50 was active during the early part of this period and provided inspiration for many,51 as did the French civil code of 1804.52 David Dudley Field (1805–1894), the most prominent American codification advocate, was a New England aristocrat who knew Latin and Greek.53 Field was well disposed toward Roman and civil law and believed American law was at a stage of confusion similar to that of France before Napoleon and the Roman Empire before Justinian.54 Field’s Code of Civil Procedure was partially adopted in New York in 1846,55 and it and his Code of Criminal Procedure were enacted by many of the new western states following the Civil War.56 However, the champions of true codification, in the sense of a Code Civil–style simplification and harmonization of law, lost to those who did not trust legislatures and who favored the judicial discretion, and flexibility, of the common law.57 Moreover, the codifications that had been enacted were routinely amended by legislatures and construed like ordinary legislation by courts.58

Law School Education in the Nineteenth Century

¶18 Although law teaching in colleges began in the United States in the late 1700s, the first wave of law schools did not appear until the nineteenth century—from about 1810 to 1860.59 Roman law played a significant role in the curriculum of some of these early law schools. In the second decade of the 1800s at the Univer-

48. Konefsky, supra note 40, at 95.
49. Id.; see also Cook, supra note 32, at 5; David S. Clark, The Civil Law Influence on David D. Field’s Code of Civil Procedure, in The Reception of Continental Ideas in the Common Law World 1820–1920, supra note 38, at 63, 65.
50. Miller, supra note 15, at 243.
51. Charles Noble Gregory, Bentham and the Codifiers, 13 Harv. L. Rev. 344 (1899).
52. See Clark, supra note 49, at 67–68. Cook notes that the Napoleonic Code already was functioning in France and seemed applicable to the United States. Cook, supra note 32, at 71.
54. Clark, supra note 49, at 73, 76.
55. Browne, supra note 53, at 51.
56. Id. at 52; see also Friedman, supra note 34, at 405–06; Maurice Eugen Lang, Codification in the British Empire and America 131 (1924).
57. See, e.g., Miller, supra note 15, at 255 (characterizing the struggle as a contest between nationalism and cosmopolitanism).
58. Friedman, supra note 34, at 406.
59. M.H. Hoeflich, The Gladsome Light of Jurisprudence 6 (1988). Hoeflich notes that chairs in law were established at the College of William and Mary, Columbia College, and Penn (the College of Philadelphia) in the last two decades of the eighteenth century, but that most law schools per se, such as those at Harvard, Tulane, and Transylvania, did not arise until the next century. The Litchfield law school was an exception in the late 1700s. See also Friedman, supra note 34, at 318–22; Stevens, supra note 46, at 4–10; Warren, supra note 31, at 341–65; Hugh C. Macgill & R. Kent Newmyer, Legal Education and Legal Thought, 1790–1920, in 2 The Cambridge History of Law in America, supra note 40, at 36, 45–48.
sity of Maryland, David Hoffman gave thirty lectures on Roman law,60 and Daniel Mayes included Roman law in the Transylvania law school curriculum in the 1830s.61 Others, such as Simon Greenleaf at Harvard, used Roman law for purposes of comparison with the common law.62 As Stein points out, the leading figures of legal education in this period viewed the civil law “as the source of that academic method of legal study they hoped would replace the traditional practical learning.”63

However, as has been noted above, the practice of law as a profession was under attack in the third and fourth decades of the nineteenth century, and as a result, many law schools closed.64

¶19 Still, law school education (and the legal profession) rebounded in the second half of the century, and, again, Roman law accompanied it to a significant extent. There were 31 law schools in the United States in 1830, 51 by 1880, 61 by 1890, and a total of 102 at the turn of the century.65 It was in the later 1800s that many universities added law schools.66

¶20 The reasons for this resurgence of the bar and of university-based legal education in the second half of the nineteenth century include the general institutionalization and industrialization of life in America and an associated interest in “scientific” progress in all areas of life,67 as well as a reform movement in law and government that also led to the organization of the American Bar Association (ABA) by an elite group of lawyers in 1878.68 Tellingly, one of the ABA’s first actions was to create the Committee on Legal Education and Admission to the Bar, headed by Carlton Hunt, a Louisiana lawyer.69

¶21 The universities in which these new law schools were taking root looked toward continental European models, and especially to Germany, where law was seen as a science and the prestige of the professoriate was high.70 Thus, it is not

60. Lewis C. Cassidy, The Teaching and Study of Roman Law in the United States, 19 GEO. L.J. 297, 301 (1930); see also Stein, supra note 18, at 424. Hoffman’s course of lectures is outlined in David Hoffman, Syllabus of a Course of Lectures on Law, in 1 The History of Legal Education in the United States, supra note 13, at 250.

61. Hoeflich, supra note 27, at 1725. Both Hoffman and Mayes believed law was a science and ought to be taught as one. See Hoeflich, supra note 17, at 114–18. Roman law was added to the Harvard Law School curriculum in 1829. Hoeflich, supra note 27, at 1730.

62. HOEFLICH, supra note 59, at 139–40.

63. Stein, supra note 18, at 423.

64. The reasons for this are disputed, but they include the Jacksonian democracy previously mentioned. STEVENS, supra note 46, at 7–10; see also Konefsky, supra note 40, at 83–84 (noting that from 1800 to 1840, lawyers lost control over bar admission standards).

65. FRIEDMAN, supra note 34, at 607.

66. Id. at 608–09. Friedman mentions the Universities of Michigan, Notre Dame, Georgetown, Howard, and Northwestern, among others.

67. See STEVENS, supra note 46, at 20–23.

68. See HARNO, supra note 40, at 71–73; see also Macgill & Newmyer, supra note 59, at 49. As to the elite nature of the ABA in its early decades, see LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 41 (2002).

69. HARNO, supra note 40, at 73.

70. Mathias Reimann, A Career in Itself: The German Professoriate as a Model for American Legal Academia, in The Reception of Continental Ideas in the Common Law World 1820–1920, supra note 38, at 169. He points to the German professoriate’s “elegant systematization of legal concepts and whose historical research [American law professors] deeply admired.” Id.; see also David S. Clark, Tracing the Roots of American Legal Education: A Nineteenth Century German Connection, in 1 The History of Legal Education in the United States, supra note 13, at 495, 498.
surprising that many American law schools of the era viewed Roman law as the paradigm of the scientific legal system they ought to teach. The 1879 Report of the ABA Committee on Legal Education and Admission to the Bar reflected this view in referring to “the movement everywhere observable in favor of codification and the use of the symmetry and scientific accuracy of the Roman jurisprudence.”\(^{71}\) The committee, chaired by the civilian lawyer Hunt, lauded Roman and civil law at length\(^ {72}\) and ended by recommending that state and local bars lobby for the creation in their jurisdictions “by public authority” of law schools “whose diplomas shall . . . be essential as a qualification for practicing law” and in which “the Civil or Roman Law” was part of the curriculum.\(^ {73}\)

¶22 Absorbing Roman law also was viewed as a way of establishing law in the United States as a learned profession, as opposed to a trade, inasmuch as it provided a broad historical understanding of the law in its ethical, political, and economic aspects.\(^ {74}\) Introducing Roman law into the curriculum also was often associated with making law a “gentlemanly” profession. Hoeflich points this out nicely in quoting Simon Greenleaf’s closing address to Harvard Law School students a few decades earlier when Greenleaf told them: “[L]aw school is ‘an association of students’ who are ‘gentlemen’ whose object is to make ‘good lawyers of good men . . . .’”\(^ {75}\) Hoeflich goes on to note that Greenleaf and others in what he refers to as the Boston circle saw lawyering as evolving into a “broadly learned profession comprised of gentlemen.”\(^ {76}\) This is the type of legal profession the ABA and university law schools were seeking to create in the late 1800s.\(^ {77}\)

¶23 However, the explosive growth in the number of law schools that occurred in the late 1800s (and on into the early 1900s) included many nontraditional institutions, whose philosophies and goals differed from those of the ABA and university law schools. Many of them were not affiliated with universities, most were urban, and many had part-time programs, including evening courses, that were aimed at immigrant populations and working people who could not afford to attend full-time.\(^ {78}\) The number of evening law schools, which typically were not university-affiliated, grew from ten to forty-five between 1890 and 1910.\(^ {79}\) The YMCA, for instance, founded numerous part-time, night law schools in big cities

72. Id. at 221–22.
73. Id. at 235–36.
74. Munroe Smith, Roman Law in American Law Schools, 45 Am. L. Reg. 175, 178–81 (1897). Smith goes on to opine that an even stronger case could be made for teaching Roman law to the extent law is a science. Id. at 181–84.
75. Hoeflich, supra note 27, at 1729 (quoting an undated, unpagedinated manuscript at the Harvard Archives).
76. Id. at 1729–30.
77. The University of Iowa, for instance, offered a course in Roman law in 1870. Lewis C. Cassidy, The Teaching and Study of Roman Law in the United States, 19 Geo. L.J. 297, 302 (1931).
78. Stevens, supra note 46, at 74–75; see also Friedman, supra note 68, at 36–37.
79. Friedman, supra note 68, at 36. See also Stevens, supra note 46, at 75–76, for statistics about the number of law schools and law students in the various sorts of programs in this period. For example, while there were 1200 law students in twenty-one law schools in 1870, the numbers had grown to 4500 students in sixty-one schools by 1890.
starting in the 1890s. 80 Thus, at the turn of the twentieth century, conflicting currents were sweeping through the legal profession and legal education.

**Roman Law in Twentieth-Century America**

¶24 While the legal profession and legal education were thriving in the United States as the twentieth century began, they lacked cohesion. The elite bar and university law schools saw law as a learned profession for gentlemen, whereas the less affluent (who often did not have good educational backgrounds) 81 and the schools that served them tended to see law more as a technical skill that could lift life prospects and solve social problems. Economic interests were at stake in addition to these philosophical ones. Friedman puts it clearly: “These evening and part-time schools supplied the ranks of Greek lawyers, Jewish lawyers, Irish and Italian lawyers, and other lawyers who took care of clients in immigrant communities . . . . The upper-crust lawyers worried about the prestige of their profession . . . and they worried about money, too.” 82 Hence, the well-established bar and traditional law schools suggested solutions that at once reflected economic self-interest, perhaps anti-immigrant bias, and possibly a sincere concern for professional competence: raising standards for legal education and for admission to the bar. 83 A detailed examination of these movements is beyond the scope of this article, but they are relevant here to the extent that many of those involved in these movements also tended to value knowledge of Latin and Roman law and to see their continued relevance to law and legal education in the United States.

¶25 In the 1920s, the AALS and ABA pushed hard to raise standards for law school admission; this included an ABA recommendation for at least two years of college education before law school. 84 As we shall see, given the common curricula of higher educational institutions in the era, this meant that the students meeting these standards for the “high-entrance” law schools would have learned Latin and have studied the classics. 85 Around this same time, twenty AALS law schools offered
Roman law, the Riccobono Seminar on Roman Law in America was being founded at the Catholic University of America, and at least one law professor was suggesting that Roman law should be required for admission to the bar in every American jurisdiction, because “it would lead . . . to a diminution of the present professional incompetency.” So, when Scott, Blume, and Pharr were laboring at their translations of Roman law in the first part of the twentieth century, they were in harmony with the positive attitudes toward Roman law held by elite members of the bar and traditionalist legal educators.

Moreover, they were supported to some extent by another movement of the era that, at first glance, might appear to have nothing whatsoever to do with Roman law: the American Law Institute’s Restatement of the Law project.

The Restatements and Roman Law

The American Law Institute (ALI) was founded in 1923 “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” The report that recommended creating the ALI was produced by a committee whose membership reads like a Who’s Who of elite American lawyers, judges, and law professors, including Elihu Root (chairman), George W. Wickersham (vice chairman and subsequently the Institute’s first president), William Draper Lewis (secretary and then the ALI’s first director), Joseph H. Beale, Benjamin Cardozo, Arthur L. Corbin, Ernst Freund, Learned Hand, Roscoe Pound, Harlan F. Stone, John H. Wigmore, and Samuel Williston.

The Restatements and their promoters are relevant here for two reasons. First of all, many ALI members were familiar with and well disposed toward Roman law and codes; many of them later provided the positive comments Pharr used in his attempts to obtain grant support for his Roman law translation proj-

---

86. Cassidy, supra note 60, at 302. When Thomas Swann became dean of Yale Law School in 1916, he recommended the school emphasize the areas of criminology, administrative law, international law, and Roman law. See Stevens, supra note 46, at 135.


88. Charles P. Sherman, The Nineteenth Century Revival of Roman Law Study in England and America, 23 Green Bag 624, 626 (1911). Here, Sherman was following up on remarks made by another in a speech to the ABA that distinguished the “better equipped” university law school graduates from the less well-equipped graduates of part-time and night law schools. See Frederic R. Coudert, The Crisis of the Law and Professional Incompetency, 36 A.B.A. Rep. 677, 682 (1911); see also Moliterno, supra note 83, at 31 (commenting on Coudert’s and other elite bar members’ association of immigrants and part-time and night law schools with incompetence).


90. Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of the American Law Institute, in 1 A.L.I. Proc. 1 (1923); see also William Draper Lewis, Plan to Establish American Law Institute, 9 A.B.A. J. 77 (1923) (noting that the report was largely funded by a $25,000 grant from the Carnegie Corporation). The Carnegie Corporation also agreed to finance the ALI with a grant of $110,000 per year through 1933. Lewis, supra note 89, at 636.
ect. 91 Second, to a significant extent the Restatements were a continuation, or permutation, of the Roman and civil law–influenced codification movement (as can be seen in the rationale for the ALI’s creation provided above). 92 Views vary as to the role of the Restatements in American legal history—whether, for example, they were conservative or progressive—and this article does not delve into that debate. 93 We shall look only at how the Restatements implicated Roman law and the extent to which both were of interest to the elite bar and therefore may have helped create the atmosphere in which Scott, Blume, and Pharr conducted their arduous work of translating ancient Roman law.

\[\text{¶}29\] In his report on the ALI’s organizational meeting, William Draper Lewis emphasized that the committee was opposed to codification owing to the rigidity of codes compared with the flexibility of common law and the ability of judges in that system to elucidate the law in greater detail.94 Friedman agrees that the Restatement drafters wanted to save the common law system and head off codification,95 while Williston, one of the Restatement drafters, explained that they were attempting to procure some of the advantages of codification without the disadvantages.96

\[\text{¶}30\] However, some saw the Restatements either as a precursor to codification or a sort of quasi-codification. Williston himself actually was in the former group. Discussing codification he opined: “It has been the history of law in every other civilized country that after a customary or common law has developed to a certain degree . . . a Code has followed . . . [M]y own belief is that we shall repeat the history of other countries.”97 He then went on to say, referring to the Restatements, that “if we are going to do so, it is highly desirable that we should have something that will be a good Code. This Restatement . . . after [having been] put through the mill, so to speak . . . will serve as a better foundation for a Code . . . than any country has ever had before.”98 Mitchell Franklin, of the Tulane College of Law faculty, viewed the Restatements similarly, writing that “[t]he American Romanist . . . will compare this enterprise with corresponding enterprises in modern civil law,”99 and noting Williston’s awareness that the Institute’s texts are “dress rehearsals for

---

91. See infra notes 108–109 and accompanying text at ¶ 35.
93. See, e.g., Friedman, supra note 34, at 676; Grant Gilmore, The Death of Contract 65–67 (2d ed. 1995); N.E.H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, 8 LAW & HIST. REV. 55 (1990); White, supra note 83.
94. Lewis, supra note 89, at 636. George Wickersham, ALI president, reiterated this in his address at the Institute’s second meeting, stating this was not an endeavor to formulate a code of law for legislative enactment. Progress Is Made in Restatement and Classification of Law, 10 A.B.A. J. 157, 158 (1924).
95. Friedman, supra note 34, at 676.
97. Id. at 41.
98. Id.
Franklin expounded on this position at length in an article whose title clearly states his thesis: “Restatement as Transitional to Codification.”

¶31 Others, while not necessarily viewing the Restatements as a preliminary stage of codification, connected them with Roman law. One writer referred to them “as a sort of [Justinian] Digest without its statutory force,” while an ALI member making the same connection saw the Restatements as being more like the glossators’ annotations on the Digest.

¶32 Even the ALI officials who most stoutly denied that the Restatements were attempts to codify connected them to Roman law. Lewis compared the “difficulty and magnitude” of the project to the “codification and exposition of Roman law undertaken in the reign of Justinian,” while Wickersham repeated the assertion made in the original committee report: “As a scientific, constructive legal work, there has been nothing to compare with it, not even the work of framing the Napoleonic Code, since under the direction of Justinian, the Roman law was given systematic expression.”

¶33 For reasons that will be described below, it is certain that Blume was aware of the Restatement movement and its connection to Roman law, and it is highly likely that Scott and Pharr were as well. Moreover, members of the elite bar knew and valued Roman law. Thus, the translators were working in an atmosphere that encouraged their endeavors.

The Classics and Roman Law in the Elite Bar

¶34 The classics and Roman law continued to be part of higher legal culture in the United States from the late nineteenth century into the early twentieth century. Hoeflich notes how “[d]uring the last two decades of the nineteenth century and the first two of the twentieth, it was difficult to avoid seeing an article on [Roman and civil law] if one read the legal literature.” This interest was supported by the ongoing importance placed on offering a classical education to students. We shall look at this in detail when we discuss the education Scott, Blume, and Pharr had to prepare them to translate Latin, but it will be sufficient and convenient here to again refer to Hoeflich, who points to a 1905 symposium on the continued teaching of Latin and Greek to undergraduates, which included a discussion on the importance of classical languages as “a pre-professional subject for would-be lawyers.”

100. Id. at 149 n.2.
103. Henry Upson Sims, The Restatement of Law by the American Law Institute, 3 Ala. Law. 383, 391 (1942); see also John H. Langbein, Renee Lettow Lerner & Bruce P. Smith, History of the Common Law 851 (2009) (noting that the Restatements are “the closest analogue to the civil law of European civil codes of private law”).
104. Lewis, supra note 89, at 636.
105. George W. Wickersham, Address of President Wickersham, 19 A.B.A. J. 327 (1933) (quoting the report).
107. Id. Hoeflich writes: “[S]everal practicing lawyers argued that Latin was particularly well suited as a prelaw subject, especially if the study of the language included the elementary legal literature (including Justinian’s Institutes).” Id.
Illustrative of the elite bar’s interest in Roman law in this era is the list of notables whose endorsements Pharr gathered in 1933 for his *Project for a Variorum Translation into English of the Entire Body of Roman Law.* Fifteen of them were members of the American elite bar: officers or members of the ALI or of important bar associations, U.S. Supreme Court Justices, former high U.S. government officials, and prominent law faculty members. So, it was not shocking when, in May 1938, U.S. Supreme Court Justice Pierce Butler attended Justice Blume’s address to the Riccobono Seminar on “The Code of Justinian and Its Value,” nor was it surprising that Justice Blume would attend the ALI meeting while he was in Washington, D.C., to deliver that paper on Roman law. Moreover, it was not unusual at the time for other legal academic worthies who today are commonly associated with subjects other than Roman law, such as Pound, Wigmore, and Williston, to be interested also in Roman, civil, and comparative law. Wigmore, for instance, suggested that the AALS pursue the translation into English of foreign legal scholarship that resulted in the Continental Legal History series. None of this was extraordinary for the period because these men had classics-oriented educations—like the Founders, and like Scott, Blume, and Pharr—and one gets the distinct sense from reading of their activities that showing an appreciation for Roman law was one way elite lawyers verified their status.

### Scott, Blume, Pharr and Classically Oriented American Education

Although they were from diverse socioeconomic backgrounds and attended very different sorts of schools, Scott, Blume, and Pharr all had educations that

---


109. Clyde Pharr, *Comments on the Roman Law Project* (unpublished manuscript, on file with author). These commenters were Benjamin Cardozo (Supreme Court), Zechariah Chafee (Professor, Harvard Law School), John W. Davis (N.Y. Bar Association president), Albert Harno (Dean, University of Illinois College of Law), Charles Evans Hughes (Supreme Court), William Draper Lewis (ALI), Justin Miller (Dean, Duke Law School), George Wharton Popper (ALI; former U.S. senator), Roscoe Pound (Dean, Harvard Law School), Owen J. Roberts (Supreme Court), Elihu Root (ALI; former U.S. secretary of state), Harlan F. Stone (Supreme Court), J.B. Thayer (Professor, Harvard Law School), Guy Thompson (ABA president), and George W. Wickersham (ALI; former U.S. attorney general). Interestingly, seven of the members of the committee that wrote the report recommending the ALI’s creation also endorsed Pharr’s project. That committee and its reports are discussed at *Report of the Committee, supra* note 90; Lewis, *supra* note 90; Lewis, *supra* note 89, at 636.


111. As chief justice of the Wyoming Supreme Court, Blume was an ex-officio ALI member. See *Ex Officio Members and Those Appointed to Represent Them*, 15 A.L.I. *Proc.* 20 (1938).

112. Wigmore and Williston also attended the Riccobono Seminar at which Blume gave his paper, as did Harvard Professor Joseph Beale, who noted that it was Pound “who really brought the spirit of Roman law to Harvard.” Riccobono, *supra* note 110, at 416, 425. In addition, Pound, Wigmore, and Williston all were officers or editors of the ABA’s Comparative Law Bureau. See *Organization and Work of the Bureau of Comparative Law*, 1 A.B.A. J. 591, 592 (1915).

connected them to the ancient Greeks and Romans and that provided them with the basic tools they needed to translate ancient Roman laws.

Samuel Parsons Scott

¶37 S.P. Scott was born into a wealthy family in Hillsboro, Ohio, only ten years after the death of Founder and fourth U.S. president James Madison, so it was to be expected that Scott would be provided a classics-based education.114 As already has been described, a Latin grammar school education had been the sine qua non for college-bound students, such as Madison, who were preparing for careers in the ministry, medicine, or law, in the Colonial and early post-Revolutionary era.115

¶38 Despite some efforts to make education in the United States more practical and to deemphasize the study of Latin and Greek, the classical curriculum of grammar schools and colleges remained much the same into the first decades of the 1800s.116 Latin grammar schools gradually gave way to “academies,” which taught Latin and Greek less intensively but that still “retained the study of Latin, and usually Greek through the medium of English.”117 It seems that Scott attended such an academy in Hillsboro, Ohio, before going on to earn an A.B. degree from Miami University (Ohio), and Phi Beta Kappa honors, in 1867.118 At Miami University, Scott’s studies were heavily weighted toward the classics; according to his college catalog, twenty of the fifty-one required courses were on Greek or Latin literature or history (e.g., Heroditus, Greek History, Livy, and Roman history).119 Scott’s university education also included training in the classical art of rhetoric, and he gave a skillful valedictory address at his graduation.120

Fred H. Blume

¶39 Blume’s background was much less privileged than Scott’s, yet he also obtained the fundamentals of a classics-based education that made him later believe he could translate the Justinian Codex and helped equip him to do so. He was born in Winzlar, Germany (near Hannover), in 1875, where his parents, Wilhelm and Caroline, owned a small forty-acre farm.121 Friedrich, as he was christened, almost certainly attended school, for long before then German states had mandated compulsory elementary school education.122 While it is not known which of the four types of school he attended, we can be sure he was literate when he immigrated to the United States in 1887 to join his elder brother Wilhelm and

114. See Kennedy, supra note 7, at 119–20.
115. See id.; Walsh, supra note 5, at 33–68.
116. See Reinhold, supra note 5, at 27.
117. Butt & Cremin, supra note 6, at 126–27.
119. Forty-first Annual Circular of Miami University 11–12 (Oxford, Ohio 1866). These were for the “College,” in which he was enrolled, as opposed to those for the “English and Scientific” department. Scott went on to earn an A.M. from the university as well, but nothing is known about the requirements for that degree.
120. Kearley, supra note 3, at 6.
that he knew some French. The family’s economic prospects must not have been
good, even by the standards of that place and time, for each of the three sons
eventually emigrated to the United States.

¶40 In the United States, Fred (as he became) attended rural or small-town
schools in several midwestern states while working as a farmhand. He settled in
Audubon, Iowa, where he graduated from high school in 1894, in a class of 13. Yet he learned Latin even in that small-town high school, and he helped some of his
classmates with it.

¶41 The admission requirements of the State University of Iowa (now the Uni-
versity of Iowa) for the bachelors in philosophy, which Blume earned there in 1898,
prove that high school education in Iowa must have been rich in the classics. It is
not known which set of requirements Blume qualified under, but both courses
included Group I, Ancient Languages. The Philosophy A Course entrance require-
ments consisted of seven or nine terms (depending on their length in the appli-
cant’s high school) of ancient languages, including Latin grammar, Caesar (four
books), Cicero (four orations), Virgil (six books) with prosody, Latin prose compo-
sition, Greek grammar, and Xenophon’s *Anabasis* (two books). Taking the Philoso-
phy B Course path allowed a student to substitute science or modern languages
(German or French), but B Course students still had to take fifteen credits in Latin
during their first year at the university and nine in ancient history, and in the sec-
ond year they had to pass fifteen hours of Latin or French. In short, regardless of
which set of requirements he satisfied, Blume could not have earned his degree
without having studied a significant amount of Latin, and some Greek, and clearly this sort of background was not uncommon among state university gradu-
ates of the era.

¶42 Blume, like Scott, also learned the classical art of rhetoric. Blume was a
member, and ultimately president, of a literary, or forensic, society called the Irving
Institute, which was part of the university’s Debating League whose teams engaged
in both intra- and intercollegiate debate. Blume remained proud all through his
life of these endeavors.

123. Golden, supra note 121, at 203, 206; Frank Mantz, *Audubon High School Gradu-
ates of 1957 Can Get Inspiration from Blume Story, AUDUBON NEWS-GUIDE*, May 16, 1957 (unpagi-
nated photocopy; on file with author). The types of school were the Gymnasium, Realgymnasium,
Oberrealschule, and Volksschule. *Craig, supra* note 122, at 189–90. Blume may have attended the sec-
ond or third listed, given that they taught modern languages. *Id.*


125. *Id.* at 203–05.

126. *Id.* at 206.

127. Letter from Fred Blume, Justice, Wyo. Sup. Ct., to Clyde Pharr, Prof., Vanderbilt Univ.
(Dec. 28, 1943) (on file with the Wyo. State Archives); Mantz, * supra* note 123.

.handle.net/2027/uuig.30112076172102?urlappend=%3Bseq=16.

129. Blume’s university Greek notebooks (heavily corrected in red) are among the materials
he bequeathed to the University of Wyoming.

.net/2027/locark://13960/1tpg2m314.

131. In his eighties, Blume referred to his forensic activities in letters to University of Wy-
oming officials stating the highlights of his career in connection with his receipt of an honorary degree.
Letter from Fred Blume, Justice, Wyo. Sup. Ct., to R.R. Hamilton, Dean, Univ. of Wyo. Coll. of Law
(Oct. 29, 1956) (on file with the Wyo. State Archives); Letter from Fred Blume, Justice, Wyo. Sup. Ct.,
Clyde Pharr

¶43 Clyde Pharr was the least privileged of the three translators. He was born February 17, 1883, near Saltillo, Texas, the son of a poor Texas farmer and his wife.132 He worked on the farm most of the year and attended a country school only two or three months a year—in the winter, when his labor was not needed.133 After running away from home several times, Clyde was fortunate in being sent away to school in Evans Point, Texas, where he was inspired to learn by his teacher, A.S. Harper.134 Pharr’s late-found enthusiasm for education convinced his father to allow him to start East Texas Normal College, some forty miles distant, in Commerce, Texas, in 1901, when Clyde was eighteen.135

¶44 East Texas Normal College (ETNC) was typical of the many normal schools of that era in having as its primary function the training of young men and women to teach in rural elementary schools.136 Public normal schools in the United States arose in New England in the third decade of the 1800s and increased in number and geographical extent throughout the following decades, so that there were 139 by 1900, shortly before Pharr began at ETNC.137

¶45 The original basic normal school course of studies was a two-year certificate program, not one ending with a degree. However, as the country industrialized and urbanized, normal schools raised their standards and expanded their goals;
they made four years of secondary education an entrance requirement and began offering degrees.\textsuperscript{138}

§46 ETNC was founded in 1889 by William L. Mayo as a “first-class private college, based on Normal principles.”\textsuperscript{139} In the American West, normal schools often substituted for liberal arts colleges or regional universities, and ETNC developed aspects of the latter two. At the end of the first year, its students could take an exam to obtain their temporary elementary school teaching certificate. In this way, the students could “keep school” (teach in elementary school) periodically to pay their way through additional years at ETNC.\textsuperscript{140} By 1894, ETNC had secondary degree and B.S. programs, and plans were underway for a bachelor of literature, as well as philosophy and arts programs.\textsuperscript{141}

§47 To acquire his B.S. degree in 1903, alongside future Speaker of the U.S. House of Representatives Sam Rayburn,\textsuperscript{142} Pharr had to take four terms of Latin, including Caesar and Virgil.\textsuperscript{143} For the A.B. degree he earned two years later, Pharr was required to take the “classics course,” which included four more terms of Latin (encompassing Cicero, Horace, Livy, and Tacitus), as well as a year’s study of Greek (or he might have substituted two full courses of German, French, or Spanish).\textsuperscript{144} Moreover, Mayo emphasized public speaking throughout the curriculum, so it is likely that Pharr learned the same sort of rhetorical skills as Scott and Blume.\textsuperscript{145} A year after graduating from ETNC, Pharr earned an A.B., with honors, from Yale University in classical languages and literature and gave a philosophical oration there.\textsuperscript{146} He received his Ph.D. in classics, as an Abernethy Fellow, from Yale in 1910.\textsuperscript{147} Pharr went on to a successful career as a professor of classics and wrote Greek and Latin textbooks, revised editions of which remain in use.\textsuperscript{148} Thus, Pharr not only must have been an excellent student, but little ETNC must have given him a very sound educational foundation.\textsuperscript{149}

\begin{flushleft}
\begin{footnotesize}
\textsuperscript{138.} Normal School, supra note 136; Helton, supra note 136, at 30, 34–35.
\textsuperscript{139.} REYNOLDS, supra note 136, at 3.
\textsuperscript{140.} See Goodwin, supra note 136, at 85–86. Pharr was one of those who “kept school.” Id. at 86.
\textsuperscript{141.} REYNOLDS, supra note 136, at 13. Like many normal schools, the missions of which changed over the years, ETNC has had many names: East Texas Normal College (1889–1917), East Texas State Normal College (1917–1923), East Texas State Teacher’s College (1923–1957), East Texas State University (1962–1996), and Texas A & M University at Commerce (1996–). For a description of how normal schools evolved into teachers’ colleges, see GEIGER, supra note 137, at 435–38.
\textsuperscript{143.} See Goodwin, supra note 136, at 177.
\textsuperscript{144.} See BLEDsoe, supra note 136, at 234–35; REYNOLDS, supra note 136, at 13.
\textsuperscript{145.} Gold, supra note 136, at 320–21. At his 1903 graduation ceremony, Pharr gave an oration entitled “Deeds and Endeavor.” Goodwin, supra note 136, at 133.
\textsuperscript{146.} HISTORY OF THE CLASS OF 1906, YALE COLLEGE 78, 81 (Edwin Rogers Embree ed., 1911).
\textsuperscript{147.} For a full list of Pharr’s degrees, see BIOGRAPHICAL DICTIONARY OF NORTH AMERICAN CLASSICISTS, supra note 132, at 498. See also In Memoriam, Clyde Pharr, supra note 132. Pharr also was an Archeological Institute of America fellow at the American School of Classical Studies in Athens from 1910 to 1912. Id.
\textsuperscript{148.} See Hall, supra note 4, at 2. The latest editions of his texts are HOMERIC GREEK (Clyde Pharr, John Wright & Paula Debnar eds., 4th ed. 2012); Virgil’s Aeneid (2007).
\textsuperscript{149.} ETNC graduated many students who went on to highly successful careers. See, e.g., BLEDsoe, supra note 136, at app. for pictures and descriptions of some of them.
\end{footnotesize}
\end{flushleft}
Early Twentieth-Century Support for Ancient Law Translations

¶48 S.P. Scott, Fred Blume, and Clyde Pharr participated in the high American culture of the time, which celebrated the ancient Greek and Roman basis of Western civilization. This culture was one factor in the elite bar’s involvement in the codification movement of the latter part of the nineteenth century and in the Restatement movement that began in the early twentieth century, as has been shown above. Scott and Blume were part of this legal subculture, whereas Pharr’s advanced education and subsequent career in the classics provided him with a similar orientation. For reasons that remain unclear, Pharr changed his research agenda in midcareer to narrow his focus toward translating Roman law, and he too became connected with the elite legal culture. This connection was encouraging of their translation endeavors, but each man was, in the end, motivated mainly by his own desire to make a lasting contribution to Western culture.

¶49 The reasons for Scott’s willingness to dedicate so much of his life to translating ancient Roman law has to be inferred from surrounding circumstances because none of his correspondence survives. It appears as though Scott’s interest in Roman law derived from his study of European history. He saw law mainly as a historical artifact, and he began to translate it out of his fascination with the history and culture of Spain. In his preface to The Visigothic Code, Scott approves of Gibbon’s statement that “Laws form the most important portion of a nation’s history,” before he goes on to remark on the laborious nature of his translation work.

¶50 Scott elaborates on this theme in his preface to The Civil Law, writing: “No more faithful or suggestive picture of the rise, development, and destruction of a race can be obtained, than by the philosophical study of the laws by which it was governed . . . and to no state is this remark more applicable than to Rome.” He then connects Roman law to Western civilization in asserting that “[t]he rules of the civil law, as laid down and promulgated by Justinian, more than any other factor, have contributed to the establishment of modern civilization, to the maintenance of good government and public order, and to the preservation of the vital interests of society.” Scott goes on to say that the translation of the Corpus Juris Civilis took him eight years to complete (although he actually spent more time than that on it, inasmuch as he clearly had to translate some of the CJC in the course of translating the Visigothic Code).

¶51 Moreover, although Scott lived largely as a recluse in Hillsboro in his later years, he had connections with elite legal professionals in the ABA. For more than twenty years Scott was a member of the ABA’s Comparative Law Bureau,

---

150. See Hall, supra note 4, at 2–3.
151. Scott was estranged from his wife at the time of his death, referring in his will to her alleged “insults, outrages, cruelties, disgrace and humiliation which she has constantly and without reason, during my entire married life, heaped upon me.” See Kearley, supra note 3, at 4 n.15 and accompanying text. Hence, she doubtlessly had no desire to keep his correspondence or otherwise perpetuate his memory.
152. The Visigothic Code (Forum Judicum), at v (S.P. Scott ed. & trans., 1910).
154. Id. at 48–49 (emphasis added).
155. Id.
156. See Kearley, supra note 3, at 4, 10–14.
which published two of his translations. He corresponded with Judge Charles S. Lobingier, a fellow bureau editor and Roman law scholar, who urged the bureau to move forward with the publication of Las Siete Partidas. The connections among members of this group also are shown by Dean Wigmore’s awareness that a posthumous publication of Scott’s Justinian translation was in the offing.

Thus, it is reasonable to deduce from the above that Scott consciously undertook the onerous task of translation, in part, on account of its historical significance and his desire to become a link in the chain of transmission for some of the fundamental documents of Western culture and that he likely was encouraged in this work by the elite legal culture of the day with which he was in contact.

Fred Blume was a man of great energy, who cared about both current events and the broad sweep of history. When his early political ambitions were blocked, he transferred his efforts to the study of Western civilization and thence to the translation of Roman law. His correspondence reveals his motivations clearly.

In describing to Pharr the history of his translation, Blume wrote that, on being informed that no English translation of either the Theodosian or Justinian codes existed, “I wondered if I might not be able to add my little mite of culture to the world by translating at least one of these Codes.” He also remarked in a letter to Thomas Swann, Dean of Yale Law School: “It is only occasionally that a person can be found who has either the ability or the inclination to make such a translation, and hence I have sometimes thought that, inasmuch as I am . . . reasonably fitted to do the work, my knowledge ought not to be altogether wasted.”

Blume also believed that the Justinian Code and other Roman law could be of practical value for twentieth-century American jurists, and he hoped his translation would be “used by courts for analogy or contrast.” In addition, Blume was encouraged in his translating by elite legal academicians such as Deans Swann and Wigmore. The latter invited Blume to teach Roman law at Northwestern University’s

---

157. He was one of the bureau’s original editors in 1907 and remained one until his death in 1929. Id. at 20 n.111 and accompanying text. The two translations were The Visigothic Code (Forum Judicum) (1910) and Las Siete Partidas (1931).
158. Regarding Lobingier, see Hon. Charles S. Lobingier, 10 Law & Banker & S. Bench & B. Bar, Rev. 209 (1917). The correspondence and Lobingier’s advocacy is described in Spanish Law—Publication of Siete Partidas Advocated, 50 Chi. Legal News 351 (1917). The letter from Scott to Lobingier mentioned in the article has not been found.
159. He was only partially informed, writing that “[t]he late Mr. S.P. Scott’s translation of the Digest now has some chance of publication, owing to Mr. Scott having left some money for the purpose in his will” (apparently not knowing publication of the entire CJC was contemplated). Letter from John Wigmore, Dean, Northwestern Univ. Law Sch., to Fred Blume, Justice, Wyo. Sup. Ct. (Jan. 15, 1931) (on file with the Northwestern Univ. Archives).
160. See Kearley, supra note 2, at 530–31, ¶ 16.
161. Id. at 531, ¶ 16.
162. Letter from Fred Blume, Justice, Wyo. Sup. Ct., to Thomas Swann, Dean, Yale Law Sch. (Feb. 18, 1924) (on file with the Wyo. State Archives).
163. Letter from Fred Blume, Justice, Wyo. Sup. Ct., to Clyde Pharr, Prof., Vanderbilt Univ. (June 30, 1933) (on file with the Wyo. State Archives). However, in this same letter, Blume indicates he limited Roman law references in his opinions so as not to vex his fellow justices. For a detailed examination of Justice Blume’s use of Roman law in his Wyoming Supreme Court opinions, see Harold D. Evjen, Rome on the Range: Roman Law and Justice Blume of Wyoming, in Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) 213 (1980).
law school and responded to Blume’s report of his Codex translation by telling him it was “the most fascinating piece of news that I have received for a long time.”

¶56 Clyde Pharr’s interest in ancient Roman law is less mysterious, in that he was a classics professor. However, his shift from writing introductory textbooks to undertaking the massive translation project he proposed is interesting. While the reasons for this shift remain obscure, two things are clear: (1) his choice of persons from whom to elicit project endorsements shows he knew who was who in the elite American bar of the day, and (2) like Blume, he wanted to make a lasting contribution to our cultural heritage. In an early explanation of his ambitious (and never completed) program to translate all ancient Roman law, he wrote: “A variorum translation of Roman law would be of inestimable worth and should be of value as long as civilization endures.” Pharr, again like Blume, also attributed practical value to the translations. He pointed out the importance of civil law in the modern world, claimed that “the proper approach to an adequate understanding of the Civil Law is through a study of Roman law,” and asserted the proposed translations would be of “great value in helping English-speaking people to a fuller and more sympathetic understanding and appreciation of the laws and institutions of other countries.” In any case, from the inception of the translation project in 1933 and across the many iterations of his project proposals, Pharr firmly maintained its historical importance and repeated its “inestimable value as long as civilization endures.”

Conclusion

¶57 In short, S.P. Scott, Fred Blume, and Clyde Pharr were able, and eager, to toil at translating ancient Roman law in twentieth-century America because they were imbued with much of the same classically based intellectual tradition that helped inspire the Founders to establish a new Roman Republic in North America and that remained prevalent in the elite legal culture of the translators’ time. Both the connection they felt to our ancient cultural heritage and their knowledge of it are rare in the United States today.


165. See sources cited supra note 148.

166. Pharr, supra note 108, at 1.

167. Clyde Pharr, A Project for the Collection, Translation, and Annotation of All the Source Material of Roman Law 4–5 (1952) (unpublished twenty-one-page proposal) (on file with author). A similar claim is made for the project in Clyde Pharr, Theresa Sherrer Davidson & Mary Brown Pharr, A Project for the Translation of Roman Law, 42 Classical J. 141 (1946). The explanations of the practical value of the project varied over time in his many proposals, and one suspects they were rationales aimed more at acquiring funding than they were an expression of his deepest motivations.

168. Pharr, supra note 108. It is repeated again, for instance, in 1952. Pharr, supra note 167, at 3.
Yellow Flag Fever: Describing Negative Legal Precedent in Citators

Aaron S. Kirschenfeld

This study analyzes the accuracy with which descriptions of subsequent negative treatment are applied by online citators. A system making use of a hierarchical controlled vocabulary applying these descriptions appears marginally more accurate, but the citator’s traditional role in legal research must be reconceptualized.

Flying the Flag: An Introduction

Iconography without meaning is no iconography at all. Imagine if tomorrow we were to look at the Star Spangled Banner and think not of America but instead emotionlessly identify vaguely with thoughts of a shapeless, formless, but nonetheless large country in the Western Hemisphere. This scenario would make our flag’s symbolic power next to nil because a symbol’s sine qua non is to convey a coherent, readily grasped message. This much, without delving into the past half century of semiotics and linguistics, we should be able to say is true, especially when the object of the symbol is to communicate concrete meaning to subject-matter experts seeking answers. The flag’s place at the center of a town’s Fourth of July celebrations is discursively rich, but its use as a small digital image to be clicked on when setting up a new computer, indicating that U.S. English is the desired keyboard configuration, should not need to be.

This study began with a question: do the symbols and phrases used in commercial online citators adequately convey meaning to legal researchers? Based on the study’s findings, I posit that serious questions surround the citator’s place in legal research. I then provide suggestions for teaching students and practitioners how to best use citators. Among other things, I suggest that legal information

© Aaron S. Kirschenfeld, 2016. This is a revised version of the winning entry in the student division of the 2015 AALL/LexisNexis Call for Papers Competition.

professionals bear the responsibility of questioning legal information vendors about the accuracy of their citator products. I also offer areas of further research for developing a more robust, rigorous literature on citators as legal research products. Finally, I present alternatives to traditional citators that might someday subsume their functions, including citation analysis tools based on visualization or on algorithmic extraction and presentation of subsequent negative treatment.

¶3 But let us start our inquiry with some first principles. The system of common law as practiced in the United States depends on the doctrine of stare decisis, or in adhering to precedent established in earlier cases. Judges in state appellate courts rely on precedent from their own jurisdictions and are sometimes bound by it, but also consider precedent from other states, which can be seen as persuasive authority. On constitutional issues, state judges must defer to pronouncements of the U.S. Supreme Court. Judges in federal district courts look to precedent from the appellate court from the geographic circuit they practice within when interpreting federal law, and to the Supreme Court as well. Precedent from other circuits may also be persuasive. And state law precedent binds federal courts in diversity of jurisdiction actions. In this system of overlapping, often complex, authority, lawyers must research and argue based on judicial precedent and its application to their particular clients’ facts. Not only is finding precedent that supports clients’ desired outcomes necessary, however; lawyers must also find precedent that calls into question their arguments. As the title suggests, this article focuses on the second type of precedent.

¶4 One tool in lawyers’ arsenals for accomplishing this—specifically in determining cases’ precessential value—is the citation index, or citator. Major commercial online citators signal negative treatment of a case using one general form: an introductory symbol—such as a colored flag or a colored shape—followed by an explanatory phrase. The appearance of both of these elements varies greatly among the two major citators, KeyCite (Westlaw) and Shepard’s (LexisNexis). Some minor citators, such as Bad Law Bot (Fastcase), do not include both elements. These products rarely agree on the meaning of these explanations of subsequent negative treatment. But do these differences in characterization of a case’s negative treatment affect how citators themselves, as well as the lawyers who use them, evaluate the case’s significance in common-law precedent?

¶5 I propose that when a standardized and hierarchical controlled vocabulary is applied to a legal citation indexing system, evaluation of a case’s subsequent negative treatment is more accurate. Knowing whether this proposition is valid will help inform lawyers, law librarians, and teachers of legal research in addition to legal information vendors. The LexisNexis Shepard’s product is an example of a hierarchical controlled vocabulary of subsequent negative treatment. In contrast, KeyCite uses language from cases to produce explanatory phrases describing subsequent negative treatment. Both systems use symbols to represent subsequent negative treatment as well.

1. The term “common law” is used in an informal sense, given that so much law in the United States is statutory or regulatory in nature. However, judges do still make law by interpreting legislative actions and other cases, and their decisions can still be said to be meaningfully different from those in countries practicing civil law.

After review of a set of cases in Shepard’s and KeyCite, described in the methodology below, the results suggest, absent the action of other variables, that citators using a hierarchical controlled vocabulary do describe subsequent negative history more accurately than those that do not. Shepard’s performs better than KeyCite by applying explanatory phrases more accurately in the limited sense tested. Shepard’s also performs better in applying introductory symbols more accurately. To that end, this article introduces an operationalized definition of “accuracy” and a method for determining whether descriptions of negative precedent have been applied accurately.

Looking Backward: Reviewing the Relevant Literature

Legal research instructional materials and courses emphasize the importance of updating one’s research before submitting a legal work to a publisher, court, or other lawmaking body. Updating involves revisiting selected documents to determine whether they still represent the most current law. (While citators are used to update statutory, regulatory, and case law materials, this article focuses on legal precedent found in case law.) Usually, a lesson on using citators involves a variation on a familiar theme in the law—fear of incompetence. Young lawyers who fail to update a case will find themselves in hot water, and fast. This is no doubt true—judges do not generally look kindly on counsel whose arguments rest on shaky precedent. Others have raised the question of whether the failure to update a case is a violation of a lawyer’s professional ethical obligations.

To date, academic research on citators has fallen into one of two general camps: (1) the history and development of citators, and (2) wholesale comparisons of Shepard’s Citations and West’s KeyCite. While interesting in its own right, a thorough review of the literature on the history and development of citators is unwarranted here, though it is treated in some depth in this article’s discussion section. More significant are the attempts—made both by law librarians and by


6. See, e.g., Laura C. Dabney, Citators: Past, Present, and Future, 27 LEGAL REFERENCE SERVS. Q. 165 (2008); Michael J. Lynch, Citators in the Early Twentieth Century—Not Just Shepard’s, 16 LEGAL REFERENCE SERVS. Q., 1998, no. 3, at 5; Patti Ogden, Mastering the Lawless Science of Our Law: A Story of Legal Citation Indexes, 85 LAW LIBR. J. 1 (1993). For the institutional history, see Frank Shepard Co., A Record of Fifty Years of Specializing in a Field That Is of First Importance to the Bench and Bar of the United States: An Insight into an Establishment That Has Grown from Small Beginnings to the First Rank in the Law Publishing Field (1923). For the intriguing argument that citation indexing began with law, see Fred R. Shapiro, Origins of Bibliometrics, Citation Indexing, and Citation Analysis: The Neglected Legal Literature, 43 J. AM. SOC’Y INFO. SCI. 337 (1992).

7. Specifically, the claim that citation indexing was part of a late nineteenth-century classification trend as noted in Geoffrey C. Bowker & Susan Leigh Star, Sorting Things Out: Classification and Its Consequences 16 (1999).
employees of the legal information vendors—to differentiate the market-leading citators at different points in time.8

¶9 Perhaps the leading, albeit dated, comparison of citators (following the introduction of KeyCite in the mid-1990s) is Taylor’s 2000 article in Law Library Journal. He compared Shepard’s and KeyCite for three factors: completeness, currency, and accuracy. He defined accuracy as “whether the system correctly identifies all citing opinions that have a negative effect on the validity or persuasiveness of the cited opinion.”9 Because he was assessing the citator holistically, this definition suited his purposes. But it more describes the concept of “recall” than “accuracy.” Taylor’s study, however, supplies a framework for talking about the types of information found in citators, and his vocabulary is discussed in this article’s section on methodology.

¶10 That said, in other studies assessing the accuracy of a controlled vocabulary, the term is meant as a study in the accuracy of application—for example, were all articles about cholesterol-lowering drugs marked with one of the correct subject terms relating to cholesterol-lowering drugs?10 Again, this is sensible when using “accuracy” to judge an information system as whole, and roughly aligns with Taylor’s recall-heavy definition. This article’s operational definition of “accuracy” differs slightly due to the special nature and needs of a legal citation index and the quality this study purports to test.

¶11 In general, Taylor and similar older comparisons of citators conclude that each commercial system has its strengths and weaknesses, and that truly effective legal researchers ought to consult both Shepard’s and KeyCite to ensure correctness. The legal information vendors also had their say in response to Taylor.11 More recent comparisons of citators have looked at the citator’s place within the online legal research product context—that is, how the citator behaves in relation to other parts of a unified tool containing hundreds of legal databases. Mart has studied both Shepard’s and KeyCite for their relative strengths (or, as it turns out, weaknesses) when accessed through case law subject headings, or “headnotes.”12 The difference

8. And timing did have a lot to do with it. KeyCite was developed in the 1990s, and many of these comparative studies attempted to benchmark it to Shepard’s. See Elizabeth M. McKenzie, Comparing KeyCite with Shepard’s Online, 17 LEGAL REFERENCE SERVS. Q., 1999, no. 3, at 85 [hereinafter McKenzie, Comparing KeyCite]; Elizabeth M. McKenzie, New Kid on the Block: KeyCite Compared to Shepard’s, AALL SPECTRUM, Oct. 1998, at 8. For a more recent comparison, see Carol A. Levitt & Mark Rosch, Are All Citator Services Created Equal? A Comparison of Google Scholar, Fastcase, Casemaker, LexisNexis, WestlawNext, and Bloomberg (Internet for Laws white paper, 2012), http://www.netforlawyers.com/content/caselaw-citators-comparison-Google%20Scholar-Fastcase-Casemaker-LexisNexis-WestlawNext-Bloomberg-0059.


11. Jane W. Morris, A Response to Taylor’s Comparison of Shepard’s and KeyCite, 92 LAW LIBR. J. 143, 2000 LAW LIBR. J. 14; Daniel P. Dabney, Another Response to Taylor’s Comparison of KeyCite and Shepard’s, 92 LAW LIBR. J. 381, 2000 LAW LIBR. J. 33.

that Mart fixes on is between human-generated headnotes and algorithm-generated headnotes, and she studies how inclusive each type of headnote is in listing cases cited. Mart’s article does assume that the Shepard’s explanatory phrases are both generated or selected and applied by human editors, while the KeyCite explanatory phrases are likely generated or selected and applied algorithmically.13 But this is merely an assumption based on a general impression of the data gathered, not on any otherwise verifiable information. And this point will not be a focus of the article, as it presents what is likely a distinction without a difference—the object of this study is the explanatory phrases themselves and whether or not they are accurately applied to the judicial disposition in a case, not how they were generated. Mart’s conclusions ultimately echo those in earlier citator comparisons in the narrow sense: both products are flawed, but flawed in different ways.14

¶12 Some in the profession have questioned whether the companies that market citators ought to claim that their descriptions of subsequent negative treatment “validate” case law.15 Updating case law or checking citations is no simple task. Regardless of what the citator claims about the treatment of a case, there will be misapplications or gaps in coverage. Yet substantial anecdotal evidence suggests that lawyers accept the companies’ claims about validity more or less unquestioningly.16 This perspective from actual lawyers adds urgency to our problem. Validity follows from perceived accuracy, and challenges to the role and uses of citators in attorney’s legal research will be discussed following the presentation of this study’s results.

¶13 Literature about standardized controlled vocabularies, judicial precedent, and citation indexing in general are most useful to this article’s task. Studies of law-specific controlled vocabularies have focused on the difficult nature of selecting terms using literary warrant—or classification based on the content of the information resources being classified—in case law collections.17 (And, interestingly, none treat the distinction between literary warrant and end-user warrant—or classification based on how the information’s users themselves conceptualize it—in the law.) On the whole, both the legal information literature and the academic literature concern the generation of controlled vocabularies or the appropriateness of terms chosen, but neither touches on something as specific as what is being studied here. In all, researchers seem to be concerned with studying the systems themselves or their effect on the legal profession or jurisprudence conceptually, rather than the effect that the system might have on particular users in particular instances, or on particular information objects. And of course, these are all worthy and interesting pursuits; some will even be taken up later in this article. But there are very few user studies of legal researchers and none, to my knowledge, focused solely on the use of

13. But see McKenzie, Comparing KeyCite, supra note 8, at 91.
16. Id. at 25.
citators.\textsuperscript{18} And while this article is not a user study, it does aim to address this gap in the literature.\textsuperscript{19}

\textsuperscript{¶}14 The literature on the application of standards, specifically ANSI/NISO Z39.19 2005, to collections has been helpful, although ultimately limited. As with some of the studies mentioned earlier, the measure of “accuracy” is more about consistency in application rather than correctness or perceived usefulness. The studies of standards tend to consider issues of whether application of terms is “correct” rather than “useful.” Here, of course, we are concerned with the latter. That said, the standard is also relatively new, meaning that there have been few substantive studies on it since its publication and adoption by information professionals. The standard itself does, however, offer methods for assessing controlled vocabularies.

\textsuperscript{¶}15 While the literature on Medical Subject Headings (MeSH) is well developed, it lacks relevance when applied to legal subject matter in one key respect: medical article and citation indexing does not, at least to this point, employ judgments of subsequent negative treatment.\textsuperscript{20} This article might be able to shed light on an issue not yet taken up in other professional communities—which way is best to express when articles or hypotheses, like cases or points of law, are challenged, distinguished, or even discredited. And while law is not a science—and American writers in the field have to be given credit for acknowledging such, at least since the late nineteenth century—its peculiar crucible of precedent developed through trial and appeal can be seen as an analogue to work in more practice-oriented sciences like medicine.

\textsuperscript{¶}16 Finally, a look into whether “subsequent negative treatment” has itself been satisfactorily defined is needed. In short, the literature on this topic is in one sense quite large, but for the most part focuses on the concepts of legal change or of “compliance,” that is, whether cases actually follow other cases, and to what degree.\textsuperscript{21} This literature tends to come from the political science community, and is probably not relevant here. However, compliance is a larger inclusive category for study of the common law doctrine of \textit{stare decisis}, or judicial precedent. The legal


\textsuperscript{19} That said, David L. Armond & Shawn G. Nevers, \textit{The Practitioners’ Council: Connecting Legal Research Instruction and Current Legal Research Practice}, 103 \textit{LAW LIBR. J.} 575, 2011 \textit{LAW LIBR. J.} 36, provides an interesting, if sobering, take on the difficulty of engaging practicing lawyers in a discussion of legal resources.


literature is low on systematic studies of *stare decisis*, and usually (and necessarily) focuses on one jurisdiction in depth. Alternatively, one could say that the entire focus of fields of jurisprudential study is the nature and meaning of *stare decisis*. I mention this because in each cited case studied below, an analysis of the case’s meaning and what has happened to it, dispositively, after its decision and publication, is relevant to determining the accuracy of evaluation. Considerations of the notion of the rule of law and its relation to having publicized, well-described precedent deserve special mention, as well.²²

¶17 The scholarly and professional literature, then, has not touched directly on the issue at study here but does suggest appropriate methodological approaches.

**Methodology**

¶18 The story of the dataset used in this study is somewhat tortuous and deserves a clear explanation. In 2013, I worked as a summer research associate with Fastcase, Inc., the online legal research company. As part of my work, I performed a quality assurance analysis on the Bad Law Bot software, testing several features of the automated citator product.²³ My work on Bad Law Bot increased my interest in citators, and Fastcase CEO Ed Walters allowed me to keep a copy of the spreadsheet used in the quality assurance analysis and to use the data in this study.

¶19 Before I began my project at Fastcase, the following data had been collected: the Bad Law Bot algorithm then in existence identified 44,624 cases in the Fastcase database as negative. While the algorithm is proprietary, its construction at the time was quite simple. In essence, the algorithm searched for instances of negative subsequent case treatment using “explanatory phrases” from table 8 of the *Bluebook*.²⁴ Of those cases, 3800 were selected for hand-tagging by Fastcase staff.

¶20 Staff members searched for these cases in the WestlawNext database and recorded the flag color associated with the case from the integrated KeyCite product. KeyCite assigned Red Flags to 3465 of the cases. Of the cases remaining, approximately thirty-two percent (108) were not flagged, and sixty-eight percent (227) were assigned a Yellow Flag.

¶21 WestlawNext user guides explain that the Yellow Flag “warns that the case has some negative history, but hasn’t been reversed.”²⁵ This independently conducted study begins with the set of 227 Yellow Flag cases, which, of course, had also been identified as “negative” by the Bad Law Bot algorithm. To study the phrases

---


²³ For a bit more information about how the product works, see *Introducing Bad Law Bot from Fastcase*, https://www.youtube.com/watch?v=ZsKu7FoO2Ns (last visited Dec. 7, 2015) [https://perma.cc/5XK9-QCRN].

²⁴ *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* tbl. 8, at 500 (20th ed. 2015). The phrases, according to the *Bluebook*, are “commonly used to indicate prior or subsequent history and weight of authority of judicial decisions.” Id. at 500.

explaining negative subsequent case law treatment, 116 of the 227 Yellow Flag cases were selected for further analysis. These cases were selected because their KeyCite entries consisted only of what Taylor called “unrelated opinions,” those in which “the citing opinion is from a different legal matter but has some effect on the persuasiveness of the cited opinion.” 26 KeyCite calls these unrelated opinions “negative citing references” as opposed to negative direct history, which Taylor calls “related opinions . . . , where the citing opinion is a later phase of the same legal matter, such as appeals, rehearings en banc, substituted opinions, or supplemental opinions.” 27

¶22 To summarize, then, cases identified in WestlawNext’s KeyCite having direct negative history were excluded from the data examined here. This was done to keep the focus on the descriptions of precedent in later-citing cases. Another way to think of this is to imagine three hypothetical cases: Case A, Case B, and Case C. Case A states a proposition of law. Case B in some way acts on the proposition of law stated in Case A. (Case B, then, is an example of a related opinion.) Finally, in Case C, the action of Case B on Case A is somehow memorialized. Case C is an unrelated opinion, from a different legal matter, but describing the proposition of law stated in Case A.

¶23 These terms are useful ways of talking about the same phenomena. However, since there is no other vocabulary for discussing subsequent negative treatment, a few more terms of art may help in the study that follows. I call the case being updated or “Shepardized” the “Target Case.” The term is analogous to Case A, but feels somewhat less clinical and is more geared to a researcher’s actual needs. Locating the Citing Case, namely a relevant one, is the result of using a citator. We are primarily concerned with a Negative Citing Case, which is analogous to the idea of Case C. Finally, the Acting Case refers to the case commenting on the Target Case. This is the same as Case B. The relationship between Case B and Case A, the Acting Case and the Target Case, is the subsequent negative treatment and is expressed in a Negative Citing Case, or a Case C. Descriptions of subsequent negative treatment, and their accuracy, are the narrow focus of this study.

¶24 For the 116 cases analyzed, seventeen individual pieces of data were collected. Some data were collected to ensure that the proper case was being analyzed—identification data such as the case’s name, date of decision, and one or more citations associated with the case. Other data fields record the subsequent negative treatment in the databases studied. The seventeen data fields are listed in table 1, with brief descriptions of their content.

¶25 All data have been both collected or checked by me personally and, to the best of my knowledge, are current though at least January 2015 (though some data collection continued into February and March). To gather and check the data, I used my law student access to WestlawNext and LexisNexis (or “Lexis.com” linked from the Lexis Advance platform). And while the dataset is hosted in its entirety in .xlsx format in full on my personal website, 28 I offer a sample record in table 2 for a particular case to aid in understanding of why these data might be useful.

27. Id.
For the Target Case in table 2 we can reconstruct a picture in textual form from these data. The Target Case was decided in federal court in 1994. KeyCite applies the Yellow Flag, asserting that the most negative Citing Case “declined to follow” the Target Case. Shepard’s applies the Yellow Triangle symbol and asserts that most negative Citing Case “criticized” Target Case. The most negative Citing Case in both products was the same (787 F. Supp. 2d 961). The Bad Law Bot algorithm, however, identified that the Target Case was “overruled on other grounds” by the Acting Case, and this fact was recorded in a Citing Case different from the one selected by KeyCite and Shepard’s. Numerous questions possibly flow from these

---

### Table 1

**Descriptions of Data Collected**

<table>
<thead>
<tr>
<th>Data Field</th>
<th>Description of Data Field</th>
</tr>
</thead>
<tbody>
<tr>
<td>Target Case Name</td>
<td>Name of the Target Case in short form</td>
</tr>
<tr>
<td>Decision Date</td>
<td>Year, month, and day of decision</td>
</tr>
<tr>
<td>Target Case Citations</td>
<td>Citations identifying the case from the West National Reporter System or Federal Reports (F. Supp., F., and S. Ct.), from official reports, or, for more recent unreported opinions, the case name, court of decision, and year (eschewing Westlaw or LexisNexis citations)</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Federal or State</td>
</tr>
<tr>
<td>Flag Color on WLN</td>
<td>For all Target Cases analyzed in this study, the Flag Color on WestlawNext was Yellow</td>
</tr>
<tr>
<td># of Neg. Treatment on WLN</td>
<td>The number of cases identified as “Negative Citing References” on WestlawNext’s KeyCite</td>
</tr>
<tr>
<td>WLN Neg. Treatment</td>
<td>The Citing Case identified as “Most Negative” among the Negative Citing References</td>
</tr>
<tr>
<td>Symbol on LEX</td>
<td>The graphical Shepard’s “signal” for the Target Case</td>
</tr>
<tr>
<td># of Neg. Treatment on LEX</td>
<td>After selecting “All Neg” in the Shepard’s report, the number of “Citing Decisions” listed on the report</td>
</tr>
<tr>
<td>LEX Neg. Treatment</td>
<td>Identified by selecting the most negative Citing Case within the Shepard’s report</td>
</tr>
<tr>
<td># of Neg. Treatment on FC</td>
<td>In the Fastcase Authority Check report, the number of cases flagged by the Bad Law Bot algorithm</td>
</tr>
<tr>
<td>FC Neg. Treatment</td>
<td>The top result in the list of negative Citing Cases identified by Bad Law Bot</td>
</tr>
<tr>
<td>FC Acting Case</td>
<td>The case identified by Bad Law Bot as the case acting on the Target Case</td>
</tr>
<tr>
<td>Classification on WLN</td>
<td>The phrase used in WestlawNext to describe the subsequent negative treatment in the “Most Negative” Citing Case</td>
</tr>
<tr>
<td>Classification on LEX</td>
<td>The phrase used in the Shepard’s report to describe the subsequent negative treatment in the most negative Citing Case</td>
</tr>
<tr>
<td>Classification on FC</td>
<td>The phrase describing the relationship between the Target Case and the Acting Case, as identified by Bad Law Bot and generally drawn from table 8 of the <em>Bluebook</em></td>
</tr>
<tr>
<td>Quote from FC BLB</td>
<td>A full quote of the sentence that contains the description of the relationship between the Target Case and Acting Case on Fastcase</td>
</tr>
</tbody>
</table>
To analyze descriptions of subsequent negative treatment, Target Cases having matching Citing Cases were collected, read, and assessed. Absent other methods of conducting this type of analysis, this seemed most likely to yield useful, practical results for lawyers and legal information professionals. If the most negative Citing Cases match on at least two of the citators tested, it can be assumed that users should presume these cases present the same subsequent negative treatment.

The question here is whether a hierarchical controlled vocabulary term, like those employed by Shepard’s, is a more accurate description of subsequent negative treatment than the uncontrolled systems used by KeyCite.

---

29. Note that the example from table 2 meets this criterion and was subject to the analysis described below.

Results

¶28 In the 116-case dataset, 31 Target Cases had matching “most negative” Citing Cases in Shepard’s and KeyCite. That is, twenty-six percent of the time the two market-leading citator products agreed about which case best provided subsequent negative treatment. While this may seem surprising, I do not think the result is particularly meaningful as a measure of the reliability of either product or both products. First, “related cases” assigned direct or procedural negative history were excluded—nearly half of the original 227 Yellow Flag cases. I would hypothesize that there is greater alignment among related cases, though this question will not be considered further in this article. However, the seventy-four percent rate of disagreement between citators is taken up in its proper context in the discussion section.

¶29 What is more troubling to the analysis here is the “most negative” designation as a distinctive, meaningful metric. Only KeyCite explicitly identifies a most negative case for a given Target Case. Shepard’s does not make an explicit determination of which case in its report is most negative. That said, the decision of which case was chosen as most negative was far from arbitrary. The Shepard’s system is a hierarchy from most negative to least negative (Red Hexagon/Q in Orange Box/ Yellow Triangle), with each analysis definition falling under a particular visual signal.31 On the Shepard’s Report page, a box summarizes this ordering near the top of the page. The most negative case was selected by locating the first result in the most negative set of Citing Cases. Still, I do not expect a practitioner looks only at the case in a citator listed as most negative for the Target Case she is researching. As noted earlier, a user study of attorneys and other expert legal researchers would be needed to learn how these people use citators. We only know, of course, that researchers do use them.

¶30 These challenges aside, the thirty-one cases with identical most negative Citing Cases can tell us quite a bit about the language used to describe subsequent negative treatment in Shepard’s and KeyCite. First of all, twelve of the thirty-one cases, or thirty-nine percent, used identical language to describe subsequent negative treatment. Interestingly, these twelve instances all involved the same explanatory phrase: “distinguished by.” Two additional cases were assigned near-identical language: “disapproved by” (Shepard’s) and “disapproved of by” (KeyCite). That leaves seventeen cases in which different terms were used to describe subsequent negative treatment for a Target Case. This group of seventeen cases was analyzed for differences between each citator’s accuracy in applying subsequent negative treatment phrases.

¶31 Four of the Shepard’s phrases are present in this final collection of cases: “criticized by,” “distinguished by,” “overruled in part by,” and “questioned by.” Shepard’s defines these phrases as:


31. List of Analysis Definitions Grouped by Shepard’s Signals, supra note 30.
**Criticized by**—The citing opinion disagrees with the reasoning/result of the case you are Shepardizing, although the citing court may not have the authority to materially affect its precedential value.

**Distinguished by**—The Citing Case differs from the case you are Shepardizing, either involving dissimilar facts or requiring a different application of the law.

**Overruled in part by**—One or more parts of the decision you are Shepardizing have been expressly nullified by the subsequent decision from the same court, thus casting some doubt on the precedential value of the case you are Shepardizing.

**Questioned by**—The citing opinion questions the continuing validity or precedential value of the case you are Shepardizing because of intervening circumstances, including judicial or legislative overruling.\(^\text{32}\)

\(^{32}\) According to Shepard’s, the “criticized by” and “distinguished by” phrases should be assigned the Yellow Triangle signal, meaning “caution.”\(^{33}\) “Overruled in part by” should be assigned the Red Hexagon signal, meaning “warning.”\(^{34}\) “Questioned by” should be assigned the Q in Orange Box signal, meaning “questioned.”\(^{35}\) “Criticized by,” “distinguished by,” and “questioned by” are considered to be “common analysis phrases.”\(^{36}\) Thus it can be inferred that, as common phrases, these would likely be encountered by a researcher while he conducts legal research.

\(^{33}\) Seven KeyCite analytical phrases are used in describing the subsequent negative treatment in the final seventeen cases studied: “called into doubt by,” “criticized by,” “declined to extend by,” “declined to follow by,” “disagreed with by,” “not followed as dicta,” and “rejected by.” As mentioned earlier, WestlawNext does not define these phrases. The phrases, in the large dataset, appear in combination with either a Red Flag or Yellow Flag, the only two symbols used by KeyCite. These facts support two propositions. First, that KeyCite’s system of applying analytical phrases to cases is not an example of a hierarchical controlled vocabulary. Second, it will be more difficult to assess whether the phrases have been applied to cases accurately because the definitions of the phrases are necessarily somewhat subjective.\(^{37}\) Words such as “disagreed”\(^{38}\) and “doubt”\(^{39}\) seem to be common definitions while “dicta” is a legal term of art.\(^{40}\) “Followed,” “extend,” \(^{41}\) and “rejected”\(^{43}\) seem to be
hybrids of words used commonly and as legal terms of art; they are therefore the most difficult to assess. I define the seven KeyCite analytical phrases as follows:

1. **Called into doubt by**—The Citing Case expresses uncertainty about the precedential value of the Target Case.
2. **Criticized by**—The Citing Case disagrees with the reasoning or result of the Target Case, although the citing court may not have the authority to materially affect its precedential value.44
3. **Declined to extend by**—The judge in the Citing Case has chosen to not increase the influence of the Target Case.
4. **Declined to follow by**—The judge in the Citing Case has chosen not to comply, conform with, or accept the Target Case as authoritative.
5. **Disagreed with by**—The Citing Case expresses a difference of opinion or lack of agreement with the Target Case.
6. **Not followed as dicta**—The court in the Citing Case will not accept the Target Case as authoritative because statements in the Target Case are considered to be unnecessary to the decision in the case and therefore not precedential.
7. **Rejected by**—The Citing Case declines to make use of reasoning from the Target Case.

¶34 With these definitions in place, we may finally assess how accurately the citators apply their descriptions of subsequent negative treatment. As described in the methodology, determining which system is more accurate is also necessarily subjective—a matter of reading the relevant portions of each case and determining whether one explanatory phrase (or both, or none) more clearly describes the nature of the judicial determination in the Citing Case as it relates to the Target Case. While this seems difficult in theory, there were relatively few challenging decisions to make when reading and classifying a statement of subsequent negative treatment.

¶35 Of the seventeen Target Cases (shown in table 3) with matching most negative Citing Cases, five had overlapping descriptions of subsequent negative treatment. This occurred when the explanatory phrase was equally accurate in describing the subsequent negative treatment. For example, for the three Target Cases labeled as “criticized by” in Shepard’s, the KeyCite phrases “rejected by,” “declined to follow by,” and “disagreed with by,” as defined above, were for all purposes identical. *United States v. Dorfman*, 542 F. Supp. 345, a Target Case, is described as “criticized by” in Shepard’s and as “rejected by” in KeyCite. The Citing Case comments:

The Court rejects the suggestion in *United States v. Dorfman*, 542 F.Supp. 345, 373 (N.D.Ill.), aff’d, sub nom. *United States v. Williams*, 737 F.2d 594 (7th Cir.1984), relied on by the government, that “[t]he test . . . is not the state of the mind of ‘the government,’ but the state of mind of the affiant.” This Court treats the affiant as a representative of the United States government as to the activities of any of its agents, whether or not the affiant has been made aware of those activities.45
The Citing Case, from a federal district court in the First Circuit, chooses not to apply a particular doctrinal rule used in the Target Case, from a federal district court in the Seventh Circuit. It fits the definition of “criticized by” and the definition of “rejected by,” presented above. Therefore, the description of the subsequent negative treatment has been accurately applied.

Table 3
Seventeen Matching “Most Negative” Cases

<table>
<thead>
<tr>
<th>Target Case Name</th>
<th>Target Case Citation</th>
<th>Flag Color on WLN</th>
<th>Symbol on LEX</th>
<th>Classification on WLN</th>
<th>Classification on LEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gregory v. United States</td>
<td>369 F.2d 185</td>
<td>Yellow</td>
<td>Q in Orange Box</td>
<td>Criticized by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>McCurdy v. Steele</td>
<td>353 F. Supp. 629</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Declined to Follow by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>United States v. DeCoster</td>
<td>487 F.2d 1197</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Called into Doubt by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>Brandenburg v. Thompson</td>
<td>494 F.2d 885</td>
<td>Yellow</td>
<td>Q in Orange Box</td>
<td>Disagreed With by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>Finley v. United States</td>
<td>404 F. Supp. 200</td>
<td>Yellow</td>
<td>Q in Orange Box</td>
<td>Disagreed With by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>United States v. Dorfman</td>
<td>542 F. Supp. 345</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Rejected by</td>
<td>Criticized by</td>
</tr>
<tr>
<td>Melson v. Kroger Co.</td>
<td>578 F. Supp. 691</td>
<td>Yellow</td>
<td>Q in Orange Box</td>
<td>Disagreed With by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>People v. Johnson</td>
<td>204 Cal. Rptr. 563</td>
<td>Yellow</td>
<td>Yellow Triangle</td>
<td>Not Followed as Dicta</td>
<td>Criticized by</td>
</tr>
<tr>
<td>In re A &amp; C Properties</td>
<td>784 F.2d 1377</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Declined to Follow by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>Barber v. National Bank of Alaska</td>
<td>815 P.2d 857</td>
<td>Yellow</td>
<td>Q in Orange Box</td>
<td>Called into Doubt by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>Stafford v. Purofied Down Products Corp.</td>
<td>801 F. Supp. 130</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Declined to Follow by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>Mulhall v. Advance Sec., Inc.</td>
<td>19 F.3d 586</td>
<td>Yellow</td>
<td>Yellow Triangle</td>
<td>Declined to Follow by</td>
<td>Criticized by</td>
</tr>
<tr>
<td>Doctor’s Associates, Inc. v. Distajo</td>
<td>66 F.3d 438</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Disagreed With by</td>
<td>Criticized by</td>
</tr>
<tr>
<td>Atchison, Topeka and Santa Fe Ry. Co. v. Brown &amp; Bryant, Inc.</td>
<td>159 F.3d 358</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Not Followed as Dicta</td>
<td>Criticized by</td>
</tr>
<tr>
<td>Reed v. Reed</td>
<td>48 S.W.3d 634</td>
<td>No Flag</td>
<td>Red Hexagon</td>
<td>Declined to Follow by</td>
<td>Overruled in part by</td>
</tr>
<tr>
<td>Security Ins. Co. v. Old Dominion Freight Line</td>
<td>314 F. Supp. 2d 201</td>
<td>Yellow</td>
<td>Yellow Triangle</td>
<td>Declined to Extend by</td>
<td>Distinguished by</td>
</tr>
<tr>
<td>Pequignot v. Solo Cup Co.</td>
<td>640 F. Supp. 2d 714</td>
<td>Yellow</td>
<td>Red Hexagon</td>
<td>Declined to Follow by</td>
<td>Criticized by</td>
</tr>
</tbody>
</table>
¶37 But what about an instance from this group in which a descriptive phrase has been inaccurately applied? *Brandenburger v. Thompson*, 494 F.2d 885, a Target Case, is described in Shepard’s as “questioned by” but as “disagreed with by” in KeyCite. Only the phrase from Shepard’s accurately describes the negative precedent here:

A third exception, known as the private attorney general theory, has been recognized by several lower courts when the expense of litigation may act as a deterrent to the bringing of private litigation deemed necessary to enforce important public policies. See, e.g., *Taylor v. Perini*, 503 F.2d 899 (6th Cir. 1974); *Fowler v. Schwarzwald*, 498 F.2d 143 (8th Cir. 1974); *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Knight v. Aucillo*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971). In *Alyeska Pipeline* the Supreme Court expressly disapproved the use of the private attorney general exception in federal courts.46

The Target Case, we can see, is included by the Citing Case as part of a string citation of cases that have been implicitly overruled by a Supreme Court case. This kind of treatment is accurately described by Shepard’s “questioned by” phrase, but does not match at all with what “disagreed with by,” the KeyCite term, seems plainly to mean.

¶38 In the set of cases studied, eleven of seventeen, or 64.7% of descriptions of subsequent negative treatment in Shepard’s were applied accurately as shown in table 4. The KeyCite system applied descriptions of subsequent negative treatment accurately in nine of seventeen, or 52.9% of cases. Neither citator applied descriptions of subsequent negative treatment accurately in two of the seventeen cases, or 11.8% of the time for this set as shown in table 5. While the sample size studied is small and no conclusions can be reached about the ultimate comparative quality of this aspect of either citator, these data do suggest that each system describes the actions taken in identical Citing Cases with differing degrees of consistency.

¶39 The clear definitions in the hierarchical Shepard’s system allowed for further comparison of the data from the comparative set described above to a Shepard’s-only set. A systematic sample from the remaining 85 cases in the set of 116 described above was taken. Alternating fourth or fifth cases were selected from the table sorted chronologically to help mitigate any bias from the date of a case. In total, 19 cases were selected from the 85 and subjected to the same analysis as the set of 17 above. In 14 of the 19 cases in the Shepard’s-only set, subsequent negative treatment from a Citing Case was accurately described by the analytical phrase. That is, 73.6% of the time, Shepard’s, according to its own standards, described the subsequent negative treatment accurately. A similar test of the KeyCite system for the same set of cases was not performed since KeyCite gives no clear definitions for its explanatory phrases.

¶40 These results, it can be argued, offer no definitive conclusions of any kind about how accurately a given citator describes subsequent negative treatment in case law. This is an argument I ultimately accept—a truly systematic study of the topic is likely impossible given the number of variables that could affect its results. For instance, factors such as chronology, the presence of direct procedural history (Taylor’s “related opinions”), consistent application of the phrases by LexisNexis or

Thomson Reuters, and the case identified as “most negative” could each present different findings. Each variable might be controlled for on its own, but controlling for all at once seems exceedingly difficult. However, I do believe that by articulating a methodology for studying citators and offering a detailed picture of interpreting and operationalizing accuracy of application of subsequent negative treatment is valuable in its own right.

Table 4

Accurate Classification in Either or Both Citation Indexes

<table>
<thead>
<tr>
<th>Target Case Name</th>
<th>Target Case Citation</th>
<th>Classification on WLN</th>
<th>Classification on LEX</th>
<th>Accurately Classified Within</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gregory v. United States</td>
<td>369 F.2d 185</td>
<td>Criticized by</td>
<td>Questioned by</td>
<td>KeyCite Only</td>
</tr>
<tr>
<td>McCurdy v. Steele</td>
<td>353 F. Supp. 629</td>
<td>Declined to Follow by</td>
<td>Questioned by</td>
<td>Shepard's Only</td>
</tr>
<tr>
<td>Brandenburger v. Thompson</td>
<td>494 F.2d 885</td>
<td>Disagreed With by</td>
<td>Questioned by</td>
<td>Shepard's Only</td>
</tr>
<tr>
<td>Finley v. United States</td>
<td>404 F. Supp. 200</td>
<td>Disagreed With by</td>
<td>Questioned by</td>
<td>Shepard's Only</td>
</tr>
<tr>
<td>United States v. Dorfman</td>
<td>542 F. Supp. 345</td>
<td>Rejected by</td>
<td>Criticized by</td>
<td>Both</td>
</tr>
<tr>
<td>People v. Johnson</td>
<td>204 Cal. Rptr. 563</td>
<td>Not Followed as Dicta</td>
<td>Criticized by</td>
<td>KeyCite Only</td>
</tr>
<tr>
<td>In re A &amp; C Properties</td>
<td>784 F.2d 1377</td>
<td>Declined to Follow by</td>
<td>Questioned by</td>
<td>Both</td>
</tr>
<tr>
<td>Barber v. National Bank of Alaska</td>
<td>815 P.2d 857</td>
<td>Called into Doubt by</td>
<td>Questioned by</td>
<td>KeyCite Only</td>
</tr>
<tr>
<td>Stafford v. Purofied Down Products Corp.</td>
<td>801 F. Supp. 130</td>
<td>Declined to Follow by</td>
<td>Questioned by</td>
<td>KeyCite Only</td>
</tr>
<tr>
<td>Mulhall v. Advance Sec., Inc.</td>
<td>19 F.3d 586</td>
<td>Declined to Follow by</td>
<td>Criticized by</td>
<td>Both</td>
</tr>
<tr>
<td>Doctor's Associates, Inc. v. Distajo</td>
<td>66 F.3d 438</td>
<td>Disagreed With by</td>
<td>Criticized by</td>
<td>Both</td>
</tr>
<tr>
<td>Atchison, Topeka and Santa Fe Ry. Co. v. Brown &amp; Bryant, Inc.</td>
<td>159 F.3d 358</td>
<td>Not Followed as Dicta</td>
<td>Criticized by</td>
<td>Shepard's Only</td>
</tr>
<tr>
<td>Reed v. Reed</td>
<td>48 S.W.3d 634</td>
<td>Declined to Follow by</td>
<td>Overruled in part by</td>
<td>Shepard's Only</td>
</tr>
<tr>
<td>Security Ins. Co. v. Old Dominion Freight Line</td>
<td>314 F. Supp. 2d 201</td>
<td>Declined to Extend by</td>
<td>Distinguished by</td>
<td>Both</td>
</tr>
<tr>
<td>Pequignot v. Solo Cup Co.</td>
<td>640 F. Supp. 2d 714</td>
<td>Declined to Follow by</td>
<td>Criticized by</td>
<td>Shepard's Only</td>
</tr>
</tbody>
</table>

Table 5

Inaccurate Classification in Both Citation Indexes

<table>
<thead>
<tr>
<th>Target Case Name</th>
<th>Target Case Citation</th>
<th>Classification on WLN</th>
<th>Classification on LEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States v. DeCoster</td>
<td>487 F.2d 1197</td>
<td>Called into Doubt by</td>
<td>Questioned by</td>
</tr>
<tr>
<td>Melson v. Kroger Co.</td>
<td>578 F. Supp. 691</td>
<td>Disagreed With by</td>
<td>Questioned by</td>
</tr>
</tbody>
</table>
¶41 There are other indicia of accuracy in application descriptions of subsequent negative treatment: namely, the consistency with which cases are tagged with a citator’s iconography. In the set of 116 cases, KeyCite assigns the Yellow Flag to 18 different explanatory phrases. The 18 explanatory phrases are not evenly distributed—two phrases, “declined to follow by” and “distinguished by,” account for 51 of the 116 cases. In the larger set of 227 Yellow Flag cases (containing related opinions and unrelated opinions), KeyCite assigns 57 different explanatory phrases.

¶42 Shepard’s iconography was studied only in the set of 116 unrelated opinions. Seven of the 116 assigned no subsequent negative treatment and are excluded from this part of the analysis. Of the remaining 109 cases, 37 were assigned the Yellow Triangle, 20 were assigned the Q in Orange Box, and 52 were assigned the Red Hexagon. Of the 37 cases assigned the Yellow Triangle, four explanatory phrases were applied, with two phrases, “criticized by” and “distinguished by,” accounting for 35 of the 37 cases. Of the 20 cases assigned the Q in Orange Box, all 20 were given the “questioned by” analytical phrase. Finally, of the 52 Red Hexagon cases, Shepard’s assigned fifteen analytical phrases. Some of the Red Hexagon cases included related opinions in the Shepard’s report that were not captured by KeyCite, so for a meaningful comparison, it makes sense to look at the Yellow Triangle and Q in Orange Box cases. For the 57 such cases, only five phrases are applied, and three of the five phrases account for 55 of the 57, or 96.5%. Looking at this metric, the value of a controlled visual vocabulary is apparent when considering the accuracy of application of descriptions, albeit visual descriptions, of subsequent negative treatment. It seems fair to conclude that a user encountering the Shepard’s Yellow Triangle and Q in Orange Box iconography for a Target Case would have a clear understanding of the type of subsequent negative treatment contained in the Citing Case. The user encountering a Yellow Flag on KeyCite—at least on a superficial level—would not likely know what meaning to make of the symbol.

Looking Forward: A Discussion of the Citator’s Place

¶43 Questions about the use of online citators—particularly their presentation of graphical symbols as units of meaning—are not new among teachers of legal research.47 A survey of the literature suggests that qualifications about the adequacy of these symbols form an integral part of lessons and texts on updating cases and statutes.48 Even the most basic legal research text cautions that citators’ “signals and editorial signposts are not authoritative statements of the law” and that there is “no substitute for reading a citing document and determining for yourself its scope and effect.”49 These same texts, however, note that citators are “helpful as . . . starting place[s]” in determining a case’s continuing validity and should be considered “invaluable resources . . . [ensuring] that cases are still good law.”50

¶44 Marketing materials from LexisNexis and WestlawNext paint their citators as practically infallible. “Why do so many judges and lawyers rely on Shepard’s

48. See, e.g., Armstrong & Knott, supra note 3, at 135.
49. Cohen & Olson, supra note 3, at 115.
50. Armstrong & Knott, supra note 3, at 135.
Citations Service, exclusively from LexisNexis®, when it comes to validating research?” The answer? “It’s a matter of trust.” Likewise, KeyCite materials tout “West’s 125-year tradition of editorial excellence” and the company’s “leading-edge technological expertise” in suggesting that users can “instantly verify whether a case . . . is good law.” Of course, as Wolf and Wishart point out, these statements are largely meaningless, if not misleading, marketing attempts to differentiate products. It can be tempting to believe these kinds of statements based on the credibility of the source, not to mention the cost of the product. But savvy legal researchers know—and legal research instructors profess—that there is no side-stepping the need to read a case and use professional judgment to determine the precedential effect of later-citing cases. Still, citators are seen as essential components of legal research databases.

¶45 In light of this study’s results, researchers have even greater reason to doubt the adequacy of citators’ determination. More troubling, perhaps, is the implicit boost that some instructional texts give to citators by identifying them as a “good starting place” or “invaluable resources.” Indeed, if the graphical signals and the explanatory phrases cannot be trusted to be applied accurately—at best, approximately seventy-five percent of the time, or at worst, less than fifty percent of the time—it is difficult to see how descriptions of subsequent negative treatment would reliably set the researcher down the correct path. It could be argued that the presence of any negative symbol or phrase is enough to alert the user that “here there be dragons” and therefore, a concurrent need to read and understand the “flagged” case before citing it. This argument is easily countered, however, by the fact that not reading a case before citing it is almost certainly a violation of Rule 1.1 of the ABA Model Rules of Professional Conduct, requiring a lawyer to provide “competent representation to a client[,]” a duty defined as consisting of, among other things, “thoroughness and preparation.” So, if a tap on the shoulder from a

53. KeyCite on WestLAW Next, supra note 25.
55. Bob Berring calls this the “Tinkerbell” effect. He writes: “In the Walt Disney animated feature ‘Peter Pan,’ Tinkerbell was a fairy. She only existed if children believed in her existence. This character, viewed by the author at an impressionable age, stands for the classic bootstrapping of authoritativeness.” Robert C. Berring, Chaos, Cyberspace and Tradition: Legal Information Transmogrified, 12 Berkeley Tech. L.J. 189, 193 n.17 (1997). The term was later used by Mary Whisner. Mary Whisner, Bouvier’s, Black’s, and Tinkerbell, 92 Law Libr. J. 99, 2000 Law Libr. J. 8. The extension of the idea to citators specifically is my choice alone.
58. This phrase comes to mind because of an article on a slightly different topic in legal research. See Peggy Roebuck Jarrett & Mary Whisner, “Here There Be Dragons”: How to Do Research in an Area You Know Nothing About, 6 Persp.: Teaching Legal Res. & Writing 74 (1998).
60. Am. Bar Ass’n, Model Rules of Professional Conduct 11 (2011). This is assumed from the work done in Bast & Harrell, supra note 5. Likewise, there are no cases specifically on point in Kristina L. Niedringhaus, Ethics Considerations Related to Legal Research Practices: A Selective Annotated Bibliography, 31 Legal Reference Servs. Q. 104 (2012).
citator, even without any further intelligible explanation, means “read the case,” the question remains: where’s the value in that? A competent researcher will expect to do this anyways.

¶46 To justify their continued use, then, citators must add some value to the research process, not because they are thought of as “invaluable” but because they are precisely the opposite—important components of rather costly legal research databases. To explore this problem, the discussion first considers the citator’s origin and then how citators as currently constituted can be used beneficially (or, one could say, profitably) by researchers. Next I examine how citators might fit in a legal research environment with a multiplicity of tools for determining the meaning of subsequent negative treatment. Finally, I look to fruitful areas for further research on evaluating the quality of citators.

¶47 The roots of legal citation indexes in the United States stretch to the early nineteenth century, before they were known as citators.61 Ogden credits preeminent jurist and scholar Joseph Story with the idea of applying an “explanatory letter” such as D for doubted or O for overruled to a table of cases included in a reporter volume.62 The earliest popular citation index existed for much the same purpose as the contemporary citators—efficient identification of a case’s subsequent negative treatment. The title of the volumes produced over a lifetime by Simon Greenleaf, Greenleaf’s Overruled Cases, explains itself.63 Other early citation indexes were also compiled by individuals, almost always at first for their creator’s personal use.64 But the coming of the twentieth century brought a growth in the country’s urban population and commercial activity, which led to an increase in the number of courts (and reorganization of those courts), and eventually to a consequent explosion of the number of published precedential legal documents, such as appellate opinions.65 In addition to figuring out how to organize these cases, interested parties in the profession, namely lawyers, law librarians, and the growing national publishers, needed to find a way to make sense of this ever-expanding stuff of law.66

¶48 Until the digital era in legal publishing, and through its first generation, Shepard’s was the only national citator capable of accomplishing this comprehensive task.67 While not originally conceived as a facsimile of the print version, Shepard’s online soon took on many of the functions, and idiosyncrasies, of the print volumes.68 But its purpose remained the same—identifying precedential procedural and citing history in a comprehensive and current fashion. What digital publication of legal materials added, however, was the ability to generate a so-called table of authority for a given document, such as a case. That is, it was suddenly possible to extract information about which cases cited other cases and how often

61. Ogden, supra note 6, is the canonical history.
62. Id. at 4.
63. Id. at 6. Greenleaf was a close friend and colleague of Justice Story.
64. Id. at 23.
66. This is an analogy to one of the main theses from Bowker & Star, supra note 7, at 16. In that work, the context is epidemiological classification.
67. Dabney, supra note 6, contains an excellent, detailed history of the development of KeyCite in addition to a history of Shepard’s in the late twentieth century.
68. Id. at 170.
a given case was cited, among other things. KeyCite includes graphical representations of a case’s direct procedural history, while both services include extensive lists of Citing Cases, regardless of whether the treatments within are approving, negative, or neutral.

§49 Given the change in the nature of citation analysis possible in the digital realm and the shaky performances of both systems in accurately describing substantive negative history, it is fair to ask whether the era of the citator qua citator has already passed. Instead of conceptualizing these indexes of citations as tools reliably identifying both the existence and nature of subsequent negative history, and therefore essential steps in “updating” legal research, it seems more appropriate to relieve these tools of the moniker they have acquired and the related heavy, if not impossible, burden associated with it. A legal citation index cannot, on its own, say whether a Target Case is bad law. It certainly cannot say if a case is good law. And, as discussed earlier, any legal researcher relying on a citator to do so is almost certainly professionally incompetent. This raises the question, hinted at earlier, of what legal citation indexes are still good for. To put it more circumspectly, what is the tool-known-as-citator’s place in legal research now and in the future?

§50 Currently, legal citation indexes can gather a wide range of subsequent citing authority. KeyCite is more explicit about displaying these sources—including statutes citing the Target Case as well as secondary sources like law reviews, treatises, or looseleaf series. The same variety of sources is also available in Shepard’s, though the interface makes it a bit more difficult to find. Both products include a table of authorities cited within the Target Case. KeyCite also includes a unique feature, measuring the depth of treatment in citing court documents. This measure is likely calculated based on how often the Target Case is cited or mentioned in the citing document, and how many words separate the citation from the next different citation. Thomson Reuters (the parent company of WestlawNext) does not disclose how its depth-of-treatment algorithm functions, naturally, so the prior statement represents my best guess. Neither system provides other types of symbols or explanatory phrases to describe other later-citing authorities.

§51 Legal research instructors need to emphasize these features of citation analysis currently available in both major citators while explaining potential problems with the descriptions of subsequent negative treatment in the later-citing cases when provided. Also, the notion of a citator as a tool for updating research must be expanded—the citation index, when integrated into the larger research platform, can serve a vital function throughout the research process. Examining the dates of later-citing cases (are there any that are current?) or the jurisdiction or court level of later-citing cases (will the decisions be binding precedent?) are two basic examples. Rethinking the citator as a tool for analyzing the influence of a case based on later citations in a variety of sources is needed, rather than calling it a final box to tick to ensure the validity of a case’s proposition as good law.

§52 Lawyers and legal information professionals also must continue to critique and qualify the marketing or training materials created by WestlawNext and LexisNexis about their respective citator products. As the literature cited in this article shows, much good work has already been done in this and related areas, and should continue. Law students and practicing attorneys need to be made aware of the
implicit overruling problem, the inclusion or exclusion of unpublished opinions, the misleading nature of certain graphical representations of precedent, and of course, the inaccuracy in how symbols and explanatory phrases are used to signal subsequent negative treatment. Additionally, it cannot be left to the information vendors to teach how these products work, especially if citators are being presented as tools for instantly confirming or disconfirming the validity of a point of law in a given Target Case.

§53 Beyond teaching what citators can and should do well presently, looking to the future is necessary too. There, new tools will assume some of the traditional citator’s functions, and market needs and competition will push WestlawNext and LexisNexis to reimagine their current products. Startup companies already are producing new-wave citation analysis tools based on algorithmic extraction of citation data, presenting information about case citation networks visually. Researchers no longer need to rely solely on the textual representation of citation data when analyzing precedent. Also intriguing is the possible application of machine-learning algorithms or artificial intelligence to legal systems. And while two recent articles on the topic do not mention the application to citators specifically, the authors do stress that teasing out the relationship between cases is a potential application of this technology. While a fully automated citator with accurate descriptions of subsequent negative treatment may be far in the offing, more options for conducting citation analysis outside of the bounds of traditional citators have already arrived.

§54 One hope for this article is that it will encourage more commentary on citators generally and on their descriptions of subsequent negative treatment specifically. The analysis here does not satisfactorily answer several questions it raises. For instance, does a hierarchical controlled vocabulary improve the accuracy in how citators apply their descriptions of subsequent negative treatment? Could the observed results instead be due to differences in how consistently individual services apply these descriptions? Or does the absence of any definitions of explanatory phrases in KeyCite make the idea of consistent application impossible? On the contrary, might the KeyCite terms actually represent narrower terms of broader

---

70. Mart, supra note 12, at 44, n.3.
71. Olson, supra note 47, at 60 (arguing that the red hexagon should be thought to mean “go” rather than “stop”).
72. This, as it applies to law students, is not a new argument. See Shawn Nevers, Candy, Points, and Highlighters: Why Librarians, Not Vendors, Should Teach CALR to First-Year Students, 99 LAW LIBR. J. 757, 2007 LAW LIBR. J. 46.
73. The best example of this is Ravel Law. See About Us, RAVEL LAW, https://www.ravellaw.com/about (last visited Nov. 17, 2015) [http://perma.cc/BTF5-884H]. Fastcase also makes use of visual representations of precedent in its Authority Check tool.
Shepard’s analogues, which then form a kind of implicit hierarchical controlled vocabulary? Or do the phrases exist simply as snippets, used to distinguish among cases without actually categorizing the subsequent negative treatment contained within?

¶55 Other areas for research that I see as particularly helpful are exploring further what the idea of comprehensiveness in a citator means. To that end, researchers might estimate how many cases present in the case law databases have ever been cited by another case, and, if a case has been cited, what is the mean number of times it has been cited? Of this number, how many of those citing references would be negative? Knowing how to best ask and answer these types of quantitative questions would likely be of aid to researchers looking to benchmark observed qualitative phenomena. Would the necessarily subjective descriptions of negative subsequent precedent make sense to duplicate if one were to start building a citator today or, as I suspect, would the making of meaning take some other, more inferential path? That is, what would the modern-day Story emphasize as important to the modern-day Greenleaf?

¶56 More prosaically, it should be noted that Shepard’s has a different iconography and user interface on the new Lexis Advance platform, which was not tested here. (KeyCite on WestlawNext was chosen because Thomson Reuters was beginning to phase out Westlaw Classic at the time this research began; it has now completed the transition.) Tests on this system, which seems on cursory examination to incorporate a depth-of-treatment element, could yield different results. Likewise, would an examination of, say, the three most negative cases lead to greater correspondence between the Citing Cases presented by each service?

¶57 Finally, a direct invitation to both LexisNexis and Thomson Reuters: please, critique my work. Present verifiable studies with publicly available data to justify advertising claims concerning subsequent negative treatment and the value a citator adds to the legal research platforms on the whole. Similarly, does the cost associated with producing descriptions of subsequent negative treatment make sense given the inaccuracy in application found here? If so, why should lawyers and legal professionals of all stripes—in large law firms, government, or legal education—continue to pay the ever-rising fees attached to your services? The call is not terribly complicated: show us why the systems, as currently construction, actually meet lawyers’ research needs.

Conclusion

¶58 Citators are expected to accurately describe subsequent negative treatment, an expectation that dates to their beginning in the United States. This study sought to answer the question of whether a system, such as Shepard’s Citations, employing a hierarchical controlled vocabulary, would apply descriptions of subsequent negative treatment more accurately than a system, such as KeyCite, lacking a hierarchical controlled vocabulary. To reach a meaningful conclusion, a large set of cases with later-citing history was narrowed until a fair comparison could be made. The results of this comparison suggest that the presence of a hierarchical controlled vocabulary produces more accurate descriptions of subsequent negative treatment.
To this point, the relevant scholarly literature has been largely silent on descriptions of negative precedent in law. Some comparisons of citators for other factors have been done, and considerable writing by legal information professionals has critiqued the overall trustworthiness of citators. This article addresses the gap and provides a framework for assessing particular elements of citators. But an important goal of scholarship in library and information science is to make concrete suggestions for improvement, which this article does in discussing the best use of citators given the results of the study. Citators remain valuable tools as citation indexes, gathering all later-citing history from a variety of primary and secondary sources. But in providing descriptions of subsequent negative treatment, citators seem tied to an antiquated historical model originating in the early nineteenth century. Their lackluster performance in this area suggests they are failing at the task deemed so central to their existence. Law librarians and legal educators and scholars must continue to examine the tools we use to evaluate the law so as best to communicate its meaning to those we serve.
Introduction

¶1 Those working in a law library have likely encountered a phenomenon that has been generating a substantial amount of discussion in the last decade or so: the entry of Millennials into a workforce that until recently had been dominated by Boomers.¹ Despite the momentary equal representation of generations in the workforce today caused by the Boomer exodus,² big changes are afoot. The Brook-

---


ings Institute predicts that by 2025 Millennials will make up a whopping seventy-five percent of the labor pool.³

¶2 Given that Millennials will eventually replace Boomers in the law library setting, it is essential that they are ready for the job. Fortunately, we belong to a profession known for its mentoring skills. As Michael Chiorazzi said when he received the 2013 American Association of Law Libraries Distinguished Lecture-ship Award at the AALL Annual Meeting, “If you are in the profession, you are by definition a teacher and a mentor. If you aren’t, you aren’t a librarian.”⁴ In his lecture, Chiorazzi recalled the essential role mentors played in his professional development through the years.⁵

¶3 However, to be an effective trainer or mentor, a librarian must first relate to her younger coworkers. Unfortunately, much of the material written about the qualities of Boomers and Millennials indicates that their co-existence in an office setting could create workplace misunderstandings rather than workplace harmony. All people—librarians included—are inclined to pass judgment on a younger generation for lacking the same skills and virtues they imagine they themselves had at a similar age. This trend is not new. Even what we know now as the Greatest Generation was reviled in its youth.⁶ While the notion that younger generations are across the board lacking can be dismissed out of hand, it is worth considering that all generations are not exactly alike. As Alexis de Toqueville wrote when speaking of democratic nations, “every fresh generation is a new people.”⁷ But for Boomers to successfully complete their mission as trainers and mentors to the incoming generation, it is necessary to strip away impediments to the core relationship.

¶4 Our initial premise for this article was that despite plentiful literature describing the impending workplace clash of these two generations, and despite a rich supply of anecdotal evidence from our peers, we believed research would reveal that most of the perceived differences between Millennials and Boomers were little more than the normal hue and cry that goes on between generations. But a funny thing happened on the way to our conclusion—we began to doubt our premise. We⁸ uncovered a deeper truth: there are a number of critical differences between Boomers and Millennials, most of which reflect the cultural milieux in which the two came of age. But, we further concluded, with good faith on both sides, that none of these differences should prove insurmountable to a healthy mentor/mentee relationship.

⁵. Id.
⁶. Although Tom Brokaw’s 1998 bestseller, The Greatest Generation, lauds the youth of the 1930s, the truth is that that generation was bitterly criticized as the “lost generation” and accused of being violent, drugged, lazy, promiscuous, and hopeless. Mike Males, For Adults, “Today’s Youth” Are Always the Worst, L.A. TIMES, Nov. 21, 1999, at 1.
⁷. ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 87 (Henry Reeve trans., George Adelard 3d ed. 1839) (1835).
⁸. A Boomer supervisor and a new Millennial librarian.
A brief word about our very unscientific protocol: on Millennial’s first day on the job, Boomer proposed a plan. Each would document her daily workplace experiences for approximately the next thirty days in a journal. These journals would form the core material for this article. Then Boomer and Millennial would read all the material they could get their hands on about workplace issues involving Boomers and Millennials. Last, they would compare their experiences against that body of work and, as mentioned above, establish that plus ça change, plus c’est la même chose. Not.

While members of different generations may always experience some kind of gap between them, effective trainers and mentors do their best to close that gap or, at the very least, to ensure that it does not become a chasm. This process involves cultivating an honest awareness of shared points as well as divergent ones, and perhaps even an appreciation for these differences.

Generations Defined

We begin by defining our terms. Boomers are those born between 1946 and 1964. Until the Millennials came on the scene, Boomers were the largest cohort ever born in the United States and number about eighty million. The generation before the Boomers is most commonly referred to as the Traditionalists, and when you consider the time span ascribed to them, 1900 to 1945, they really could be two generations. Gen X is typically defined as those born between 1965 and 1980, with a total of approximately forty-six million members. Finally, we have the Millennials, a whopping eighty-six million having been born between 1981 and 1999, making them the largest cohort in history.

When experts reflect on generational differences, they often describe how a generation’s shared events and conditions tend to create similarities among members. A zeitgeist goes a long way to defining who we are and, to some extent, why we are like that. Lynne Lancaster and David Stillman call this shared perspective the “generational personality.” Before we discuss actual traits of the two groups we are concerned with, we thought it useful for each of us to describe the collective experiences that we believe have shaped our generational personality.

The Boomer: unsupervised play stretching across many city blocks, the Beatles, the threat of nuclear war (everybody under the desks!), JFK’s assassination, RFK’s assassination, MLK’s assassination, moon landing, Vietnam War, psychedelic music, the draft lottery, hippie culture, Eugene McCarthy, working from an early age.

---

9. We want to acknowledge one particular work that we discovered late in the writing process by and about librarians at the McIntyre Library at the University of Wisconsin-Eau Claire. This article is insightful and interesting in that, although written five years earlier, many of the themes and concerns mentioned in our article were already evident. Eric Jennings & Jill Markgraf, Mind the Generation Gap, 17 C. & UNDERGRADUATE LIBR. 93 (2010).
12. Id. at 14.

¶10 **The Millennial:** team sports galore (including t-ball where scores weren’t kept), apocryphal stories of Satanic ritual abuse and “stranger danger,” working mothers, helicopter parents, boy bands, “gifted” programs, O.J. Simpson trial, Monica Lewinsky, first computer in elementary school, Internet in high school, CDs, DVDs, iPods, plenty of extracurricular activities, Columbine shooting, 9/11, war in Iraq, ADHD/Ritalin, reality TV, Facebook, economic fallout, climate change, first African American president, delayed marriage and child rearing, same-sex marriage, and adult-onset 1990s nostalgia.

¶11 The next section reviews the primary characteristics of each group as distilled from the literature. But before that, two points: First, we are evaluating Boomers at a later stage in their lives than Millennials. By 2016, Boomers have reached or are approaching the end of their careers; we can look back on their contributions to the workforce almost in their entirety. Millennials, on the other hand, are only now taking the reins. Had Boomer behavior been analyzed by their superiors in the sixties and seventies, “hardworking” or “industrious” might not have been the adjectives chosen. In comparison, for all that is said about Millennials, they are at present a benign group. Second, when we talk about “primary characteristics” of the Boomer generation and then later the Millennials, we do not mean to imply that all members will be cast in this mold, but we do feel it is safe to venture some generalizations.

**Primary Characteristics of Baby Boomers**

¶12 Before we address more work-related characteristics of Boomers, we want to note one characteristic that is in sharp contrast to Millennials—many Boomers grew up alienated from their parents. It is a commonplace that the sixties and seventies were times of great familial division. Parents forbade their children to wear bell bottoms, go to demonstrations, and grow long hair. Children thought their parents hypocritical, if not worse, to support the Vietnam War and to support political leaders the younger generation considered criminals. And then there was the drug taking. Turn on, tune in, drop out. Parents reacted with incomprehension as they watched their children slip further and further away. The expression “don’t trust anyone over 30” was pat but widespread. Another popular slogan of the times, “Question Authority,” also signaled the distrust between generations. This facet of Boomers’ experience is a far cry from that of Millennials’, which is described in the next section.

¶13 Boomers are often described as having strong work ethics and not a little competitiveness. This is sometimes ascribed to being part of a very large cadre, which meant that many Boomers contended for a limited number of job promotions. This competition sometimes played out in the workforce as a need to work

13. *See, e.g., Cam Marston, Motivating the “What’s in It for Me?” Workforce: Manage Across the Generational Divide and Increase Profits* 36 (2007). “Boomers excelled at long, hard work. In fact, no single generation had ever before put in so many hours with so much intensity, and a new term, workaholic, was coined in the 1970s to describe their work habits.” *Id.*
until a job was done, no matter what was sacrificed. Boomers’ personal lives sometimes suffered as a result. Women interested in advancing were afraid to acknowledge that they needed to shop for dinner or pick up sick kids, and men sometimes felt compelled to miss important family events. As described by Lancaster and Stillman, “workaholism became a badge of honor.”

¶14 Boomers believe they had to work their way up and, as a consequence, expect others to do the same. Boomers had to fight for workplace equality. They did their time in the trenches to achieve the positions they hold today. Boomers can be irritated with demands made by workplace newcomers that Boomers never would have made in their day. Boomers’ irritation with Millennials’ demands is often accompanied by snarky references to the common practice of everyone on a Millennial team getting a prize. No, everyone doesn’t get a prize! says the Boomer. Prizes are something you work hard for and earn.

¶15 Not only must one work hard like Boomers did to advance, but one must work the way Boomers worked—the same hours, the same intensity, the same location (that is, in the office, not remotely). Boomers believed that working on-site is important because out of sight can mean out of mind.

¶16 Another characteristic is that of workplace independence and circumspect interaction with supervisors. Boomers have their tasks, receive instructions, do their assigned work, and turn it in. End of story. Feedback is something employees get once a year at their performance evaluations. And the feedback is circumspectly delivered, in an appropriate setting, and at the right time.

¶17 Boomers tend to believe they will remain forever youthful and resist many of the “images of slowing down that go with being retired, because they imply taking a less important role in the hustling, bustling scheme of things.” AARP had a really hard time getting Boomers to read its magazine when it was called (ugh) Modern Maturity. That problem will probably ease now that an icon of Boomer youth, Bob Dylan (seventy-four, people), appeared on the cover of AARP’s magazine. Keep this in mind too: “The typical Boomer believes that old age doesn’t begin until age 72.”

---

14. One female Boomer described her sacrifices this way: “I had to make big sacrifices for work. For my generation . . . we had to give a lot to our jobs . . . . [W]e had to sacrifice the time we wanted to spend with our children to be at work.” Id. at 21.

15. LANCASTER & STILLMAN, supra note 11, at 99.

16. “It was important for employees to be seen working hard at their desk—it was visible time. Output was not measured nearly as much as hours spent working.” MARSTON, supra note 13, at 37.

17. Interestingly, Lancaster and Stillman claim that Boomers adopted the once-a-year performance appraisal as a reaction to being supervised by taciturn Traditionalists who believed that “no news is good news.” That was a good-enough method of feedback for Boomers who worried about where they were in the food chain, who was gaining ground and who was losing: “Boomers are comfortable waiting for feedback until the next scheduled meeting, and Traditionalists might be willing to wait until the next performance appraisal.” LANCASTER & STILLMAN, supra note 11, at 257.

18. Id. at 83.

19. Id. at 129.

20. Id. at 127–28.


One way to hold on to youth is to keep up with technology. Librarians have had little choice about this. Librarians continue to be early adopters of technology due to the nature of their work, but has anyone else noticed the escalating number of job advertisements for “emerging technologies” librarians? Methinks the Boomers have technology fatigue.

For a generation that fought so hard to change so many things, Boomers lost a lot of steam when they got to the workplace. In You Raised Us—Now Work with Us, author Lauren Stiller Rikleen describes the workplace in which Boomers most typically found themselves. This setting, created by the Traditionalists of the previous generation, is described as “rigid office hours, face-time demands, [and] inflexible work arrangements.” Rikleen contends that Boomers did little to change the rigidity of the workplace they inherited. In fact, Boomers have thrived in these work environments, working long hours and expecting those around them to do so as well.

Observations about Boomer culture are not always flattering. Indeed, in some quarters a steady drum beat of negativity is common. Leonard Steinhorn has a section entitled “Boomers under Fire,” summarizing this negativity in his book The Greater Generation. Interestingly, one of his repeated criticisms is that Boomers are self-centered, spoiled, and selfish; this is fascinating in view of the most prevalent criticism Boomers now lodge against Millennials—yes, the “entitled” card!

### Primary Characteristics of Millennials

Millennials are defined as those born after 1980 and before 1999. Overall, Millennials are judged to be less ready than Boomers to assume the mantle of adulthood. And a steady supply of commentators weighs in about why that is.

A much talked about New York Times magazine article assessing the perceived failure of Millennials to “mature” explores the idea of a new stage in human development labeled “emerging adulthood.” Jeffrey Jensen Arnett, a psychology professor at Clark University, has been the most vocal advocate for adopting the

---

23. One Boomer librarian had this to say:

"I recall the now quaint-seeming leap from a keyboard to a mouse and the enormous challenge it posed just in terms of physical coordination. In considering the distance Boomers have traversed technologically, it is mind boggling and quite impressive. Millennials, who were born maneuvering a mouse, are often lauded for their adeptness and comfort with technology. As a group they readily embrace the latest technology and can sometimes exhibit frustration with—and occasionally even arrogance toward—their older colleagues who may not adopt the latest technology as readily or with the same level of enthusiasm. While it is likely that the Millennial Generation will change the profession exponentially through technology, we should not forget that our seasoned library veterans were—and continue to be—the technology pioneers who learned, adapted, and developed technological innovations that transformed the profession."

Jennings & Markgraf, supra note 9, at 95.


25. Leonard Steinhorn has an opposing point of view to Rikleen. Steinhorn believes that Boomers injected egalitarianism into the workforce. However, chapter 8 of Steinhorn’s book, which is devoted to Boomers in the workplace, is light on support for his theory that Boomers had great impact on the workplaces they inherited. LEONARD STEINHORN, THE GREATER GENERATION 161–78 (2006). In any event, this article focuses on the legal workplace, and few would argue that the law environment has experienced much flattening of the hierarchy under the Boomer reign.

26. Id. at 44.

term. Arnett points to several cultural shifts as explanations for the Millennials’ protracted journey to full adulthood: the need for more education in a knowledge economy, a dearth of entry-level jobs, a long wait before marriage in a world increasingly tolerant of cohabitation, and a trend among young women to feel less rushed to start families due to the greater availability of assisted reproductive technology.

§23 The common traits of this new phase include “identity exploration, instability, self-focus, feeling in-between” and what Arnett refers to as “a sense of possibilities.” Classic adolescence shares many of these traits, particularly identity exploration. However, there is a key difference: because career and marriage commitments are no longer far-off abstractions but right around the bend, emerging adulthood contributes a new sense of urgency to this exploration. As such, this period is fraught with a new sense of anxiety about a still uncertain future.

§24 Millennials have trouble as a group deciding on a profession, either due to the economic nadir they faced after graduating from school or—let’s be frank—because of their own dithering. As one author put it, many of today’s twenty-somethings find themselves “wandering in the purgatorial landscape of post-graduate inertia, premarital indecision, and proto-careerist yearning.” This collective dragging of heels leaves elders shaking their heads and asking Millennials: when will you finally grow up?

§25 Despite the unease and frustration that Traditionalists and Boomers may feel toward their Millennial progeny, Millennials as a general rule look back on earlier generations with great respect and deference; many maintain strong ties to their parents—mostly Boomers, it is worth pointing out—well into adulthood, seeking their advice on everything from work to personal relationships. This is good news for Boomers since they went to great lengths as parents to support, encourage, and steer their children. Almost eighty-four percent of Millennials reported that they “frequently” or “sometimes” sought career and personal advice from their parents. One survey asked Millennials to characterize their relationships with their families: more than seventy-three percent reported “very close,” while twenty-three percent reported “close”; fewer than four percent reported “not

28. Id. Arnett argues that recognizing a new stage in human development is actually nothing new; while widely accepted today, the concept of adolescence is only about a century old. Id.

29. It is important to note that emerging adulthood does not apply across all social classes. Middle-class-and-above Millennials have more exploratory opportunities. Rikleen, supra note 24, at 132.

30. Id. Of course, women may be gravely misinformed about their own long-term fertility. Compared to their twenties, women are about half as fertile at thirty, about one-quarter at thirty-five, and about one-eighth at forty. Meg Jay, The Defining Decade: Why Your Twenties Matter and How to Make the Most of Them Now 180 (2012).

31. Henig, supra note 27 (quoting Jeffrey Jensen Arnett).

32. Id.


34. Rikleen, supra note 24, at 32–36 (including a section called “Boomers as Parents—Coach, Advisor, and Best Friend”).

35. Id. at 34.
close.” This is in stark contrast to Boomers, who responded to similar survey questions with a very different attitude: in 1974, a majority of teenagers “felt unable to comfortably talk to their parents about personal concerns” and forty percent stated that they would rather not live with them.

This respect for elders is arguably the result of a widely scorned child-rearing technique: helicopter parenting. Much has been written about the astonishing amount of control parents have exercised over Millennial children’s environments outside of the home. Parents have challenged grades, hiring decisions, and even compensation levels. One Millennial put it this way: “[O]ur generation of parents are very involved in our life and try to help us become better—whether we want/need it or not . . . .”

Knowing that they were the center of their parents’ lives, Millennials are entering into adulthood with a sense of self-assurance that could be perceived as unearned by members of older generations. Jean Twenge notes that children born after the widespread availability of birth control and abortion were “the most wanted generation of children in American history.” In the workplace, this can mean that they are more likely to assert themselves when confronted with protocols and procedures that make little sense to them. Millennials respect those senior to them, but they won’t keep silent if they see room for improvement.

Millennials are also defined by their early exposure to the Internet, coming of age at the very moment it took a hold of our cultural imagination. Beginning in middle school, Millennials were chatting online with each other—and sometimes other more predatory figures—and typing their papers for school on word processors. In fact, it didn’t take long for Millennials to demonstrate their natural ability to navigate computer networks and outsmart their older peers; they have been at the forefront of almost every major hacking scare covered in the news.

An affinity for new technology manifests itself two ways in the office: one, Millennials have greater faith in technology’s ability to help them make more efficient use of their time; and, two, they often feel overburdened by the demands of older coworkers who seek their help with computer problems, whether it is part of their job descriptions or not. Some professional Millennials even complain that they have to instruct administrative assistants in the more advanced features of programs like Adobe and Word. While in a certain sense this natural skill makes the Millennial a valuable asset—perhaps even an indispensable one—it sometimes leads to resentment as it can take them away from their defined work responsibilities.

36. Id.
37. Id. at 33.
38. See, e.g., id. at 27.
39. At Western New England University School of Law Library, one staff member was shocked to see a parent fill out and turn in a job application for an undergraduate student. He did not get the job.
40. RIKLEEN, supra note 24, at 27.
41. Id. (quoting JEAN M. Tvenge, GENERATION ME: WHY TODAY’S YOUNG AMERICANS ARE MORE CONFIDENT, ASSERTIVE, ENTITLED—AND MORE MISERABLE THAN EVER BEFORE 4 (2006)).
42. See, e.g., Adam Clark Estes, A Teenage Hacker Ring Stole $100 Million in Army and Xbox Tech, GIZMODO (Sept. 30, 2014, 4:00 PM), http://gizmodo.com/a-teenage-hacker-ring-stole-100-million -in-army-and-xb-1640880835 (discussing four young hackers who breached U.S. military servers and were being prosecuted by the U.S. Department of Justice).
43. RIKLEEN, supra note 24, at 98–99.
Though some have derided Millennials as lacking the work ethic of the industrious Boomers, Millennials see things differently. Working long hours in an age of increased technological efficiency makes little sense to them. If quality work can be accomplished in fewer hours, why not reap the benefits of that extra time? As one researcher put it: “The tension between measuring productivity by hours worked seems anathema to a generation raised on devices that promote efficiency and multitasking.”

Unlike the “workaholic” Boomers, Millennials as a group favor “work-life balance” over career advancement. This attitude can in part be traced back to the common experience of being raised by two working parents who often prioritized work over family time. Millennials don’t want this for themselves and do their utmost to find jobs with flexible work schedules; this allows them to spend more time on outside pursuits or with family and friends.

Finally, it is worth noting that Millennials are also in a financially disadvantaged position compared to where their parents were at the same age. They are graduating with historically heavy student debt burdens into an environment of diminishing entry-level jobs. Despite this economic reality, Millennials are still stubbornly optimistic, not only in general but also with regard to their financial futures.

On Finding Middle Ground—Never the Twain Shall Meet?

To list Boomer and Millennial qualities as we do in the previous sections is to begin to understand how ripe for misunderstanding the workplace can be, not to mention the training and mentoring processes. It has become clear through our reading that each generation tends to use itself as a measuring stick. The problem that arises in the context of training or mentoring is that this overvaluation of one’s generational importance, and the lack of understanding of what is important to the other generation, may lead to senseless misunderstanding and, ultimately, unrealized potential due to intergenerational frustration.

In this section, we use excerpts from our journals to examine situations that evolved in the library workplace and how we each perceived them. We also try to identify aspects of our generational identities that we believe came into play, along with any lessons we took away from the situations.

In comparing our journal entries, you will see how a Boomer and a Millennial could be on a workplace collision course. Some of these collisions are normal

44. Id. at 144.
45. Id. at 181.
46. In fact, Paul Taylor says that Millennials’ two defining but “seemingly incompatible characteristics” are their “slow walk to adulthood and their unshaken confidence in the future.” Taylor, supra note 33, at 20. He elaborates, saying this:

Despite inheriting the worst economy since the Great Depression, despite rates of youth un- and underemployment that are the highest since the government began keeping such records, despite the growing albatross of student loan debt, and despite not being able to think about starting a family of their own, Millennials are America’s most stubborn optimists. Id. In fact, when polled, almost nine out of ten say they “already have” or “one day will have” enough money to meet their needs. Id. at 19–20.
intergenerational conflicts that support the Boomer’s initial theory that things have not changed very much. However, some things that come out in the following paragraphs go beyond that. These result from influences on each generation that can truly make working together difficult and the mentoring process nearly impossible.

Hey, I Have an Idea About How To Do This!

¶36 Renee: As a Boomer, while still new on a job, my tendency would be to just do my assignment, raising as few flags as possible. On the other hand, Liza comes from a generation that is known for its confidence and not being reluctant to express its opinion. There is an illustrative anecdote in When Generations Collide: one Boomer’s child was completely absorbed in a miniseries called The ’60s. The Boomer questioned her child when it was over—well, what did you think about the protest movements of the sixties? “Well,” the Millennial answered confidently, “I thought it was a very inefficient way to make the point.”

¶37 Therefore, from Liza’s first days on the job, she has thought about the tasks given to her and proposed different ways to do them. This is not all that surprising since in addition to being a research librarian she is the emerging technologies librarian. Still, that didn’t prevent me from being startled the first few times it happened. The Boomer behavior at issue here is the tendency to just do a job as best as possible without creating a lot of notice, and also wanting to be circumspect in dealings with a supervisor. Journal entry: “Day One: I know from my earliest experiences with Liza that she has very good problem-spotting skills. This ability leads her to ask many questions and to suggest different ways to do things.”

¶38 My initial surprise gave way to pragmatism; it didn’t take long for me to realize that the suggestions were good ones and that we were lucky to have someone so invested in her workplace. Because of Liza’s questions and suggestions, we now have a more efficient way to keep our daily reference statistics, we used Google Docs to collaboratively write this article, and we have explored ways to use our iPads in the classroom for more dynamic lectures.

¶39 Liza: I have a tendency to make suggestions when I’m confident—like when it relates to a fix that could be accomplished with the help of technology. This behavior by a newcomer could be considered forward by members of an older generation. I’m less inclined to offer suggestions when I feel like I’m out of my depth in comparison to someone more skilled, such as when Renee and I are working on a reference request together. This attitude does seem to be in keeping with my generation generally. Lancaster and Stillman conducted interviews with Millennials and found that “they are simply accustomed to a household, school, or work situation where job assignments are based on capability, not seniority.”

47. LANCASTER & STILLMAN, supra note 11, at 30. Lancaster and Stillman go on to describe this behavior as emanating from being raised by “highly communicative, participation-oriented parents.” Millennials have been participating in family decisions “since they were old enough to point.” Id. at 31.

They go on to point out that while historically “it was assumed that employees who had been around a long time automatically knew more than the younger ones did,” that is not necessarily true today.49

¶40 I was surprised to hear that Renee was “startled” by my suggestions concerning reference statistics. In my journal, I wrote only this: “I had a great time working on a new way to do reference statistics using Google forms and I’m glad that Renee was open-minded about it.” My confidence, while partially arising out of the already discussed “participation-oriented parents,” could conceivably be attributed to the so-called self-esteem movements that prevailed when Millennials were school-age children. Whether they have a sense of healthy self-esteem as a result, though, is up for debate. Studies have found that children who are constantly praised develop a shakier sense of self than those who are given honest feedback; in the workplace, this can mean that some Millennials are too easily traumatized by negative feedback.50 I can attest to being a bit oversensitive at times, but I wouldn’t go so far as to say that Renee has traumatized me just yet.

¶41 **Lesson:** Boomer had to let go of the idea that in the Millennial’s early days in the library, the Millennial would quietly take on tasks with no comment. The Millennial came to realize that it might not be necessary to say out loud every innovative thought that came into her head. Boomer came to expect that Millennial would have suggestions about how to do a task and that the suggestions would most likely be good ones or at least worth trying. Boomer had to let go the slight feeling that every suggestion about how to do something differently was a *sotto voce* comment that the way it had been done was “old fashioned.” Result: The Boomer can feed knowledge, tasks, and advice to the Millennial, and sometimes those tasks get a makeover.

**Questions and Guidance**

¶42 **Renee:** I mentioned above that I recognized that Liza had great issue-spotting skills and was not afraid to ask questions. This was definitely a contrast to my Boomer behavior. The Boomer behavior at issue here is that although I am not afraid to ask questions, I place a high value on figuring things out. Also, in terms of the workplaces in which I cut my teeth, I am not sure I wanted to be distinguished as the person who asked a lot of questions. Boomer behavior also does not encourage a lot of interaction of this nature with supervisors. In fact, in some situations, supervisor interaction might be something to avoid. The Millennial value here is that it is better to ask questions than to waste time guessing.

¶43 **Liza:** I suppose I didn’t think there was anything unusual or inappropriate about asking questions. Renee must have been nice enough about meeting my requests since I didn’t even address this issue in my journal. Thanks, Renee! I can agree that I’m prone to asking questions. Maybe this is a residual effect of helicopter parenting; I appreciate direction and clarity, especially when I’m on unfamiliar

---

49. *Id.* at 57.
50. I refuse to attribute a false sense of self-worth to my own behavior, but it provides a nice segue to the discussion that follows in the text.
51. *Id.*
terrain. Additionally, given that Millennials are used to the significant role adults play in their decision making, they often view problem solving as a collective process involving advice from their parents, as well as teachers and coaches.\textsuperscript{52} One Boomer librarian tentatively reached a similar conclusion, speculating that “[t]he intimate and open relationships that Millennials have with their parents may contribute to their relative comfort and confidence in professional relationships with older colleagues.”\textsuperscript{53} Growing up, I was also always encouraged to ask questions when starting new jobs or when I was in school. From my perspective, it’s less a signal of weakness and more a sign that I’m trying to do a good job. In general I enjoy collaboration, especially with someone who might be able to offer a different viewpoint, like a more experienced colleague; I’ve genuinely enjoyed writing this article, for instance. From my perspective, it’s better not to work in a vacuum, especially when you’re part of a team.\textsuperscript{54}

\textsuperscript{54}\textsuperscript{44} At the same time, relying too much on clarification from more senior colleagues can be viewed as a crutch, at times appropriately. Put bluntly, “Millennials tend to be uncomfortable with ambiguity” and expect detailed information and specific guidance with their assignments.\textsuperscript{55} While ambiguity can be avoided in the school room, where assignments are meted out carefully and with an instructive function in mind, this is not how real-world office spaces operate. Tasks are assigned as needs arise; Millennials must be called on to adjust to an environment that bears little resemblance to their highly structured childhoods.

\textsuperscript{54}\textsuperscript{45} When faced with this behavior, Boomers can be left feeling exasperated and impatient. They view Millennials as less savvy when it comes to problem solving than they were at the same age. Boomers may have some legitimate qualms with their junior employees. However, frustration on the part of supervisors is not a helpful response to someone who’s trying to find his or her way in the workplace. At the same time, Millennials should try to recognize when it’s appropriate to ask questions and when they can solve a problem on their own. The expectation that their supervisors will devote to them the same nurturing attention that they received from concerned parents and teachers is unrealistic in “the real world.”\textsuperscript{56}

\textsuperscript{54}\textsuperscript{46} \textbf{Lesson:} In order not to discourage the Millennial from asking questions but also to maintain the Boomer’s schedule, we hit on the idea of scheduling quick catch-ups throughout the day. From Boomer’s journal: “It is interesting to me that I thought of this option to protect my schedule, but there were several times during the day when I would have popped next door to Liza’s office to impart some not very important piece of information, thereby being a disruptive force in her day!” In retrospect, the Millennial’s information-seeking behavior is a strong point because for the Boomer, the scariest thing about a new librarian being on the Refer-

\textsuperscript{52} \textsc{Rikleen, supra} note 24, at 134.
\textsuperscript{53} Jennings \& Markgraf, \textit{supra} note 9, at 97.
\textsuperscript{54} See generally \textsc{Tegan and Sara, feat. Lonely Island, Everything Is Awesome, on The Lego Movie: Original Motion Picture Soundtrack} (WaterTower 2013), https://soundcloud.com/watertowermusic/everything-is-awesome-tegan/ (arguing for the proposition that everything is awesome and cool when you’re part of a team).
\textsuperscript{55} \textsc{Rikleen, supra} note 24, at 134.
\textsuperscript{56} \textit{Id.}
ence Desk is giving our patrons, especially students, misinformation. The Millennial can be counted on to be sure about her work in this regard and to ask questions if she is not. In fact, my journal says about the Millenial’s first day on the Reference Desk: “I felt perfectly comfortable with her taking the desk at 4:00 with only three days at our school because I knew that she would not hesitate to come to me with questions.”

**Work Ethic**

¶47 The literature is filled with descriptions of Boomers as being workaholics, willing to pull all-nighters and cancel dinner plans to get the job done. Often this is ascribed to the reality that Boomers came of age in an environment where there were lots of contenders for available jobs, and then, once in the job, lots of contenders for advancement. The idea of work/life balance came into the workplace with Gen X and is seriously embraced by Millennials.

¶48 Renee: The Boomer belief here is that a good employee is a hard-working employee, and a hard-working employee does not leave at 5:00 p.m. Did my role of training and mentoring a Millenial encompass discussing this topic? From my journal: “If someone is just starting out in the profession, how are they supposed to know these things?” Fortunately, after mulling this question over, I decided that “training a new librarian does not mean having to tell him or her everything that pops into my head when it pops into my head. I think it is more important to preserve the enthusiasm and freshness that a new Librarian brings rather than make lots of nitpicking corrections that might make the new Librarian unsure of him- or herself.” As will be shown below, this was good advice to myself that I evidently did not take.

¶49 Liza: I do think people often misread the Millennial concern with efficiency and work-life balance as an indication that we’re somehow less dedicated or less “hard working.” The idea that working long hours and losing sleep leads to greater productivity is actually something of a myth anyway. Studies show that taking vacations and working from home actually increase worker productivity. Though Boomers may like to pat themselves on the back for the hours they put in, they might not be working at full capacity.

¶50 I did address this issue in my journal fairly early on. In my second week, I recall a conversation where Renee stressed the importance of “working hard—even if that meant staying after 5.” I pondered this for a while since it seemed like an unnecessary comment. I had no doubts about my ability to work hard since I attended law school, worked on a law review, and worked full-time while getting my M.L.I.S. In response to Renee’s comment, I wrote that of course I’d stay late if I was working on something, but I wouldn’t stay late just for appearances’ sake.

---


The literature supports my own anecdotal observation that Boomers are skeptical of their younger colleagues’ work ethic. As such, Millennials have reason to be concerned about how they are perceived; in one survey, only twenty percent of employers rated Millennials “above average” with regard to their willingness to work long hours. Perhaps this reflects a truth, but Millennials don’t equate long hours with quality work or a mark of dedication; instead, they look to technology to accomplish the same tasks in less time. Due to their comfort with and affinity for technology, Millennials are often frustrated when supervisors continue to view a relationship between work and time. Millennials view technology as a true game changer, something that can deliver greater flexibility and work options.

At the same time, Millennials perceive themselves as having solid work ethics, but ones “integrally tied to a holistic view of their lives,” which treats work as important, but not singularly so, compared to family obligations, personal relationships, and health and wellness. To sum up the Millennial mindset: working hard is laudable, but it’s misguided to view one’s career as the sole or even primary purpose of one’s life.

Lesson: Well, the Boomer was surprised to see from the Millennial’s entry that despite thinking she hadn’t mentioned the whole “working hard” thing, the Boomer had! That’s telling. But the Millennial’s points are important and likely represent a recurring theme in workplaces as Boomers and Millennials strive to achieve equilibrium. Interestingly, NELLCO, an international consortium of law libraries, had a conference in 2014 that highlighted the Results-Only Work Environment (ROWE). Under this concept, the emphasis is not on the “outdated model of last century workplace flexibility” but on a workplace that holds employees accountable for results. One of the corollaries of this is that how an employee spends his or her time is not judged. The ROWE workplace is inspired to some extent by the demands of the Millennial workforce. So it may be that the Millennials will be able to bring about important workplace changes that eluded the Boomers. In our own

59. Rikleen, supra note 24, at 140.


Bertrand Russell, in a 1932 essay entitled In Praise of Idleness, made this point:

Suppose that at a given moment a certain number of people are engaged in the manufacture of pins. They make as many pins as the world needs, working (say) eight hours a day. Someone makes an invention by which the same number of men can make twice as many pins as before. But the world does not need twice as many pins: pins are already so cheap that hardly any more will be bought at a lower price. In a sensible world everybody concerned in the manufacture of pins would take to working four hours instead of eight, and everything else would go on as before. But in the actual world this would be thought demoralizing. The men still work eight hours, there are too many pins, some employers go bankrupt, and half the men previously concerned in making pins are thrown out of work. There is, in the end, just as much leisure as on the other plan, but half the men are totally idle while half are still overworked. In this way it is insured that the unavoidable leisure shall cause misery all round instead of being a universal source of happiness. Can anything more insane be imagined?


61. Rikleen, supra note 24, at 141.

case, this ultimately was a nonissue since the Millennial demonstrated flexibility and willingness to put in the hours required to accomplish a task. In fact, within her first weeks the Millennial volunteered to work extra hours to help the Boomer complete a long, tedious assignment for which the Boomer remains grateful.

Feedback

¶54 Renee: In the past, the Boomer’s approach to training a new librarian has been to give the new librarian a task, give the overarching guidelines for how to do the task including the resources to consider, and walk away, giving the new librarian “space” to do her job. The Boomer might also throw the new librarian “into the Reference fray,” letting her have the satisfaction that comes from facing an issue on her own and finding a solution to it.

¶55 Any article one reads about Millennials makes it clear that they are uncomfortable with a hands-off approach. A Millennial is going to want more input as she goes along; and, when the job is completed, she is going to want a critique of the work product as soon as possible, perhaps even as the work progresses. Moreover, a Millennial is not going to want to be thrown into any situation for which she is not prepared.

¶56 This is another generational difference that can have serious implications for the workplace. As noted in When Generations Collide, 71% of top performers who received regular feedback were likely to stay on the job versus just 43% who didn’t receive it. That means that even among peak performers, feedback plays a vital role in an employee’s decision to stay in a job. Which means, of course, that quality of feedback, or lack of it, has a direct relationship to turnover.63

This statistic is relevant to our article because here is a generational difference that can have a very big impact on employee retention. Also, if the mentor is not able to give the kind of feedback that the mentee needs, misunderstanding may result; and misunderstanding, left unaddressed, can fester into irreconcilable differences.

¶57 Liza: From the Millennial's perspective, the need for feedback has less to do with hand-holding and more to do with a desire to produce quality work that’s in line with the mission of a particular library. The desire for feedback is directly linked with the Millennial concern with efficiency; why waste hours on a project that will have to be completely revamped if a supervisor sees something he or she doesn’t like? In reality, I think the feedback issue harks back to certain qualities of the Millennial upbringing. Due to helicopter parenting, we are looking for a lot of feedback and a certain amount of direction, but we also are independent and outspoken because we’ve been told from a young age that our opinions mattered.

¶58 We may also be more collaborative than older members of the workforce. How much of this issue is a generational difference and how much is due to the constant collaboration Millennials grew up with in a networked world is hard to say. I definitely think I’m a fan of dialogue—of talking out problems as they arise instead of trying to predict them.

63. Lancaster & Stillman, supra note 11, at 264.
¶59 **Lesson:** The solution to this difference may actually take some changing on both sides. While it is possible for the Boomer to react to this as an excessive need for hand-holding, this reaction is neither helpful nor correct. This seems like an instance of a Boomer saying, “Why isn’t this person more like me?” and the underlying thought is that being “more like me” also means being somehow “better.” There is no harm in a Boomer being more aware that a Millennial would like more feedback or input throughout the mentoring or training process. On the other hand, perhaps the Millennial can be more self-aware of this need and realize that for some Boomers, providing feedback above and beyond what they are used to feels exhausting.

### Conclusion, or “The Real Purpose of This Article”

¶60 Recall that one of the tasks we set ourselves was to see how much of the difference between Millennials and Boomers was attributable to the typical feeling that the upcoming generation does not measure up to the standards of the elders. We did discover some of that, but more importantly, we discovered that certain concrete differences between the generations do need to be addressed. The good news is that just talking about these potential issues can dissipate their power over us.

¶61 Unexpectedly, we also found that some characteristics that Boomers fault in Millennials are qualities that Boomers themselves are accused of possessing. For example, Millennials are famously accused of bringing an attitude of entitlement to the workplace, but Boomers are also often labeled an “entitled bunch.” And while much is made of Millennials’ seeming inability to take on adult responsibilities, isn’t that just the other side of Boomers’ inability to accept their own aging?

¶62 Here we come full circle from Chiorazzi’s emphasis on mentoring in law librarianship to ask our own questions: how can established librarians mentor and train new librarians if they don’t understand them? How can common ground be found if the relationship is fraught with misperceptions? It would be so easy for established librarians to squash the enthusiasm and optimism of the incoming group by over-reliance on routines and requirements that daily lose their relevance. The rush to judgment is equally unhelpful. Observers of the workplace have come to unhelpful predictions about the Millennials. Consider the following: “Many Boomer managers believe the concept of a work ethic will die with them (meaning with the Boomers.)” That seems a little bombastic. In any event, we wonder if working hard, even to the extent of robbing time from family and friends, is really the virtue we have made it out to be.

¶63 We advocate individual efforts as the starting point to increase our knowledge about each generation. We particularly recommend four books used in researching this article: *When Generations Collide* and *The M-Factor*, both by Lynne

---

64. **Taylor**, supra note 33, at 24; see also **Steinhorn**, supra note 25, at 44 (stating “as the world now knows, what’s on the Boomers’ minds is themselves and their riveting encounters with the routine phases of life”).

65. See supra ¶ 17.

66. **Marston**, supra note 13, at xxii.
C. Lancaster and David Stillman; You Raised Us—Now Work With Us by Lauren Stiller Rikleen; and The Next America by Paul Taylor. We have found that greater knowledge breeds humor, a welcome quality in any workplace. Liza loves to point out when Renee reverts to Boomer behavior, for example, by saying things that equate to “let’s put our nose to the grindstone and work really hard to get this done.” Conversely, Renee loves to tell Liza that a job particularly well done will surely earn Liza a trophy. We are also the first to admit that even after all our research, we can still fall into unhelpful or polarizing behaviors. But that doesn’t mean we will stop trying to get it right.

¶64 In addition to being better colleagues, mentors, mentees, trainers, and trainees, familiarity with each other’s point of view is becoming an economic necessity. With the workforce soon to be dominated by Millennials, all efforts to understand what motivates this generation will go a long way to ensure their workplace loyalty and stability. Conversely, Millennials’ understanding toward non-Millennial co-workers will perhaps help them to wear their “largest generation” status with grace. The health of our profession depends in part on taking measures now to ensure our roles going forward as effective mentors and trainers.
Keeping Up with New Legal Titles

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

Contents

Glass Half Full: The Decline and Rebirth of the Legal Profession by Benjamin H. Barton reviewed by Carey A. Sias 120

Kafka’s Law: The Trial and American Criminal Justice by Robert P. Burns reviewed by Susan Gualtier 122

A New Introduction to American Constitutionalism by Mark A. Graber reviewed by Robert N. Clark 124

The U.S. Supreme Court's Modern Common Law Approach to Judicial Decision Making by Simona Grossi reviewed by Mary Beth Chappell Lyles 126

The Relevant Lawyer: Reimagining the Future of the Legal Profession edited by Paul A. Haskins reviewed by Sarah K. C. Mauldin 127

Injustices: The Supreme Court’s History of Comforting the Comfortable and Afflicting the Afflicted by Ian Millhiser reviewed by Lynne F. Maxwell 129

Legal Research Methods, Second Edition by Michael D. Murray and Christy H. DeSanctis reviewed by Beau Steenken 131


* The works reviewed in this issue were published in 2013, 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.

** Research and Instructional Services Librarian, Ruth Lilly Law Library, Indiana University Robert H. McKinney School of Law, Indianapolis, Indiana.

*** Clinical Assistant Professor of Law and Reference/Collection Development Librarian, Kathrine R. Everett Law Library, University of North Carolina School of Law, Chapel Hill, North Carolina.

Reviewed by Carey A. Sias*

¶1 According to Benjamin Barton’s *Glass Half Full: The Decline and Rebirth of the Legal Profession,* American legal practice has been largely unchanged by the course of time. Barton observes similarities between today’s courts and those described in Charles Dickens’s *Bleak House,* concluding that “[l]aw may have changed less than any other area of the economy between 1850 and today. The same basic product is being sold and the same basic service is being performed” (p.2). Yet the American legal profession finds itself in a state of flux. Economic and technological disruptions have eroded business prospects for more than thirty years, culminating in a foundational crisis for Big Law following the 2008 recession. As the title suggests, Barton gives an optimistic spin to the situation. He foretells rebirth through dramatic changes in tools and approach. Although the field is notoriously averse to change, innovative lawyers will thrive by embracing technology, and clients will benefit as a result.

¶2 *Glass Half Full* is structured in three parts. Part I begins with a brief history of the legal profession in America and outlines current trends: high unemployment, falling salaries, and an oversupply of lawyers. Big Law managed to escape the grim reaper for decades, but now computerization, outsourcing, and client expectations threaten the status quo. Drawing from Larry Ribstein’s article “The Death of Big Law,” Barton analyzes challenges to Big Law as four corresponding “deaths.”

¶3 “Death from above” explores the repercussions of law firms’ aggressive pursuit of profits. Although successful in the short term, practices such as increasing leverage, raising hourly rates and billing targets, and lateral hiring ultimately created an unsustainable long-term business plan. Corporate clients turned to insourcing, outsourcing, and computerization to mitigate costs, leaving more lawyers to compete for fewer projects.

¶4 “Death from below” draws from Clayton Christensen’s theory of disruptive innovation. Barton discusses ways in which low-cost online legal providers under-

---

mine business opportunities for small-firm and solo practitioners. As technology expands and online providers grow to compete for high-margin work, he does not expect Big Law to recognize the threat until a large portion of traditional legal work has already been replaced by computerization.

¶5 “Death from the state” describes how courts and legislatures have reined in litigation since the 1980s through tort reform and limitations on damages, class action lawsuits, and attorneys’ fees. Funding for legal aid, government hiring, and court appointments is at an all-time low.

¶6 “Death from the side” examines the thirty-year decline for solo practitioners and small firms. Barton analyzes tax and employment data to compare earnings over time: “Adjusted for inflation to 2010 dollars, the average solo practitioner earned $69,955 in 1988 and $46,560 in 2010, a 34 percent decline in buying power” (p.6). For many of today’s unemployed and underemployed lawyers, it makes more financial sense to leave the profession entirely.

¶7 Part II delves into the history, present, and future of American law schools. From the 1980s forward, the market for lawyers shrank while law schools expanded. Students have been lured in by false employment statistics and salary information, crippled by student debt, and released into bleak job markets. Barton cites and responds to suggestions proposed by other writers before outlining his expectations: law schools will cut costs drastically but will not radically redesign the structure or curriculum.

¶8 In Part III, Barton pulls the focus back, explaining why Big Law and law schools value hierarchy and competition over differentiating their products. This strategy was effective for centuries but will prove self-destructive in today’s market. Barton predicts a future in which innovators and entrepreneurs will develop new ways for lawyers to deliver cheaper, better-quality legal services. Computerization and outsourcing will cut legal costs, improve efficiency, encourage alternative law firm arrangements, and provide the general public with more tools and autonomy to address their own legal needs. He foretells fewer jobs, smaller salaries, and budget cuts to law schools and large firms, ultimately resulting in a fragmented but nevertheless improved profession.

¶9 Glass Half Full finds companionship with a host of recent works on the state of the American legal profession, including Deborah Rhode’s The Trouble with Lawyers.4 Barton’s optimism sets his work apart, as does his insightful overview of emerging technology. He examines specific online legal information providers and virtual alternatives to traditional practice. Unfortunately, he ignores law libraries entirely, except as an item on the chopping block for law school budget cuts. This is a grave oversight, considering that much of the optimism projected in Glass Half Full depends on increased information access.

¶10 The future of law libraries is closely aligned with that of the legal profession, but while Big Law has largely ignored tools of the information revolution, libraries have embraced them. Indeed, libraries already provide many of the services Barton suggests will lead to the “rebirth” of the profession: low-cost access to information, research assistance (“outsourcing”), proprietary databases (“computerization”),

and ongoing practical education in a rapidly changing field. Law librarians are guides, curators, and creators in an ever-expanding landscape of legal technology. As the legal profession adapts to the information age, it would be wise to consider ways in which law libraries help facilitate the transition.


Reviewed by Susan Gualtier*

¶11 In *Kafka’s Law: The Trial and American Criminal Justice*, Robert P. Burns offers a close reading of Kafka’s great novel, *The Trial*, and uses it to illuminate the ways in which our own criminal justice system fails accused individuals through convolution, bureaucracy, and deception. The book begins with a quote by Justice Anthony Kennedy: “*The Trial* is actually closer to reality than fantasy as far as the client’s perception of the system. It’s supposed to be a fantastic allegory, but it’s reality. It’s very important that lawyers read it and understand this” (p.1). Burns takes his argument even further, suggesting that our system has become so obtuse that it resembles the novel not only from the client’s perspective but from an objective standpoint as well. As Burns notes about Kafka, “The characteristics of his extreme system may allow us to see features of our system that could become nightmarish and, in Justice Kennedy’s view, which may already be showing dangerous signs” (p.4).

¶12 The first half of *Kafka’s Law* focuses on the text of *The Trial*, providing a basis for the argument that Burns will make in the third chapter, where he draws comparisons between the American criminal justice system and Kafka’s fictional account. Burns’s first chapter, “A Reading of *The Trial*,” consists primarily of plot summary, with his interpretation of specific lines and scenes interspersed. While Burns assumes no prior knowledge of the work, the conscientious reader will certainly want to read or revisit the novel, if only because the absurdist narrative, with its alternately bleak, satirical, and humorous tone, does not lend itself particularly well to plot summary. Burns also cites prolifically to earlier readings of *The Trial*, and most notably to the work of Hannah Arendt. Readers searching for a richer understanding of the novel, especially regarding how it has been interpreted during different periods in legal history, will likely find themselves curious about the scholarship Burns references.

¶13 In the second chapter, “Institutional Perspectives on *The Trial*,” Burns delves a bit further into the meaning of the novel, extracting a number of themes that he will address more completely in the later chapters. Framed as characteristics of the legal system described in the novel, these themes include the unknowability of the law, both substantive and procedural, as well the ubiquity of the law. Not only are the characters in the novel ignorant of the law, but they find that it creeps into every aspect of daily life—for example, work, family, the church, and the artist’s atelier. Burns also zeroes in on the theme of bureaucracy; Kafka’s legal

* © Susan Gualtier, 2016. Foreign, Comparative, and International Law Librarian, Paul M. Hebert Law Center Library, Louisiana State University, Baton Rouge, Louisiana.
system is populated by menial workers who have no knowledge of the law or of the roles that they play within the system. They do their jobs blindly, claiming that their hands are tied, without ethical, moral, or personal considerations. Burns refers to the system as “organizational gothic,” a deliciously descriptive phrase that he borrows from Malcolm Waner, a contemporary scholar in the field of organizational theory: “Waner[] sees Kafka . . . as the principal creator of ‘organizational gothic,’ with organizations as “sites of darkness,” “labyrinths with endless corridors”; and locked doors hiding evil secrets shifting from the “dark street” to the “cramped office” or the “nightmare factory’”’ (pp.36–37). It is perhaps this endless, nightmarish cycle of red tape that most readers remember as the central theme of *The Trial*.

¶14 In the third chapter, “Echoes of Kafka Today,” Burns delves into the substance of his argument, exploring the ways in which our own criminal laws and procedures have come to mirror those described in *The Trial*. Treating *The Trial* as a premonition of things to come, he addresses not only the ways in which our current system resembles Kafka’s imaginary one, but also the social and political contexts in which our laws and procedures have developed and become increasingly bureaucratic. Mass incarceration, Burns argues, is our response to “broader socio-economic realities” (p.66), including the disappearance of entry-level jobs that disproportionately affects substantial segments of the U.S. population. Our solution, says Burns, has been an increasingly convoluted and bureaucratic criminal justice system designed primarily to keep underclass citizens off the streets and separated from unaffected sections of the population. Harsh sentencing, the death penalty, and a perceived general intolerance for violent crime provide a fearful and angry public with the illusion that their government is working to protect them.

¶15 Burns focuses on interrogation and plea bargaining as the two primary areas in which the American system has come to resemble the one in *The Trial*. While our interrogation system speaks to themes such as the unknowability and ubiquity of the law and the use and ubiquity of deception, our reliance on plea bargaining speaks to the bureaucratization of our legal system and the jettisoning of the formal protections that defendants would be afforded were their cases to go to trial. Burns makes a number of compelling arguments in this section of the book. It would be difficult to argue against his point, for example, that the number of criminal laws and procedural rules has grown so vast and complicated that even an experienced criminal attorney cannot claim to know the law in its entirety. Similarly, it is impossible to contest that the criminal law reaches into so many areas of daily life that literally every person in America has committed a crime at some point in his or her life. This argument might be waved away as hyperbole until one remembers that the main character in *The Trial*, who has never actually been told what the charges are against him, attempts to write his entire autobiography to prove that he cannot be convicted of any possible crime. Viewing the scene through Burns’s lens, it is impossible not to come to the sinking realization that we could all be on the hook for something, provided that someone wanted us to be guilty.

¶16 In the current climate, Burns would have been remiss not to mention the disproportionate and systemic stopping of young black men by police in minority neighborhoods “without any articulable specific suggestion of criminal activity
(other than who and where they are)” (p.77). While Burns addresses issues of race throughout the book, it is not his focus, and race comes up primarily during his discussion of socioeconomic factors, as described above. Interestingly, Burns so successfully builds his argument without referring to racial discrimination that when the allusion to it finally arrives, the impact is that much greater. Readers have already begun to realize how easily they could be trapped by the unknowability and ubiquity of the law. They already feel a creeping paranoia and a newfound sense of their own vulnerability; it turns out that Burns has been building empathy all along.

¶17 In the fourth and final chapter, “Spaces of Freedom in American Law?,” Burns questions whether the U.S. legal system includes any safeguards against its own devolution into a Kafkaesque nightmare. Burns sees the jury trial, with all of its attendant formalities, as one potential safeguard; however, he does not seem optimistic that the jury trial will endure as a “space of freedom” (p.126). Alluding again to the predominance of plea bargaining, he notes that for the jury trial to successfully function as a safeguard, more cases would have to go to trial, and the trial process itself would have to become less bureaucratic. Burns also argues in favor of greater formality and publicity within the bureaucracies themselves, but expresses strong doubt about the possibility of reforms to the criminal justice system.

¶18 Thus, despite his attempt at a call to arms, Burns is clearly more interested in drawing comparisons between our system and that of The Trial than in offering concrete solutions. The reader is left with the impression that perhaps Burns thinks we have reached a point of no return, and whether the book succeeds or fails in the eyes of individual readers will depend on their reasons for reading it and on the strength of their need for optimism. Those who approach the book looking for answers will likely be disappointed. However, those who can appreciate the book for what it is—a close literary reading, warning bell, and indictment of the American justice system—will find it more than adequate. Kafka’s Law is highly recommended for students, scholars, and recreational readers interested in criminal law or law in literature. It is a creative and insightful approach to a timely topic and deserves a place on every law library’s shelf.


Reviewed by Robert N. Clark*

¶19 Mark Graber describes his approach in A New Introduction to American Constitutionalism as historical-institutionalist. A term of social science, “historical institutionalism” is a method of studying institutions to identify social, historical, and political trends. So you might call Graber’s method the big-picture approach to constitutional scholarship. Indeed, the central theme of the book is that traditional constitutional study in the United States is hampered by an overly narrow

---

focus on constitutional law, as embodied in the decisions of the U.S. Supreme Court. According to this traditional view, law and politics are two distinct realms, with law providing necessary constraints on politics. But as Graber writes (and repeatedly demonstrates), “[c]onstitutions . . . integrate legal and political norms in ways that blur sharp separations” (p.213). His aim, then, is to see constitutionalism as a whole, noting that “[c]onstitutional controversies are structured in part by constitutional texts, in part by history, and in part by present politics” (p.13).

¶20 The book is divided into eight chapters: “Introduction to American Constitutionalism,” “What Is a Constitution?,” “Constitutional Purposes,” “Constitutional Interpretation,” “Constitutional Authority,” “Constitutional Change,” “American Constitutionalism in Global Perspective,” and “How Constitutions Work.” Graber’s careful organization of his material provides a foundation in political theory that lends context to discussions of specific constitutional issues. In the first chapter, an analysis of Chief Justice John Marshall’s opinion in *McCulloch v. Maryland* gives rise to a wide-ranging discussion of constitutional purposes, problems of interpretation, the nature of constitutional authority, and the difference between fundamental and ordinary law. This section is full of characteristically subtle insights. While a first-year law course typically focuses on the ways in which *McCulloch* shaped constitutional law, Graber points out several ways in which the Constitution shaped *McCulloch*. For example, Article III establishes life tenure for justices. “Had the Constitution limited judicial tenure to ten years,” Graber writes, “five of the seven justices who decided *McCulloch*, including Marshall, would not have been on the bench in 1819” (p.9).

¶21 The structural significance of a life-tenured judiciary is one of the book’s recurring themes. The function of life tenure, however, is not to make the courts immune from politics. The nomination and confirmation of Supreme Court Justices, Graber observes, is itself a political process and “practically guarantees that, with some lag, the center of the court will sit in the political mainstream” (p.131). Nor is the judiciary the sole arbiter of constitutional questions. Graber identifies several ways in which constitutional decision making is shared among all governing institutions in the United States, including those at the state and local levels. Legislators consider constitutional questions when drafting bills. Presidents may choose to pardon people they believe were unconstitutionally convicted. Even a local jury may exercise constitutional authority by refusing to convict someone for violating a law the jurors believe to be unconstitutional. In light of all this, Graber notes how “[c]onstitutional decisions in one governing institution influence constitutional decisions in another” (p.103). As an example, he cites the history of gay rights in the United States, a history not solely determined by Supreme Court decisions, but also by

state court decisions finding a state constitutional right to same-sex marriage; the litigation strategies of gay rights activists, which help determined [sic] how issues were framed before courts; state referenda approving amendments limiting marriage to a man and a woman; and the Obama administration’s decision to urge courts to find certain provisions in the Defense of Marriage Act unconstitutional (p.103).

---

5. 17 U.S. 316 (1819).
Such complex interactions of law and politics amount to what Graber calls “constitutional dialogues” (p.103).

¶22 Overall, this book makes a valuable contribution to the study of American constitutionalism. The final chapter, “How Constitutions Work,” sums up Graber’s arguments with an illuminating discussion of how constitutions not only constrain but also construct and constitute politics. While reading this chapter, I found myself returning to earlier sections of the book and rereading them with a deeper understanding. Of course, the book is not without its flaws. At times it is unnecessarily repetitious (a long sentence from the Federalist Papers on the subject of constitutional interpretation is quoted no less than three times), and it would have been useful to have an appendix containing the full text of the U.S. Constitution, given Graber’s frequent citations to article and section numbers. But these minor complaints should not prevent any law library from adding this book to its collection.


Reviewed by Mary Beth Chappell Lyles*

¶23 In The U.S. Supreme Court’s Modern Common Law Approach to Judicial Decision Making, Simona Grossi calls for substantial changes to what she terms the U.S. Supreme Court’s “modern common law method” (p.2) of deciding cases, focusing primarily on its application to civil procedure jurisprudence.

¶24 Arguing that the current system “elevates established formalities over common sense,” Grossi charges that the “U.S. Supreme Court appears increasingly engaged in the development of doctrinal tests but insufficiently invested in the underlying principles and theories that should guide legal analysis and give uniformity to the relevant doctrines” (p.2). Fearing “mechanical jurisprudence” and the phenomenon of judges who feel compelled to awkwardly “fit the case to the rule” (p.2), Grossi calls for reform of legal analysis that includes both the judiciary and the legislature and offers “proposals for the restatement of judge-made procedural laws” (p.3).

¶25 Grossi’s proposed method relies on “durable principles” that can be uniformly applied, and decisions that evidence “reasoned elaboration that takes into account the full sweep of constitutional text and tradition; considers the measure of evolving cultural norms, including new perspectives on established standards; and presents a fair and thorough consideration of real-world consequences” (p.19). Boiled down, Grossi would prefer that the Supreme Court, rather than telling us what the law is, “identify the range of alternative interpretations to the constitutional principle at issue and, after careful examination of those alternatives, explain what the law ‘ought to be’” (p.20).

* © Mary Beth Chappell Lyles, 2016. Assistant Law Librarian for Reference, Hugh F. Macmillan Law Library, Emory University School of Law, Atlanta, Georgia.
¶26 Grossi initiates the reader into the common-law method and then provides a perspective for assessment and critique. She proceeds to analyze the Court’s decision making in relation to personal jurisdiction, forum non conveniens, subject matter jurisdiction, and conflict of laws, including analyses of personal jurisdiction and forum non conveniens from a transnational perspective.

¶27 Grossi again looks abroad in chapter 6 by using the questionnaire responses of a variety of civil law professionals as a method of comparison, drawing the perhaps surprising conclusion that civil law’s codification is actually more flexible and adaptable to new scenarios than the method employed by the Supreme Court. Respondents to her survey include a doctoral student and law clerk in the Belgian Constitutional Court, a Rio de Janeiro Court of Appeals judge who is also a professor at the Rio de Janeiro Court of Appeals School, a German law professor, a lecturer at the University of Athens, and a Hungarian law professor. In chapter 7, Grossi offers proposals for judicial guidelines tailored toward legal systems that operate within a democracy that aim to create “a global judicial dialogue” (p.4).

¶28 One interesting nuance of Grossi’s overarching argument is the potential ability of her reforms to insulate the Court against charges of inappropriate judicial activism. She cites “a legitimate concern that judicial law making may stray into the realm of everyday politics” (p.19) and her belief that “a framework from which to assess the quality and legitimacy of judicial law making” (p.19) will help promote a given decision’s, and the Court’s, legitimacy. Further, she asserts that the model for judicial decision making that she provides would, in essence, fix the problem, if it were only followed. That is a big if.

¶29 Grossi makes bold assertions in her book and does an admirable job of supporting them, illustrating their context, and ultimately proposing alternatives. Her international comparisons are truly fascinating. However, the whole book comes off as slightly utopian. It is a fascinating intellectual exercise but seems somewhat disconnected from American reality. An entirely new judicial decision-making approach seems unlikely to occur, especially in a sweeping way, although one would never know that from the tone of the book. Her call for change seems quite overarch ing and as such is perhaps overambitious. It is best to see the book as a stimulating academic exercise rather than a likely blueprint for change. That said, Grossi has interesting, innovative ideas and writes from a distinctive perspective, which makes the book a good pick for acquisition.


Reviewed by Sarah K. C. Mauldin*

¶30 The Relevant Lawyer: Reimagining the Future of the Legal Profession is a collection of essays showcasing the voices of attorneys and allied professionals from the United States, Canada, the United Kingdom, and Australia as they imagine the future of the legal profession and explain how it has already changed in response to

* © Sarah K.C. Mauldin, 2016. Director of Library Services, Smith, Gambrell & Russell, LLP, Atlanta, Georgia.
disruptive technologies and the entrance of digital natives into practice. The book is edited by Paul A. Haskins, Senior Counsel for the American Bar Association Standing Committee on Professionalism. The distinguished group of individual authors includes professors, consultants, practicing attorneys in firms of all sizes, and bar association officials. Each brings a unique perspective on how lawyers can survive and thrive in a changing market while maintaining a level of professionalism that is the essence of professional identity.

The book is arranged into five broad categories: transformation, equity, practice settings, regulation, and development. Each category is divided into chapters written by individual experts, and each chapter is a take on the evolving profession and the difficult conversations taking place in legal organizations around the world, even if the subject is unwelcome and uncomfortable for those participating. In the transformation section, chapters cover how the profession has already changed and what responses are necessary; there is also an introduction to alternative legal service providers and an exploration of how technology has changed potential client behavior and interaction with the law and lawyers in a world of LegalZoom, limited scope representation, and more. The equity section looks at issues of inclusion and diversity in organizations large and small. This section focuses on the shifting demographics of the potential client base and the law school pipeline, as well as the high rates of attrition of women in large firms and the rise of alternative practice in the hunt for work-life balance in the face of implicit bias that remains entrenched in law firm culture.

The practice settings section begins with an introduction to virtual law practice and how it is already changing how clients and attorneys interact. The section examines ways that the profession can adapt to meet the needs of digital natives and increase access to justice for low- and middle-income people with little opportunity to seek help with their legal problems in the current legal business model. Then the section turns to the changes that large firms are making to keep up with rapid market changes, increased cost pressure, globalization, technological advances, client expectations, and new competitors. It also addresses the niche that solo and small-firm practitioners can inhabit and some of the regulatory changes that are needed to make the market friendlier to independent lawyers. The section also takes on the dual professional responsibilities of military lawyers as they act as both soldiers and attorneys, and the lessons that others can learn from this dual professionalism model.

The section on regulation shifts to changes to law practice in the face of globalization. The chapters describe the challenges that lawyers face in crossing borders as well as the differing practice environments in the United Kingdom, Canada, and Australia. Each country has begun to change how the legal profession is regulated, allowing fee splitting with nonattorneys in the United Kingdom, incorporation of legal organizations in Australia, and a move toward breaking down jurisdictional barriers to practice and changing the way that firms are regulated in Canada.

The development section looks at the future of legal education and the possibilities for changing entrenched teaching methods, the goals being to graduate practice-ready attorneys, to use new technologies to lower the debt burden of
new entrants into the profession, and to make law school achievable for those who cannot enroll due to distance and other barriers. Next, the section looks at the importance of mentoring for both newly minted and seasoned attorneys and the benefits for mentor and mentee. The section also looks at the realities of social media, the vital role that professionalism plays in navigating the swiftly changing legal marketplace, and the importance of bar association membership and active participation, especially among newer attorneys.

¶35 The book can be read cover to cover as an overview of how the profession has and is changing and what lawyers can do to cope with the changes. It can also be read one essay at a time based on the reader’s goals. The essays are all well written but vary in the level of factual reporting versus opinion and advice. The Relevant Lawyer is a worthy addition to academic law library collections and would be useful in law firm collections, even if change is not as warmly welcomed in that environment. By reading this book, any lawyer, law professor, law firm leader, librarian, and current or would-be law student can gain valuable insight into the future of practice and what can be done now to prepare for the coming disruptions and opportunities afforded by the evolution of law practice.


Reviewed by Lynne F. Maxwell*

¶36 This eminently readable book is an intriguing exploration of the U.S. Supreme Court and its capacity to shape law and social policy, for better or worse. Ian Millhiser is a senior fellow at the Center for American Progress and editor of ThinkProgress Justice. As a scholar, he focuses on the Constitution and the Supreme Court, and in this book he reveals the frequent tension between these forces of law. As an author, he provides compelling historical and jurisprudential evidence for the argument that the Court has abused its power by mistaking ideology for law and imposing it on a captive country. In short, the Justices have “read doubtful ideologies into the Constitution’s vaguest phrases. And they’ve ignored provisions intended to protect the unpopular and least fortunate” (pp.xiv–xv). Indeed, “The justices of the Supreme Court are the closest thing America has to actual royalty” (p.xiv). Each chapter of the book teases out the implications of seminal cases in which the Court has abused its fundamental power, at least according to the author’s reading.

¶37 Where has the Court gone wrong? Millhiser begins by critiquing the opinions in The Slaughterhouse Cases, decisions that helped bolster white supremacy after the Civil War and supported monopolistic business practices that gouged small farmers. He proceeds to eviscerate Plessy v. Ferguson and Dred Scott v. Sandford before devoting a fascinating chapter to the Pullman Strike in Chicago, a

* © Lynne F. Maxwell, 2016. Director of the Law Library and Associate Professor of Law, West Virginia University College of Law, Morgantown, West Virginia.
6. 83 U.S. 36 (1873).
7. 163 U.S. 537 (1896).
8. 60 U.S. 393 (1857).
conflict in which the Court supported management to the supreme detriment of workers. In particular, he examines the Court’s alignment with management interests in union busting and defeating labor leader Eugene Debs. As if this were not sufficiently egregious, in *Hammer v. Dagenhart* the Court refused to ban child labor because the ban would hinder interstate commerce. Today, this byzantine decision strains credulity. Other opinions prolonged inhumane working conditions, continued violations of women’s Fourteenth Amendment rights, and permitted invidious racism.

¶38 Millhiser goes on to discuss the relatively recent decision in *Bush v. Gore*, in which the conservative majority virtually hijacked the election results and decreed the winner of the presidency. In addition, *Shelby County v. Holder* facilitated further erosion of the Voting Rights Act, while the majority opinion in *Citizens United v. Federal Election Commission* permitted unfettered spending by wealthy campaign donors. These are but a few of the notable decisions that Millhiser explores. Sadly, there are many more.

¶39 In the final chapter, Millhiser moves beyond analysis and critique of Supreme Court opinions to pose solutions to the problem of partisan justice. He proposes that legislative bodies pay closer attention to drafting the language of statutes to reduce ambiguity and litigation. Moreover, he advocates changing the method of appointing Justices to eliminate weak or politically motivated jurists. Ultimately, he argues that “the only practical solution to bad Supreme Court justices is good Supreme Court justices” (p.279). Furthermore, “the only way to ensure that the new justices will not repeat the Supreme Court’s past is to elect presidents who are committed to a very different future” (p.279). While these are noble suggestions, their practicality is suspect. Nonetheless, Millhiser does attempt to resolve a long-standing structural problem in our judicial system, and for this he deserves credit.

¶40 Ultimately, *Injustices: The Supreme Court’s History of Comforting the Comfortable and Afflicting the Afflicted* not only states its premise arresting in the title but successfully makes its case by means of numerous, well-examined, well-articulated examples. Millhiser excels in introducing the human consequences of the Court’s jurisprudence, situating each case within a larger personal and historical context. His contentions are by no means unique, or even particularly revelatory, but what distinguishes this book from others of its persuasion is its comprehensive scope and its overwhelming body of evidence in support of its fundamental argument. In the end, it is a poignant exploration of the hegemony that an ideologically driven Supreme Court exerts over all of us. This thought-provoking book should be a welcome acquisition by all academic libraries, in addition to public libraries offering significant social science collections.


Reviewed by Beau Steenken*

¶41 *Legal Research Methods, Second Edition*, is the latest installment in the comprehensive system of legal research and writing texts by Michael D. Murray and Christy H. DeSanctis. In addition to *Legal Research Methods*, Murray and DeSanctis have authored *Legal Writing and Analysis*, a number of advanced legal writing texts, and *Legal Research and Writing Across the Curriculum*, which I try to leave in the paths of susceptible doctrinal faculty members whenever possible. Much has changed in the legal research world since the first edition of *Legal Research Methods* appeared in 2009, so the second edition is a welcome addition.

¶42 In the second edition, Murray and DeSanctis replace all of the screenshots in the book to reflect the new generation of legal research platforms. Furthermore, they discuss the relative strengths and weaknesses of the new platforms and provide sound advice on how to narrow in on the most relevant results using the new systems, such as effectively using both presearch and postsearch filters. Also, the new edition provides treatment of Bloomberg Law alongside WestlawNext and Lexis Advance. Similarly, FDSys takes the place of THOMAS in the chapter on legislative history, though Congress.gov is oddly absent. Beyond the technology updates, not much has changed in the second edition, but that is a good thing because the work’s organization, content, and tone make *Legal Research Methods* a solid choice as a text for first-year legal research courses.

¶43 As I can attest, having recently coauthored a first-year legal research text for CALI’s eLangdell Press, choosing how to organize the vast amount of information that needs to be relayed to first-year law students is a daunting task. This difficulty can be seen in the split among both texts and teachers of legal research in where to begin. Some favor beginning with secondary sources, as those are traditional starting points of the research process. Others prefer beginning with primary sources, as these constitute the most important of potential research results. Murray and DeSanctis take the latter approach, but they bracket it with thorough, readable discussions of the research process in the first and last chapters. The authors show students how to use select secondary sources to find relevant primary sources when introducing the primary sources, then fleshing out secondary sources more fully in a later chapter. This hybrid approach excellently emphasizes the relative importance of primary sources while also highlighting the utility of secondary sources.

¶44 In terms of content, *Legal Research Methods* provides a sound amount of information for a first-year course. The text covers the core topics of constitutions, statutes, cases, regulations, and secondary sources, as well as legislative history and local court rules. Most impressively, Murray and DeSanctis manage to focus on electronic research, to which most students gravitate, while also following up with enough discussion of print sources to provide students with not only background context but also instructions on how to conduct print research if they do not work

---

* © Beau Steenken, 2016. Instructional Services Librarian, University of Kentucky College of Law Library, Lexington, Kentucky.
at jobs with expensive research platforms. (Murray and DeSanctis are rightfully skeptical of the efficiency of legal research using free online sources.) *Legal Research Methods* thus would work well with most first-year legal research courses, particularly those that begin immediately with computer-assisted research.

¶45 Finally, Murray and DeSanctis use a direct, unpretentious tone that is likely to connect well with students. The authors use the second person to deliver both specific instructions and more general advice. They often make use of hypotheticals to aid students in understanding the reasons for research steps, as well as the mechanics of conducting research. However, at times the discussion of technical steps, such as Boolean searching, struck me as a bit quick, so I would emphasize to students the value of having a computer handy to follow along and visualize fully the concepts being relayed by the reading.

¶46 In conclusion, *Legal Research Methods, Second Edition*, provides a necessary update to the first edition and would be a solid choice as a text for first-year legal research courses, particularly those that jump straight to computer-assisted research.


*Reviewed by Jodi L. Collova*

¶47 Libraries will be as necessary in the future as they were in the past—if we play our cards right. John Palfrey, former director of the Harvard Law Library, suggests that to thrive in a “digital-plus” age (p.73), we must “hack” libraries (p.112)—that is, deconstruct the way that we envision libraries and reinvent them. We can no longer think of libraries as storehouses for books, but must reconceptualize libraries as networked platforms. In the digital-plus era, a greater amount of information is available. Meanwhile, library budgets are shrinking. As such, it is not possible or desirable for an individual library to maintain every resource that its users may need. Instead of focusing on individual physical libraries, Palfrey calls on libraries to collaboratively provide networked access to digital collections on a scale much greater than interlibrary loan.

¶48 While Palfrey promotes mass digitization, he advocates for a gradual transition that still includes library materials in print format. “Libraries serve a diverse range of patrons with a diverse set of practices,” he writes, “ranging from the most digitally savvy to the determinedly analog” (p.41). Thus, to serve all of their users, networked libraries need to provide access to materials in multiple formats. Additionally, while the need for digital information has increased, the preservation of digital information presents a problem. Digital information is easy to create but difficult to store, which makes it desirable for a network of libraries to preserve at least one original print copy of an item.

¶49 *BiblioTech: Why Libraries Matter More Than Ever in the Age of Google* is a call to action for librarians and library supporters: “Those of us who care deeply

---

* © Jodi L. Collova, 2016. Research Librarian and Adjunct Professor of Law, University of San Francisco School of Law, San Francisco, California.
about the future of libraries are too likely to rely on the deep nostalgia about libraries rather than take risks and invest now in a bright future” (p.214). Meanwhile, “those in the for-profit sector are working much more quickly and effectively to address many of these same problems, only with a profit motive rather than the public interest as their driver” (p.212). Without libraries as a democratic equalizer, Palfrey argues, for-profit interests will fill in the gaps to meet information needs. As an example, public libraries must provide sufficient Internet access and evening hours so school-aged children without Internet at home do not have to go to McDonald’s or Starbucks to complete their homework. To avoid this undesirable usurping of library services by profit-driven interests, we must “pursue a new strategy for libraries that will shape, rather than merely react to, the digital revolution” (p.217).

¶50 Throughout the book, Palfrey provides concrete examples that make vivid some of the great work that innovative librarians are doing around the country. For example, he favorably discusses the Digital Public Library of America (of which he is a founder), HathiTrust, the Digital Preservation Network, YouMedia centers, and other library leaders. Palfrey’s book is full of stories and devoid of jargon, making it highly readable.

¶51 In addition to suggesting collaboration between libraries, Palfrey also recommends greater collaboration between librarians and educators. The vast majority of libraries are school libraries. Young people are more likely to use libraries than older people. Schools are making a large-scale shift toward blended learning models, combining analog teaching models with digitally mediated methods. Librarians must partner with schools to support and enhance this educational transition.

¶52 To move forward, Palfrey argues, legal reform is needed: the “law is a stumbling block on the route toward a bright future for libraries” (p.181). Providing a concise and helpful overview of copyright law, he then highlights the need for a digital first-sale doctrine. He also briefly addresses privacy concerns.

¶53 Palfrey’s work appeals to a broad audience. Despite Palfrey’s claim to target nonlibrarians, every chapter makes suggestions aimed at librarians. His pragmatic book provides meaningful suggestions to librarians, library supporters, and the public as to how we should proceed toward a brighter future. While BiblioTech discusses examples in the context of public and school libraries more than other types of libraries, it nevertheless has value for law librarians because the concepts apply generally to all libraries.


Reviewed by Elizabeth A. Greenfield*

¶54 Does the world really need another book or article on the deplorable state of the U.S. legal system, the unhappiness of our lawyers, and the unmet needs of would-be clients? Do we need to discuss the failure of law schools to prepare new lawyers for practice and provide them with usable skills? And can we continue to
justify a legal system that values a lawyer’s salary as some sort of marker of success, where first-year lawyers at Big Law firms feel entitled to starting salaries approaching $200,000, and partners want to measure their incomes in seven figures?

¶55 The subject has been well covered, but Deborah Rhode’s *The Trouble with Lawyers* bundles all of these topics and many more into a cohesive discussion. Although she starts from the premise that “the bar is failing to deal with fundamental problems in the conditions of legal practice, access to justice, diversity in the profession, regulation of lawyers, and legal education” (p. 2), the fact of the matter is that most of the problems concern money.

¶56 Although one of the shorter chapters in the book, the chapter on legal education is one of the most important, and the one this review focuses on, with its discussion of school rankings, tuition rates, and crushing student loan burdens. We all know we are going to have to pay tuition, so why does this chapter merit emphasis? Because the ability to pay—or, perhaps more important, to pay back—that ever-rising tuition bill has far-reaching effects. As an illustration, Rhode points out that lower-scoring law school applicants pay full tuition rates, and those students’ payments, in turn, subsidize the scholarships that attract the top candidates, with some key results: those top candidates’ LSAT scores and undergraduate grades bolster the law schools’ rankings, and, as students at the top-ranked schools, they obtain the highest-paying summer clerkships and first-year positions at the large firms. Then, as hiring partners at those Big Law firms, they in turn perpetuate the system. Rhode discusses this process and its detrimental effects on both diversity in the profession and the financial availability of top-level legal services to the average person, and makes a strong argument for expanding the reach of legal services beyond law firms and solo practices.

¶57 Quoting the tired axiom that the goal of legal education is to teach students to think like lawyers, Rhode contends that it, in fact, actually teaches them to think like law professors. Almost hand-in-hand with this observation are first, the importance of law review publications, and second, the dearth of (or at least, the second-class status of) clinical programs at law schools. The former are full of student-written or edited articles on a huge range of topics, few of which are of practical application, while the latter can provide practical, valuable experience and perhaps even help people who need legal assistance.

¶58 Other chapters cover diversity in the profession, access to justice, and regulation of the profession. The questions raised by regulation are especially troublesome, focusing on issues inherent in self-regulation, state-based regulation of a profession that is increasingly multijurisdictional in practice, and the dreaded mandatory continuing legal education requirements. Rhode covers each of these thoroughly, raising cogent arguments and making practical suggestions for resolution of the issues raised.

¶59 *The Trouble with Lawyers* is well indexed and written in a lively, engaging style. Rhode intersperses anecdotes with statements of facts in a way that makes for an inviting text. While almost seventy-five pages of endnotes might seem excessive, the notes contribute satisfactorily to the book’s content and are valuable and worth reading.
Who should read this book? Everyone contemplating becoming a lawyer, college prelaw placement advisers, law school librarians and placement officers, and anyone interested in legal ethics and the practicalities of the legal profession should read *The Trouble with Lawyers*. It is likely that some (especially Big Law lawyers) may not be happy with the book’s premises and conclusions, but the truth is not always pretty.


Reviewed by Adeen Postar*

As a relatively new law library director (starting in May 2014), I eagerly anticipated the publication of *Academic Law Library Director Perspectives: Case Studies and Insights*. I hoped the perspectives of so many successful sitting library directors would inform the new directions in which I wanted to take the University of Baltimore Law Library. I was pleased to find that beyond the sage advice the book offers, it is a very accurate and complete picture of the state of academic law libraries today. This book should be required reading for every law librarian, as well as law school administrators and faculty.

The book is divided into four parts: general advice, unwritten roles, service contributions, and developing issues. Much of the book is organized through a series of fictional case studies that the book’s editor, Michelle Wu, characterizes as “reflect[ing] real dilemmas faced by law library directors” (p.xi). Wu also notes that “the facts were structured to raise common challenges and issues in situations where few (if any) of the actors are behaving as well as they could” (p.xi). The case studies are set up to be extreme examples of situations in which directors may find themselves. Some are nearly caricatures, but the technique works: the more bizarre the scenario, the better and more interesting the response. Each case study has at least one analysis by an experienced director. Most of the case studies center on “finance, personnel, and communications” (p.xi). I wish I could cover each essay in depth, but space constraints allow me to highlight only a few.

The part on general advice includes information and strategies about getting a law library director job, fundamentals of finance and data available to libraries, information on nonautonomous law school libraries, and an interesting chapter entitled “When (and How) to Say ‘No.’” The sections on landing the job are straightforward. The first is a portion of an article that first appeared in *Law Library Journal* and provides a step-by-step guide to the job process, from the initial search to the interview, and a brief section on negotiating salaries and benefits.13 James Duggan’s chapter on “Negotiating after Receiving the Directorship Offer” is a detailed and nuanced picture of the negotiation process, with good advice on the various possibilities a director candidate might face after getting an offer but before

---

* © Adeen Postar, 2016. Law Library Director, University of Baltimore School of Law, Baltimore, Maryland.

accepting the position. Duggan incorporates discussion on important nonsalary benefits like summer stipends, sabbaticals, travel funding, and even equipment and office requirements into a possible negotiation strategy. This all would be very useful to first-time directors in institutions where salary offers may be made under great financial pressure.

¶64 Information on budgets and their processes is covered through a series of questions answered by directors from three very different law schools: Elizabeth Edinger from Catholic University, Spencer Simons from the University of Houston, and Suzanne Wones from Harvard University. Their perspectives are revealing in their different emphases on how library money is budgeted, spent, and accounted for, and the questions they are asked in these sections go to the essence of what any director should know about a library budget.

¶65 In his “Libraries and Data” chapter, Darin Fox gives a useful summary of some of the data points for academic libraries. Fox’s advice on tailoring budget data to the American Bar Association questionnaire is spot on, but not all integrated library systems can so neatly spit out the data he describes, and following the questionnaire structure may require a great deal of front-end engineering to the budget and a lot of negotiation with administrators at your law school and university.

¶66 The real star of this part is Michelle Wu’s “When (and How) to Say ‘No,’” and for reasons that go beyond the great advice she provides. For rank-and-file law librarians, this essay shows how integral the law library is to the operation of the entire law school and the pressures that the director is under to meet perceived law school needs that cannot or will not be satisfied elsewhere. Wu writes rather eloquently on the balancing of interests that should occur when the library is asked to take on new tasks and responsibilities, both for the law library and the parent institution. This chapter alone should be required reading for every law librarian, not just aspiring directors.

¶67 Looking next at the part on unwritten roles, the “Library Director as Negotiator/Horse Trader” follows in the same vein as Wu’s and should also be required reading. Both Billie Jo Kaufman and James Heller analyze a scenario in which the library director has to respond to a surprise decision from the law school dean that the library will have to provide office space in the reading room to several faculty members. Kaufman and Heller speak to the responsibilities of the law library director to the entire law school and how important it is for the director to be a team player and to have a seat at the law school administration table while maintaining good relationships with faculty. They both write about successfully negotiating for the law library and for all law school constituencies. Both note that negotiation requires fact finding, trading for mutual gain, and the possibility of gaining (and losing) something in the process. Heller starts his chapter with a quote from the lyrics of an old Bo Diddley song, “Who Do You Love?,” that speaks to anger and irrational actions. Heller cautions that no matter how provoked, librarians should never react aggressively to a bad situation but rather should work with friends, allies, neutral parties, and perceived enemies to arrive at the best outcome possible.
Three case studies cover the role of the director in assorted personnel issues. The first, “Library Director as Counselor and Mediator,” discusses workplace issues, including performance, proper supervision, and work ethics and training. Karl Gruben and Kris Gilliland both provide excellent insight and advice on handling thorny employment issues. Footnotes for both essays provide excellent resources for further exploration.

There are also several useful essays in this part on how to effectively work with issues involving unionized librarians and staff. In some libraries, this is a crucial factor in managing library personnel. Taylor Fitchett and Victoria Szymczak provide advice on interpreting collective bargaining agreements as they relate (in the case study) to a librarian filing a grievance over a termination notice for failure to perform her job. Both directors stress the need for consultation and frank and open discussions with library staff, human resources departments, and university and law school administrations to find the best way to handle these very difficult situations.

The essays on working with unionized staff have a similar theme. The case study centers in part on a university-wide reduction in force that affects a longtime staff member with a poor record of time and attendance. Kristina Niedringhaus and Courtney Selby address the need for “clear communication, creative thinking, and a detailed record” (p.255). Both provide advice and options that might manage the situation to allow termination of the problem employee while allowing the retention of a productive employee with less time on the job.

The essays on “Library Director as Fundraiser” and “Library Director as Opportunity Identifier” struck me as particularly important, especially for libraries whose budgets are under fiscal constraint. As far as I know, there is no fund raising training offered in library school, and my own education on this topic has been through professional reading, observation, and anecdotes from other librarians. The essay on fundraising summarizes typical scenarios and offers sound advice on how to best deal with them.

Pauline Aranas and Ron Wheeler respond to a case study that shows very directly how a law library can add value to its law school by identifying and taking on new roles. While identifying opportunities to contribute to and support various law school offices and programs do not go to the bottom line, they may leverage the library’s position within the law school, help raise the status and visibility of the library, and even mitigate against future budget and staff cuts. Aranas encourages directors to take strategic advantage of these opportunities to make sure they align with the core mission of the law library. Wheeler identifies participating in law school strategic planning as the key to “an opportunity to identify, early on, ways that the library can play key roles in each and every program and initiative undertaken in the strategic plan” (p.199).

The “Library Director as Educator” focuses on educating administrators, not law students. Christopher Knott and Sally Wise offer analysis for a case study in which the library director is blindsided by the dean’s response to a budget crisis: centralizing routine library processes under the university library, requiring faculty to rely on research assistants, and shifting responsibility for legal research instruction from librarians to legal writing faculty. Both Knott and Wise stress how important it
is for the director to clearly communicate the many vital roles the library plays in the law school by supporting the scholarship and research needs of its students and faculty. Both also recognize the need for the director to find ways to assist in resolving the budget crisis without compromising essential library operations. They stress how important obtaining accurate information is in this process, both in knowing just how serious the situation is and in understanding whether the dean’s proposals will actually ameliorate the financial situation. This case study and the responses are another essential section of the book.

¶74 The final entry I will cover in this part is “Library Director as Politician,” with an analysis by Filippa Marullo Anzalone. The most compelling part of the case study concerns a new director who believed that the cuts he and his staff made to the library’s collections, services, and staff were informed choices that minimized the effect on the law library’s core mission while resolving the budget crisis at his law school. Unfortunately, the dean did not agree, feeling they were not deep enough and that the proposed service cuts would antagonize students and faculty. As Anzalone correctly points out, this scenario is all too common in academic law libraries today. Library budgets and staff are attractive targets for administrators looking to their bottom lines.

¶75 Anzalone looks at these problems through a political prism and asks us to determine whether the director, as a responsible and “virtuous leader,” has actually made his decisions with skill, transparency, and “organizational loyalty” (p.331). She notes that the director did not adequately communicate his efforts to cut his budget and staff to the dean or fully discuss how those cuts would affect library services and the law school. Without that information and the possibility that those conversations would have established a rapport and supporting relationship with his dean and faculty, the new director has greatly limited his options for a successful outcome.

¶76 The part on service contributions covers responsibilities the director may take outside the law library (involving such roles as chair of a university committee and consultant to another law school library) and provides an especially important analysis that describes the multiple responsibilities directors have in ABA site visits, for their own schools and by serving on an inspection team. The essay explains the use and application of the ABA standards for libraries in a clear and concise manner, with suggestions on how best to comply with the standards. All three analyses show that these roles add tremendous value to our larger institutions and to the profession as a whole.

¶77 The two essays in the part on developing issues cover “Law Librarians’ Roles in Modern Law Libraries” and “Privacy and Competing Library Goals: How Can Library Directors Lead When Values Collide?” Richard Leiter’s essay on modern libraries attempts a herculean task: to sum up the impact of the shift from print to digital resources on the operations of the law library. He urges us to rethink how we provide access to our myriad databases and encourages the development of subject-based access tools.

¶78 Anne Klinefelter’s essay provides a nuanced view of the many issues involving privacy concerns in our era of constantly evolving technologies. She asks us to consider how our traditional notions of privacy in academic libraries are affected
by legal, practical, and technical developments in scholarly communications and by the publishing industry. It is a compelling and important essay.

¶79 Is Academic Law Library Director Perspectives a perfect book? Of course not. I wish it had more detailed information about working with state budgets and a chapter offering candid and practical advice about how to strategically construct and use the ABA and U.S. News & World Report data to the greatest and most ethically sound advantage. A section on how to motivate library staff, especially in this era of ever-changing technologies, staff shortages, and budget challenges, would have been especially helpful. But the advice and knowledge included in this book is priceless. Through their contributions, each author has mentored future generations of directors and law librarians, and this book is a testament to their faith in the future of our profession.

¶80 Reflecting on the entirety of this book, I believe this is as much a letter of gratitude to my colleagues for illuminating the roles library directors play in legal education as it is a book review. I regret that I did not have a resource like this when I began my career as an academic law librarian. I would have been a much better librarian and made greater contributions to the various law libraries at which I worked had I known the difficult, crucial roles and broad responsibilities of my library directors. I am quite sure that the authors never intended the book to be viewed this way, but what they have produced is a very accurate picture of the pivotal role of law library directors and, albeit indirectly, on the state of academic law libraries. No one involved in legal education today should miss the opportunity to read it.
This essay uses animals and animal-related metaphors to illustrate several short lessons about practicing reference.

¶1 Ravens, wolves, serpents, dragons: animals, real and imagined, populate many stories, standing in for characters and concepts in human society. The vignettes in Aesop’s fables are so vivid that their lessons stay with us long after we hear the stories (think of “sour grapes” or “dog in a manger”). Because I was walking at the off-leash park while trying to come up with a theme for this column, it was natural to think of dogs. Other animals crowded into my mind and before long I had a collection of lessons united by animal themes, from pulling a rabbit out of a hat to teaching a person to fish.

Pulling a Rabbit out of a Hat

¶2 Recently a Master of Jurisprudence student asked for books about how to read a case. I walked her to a shelf with Law School Success in a Nutshell and similar books. That was good, but before she left I remembered seeing a blog post about an essay, “How to Read a Legal Opinion: A Guide for New Law Students.” And I remembered that the author (Orin Kerr) said his essay was posted on SSRN. So after just a quick search, I was able to show the essay to the student, who was delighted.

¶3 Pulling a rabbit out of a hat like that is fun, but it’s not really magic. Even stage magicians are not actually performing magic with the trick: the rabbit has been hidden somewhere, not conjured out of nothing. My trick depended on having read something relevant to the student’s need and then remembering enough to know a source and have good search terms. We reference librarians can’t plan our “performances” as carefully as illusionists plan their nightclub acts. On the other hand, we also aren’t expected to keep wowing a crowd with a succession of
amazing feats: we just have to help individuals with the questions they have. It was a nice bit of luck that I’d seen that blog post, but there’s no way for any one librarian to follow enough blogs, newsletters, journals, and new title lists to anticipate every patron’s question. Most of the time we rely on our skills, such as (in this case) using the catalog or browsing the shelf near a relevant book. And the patron would have done very well with that service. Adding Kerr’s essay was a bonus.

**Following Rabbit Trails**

4 I recently met a woman at the off-leash park whose dog appeared to be a cross between a basset hound and a beagle. True to his hound nature, he was sniffing the ground, slowly advancing as he followed a scent. The woman told me that they live in a suburb where rabbits visit, and the dog loves to snuffle around, carefully following the “bunny trails.” Bassets and beagles are careful and persistent when they’re studying scents. When I walked friends’ bassets a couple of weeks ago, I was impressed at how different the experience was from walking other dogs I know: our pointer sniffs some, but is also on the lookout for birds; a friend’s cocker spaniel likes to spin in circles and run up to greet people; another friend’s Maltese mix barks vociferously when he sees other dogs. The bassets studied each bush and tree trunk much more seriously than any of these dogs. (And they never froze into a point when they saw a bird.) Even among a species of talented sniffers, bassets stand out.

5 People have used dogs’ superior sense of smell for millennia, first to help hunters follow prey and more recently to alert people to diabetic hypoglycemia or a bedbug infestation. When the U.S. Department of Agriculture started training dogs to help inspect travelers’ baggage for contraband food items, the trainers chose beagles and beagle mixes “because of their keen sense of smell, non-threatening size, high food drive, and gentle disposition with the public.” Scent hounds are good at these jobs not just because they can find the target scents, but also because they are willing to do the job and don’t get distracted. Smelling interesting stuff all day is rewarding in itself, plus those food-driven beagles will keep checking suitcases for a long time if they are given tasty morsels as rewards. Note that it takes

4. Bloodhounds are one of the supersmellers among dogs. Not only do they have more nose tissue—but many features of their body seem to conspire to enable them to smell extra strongly. Their ears are terrifically long, but not to enable better hearing. . . . Instead a slight swing of the head sets these ears in motion, fanning up more scented air for the nose to catch. Their constant stream of drool is a perfect design to gather extra liquids up to the vomeronasal organ for examination. Basset hounds, thought to be bred from bloodhounds, go one step further: with their foreshortened legs, the whole head is already at ground—scents—level.


6. Leslie Earnest, *Beagles Have a Nose for Bedbugs*, L.A. Times, Aug. 13, 2007, at A14 (“Beagles aren’t the only dogs that can learn to find live bedbugs. . . . But Alden said beagles were the best. ‘Their nose goes to the ground,’ he said, ‘and they’re very focused.’

more than aptitude: the dogs must be trained. If you took an untrained beagle\(^8\) to the airport, it might well investigate travelers’ bags, but it wouldn’t know what scents represented contraband or how to signal to the handler which bags had the forbidden goods. More likely, it might run right past the luggage to the food court, hoping for a handout near Sbarro or Burger King.

\(\%\) Developing good reference librarians is like finding and training these dogs. It’s best to start with people who have some natural aptitude for searching, plus the drive to follow a research trail. Reference librarians who think that a lot of questions are interesting will be able to stay with it a lot longer than those who can do the research but don’t really like to. Even reference librarians with very good natural talents (curiosity, a good memory, an ability to find connections) need training to learn about the available resources. And they need to focus on the right results: the information that answers a question, rather than the information equivalent of the enticing but nonnutritious Burger King wrapper that an untrained beagle would go after. Moreover, reference librarians, like beagles, should have a “gentle disposition with the public.”\(^9\) We need to make patrons feel comfortable asking us for help and listening to our answers.

\textbf{Down the Rabbit Hole}

\(\%\) Hunting dogs need to be trained to stop following a trail or chasing game. Driven though they might be, they need to respond to the hunter’s whistle and give up the chase.\(^10\) Maybe it’s time to go home. Or maybe the hunter wants to save the dog from an encounter with a skunk or a porcupine. Likewise with librarians. Although being driven to follow a research trail is helpful, it is important to be able to stop when stopping is called for—because the information need has been met, because the budget limit has been reached, or because continued searching is no longer fruitful.

\(\%\) Unwary researchers can fall down a rabbit hole only to emerge hours later, somewhat dazed and no closer to an answer than when they fell. Building on the images from \textit{Alice’s Adventures in Wonderland}, “down the rabbit hole” used to connote a visit to a bizarre, psychedelic place. Now, though, it means that getting “interested in something to the point of distraction—usually by accident, and usually to

\begin{itemize}
  \item \textbf{8.} Like the late Bradwell, who kept me company through library school and my first years as a librarian.
  \item \textbf{9.} \textit{See also Susannah Charleson, Scent of the Missing: Love and Partnership with a Search-and-Rescue Dog} 21 (2010) (“Another in the long list of reasons I wanted a Golden [Retriever] was the attraction factor. We search for children and Alzheimer’s patients with some frequency, and I didn’t want these victims more scared when they were found than when they were lost. I knew I wanted a light-faced dog with an open, kindly expression.”). Bears may have the most sensitive sense of smell in the world—seven times better than a bloodhound’s. \textit{Kim DeLozier & Carolyn Jourdan, Bear in the Back Seat II: Adventures of a Wildlife Ranger in the Great Smoky Mountains National Park} 7 (2014). But they are unsuitable for the jobs dogs perform. If you were lost in the woods, would you rather be found by a golden retriever or a bear?
  \item \textbf{10.} We had a pointer who was not trained to turn off her hunting instincts. When she was on point, staring at a pigeon, we often had to put a hand over her eyes to get her to move on so we could continue our walk.
\end{itemize}
a degree that the subject in question might not seem to merit."\textsuperscript{11} Falling down a rabbit hole is not all bad,\textsuperscript{12} but it can prevent us from finding what we need. I sometimes suggest to students that they write down the question they are trying to answer and look at it from time to time, to guard against "question drift"—the tendency to start looking for material that is tangentially related to the question, either because it is interesting or because it is easy to find.

\textsuperscript{9} In addition to the vast rabbit hole that Alice explored, there’s the smaller, cozier hole Winnie-the-Pooh found when he went to visit his friend Rabbit.\textsuperscript{13} Smaller is the essential attribute: the hole itself was so small that when Pooh tried to leave after enjoying a good snack he became stuck. Pooh had eaten too much, and we researchers can sometimes take in too much as well. More than once I’ve gone downstairs to grab two or three old volumes of Martindale-Hubbell, decided to look at more, and regretted not bringing along a book truck. That’s physically too much. We can also “eat” too much online by finding and reading more than our project merits. Maybe it’s all relevant, so we aren’t going down the rabbit hole of distraction, but it’s still more than is needed. Like Pooh, we need to restrain our appetite.

\textbf{Fishing Lessons}

\textsuperscript{10} Our role is often to teach patrons how to fish rather than handing them a fish.\textsuperscript{14} If we’re in an academic setting, helping students develop their skills is part of our teaching mission. And even if patrons are not explicitly “students,” many of them want to learn: it’s satisfying to develop research skills, and researchers can get their work done better and faster if they know what they’re doing. Making the patrons more self-sufficient is also more efficient for us. It might take longer to explain how to download an article than to do it for the patron, but if the patron has to download a dozen articles, our initial effort pays off.

\textsuperscript{11} When patrons are special in one way or another, we do give them the fish. The specialness is often derived from high status. We compile research and hand the results in nice packages\textsuperscript{15} to professors, judges, or law firm partners. At the

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{12} The common charge against our online habits is that they are shallow; but, in keeping with the metaphor, rabbit holes deepen our world. They remind us of the sheer abundance of stuff available to think about, the range of things in which it is possible to grow interested. Better still, they present knowledge as pleasure. \textit{Id}.
\end{flushright}

\begin{flushright}
\end{flushright}

\begin{flushright}
\textsuperscript{14} There are many variations of the familiar proverb. Based on current evidence Anne Isabella Thackeray Ritchie deserves credit for formulating a striking adage that used fishing as a paradigmatic task enabling self-sufficiency. The saying evolved over time and became more memorable by mentioning the ability to eat for a lifetime. The claim that the adage was an old proverb from China, Italy, India or somewhere else has only weak support at this time.
\end{flushright}

\begin{flushright}
Garson O’Toole, \textit{Give a Man a Fish, and You Feed Him for a Day. Teach a Man to Fish, and You Feed Him for a Lifetime}, Quote Investigator (Aug. 28, 2015), http://quoteinvestigator.com/2015/08/28/fish/.
\end{flushright}

\begin{flushright}
\end{flushright}
other end of the spectrum, a patron who knows very little and is unlikely to return might need special treatment too. It would take too long to teach such a visitor enough about the library, research, and computers to find and download the needed document, so it can make sense for the librarian to do most of the work.

¶12 The proverb channels us into thinking that we have only two options: teach to fish or give a fish (teach to research or hand over the research results). But each option holds within it a range of possibilities. Teaching to fish might be as basic as demonstrating how to drop a baited hook into a pond or as elaborate as showing the trainee the best fly fishing spots, pointing out how to read the flow of the water, instructing how to tie flies, and coaching the student in fly casting. Giving a fish could be anything from handing over a raw, uncleaned fish to plating grilled salmon on a cedar plank with appropriate side dishes and a paired wine. Similarly, teaching someone to research might be very basic, for instance: “Here are the Oregon statutes; start with the index volume,” or “Click here to connect to LexisNexis Academic; you can search federal and state cases.” But teaching might be much more involved, covering many steps and demonstrating many sources over the course of an hour in a reference interaction. It could even include a semester of lectures, class exercises, and homework. Presenting research results also offers a range of possibilities, from “here’s your case” to “here is a complicated legislative history.” So the proverb takes us only so far. Even as we tell ourselves and our trainees when to teach someone to research and when to provide the research, we need to be aware of all the choices within each of those categories.

A Wolf in Sheep’s Clothing

¶13 Almost on a whim, a design student stopped by the law library’s reference office. She was studying in the law library (it’s a beautiful place to study) when it occurred to her that we might be able to help her with a project. She was interested in finding something (not necessarily legal) about clothing and waste—for example, “fast fashion” that is worn a few times and then discarded. She told me about a company that repurposed college football jerseys after they’d been worn for a game (apparently big-time teams wear uniforms for one game and then start fresh the next week).16 As she explained what she was interested in, I began to understand the concept and became interested myself.

¶14 To start, I did a quick search for clothing waste in Google Scholar.17 We were amused by some of the irrelevant titles we saw in the first screen. There was something about clothing used when handling hazardous waste. And we saw two classic metaphors: “a wolf in sheep’s clothing” (combined with something to do with waste) and “haste makes waste” (also combined with something to do with clothing). Oddly, when I tried to reproduce this now, several weeks later, I found highly

relevant works, without the funny false hits. But at the time, examples like the article using "wolf in sheep’s clothing" provided a wonderful entrée to the idea of controlled vocabulary. That article was itself a wolf in sheep’s clothing: an irrelevant article disguised as a relevant one by clothing itself with the term we wanted (“clothing”). We moved to subscription databases where we could require “clothing” to be in the subject field, leading us to “clothing industry” as a good descriptor. In Academic Source Complete (Ebscohost), the search de(clothing industry) and (waste or sustainable) yielded many articles that the student thought were promising. We tried a similar search in ProQuest Environmental Science Collection and found some more. Finally, I showed the student ProQuest Dissertations & Theses Global. We didn’t find much (the same search yielded only four records), but we liked the look of Development and Implementation of a Sustainable Apparel Design and Production Model. I showed the student how she could download the dissertation and get not only the author’s analysis but also a seven-and-a-half page bibliography listing sources the Ph.D. candidate had found over the course of several years.

The Tail End

I’m sure I haven’t exhausted the reference lessons one might derive from our vast cultural store of animal myths, fables, proverbs, and clichés. But pursuing them all would lead me down a rabbit hole. It is much more important to get a column draft to my editor than to come up with one more lesson.


19. See American Heritage Dictionary of the English Language 1105 (5th ed. 2011) (“meta” means “[m]aking or showing awareness of reference to oneself or to the activity that is taking place, especially in an ironic or comic way.”).


